TRADE PRACTICES LEGISLATION:
THE BRITISH COLUMBIA EXPERIENCE

by

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ABSTRACT

The innovative features of the recently enacted British Columbia Trade Practices Act have been widely acclaimed, but have received little critical appraisal by legal writers. The Act provides wide-ranging protection to consumers from undesirable business acts and practices, making relief readily available through both new and traditional enforcement mechanisms.

This thesis examines the interpretation given to the Act's major provisions, and considers what the Act has in fact accomplished for consumers in this province. The discussion is placed in the wider context of the protection that consumers should be given from deceptive and unfair practices, contrasting this with the inadequate remedies at common law.

It is shown that the Act has not always been fully accepted or liberally interpreted by the courts. The definition of deceptive practices has been narrowly applied by some judges, and the wide timing of the provision overlooked. The need for some procedural defect to invoke the unconscionability provision has been strictly adhered to, despite the fact that the Act invites judges to emphasize matters of substantive unfairness. These problems have been complicated by the Act's poor drafting, and the lack of strong test cases.

These difficulties aside, the Trade Practices Act has accomplished much for consumers in this province. Active enforcement of the Act's administrative remedy, the assurance of voluntary compliance, provides the visible evidence of its successful implementation. But it is shown that it is at the informal level that the Act has been most useful. It had provided consumers with considerable bargaining leverage, and the mediation efforts of the Ministry of Consumer and Corporate Affairs have often alone achieved results. The Act's very existence has had a strong deterrent effect on the
entire marketplace. It is argued that these informal aspects are in fact more important than the formal resolution mechanisms in the consumer field, but that the latter are required to give strength to them.

In attempting to provide British Columbia consumers with maximum protection, the Trade Practices Act is too onerous on suppliers in respect of its adoption of a strict liability test for deception according to the civil standard. It is argued that a limited defence in cases of innocent deception would be fairer and would not compromise the needs of consumers. A model defence is proposed. The Act is not without its weaknesses too. There is a strong need to provide better protection from substantive unfairness and from consumer abuses not directly tied to a consumer transaction. The Act also needs to be enforced more effectively. The Ministry's policies and priorities require reassessment, and there have been difficulties arising from the selection of the courts as the enforcement forum. Further administrative remedies are considered.

Small claims courts have proved unsatisfactory for the resolution of consumer disputes, and the question arises as to what are suitable alternatives. Both traditional and non-traditional approaches are reviewed. It is concluded that while restructuring the present court system would bring improvements, introducing an arbitration model tailored to consumer needs would be better.
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CHAPTER I

INTRODUCTION

Although the term "consumer" and the concept of "consumer protection" have only become fashionable in modern times, marketplace abuses and complaints have existed since man first began to barter. But the law was slow to move away from the old unwritten rule of caveat emptor - let the buyer beware!

The first substantial change came with the enactment of the English Sale of Goods Act in 1893, which provided statutory remedies to purchasers of defective and "unmerchantable" goods. The Act was actually a codification of case law developments up to its time, and it reflected the growing trend away from caveat emptor. But in the intervening decades, particularly in the post-war years of furious consumer activity, there has been a realization that far stronger support for the consumer was necessary. In the face of the complexity of modern business, it was no longer realistic to assume that consumers could reasonably look after themselves. Not that this realization was universal. Even today, some legal writers and economists still advocate that the market be self-regulating, ignoring the imbalances and deficiencies in the market, and the social costs involved in allowing it to operate freely.3

1 But Belobaba (infra note 8, p.327) reminds us that concern for consumers was shown even in 1481, when King Louis XI of France issued the following 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."

2 56 & 57 Victoria, c.71. This statute was subsequently adopted by Commonwealth countries through the world. See Sale of Goods Act R.S.B.C. 1960, c.344, as amended by S.B.C. 1973, c.84.

3 See Richard A. Prosner, Economic Analysis of Law, 2nd ed., Little Brown
A major concern was the lack of comprehensive legislation protecting consumers from deceptive and unfair business practices. Consumers are as much wronged by false claims and improper selling techniques, and by the imposition of harsh contractual terms, as they are by the purchase of defective goods. But until quite recently, legislation in British Columbia was piecemeal - aimed at countering certain specific sales practices, or else directed towards isolated industries. The one exception to this was the 1967 Consumer Protection Act which regulates, in general terms, credit transactions and executory contracts. All-embracing legislation tackling the problems of deception and unfairness did not come to British Columbia until the Trade Practices Act of 1974.

Prior to this Act there was some protection at common law from deceptive and unfair practices, but the rules applied were highly technical and very restrictively interpreted. And the protection offered was always subject to those ogres of the common law - the parol evidence rule, the admissibility of disclaimer clauses, and the concept of privity - which barred relief in many cases. In addition, even where a consumer had a strong case he was often daunted by the cost and formalities involved in litigation. Reform of the law required both substantial alteration to the old rules of law, and the introduction of new procedural mechanisms better suited to meet consumer needs.

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5 S.B.C. 1967, c.14. This Act has recently been substantially amended to cover a far wider range of matters, including contracts for future services, foodplan schemes, and negative option contracts: S.B.C. 1977, c.6.
6 S.B.C. 1974, c.96, as amended by S.B.C. 1975, c.80.
1. TRADE PRACTICES LEGISLATION IN BRITISH COLUMBIA

The Trade Practices Act, which has been made the focal point of this thesis, embodies some of the most progressive features of modern consumer protection legislation in other parts of the world. It specifically prohibits deceptive and unfair business acts and practices and provides a diverse range of remedies in cases of infringement. Its adoption had placed this province in the forefront as a strong leader on consumer protection measures. It is ironic that prior to 1974 British Columbia had the reputation of being backward in this field - it was one of the last Canadian provinces to establish a government department to deal with consumer affairs, and few statutory measures were "on the books". 7

The Act itself is a combination of what were considered to be the best features of American, English and Australian models. As might be expected, the American influence is the most pronounced. But in fairness, American jurisdictions have had the longest and most comprehensive experience in consumer-oriented legislation, and this shows itself in the B.C. Act in the detailed listings of prohibited practices, and the adoption of administrative remedies. 8

Ontario 9 and Alberta 10 have already followed B.C.'s lead by enacting their own comprehensive trade practices legislation. Other provinces intend

10 Unfair Trade Practices Act S.A. 1975, c.33, as amended by S.A. 1976, c.54 (hereafter referred to as the Alberta Act).
to do the same in the near future; Saskatchewan in 1976 produced a draft bill which is still awaiting parliamentary approval. The provincial statutes are far from uniform, but each is committed to the idea that major revision of the law is essential for consumers to be adequately protected in the 1970's and in the future.

Aims and policies of the Act

The primary goals of the Trade Practices Act are to provide effective redress to aggrieved consumers, and to promote the quick cessation of questionable business acts and practices. It seeks to draw together many diverse elements of consumer protection legislation and case law, and to free consumers from reliance on antiquated rules of law.

The Act strikes at deceptive practices in very strong terms, regardless of whether a consumer has actually been harmed. For it attempts to set higher and more ethical business standards, rather than merely regulating particular practices. On the question of unfairness, it seeks to revitalize the old doctrine of unconscionability and develop it as a general remedy in all cases involving grossly inequitable terms, thereby making it a useful tool for modern consumers.

The Act operates on the assumption that radically new laws can be actively and liberally enforced by the courts, for it essentially leaves decision making to this body. This enforcement choice was made partly out of necessity, for it was feared that otherwise the Act would be considered too

11 The move towards such trade practices legislation is also discernable in Canada's civil law jurisdiction. The Quebec Consumer Protection Act, A.N.Q., 3rd session, 31st Legislature, 1972, Bill 72, proscribes deceptive business practices in very general terms.

radical and be rejected out of hand.

Comprehensive trade practices legislation such as the Trade Practices Act has the advantage of reducing the need for further statutes directed at particular industries or practices, and therefore of eliminating the usual time-lag between recognition of an undesirable practice and legislative prohibition - a feature of piecemeal reform.

2. OUTLINE OF THESIS

In Chapters II and III, the specific prohibitions relating to deceptive and unconscionable acts and practices, respectively, will be examined in some depth. The framework of these provisions will be analyzed, and major cases will be discussed so as to ascertain the degree of protection now offered to consumers. This protection will be contrasted to the old common law remedies, and other legislative initiatives.

Chapter IV will be concerned with the enforcement of the Act. The range of private, public and quasi-criminal remedies available will be briefly set out, with attention being focused on the aspects of public enforcement. The role of the courts in the field of consumer remedies will be examined.

The implementation of the Trade Practices Act highlights the need for more suitable forums to handle individual consumer complaints, especially at the adjudicative level. In Chapter V, alternative approaches which may be more suited to handling consumer grievances will be examined. The consumer arbitration model is discussed in depth.

In Chapter VI, conclusions will be drawn as to the effectiveness of the present Act. In its present form it has been a useful experiment, but by no means is it the final answer to all consumer problems. Further legislative reform will be recommended.
For the moment, we will turn to a brief discussion of the historical background of the Trade Practices Act and outline the scope of its application.

3. BACKGROUND AND SCOPE OF THE ACT

The Trade Practices Act was introduced on May 8, 1974, gaining the edge over the Ontario Act by just a day. It was passed, with very few amendments, and proclaimed only two months later.13 It is quite astonishing that legislation of such a controversial nature, and affecting so many people, should have had such a swift and trouble-free passage through parliament.

Many drafting flaws and inadequacies became apparent during the Act's first year of operation and several amendments were made in 1975.14 The Act made no pretensions to being perfect; nor was perfection to be expected, for the newly instituted Department of Consumer Services15 had had but a year to research and consider the various legislative precedents, to draft legislation, and to develop the machinery necessary for administering it.16

In its formative years, the Department dealt exclusively with consumer matters. An extensive campaign was initially undertaken to educate consumers and businessmen alike of their new rights and responsibilities, and storefront offices popped into existence throughout the province to handle consumer complaints. Expertise and competence in consumer matters was soon acquired in this atmosphere.

13 July 5, 1974 (with the exception of ss.2(3)(n) & 2(3)(p) which have still to be proclaimed). However, note that proclamation of the Ontario Act was delayed until May 1, 1975.
Various administrative changes have taken place in the past few years, the most noticeable being the move in October 1976 of the corporate branches of government to the Department, and its consequent renaming as the Ministry of Consumer and Corporate Affairs.17

Scope of the legislation

The Trade Practices Act applies as such to all consumer transactions. Essentially it covers all transactions involving the disposition of goods or services for purposes that are primarily personal, family, or household.18 The Act unequivocally extends protection to all services, in contrast to the other provinces which expressly exclude professional services;19 as yet there have been no cases which take advantage of this.20 However, private transactions between consumers, as for example in the private sale of a car, are effectively (and unfortunately) excluded from the Act's protection.21

The definition of a consumer transaction extends beyond just private usage in one respect. "Business opportunities" (first-time business ventures) which involve personal services as well as expenditure of money or property are specifically covered.22 The personal services qualification indicates that the Act does not cover all new business ventures. It was meant, basically, to protect consumers who became involved in small business

17 S.B.C. 1977, c.75, amending the Department of Consumer Services Act, supra note 15.
19 Ontario Act, s.1(1); Alberta Act, s.1(g).
20 However, the Act has been applied to banking services which can be classed as quasi-professional: Bank of British Columbia v. Ramsey, Unreported decision, May 10, 1978 (B.C. Small Claims Ct., Surrey Registry). The constitutional difficulties involved in the application of provincial legislation to banks were not even mentioned.
21 The penalties and remedies stipulated in the Act apply only against suppliers: ss.15, 16, 20 and 25.
22 S.1(1).
operations. But it is difficult to visualize any situation which involves pure investment without any personal services. The present wording of the Act leaves a great deal of uncertainty as to the exact type and extent of services required to invoke it.

Several important types of transactions are excluded from the scope of the Act. Credit transactions dealing solely with real property, securities as defined under the Securities Act, and insurance contracts under the Insurance Act are expressly excluded. It is indeed anomalous that the purchase of real estate and the raising of money to finance it, which are undoubtedly two of the most significant consumer transactions ever entered into, should receive less protection than the most trivial of consumer purchases.

Unfair terms in mortgages are regulated to some extent in the Consumer Protection Act, but since this Act fails to provide the comprehensive remedies available under the Trade Practices Act - in this context the right of the Director of Trade Practices to intervene on behalf of a consumer - it is of limited value. Real-estate transactions have no specific statutory protection from such practices. While the complexity of this area of law suggests that the direct application of the Trade Practices Act, with its very general provisions, would be quite unsuitable, there is a pressing need for strong legislative action.

It is interesting to note that subject matter excluded from the scope of the Act can indirectly come within its provisions through the Act's broad

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26 S.B.C. 1960, c.197.
27 S.24.
definition of services. For instance, in the real-estate sphere, the agent who holds himself out to be an expert on houses could be held liable for any misrepresentations he makes. Several cases have already been decided along these lines.28

To whom does the Act apply

A feature of modern trade practices statutes is the dismissal of the old rule that a person bringing an action to enforce a contract, or seeking to rely on its defences, must prove that he was actually a party to the contract - the old notion of privity. The Trade Practices Act overcomes this rule by defining in very wide terms who is a "consumer" and who is a "supplier". A consumer is defined as any individual, other than a supplier, who participates in a consumer transaction, and specifically includes guarantors or donees of that individual.29 Thus, even in cases where the product was actually purchased by another member of the family, or was a gift from a friend, the recipient will now be able to initiate proceedings if the product was misrepresented or the terms of the sale were unfair. However, this extended definition is unlikely to have any real impact as s.20 stipulates that a consumer may only recover damages for losses he has actually suffered.

A supplier is defined to include any individual who in the course of his work advertizes or promotes the disposition of goods or services.30 This definition is wide enough to allow consumers to directly reach any manufacturer who breaches his express or implied warranties and representations rather than having to struggle against the middle-man - the

29 S.1(1).
30 Ibid.
retailer - who often plays only a minor role in the promotion and
distribution of goods and services. The Act further provides that any
assignee of the supplier is fully liable for any consumer losses suffered as
a result of a deceptive or unconscionable act or practice perpetrated by the
original supplier. This feature has been severely criticized by legal
writers on the grounds that full liability fails to fairly balance the
interest of the parties involved.

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31 For the anomalous position under the old rule see the Ontario Law Reform
Commission, Report on Consumer Warranties and Guarantees in the Sale of
Goods, Department of Justice, 1972, 65-76.
32 See Belobaba, supra note 8, pp.331-332; Michael J. Trebilcock et al, A
Study on Consumer Misleading and Unfair Trade Practices, Department of
CHAPTER II

DECEPTIVE TRADE PRACTICES

Deception in market transactions strikes at the very heart of the doctrines of contract law, for that law assumes that both parties freely enter a contract with the full knowledge of what they are buying or selling, and upon which terms. Where a buyer (or seller) is deceived by the other party, fair bargaining becomes illusionary.

More than any other class of buyers, consumers are particularly easy prey to deceptive practices. Consumers lack the information, the experience, and the business sense required to distinguish sound from faulty products or to recognize shady selling techniques. Whereas a businessman can gain experience by repeatedly buying similar products, most major consumer purchases are "one-off" affairs.

In recognition of this, the Trade Practices Act takes a very forceful stand in protecting consumers from deceptive practices. In addition to providing remedies for consumers who have actually suffered loss, it seeks to eliminate deceptive practices before they can become entrenched.

This chapter begins with a short review of the scant and confusing protection given at common law, and of how the courts are struggling to bring the law into tune with market realities. The main part of the discussion examines the innovative provisions of the Trade Practices Act and the interpretation which is being given to them in the courts.
1. THE POSITION AT COMMON LAW

The common law has always provided some relief in cases involving deception. Relief is found under two distinct headings, although the distinction has become confused and of little significance. These are breach of contractual terms, and misrepresentation. The remedies available under the two categories have become closer in recent years, and the rules determining which to apply have become more confused. This confusion has resulted in considerable uncertainty as to the correct category of relief in any particular case. One is often tempted to think that the classification adopted in practice depends only on the remedy which the court wishes to give. Lord Denning has even admitted as much.

Breach of contractual terms

Relief is always granted when the deception forms a term of a contract, regardless of whether the deceptive statement was fraudulent or innocent. Until recent times, the relief available was totally dependent on whether the term was classified as a condition or merely as a warranty. Breach of a condition leads to actions for both rescission and damages, whereas breach of a warranty leaves open only rescission. Thus, even where the breach of a warranty resulted in serious losses, no damages could be awarded. To overcome this, courts have, as one might expect, used their discretion in labelling terms as conditions or warranties, according to the nature of the

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3 Comment (1967), 41 Aust. L.J. 293.
relief they intended to give.

Recently, courts have introduced the device of an innominate term to award damages for a breach of warranty. An innominate term is a warranty, the effect of a breach of which is so severe that it is considered equivalent to a condition.

**Misrepresentation**

It is often difficult to prove that deception in the form of an oral statement forms a term of a contract, and in such cases actions for misrepresentation are a more common route to relief. Again, there are two traditional categories into which an action for relief may fall, and a third one of very recent origin that bridges the other two. Traditionally, misrepresentation is classified as either fraudulent (with the remedy of rescission and damages) or innocent (rescission only). Relief has always been available for fraudulent misrepresentation, which is deemed to occur when a person makes a deliberately untrue statement or is recklessly unconcerned as to its truth. Damages can be sought under the tort of deceit. Relief in cases of innocent misrepresentation has only been available since the 19th century, when Equity intervened to allow for rescission.

It was not until 1963 that damages were ever allowed in a case involving only innocent misrepresentation. The doctrine of negligent misrepresentation was ushered in by the House of Lords in its landmark decision of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* The court held that in certain circumstances, innocent misstatements would allow for

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4 *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha*, [1962] 1 All E.R. 474 (C.A.). Whether this principle will be accepted in Canada is still uncertain, see Fridman, supra note 1, pp.279-285.

damages under the tort of negligence. This doctrine is only in its formative stages and the extent to which it will be used by consumers is uncertain.

The above discussion might give the impression that the common law protects consumers from most deceptive acts and practices. This is certainly not the case. Many acts of deception involve only exaggerated claims - "puffs" - which have never been considered to have any legal consequence. Some respected legal authors have even endorsed this situation:

... it would be an impracticable and mischievous rule which permitted the rescission of contracts merely because expressions of a laudatory and optimistic nature, couched in the language of exaggeration, chanced to transcend the truth.\(^6\)

However, courts are beginning to recognize that exaggerated claims do induce people to enter into contracts and they are labelling such claims as terms of the contract or as actionable misrepresentation. This is particularly noticable in the advertising field.\(^7\)

The common law position crystallized at a time when conditions were quite different from those existing in today's complex and diverse marketplace. The artificial distinctions drawn only serve to cloud the real issue - has the consumer been deceived, and if so, are the circumstances such as to warrant relief?


\(^7\) See Trebilcock, supra note 2, pp.197-199.
2. THE TRADE PRACTICES ACT - LEGISLATIVE APPROACH

As a response to the poor level of protection at common law, governments throughout the world have enacted statutory measures seeking to give consumers more comprehensive relief. The B.C. Trade Practices Act is no exception. These statutes set out in more specific terms what types of conduct are unacceptable, thereby providing a minimum standard for the marketplace to operate by. They attempt to not only catch existing offenders but to encourage and educate all businessmen to act more fairly and honestly. The following discussion will focus on the Trade Practices Act which seeks to give consumers very wide protection indeed.

(1) General comments

In common with most trade practices legislation, the B.C. Act completely does away with the common law classification system for deceptive practices.\(^8\) Section 2 characterizes deceptive, misleading, or false representations without any reference to conditions, warranties, or types of misrepresentation. It begins with a general clause defining all deceptive acts and practices:

2. (1) For the purposes of this Act, a deceptive act or practice includes
   (a) any oral, written, visual, descriptive, or other representation, including non-disclosure; or
   (b) any conduct having the capacity, tendency, or effect of deceiving or misleading a person.

The general definition is supported by an explicit list of deceptive acts and practices set out in subsection (3).\(^9\) The list, though

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\(^8\) See Alberta Act, s.4; Ontario Act, s.2; Federal Combines Investigation Act R.S. 1976, c.314, s.36(1); and the Australian Trade Practices Act 1974, no. 51, as amended by no. 63, 1975.

\(^9\) Penalties for deceptive conduct are provided in later sections: ss.15,
non-exhaustive, covers a broad spectrum of marketplace abuses. It covers, inter alia, claims as to the sponsorship of goods or services, their quality and availability, the past history of a product, the need for repairs, and failure to emphasize the total cost involved in a consumer transaction. Very close replicas of the list can be found in the Alberta and Ontario Acts.\(^{10}\)

The Trade Practices Act also contains, in s.3, a general description and illustrative list of unconscionable acts and practices. In treating deceptive and unconscionable practices separately, the Act retains the old distinction between common law remedies and equitable remedies.\(^{11}\) In contrast, the Federal Combines Investigation Act\(^ {12}\) makes no such distinction. It makes it an offence to conduct one's business affairs in certain proscribed ways, without classifying the conduct as deceptive or unconscionable. This approach has been argued by some to be more logical, for the consumer is after all only concerned with effective redress.\(^ {13}\) But this argument is difficult to follow as the differences between deception and unfairness are apparent even to the consumer, and the separate classification in no way affects his chances of obtaining satisfactory redress.

The most striking feature of s.2 is the variety of situations in which it can protect the consumer. Prior to the passing of the Act, there was only a small body of protective legislation (both British Columbian and Federal) aimed at preventing specific forms of deception.\(^ {14}\) Moreover, this

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16, 20, & 25.
10 Supra note 8. See also Belobaba, "Unfair Trade Practices Legislation" (1977), 346-351.
11 The other Canadian provinces have also taken this approach, although there are significant departures both in form and in substance.
12 Supra note 8, Part V.
14 E.g. At the provincial level see: Pyramid Distributors Act S.B.C. 1973, c.32; Closing Out Sales Act R.S.B.C. 1960, c.59. At the federal level see the Combines Investigation Act, supra note 8, which today combats deception
legislation was usually passed only in response to a strongly felt need, generally after many people had suffered hardship and loss (e.g. from a pyramid selling scheme). The comprehensiveness of s.2 should succeed in eliminating this legislative time lag. Additional valuable protection for consumers should come from the section's ability to catch and correct deceptive practices before they have even caused any harm.

However, to establish this, it is necessary to examine closely the major features of the section and the problems that have arisen in the courts.

(2) Tendency to deceive

Section 2 offers protection against acts or practices which have the capability, tendency, or effect of deceiving consumers. The central concept is therefore the tendency to deceive and not whether actual deception has occurred.

The words "to deceive", though previously interpreted by long-standing case law, were clearly defined for the purposes of s.2 in the first major case under the Trade Practices Act, that of the Director of Trade Practices v. Household Finance Corporation of Canada. It was held that to deceive a person is "to lead that person astray into making an error of judgement",¹⁵ regardless of whether the error is to the person's detriment or benefit.¹⁶ All subsequent cases under s.2 have referred back to this definition.

It is the protection against acts or practices having even a tendency to deceive that gives the section much of its strength. Actions can be brought against practices which might deceive, even if no consumer has

actually been injured by the practice. In fact, orders for injunctive or declaratory relief have been obtained, and successful prosecutions have been undertaken, in just such cases.\textsuperscript{17}

It should be noted that s.5 of the American Federal Trade Commission Act,\textsuperscript{18} which gives the Commission power to regulate unfair and deceptive trade practices, has also been interpreted to not require proof of actual deception.\textsuperscript{19} In complete contrast, the Ontario Act does require such proof (s.2(a)).

The B.C. Section deliberately does not require \textit{intention} to deceive. The test of deception in s.2 is simply whether the supplier's conduct has the capability or tendency to lead to an error of judgment. The supplier may have been merely careless, or even totally innocent and under a mistaken belief himself, and yet still violate s.2. What is important in such cases is the objective capacity of the act or practice to deceive consumers, not the frame of mind of the supplier. For the intention of the Act was to give wide protection to consumers, as was pointed out by Mr Justice Ruttan in \textit{Findlay v. Couldwell}:

\begin{quote}
... A deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading, and it may be inadvertent yet still sufficient to void the transaction under the statute, which is directed to the welfare of the consumer, not the punishment of the vendor.\textsuperscript{20}
\end{quote}

Insistence on proof of intention to deceive, or knowledge of the falsity of a statement, would only hamper the effectiveness of unfair trade


\textsuperscript{18} 15 U.S.C. 1970, s.45(a).


\textsuperscript{20} Unreported decision, June 10, 1976, 7 (B.C.S.C., Vancouver Registry).
practices legislation. No doubt, it is for these very reasons that the Federal Trade Commission Act,\(^\text{21}\) and the Australian Trade Practices Act\(^\text{22}\) treat deception as a strict liability offence.

At common law, deceit has always been understood to involve conscious and deliberate falsehood. The law reports abound with cases to support this.\(^\text{23}\) So it will no doubt take some time for judges and lawyers to fully accept the implications of the new legislation. But is needs to be remembered that the common law affords some relief in cases of innocent deception. If the deception forms a term of the contract, then innocence is irrelevant; if it constitutes innocent misrepresentation, then at least rescission of the contract is possible. The Trade Practices Act's use of the term "misleading" as well as the term "deceiving" should aid judges in giving s.2 its full meaning, as the former word has not been coloured by years of judicial interpretation.

As non-disclosure can constitute deception under the Trade Practices Act (a point which will be amplified in the next section) and intention to deceive is irrelevant, it is possible to contravene the Act by innocently making no statements at all. This seems overly unjust to suppliers, and one must wonder whether the Act has overstepped the bounds of fairness. It is therefore not surprising that judges have difficulty in accepting the notion of innocent deception in non-disclosure cases.\(^\text{24}\) But on reflection, the fact


\(^{22}\) See excellent discussion of the Australian provisions in G.Q. Taperell et al, Trade Practices and Consumer Protection: A Guide to the Trade Practices Act 1974 for Businessmen and their Advisors, Butterworths, Sydney, 1974, 168-246 (esp. pp.183-184, & 230-231). Taperell argues that, in general, proof of intent is not necessary but that proof of absence of intent, in relation to the criminal charges (e.g. the list of deceptive practices set out in s.53), can provide a defence under s.85(1).

\(^{23}\) See Buckley J. in re London & Finance Corp. Ltd., 1 Ch. 728, 732 (cited in Taperell, ibid., p.183).

\(^{24}\) Despite the Act's clear stipulations to the contrary, Mr Justice Ruttan remarked in Finlay's case, supra note 20, p.8, that he thought it would be
that there was no disclosure is largely irrelevant. As long as the supplier acted totally innocently and responsibly, there is little difference between deception arising from something he said, and deception arising from something he did not say. Yet the common law has had a tradition of attaching much more importance to what is actually disclosed.

The whole question of liability in cases of innocent deception needs to be re-examined. While strict liability is in keeping with the aim of setting higher standards for suppliers - it is certainly an incentive for every supplier to exercise more care - it is at the same time unjustly harsh, and commentators have repeatedly called for some form of defence.\(^25\)

There have already been moves in B.C. away from strict liability. Section 25A, introduced in 1975, allows due diligence to be a total defence from prosecutions under s.25.\(^26\) This alleviates much of the harshness, as prosecutions are the Act's most severe penalty. Still, it is tempting to propose a limited civil defence, for the central question is who can best bear the loss in such cases? To answer it requires an examination of the type of product or service involved in the transaction, and the resources of the two parties.

It is therefore proposed to allow a limited defence in cases of civil deception, in which proof of due diligence and honest error on the part of the supplier can be taken into account by the court in deciding a case involving innocent deception. The onus should be on the supplier to show that he acted innocently. It would be for the judge to weigh fairness to the supplier against the seriousness of the offence and the loss to the


\(^26\) Note that s.37.3 of the Combines Investigation Act, supra note 8, provides a similar defence in relation to certain offences under that Act.
consumer. Such a defence need not compromise the needs of consumers, but would be much fairer to suppliers.

Non-disclosure

What a person does not say, as well as that which he does, can have a tendency to mislead. The Trade Practices Act recognizes this fact, and covers both types of deception. Non-disclosure is included within the general concept of deception, and is specifically included in the list of deceptive practices in s.2(3).

In cases of non-disclosure, the Act gives much better protection to consumers than does the common law, which equates it to an actionable misrepresentation in only three specific situations: (1) when it distorts what has actually been said ("active concealment"); (2) if the subject matter of the contract is such that "utmost good faith" must be shown (uberrima fides); and (3) when a fiduciary relationship exists between the contracting parties.27

In recent times remedies in tort have been available in some situations. The Hedley Byrne doctrine has been used to give a remedy for negligent non-disclosure,28 and in Rivtow Marine Ltd. v. Washington Iron Works,29 the Supreme Court of Canada founded liability for non-disclosure directly on Donoghue v. Stevenson.30 The doctrines developed in these cases,

27 In a recent B.C. Case, Ames v. Investo Plan Ltd., [1972] 3 W.W.R. 443 (B.C.S.C), Mr Justice Anderson held that failure to advise a purchaser of shares that a prospectus has not received the approval of the Securities Commission, amounted to fraudulent misrepresentation. On appeal it was held that fraud (active concealment) had not been clearly shown: [1973] 5 W.W.R. 451. See also Bank of Nova Scotia v. Boehm, [1973] 3 W.W.R. 757 (B.C.S.C.).
however, require considerable clarification.

(3) The deception must be material

Given that deception did occur, it is by no means certain that it is deserving of the protection given to consumers under the Act. If the deception concerns a trivial or irrelevant matter, why should the transaction be overturned? Courts have always been in agreement with this most reasonable standard, and have held that the deception or misrepresentation must be material.31 This has involved showing that the representation significantly influenced the decision to contract. Although s.2 of the Trade Practices Act only mentions the word "material" in two sub-clauses (s.2(3)(p)&(r)), the concept underlies the entire list of deceptive acts and practices in s.2(3).32

Problems do arise in determining whether or not a matter is materially deceptive, and the far-reaching examples of s.2(3) give the courts wide discretion to interpret the requirements for material deception as they please. The Household Finance case augurs for the adoption of a somewhat cautious approach. This case was concerned with non-disclosure of the assignment of conditional sales contracts. While the contracts in question warned consumers of the possibility of assignment, they were only advised of the actual assignment in cases of default. In fact, Household Finance took elaborate steps to disguise the arrangement, even going so far as communicating with customers on the retailer's letterhead.

Although there was no evidence of any consumer having been harmed, and there were no consumer complaints, the Director of Trade Practices sought a

32 The Federal Trade Commission adheres to this principle: Federal Trade Commission v. Mary Carter Paint Co. (1965), 382 U.S. 46; Kintner, supra note 19. See also Combines Investigation Act, supra note 8, s.36(1).
declaration against these practices. The action failed because both the British Columbia Supreme Court and the Court of Appeal viewed the deception as immaterial. At first instance, Mr Justice Hutcheon held that deception after completion of a consumer transaction would not lead a person to make an error of judgement - he could not envisage any decision to be made which would even be affected by disclosure of the truth. The Court of Appeal affirmed this view.

The financial and economic affairs of small business men (such as the retailers in this case) were considered to be essentially private and personal matters, which were of no concern to consumers and would have little or no effect on their buying decisions. The judge stressed that the Act was designed to protect consumers, not to require full disclosure of all business affairs. Merely being kept in the dark as to an immaterial fact did not fall within the protection of s.2.

While this decision may on the facts be correct, it was poorly reasoned and narrow in scope. Mr Justice Hutcheon seemed unaware of the fact that s.2 expressly applies in cases where the deception occurs after a consumer transaction. It is difficult to imagine any case involving post-contractual deception succeeding under s.2, given his criterion as to materiality. But the fault may not lie entirely with the judge. If the intention of this timing provision is to expose such post-contractual collection practices - for they could affect future dealings between consumers and the retailers involved - they should perhaps have been expressly listed in s.2(3).

33 Supra note 15, p.738.
34 Supra note 16.
35 Supra note 15, p.737.
36 Ibid., pp.735-736.
37 S.2(2).
38 Note that in the Household Finance case, supra note 16, p.2, the Court of Appeal dismissed this argument.
Mr Justice Hutcheon's reasoning would presumably have led to the same decision had there been no warning of possible assignment. This is in sharp contrast to the 1968 American decision, *All-State Industries of North Carolina, Inc.*,\(^{39}\) in which the Federal Trade Commission held that such practices were deceptive on public policy grounds, given the increasing need to regulate credit transactions. The Commission held that it was necessary to warn of the possibility of assignment but not to actually disclose if it took place. Mr Justice Hutcheon could have adopted a similar approach to arrive at his decision.

The Ministry have expressed great disappointment in the *Household Finance* case, fearing that it severely limits their ability to bring cases where no one has actually been deceived.\(^{40}\) The case shows that a practice that is dishonest does not automatically carry with it a "tendency to deceive"; rather, it is necessary to present good arguments as to why a practice it materially deceptive.\(^{41}\) But on reflection, one would expect only practices with a tendency to materially deceive to warrant the penalties in the Act. The Ministry's disappointment is understandable, as it results in more work for them!\(^{42}\)

The case of *William Stubbe & Director of Trade Practices v. P.F. Colliers Ltd.*\(^{43}\) shows that when the arguments are presented well, the courts are prepared to consider a practice deceptive in the absence of any person having been harmed. Mr Justice Aikens applied the *Household Finance* case

\(^{39}\) (1969), 75 F.T.R.
\(^{40}\) Conversation with Michael Hanson, B.C. Director of Trade Practices, Dec 1 1978.
\(^{41}\) Which was not done in the *Household Finance* case! The judgments reveal that with one exception (see supra note 38 and text), the case was argued on the basis of abstract legal principles.
\(^{42}\) Under the Act, the Cabinet is empowered to make a regulation declaring any particular dishonest practice to be deceptive: ss.2(3)(s) & 32. However, this power has not yet been used.
\(^{43}\) Supra note 17.
test for deception, but adopted a more liberal view of what was material. His Honour stated that a material factor need not relate only to the substantive qualities of the product in question, but that any act or practice which induces a customer to buy may be materially deceptive under s.2; he cited with approval American authority to that effect.  

Salesmanship

Salesmanship, a term which covers a whole gamut of selling techniques and practices, is severely limited by the Trade Practices Act. Exaggeration, innuendo, or ambiguity as to a material fact offend s.2. As a result a seller is forced to confine himself to making little more than purely factual statements during a sales presentation, despite Mr Justice Aiken's unsuccessful attempts in the Collier's decision to assure otherwise:

There is, as far as I can see, no sensible reason why the statement by the representative that he intends to sell an encyclopaedia cannot be imbedded in legitimate representations as to the quality and usefulness of the encyclopaedia. For instance, if Collier wishes to describe the encyclopaedia as having educational value, which I have no reason to suppose it lacks, Collier may prepare a script embodying the statement that its intention is to sell but also embodying representations that the encyclopaedia has educational value for adults and children. This sort of thing, provided there is no deceit, is no more than legitimate salesmanship and it is not my view that the Act was intended to foreclose salesmen from the use of their selling skills, provided they are exercised in a way which is not deceptive.

It remains to be seen if s.2, by severely stifling salesmanship, will have the effect of discouraging suppliers from playing an active and informative role in the marketplace.

The main part of the discussion in the Collier's case actually revolved

45 s.2(3)(r).
46 Supra note 17, p.513.
47 See Kintner, supra note 19, pp.32-33 (cited by Aikens J., ibid., p.514).
around whether the company's "door-opener" - the words used by its salesmen to win entry into a home - were deceptive. Door-openers are an integral part of the sales presentation, and although they do not touch directly on a consumer transaction, they are specifically dealt with in s.2(3)(1):

A representation that the purpose or intent of any solicitation of, or communication with, a consumer by a supplier is for a purpose or intent different from the fact [constitutes a deceptive act or practice].

In the early 1970's Collier's salesmen had used a door-opener which suggested that they were conducting a survey as to the effectiveness of a television campaign. Following the commencement of Stubbe's action, the company adopted a more honest approach. The new door-opener still spoke of a survey (an educational survey), but the salesmen were instructed to also show a card which indicated that the real purpose of their visit was to sell encyclopedias. Mr Justice Aikens held that both the old and the new door-openers were contrary to s.2. His Honour went so far as to state that any representation which did not reveal the true purpose of a visit, must be suggestive of some other purpose and thus be deceptive. Therefore, Collier was ordered to prepare a new script which stated at the outset that its purpose was to sell encyclopedias.

This strict disclosure requirement would seriously impede the chances of salesmen gaining entry into homes. Mr Justice Aikens, himself, acknowledged that it was to a salesmen's advantage to speak in terms of surveys rather than sales. So it came as no surprise that Collier should challenge this decision.

As the original orders (for permanent injunctions and declarations) had not been entered, the case was reheard by Mr Justice Aikens. This time,

48 Supra note 17, p.510.
49 Ibid., p.504. Expert evidence to this effect was admitted.
however, Collier had more success. Firstly, the judge accepted that his original decision had been phrased too widely. Neither the Statement of Claim nor the evidence raised the issue that it was deceptive to fail to state the true purpose of a visit at the outset.  

Moreover, Mr Justice Aikens voiced a doubt as to whether neutral door-openers (where the salesman suggests no reasons for his visit) could fall within s.2. While such statements are deceptive in a general sense, they have no direct bearing on a consumer transaction, and are outside the scope of s.2(3)(1) which was interpreted, but not conclusively determined, to require some actual representation as to purpose.

Yet neutral door-openers are still objectionable. Allowing salesmen to gain entry by such means places weak-willed persons – who are after all the ones most likely to be fooled by the initial deception – in a very vulnerable position where they could easily be trapped into making unwanted purchases. Such cases could, perhaps, be dealt with on the grounds of unconscionability. Alternatively, s.2(3)(1) could be more strongly worded so as to expressly cover this form of deception.

(4) Relevant time

Section 2 protects consumers from deception which occurs "before, during, or after" a consumer transaction (s.2(2)). This all-encompassing timing provision is indicative of the wide protection that the Act hopes to give consumers. The common law categories of relief, by focusing on the formation stages of the agreement, only allow relief if the representation occurs before or during the making of the contract. If no contract

51 Ibid., pp.19-20.
52 Ibid., p.10-11. Note the example given by counsel of a neutral door-opener: "How are you today? I represent Collier and I would like to talk to you. Can I step in?"
results, then no relief can be given. Moreover, it is often difficult to
prove that the deception actually induced the consumer to contract. With s.2
there are no such difficulties, as deception prior to a transaction is
actionable regardless of whether it is completed or not. As an example of
the power of s.2, a successful action was brought against a supplier who
advertized that he was giving away free gifts, but who required consumers to
submit to a home demonstration of a vacuum cleaner before they could receive
them.54

Post-contractual deception is not actionable under contract law
doctrines, and since the decision in Numes Diamond Ltd. v. Dominion Electric
Protection Co.,55 in which losses were incurred due to reliance on a
warranty given some time after a contract, the possibility of succeeding in
an action for negligent misrepresentation in tort has been very doubtful.56
The wide timing provision of s.2 is therefore very welcome, as it should at
least be useful in mitigating losses arising from a post-contractual
warranty. However, the Household Finance case shows that judges are likely
to have great difficulty in dealing with deception outside the traditional
terms. Mr Justice Hutcheon simply could not accept that it was possible to
have deception after a contract.

The timing provision in the British Columbia Act is considerably wider
than that in other Canadian statutes. The Ontario Act,57 and the Federal
Combines Investigation Act58 only provide relief in cases where the

53 See supra note 1.
54 Director of Trade Practices v. Jolin Industries, Unreported decision,
Dec 29, 1977 (B.C.S.C., Vancouver Registry). Mr Justice Legg ordered a
permanent injunction against these practices.
56 The Majority held that intra-contractual misrepresentation was not
actionable in tort unless the negligence relied on arose from an independent
tort. See Jacob S. Ziegel, "Tortious Liability for Pre-Contractual and
57 S.2(a).
58 Supra note 8.
misrepresentation actually induced the contract. The Alberta Act strikes at deceptive practices regardless of whether a contact was entered into, but only if the abuse occurred "in the course of inducing a person to enter into a consumer transaction"; it does not protect consumers from post-contractual deception.\textsuperscript{59}

(5) \textbf{Who is protected}

In assessing whether a representation has the capacity to deceive, the test is not what would the reasonable man believe, but rather what would the foolish man believe. For the Act is aimed at protecting those who most need its protection - those who might believe anything. This has been accepted by the courts; in the \textit{Collier}'s decision, Mr Justice Aikens stated:

\begin{quote}
... the provisions of the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspicious and are credulous.\textsuperscript{60}
\end{quote}

Thus, he held that the current door-opener used by \textit{Collier}'s was deceptive even though the salesmen displayed a card to householders indicating that they were selling encyclopedias. He felt that while the alert person would realize what was happening, the less wary would not.\textsuperscript{61} In his decision, the judge specifically referred to the decision of Mr Justice Black of the United States Supreme Court, in \textit{Federal Trade Commission v. Standard Educational Society},\textsuperscript{62} where it was stressed that trade practices legislation was made to protect the trusting as well as the suspicious.

The "credulous man" test, in fact, originated in a much early decision of the United States Supreme Court, \textit{Charles of the Ritz Distributors v. Federal Trade Commission}.\textsuperscript{63} This test was first introduced in Canada in R.

\begin{footnotes}
\item S.4(1)(d). See Belobaba, supra note 10, p.12.
\item Supra note 17, p.510.
\item Ibid.
\item (1937), 302 U.S. 112, 116.
\end{footnotes}
v. Imperial Tobacco Ltd., a case concerned with misleading advertising charges. Since this decision the test has been repeatedly used by Canadian courts, especially in relation to advertising claims.

In sharp contrast to the British Columbia Act, the Alberta Act restricts relief to cases where the representation or conduct has the effect or might reasonably have the effect of deceiving a consumer. The Legislature's adoption of this test works against the general aims of the Act to protect those who are most vulnerable. The unwary consumer is certainly better protected in British Columbia than in Alberta.

(6) Parol evidence and exemption clauses

Consumers seeking relief at common law from false or misleading representations have always faced two major problems: the parol evidence rule which excludes any evidence which adds to, varies, or contradicts a written agreement, and the widespread use of exemption clauses to avoid liability for promises and warranties which prove to be false.

The Trade Practices Act overcomes both these problems. The parol evidence rule, implicitly negated in s.2 which states that an oral representation can be deceptive, is expressly abolished by s.27. Section 27 provides that oral and extrinsic evidence is always admissible in cases dealing with consumer transactions. Exemption clauses are made inoperative for the purposes of the Act in s.28. Thus, no longer must consumers suffer for placing their trust in oral statements, nor be prevented from obtaining relief by reason of fine print that they probably did not even read. This is

63 (1944), 143 F.2d 676.
66 S.4(d).
only fitting, for oral claims, promises, and warranties can be major factors in persuading a consumer to enter into a transaction.

It should be noted that the position at common law has improved in recent times. Although the parol evidence rule has not been directly overruled, judges are now much more willing to make exceptions to the old rule which they recognize to be inappropriate in many situations.67 The courts have been even more active in relation to exemption clauses. Judges have proven to be very hostile to such clauses, and through the development of the doctrine of "fundamental breach" they have managed to circumvent them in many - but by no means all - cases.68

67 See Trebilcock, supra note 2, pp.225-229.
CHAPTER III

UNCONSCIONABLE TRANSACTIONS

A novel feature of the Trade Practices Act is the statutory recognition of the doctrine of unconscionability. The doctrine, established in the courts of Equity hundreds of years ago, allows courts to declare excessively unfair ('unconscionable') contracts as unenforceable. However, the courts have always applied it very restrictively. The importance of the new statutory provision therefore lies in its making the doctrine an accessible weapon for the modern consumer. It will provide relief in situations where unfairness is not the result of any deceptive conduct.

The Legislature's adoption of the doctrine is actually a reflection of the renewed force it is now being given at common law. In the past, courts have been reluctant to give protection to the unfortunate who find themselves trapped in harsh contracts. Recently, however, courts have been more willing to give such protection. They are starting to rationalize the position that they take, and are honestly examining whether or not intervention is necessary in a particular case.

The imposition of unfair terms and conditions is a real threat to the consumer, ever vulnerable. Vigilance on the part of the courts, whether self-imposed, or the result of legislative reform, is both welcome and necessary. This chapter will discuss in detail the developments at common law, and the recent legislative moves in British Columbia. Attention will be centred on the scope of the protection that should be given to consumers.

We begin the discussion by considering the plight of the modern consumer.
1. **PROBLEMS FACED BY CONSUMERS**

Contract law is founded on the notion of freedom to contract - the right of an individual to enter into such agreements as he chooses. The law assumes that contracting parties have roughly equal knowledge and bargaining power.¹ In effect, the free market should be self-regulating. For this reason contract law as a body largely relates only to matters of formation, not to the substantive contents of the agreements.

However, in today's complex and organized marketplace, it is not enough that the law leaves the consumer to his own cunning and good (?) market sense.² Consumers often have little knowledge of the worth of products and are unable to make meaningful evaluations. They are forced into a position of total reliance on the seller to disclose information about the subject matter of a transaction. This is particularly true of durable goods - for example, cars and household appliances.

Further, consumers are normally in no position to negotiate the terms and conditions of a sale, or to gain assurances of a product's quality. Standard form contracts are the norm, and such contracts do not permit individual bargaining.

The problems inherent in standard form contracts have not gone unnoticed by the courts. In *Schroeder v. Macaulay Music Publishing Co. Ltd.*, Lord Diplock specifically drew attention to the consumers' plight:

> The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests of the weaker

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¹ See M.J. Horwitz, "The Historical Foundations of Modern Contract Law" (1974), 87 Harv. L. Rev. 917. Horwitz contends that the "will" theory of contract law did not appear until the late eighteenth century or early nineteenth century.

party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods at all, these are the only terms on which they are obtainable. Take it or leave it."³

Some legal commentators, notably Prosner⁴ and Trebilcock,⁵ take a less sinister view of such contracts. They see them merely as a means of facilitating the conduct of trade and reducing the transaction costs, by avoiding the necessity of negotiating and drafting an individual agreement with every purchaser. These arguments gloss over the fact that consumers have no choice but to accept such terms, as there are no alternative sources of supply or at least no other sources which offer the desired goods or services on substantially different terms. Clearly this is the situation when a seller has a monopoly in a particular industry. But even in cases where there is no monopoly, choice is often limited. Conscious parallelism pervades the marketplace, and suppliers as a rule offer roughly the same terms and conditions.

The consumer marketplace is characterized by inequality of bargaining power between buyers and sellers. The consumer's weakness could easily lead to the imposition of unfair contractual terms. Traditional contract law theories simply do not fit modern-day market realities.

2. **COURT INTERVENTION**

(1) **Historical perspective**

The courts have not totally ignored the injustices which arise from the application of general contract principles. There are cases dating back to the eighteenth century which clearly illustrate that the courts did assume an obligation to police the marketplace and give relief from contracts which were grossly unfair:

There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused.

Equity always went further than the common law courts which only gave relief in cases of duress, mistake or misrepresentation. There is an established line of cases which illustrate that the courts can grant relief in cases of "undue influence" where, because of the personal relationship between the parties, it would be unfair to enforce a harsh or unconscionable contract. The cases can be divided into two kinds. Firstly, there are some classes of relationship where the law presumed that undue influence existed - for instance, parent and child, solicitor and client, doctor and patient.

In these cases (where the relationship is sometimes referred to as "special" or "fiduciary") the person seeking to enforce the contract had to show that

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6 This is true of all civilized countries. See A.M. Squillante, "Unconscionability: French, German, Anglo-American Application" (1970), 34 Albany L. Rev. 297.
7 Denning J. (as he then was) in John Lee & Son (Grantham) Ltd. v. Railway Executive, [1949] 2 All E.R. 581, 584. This view was reiterated by his Honour in Gillespie Brothers & Co. Ltd. v. Roy Bowles Transport Ltd., [1973] 1 Q.B. 400, 415-416.
8 Historically, duress was limited to actual violence or threats of violence to the person. However, the doctrine is gradually being expanded to cover what can be termed "economic duress". For general discussion see Trebilcock, A Study on Consumer Misleading and Unfair Trade Practices, Ottawa, 1976, vol 1., 246-250.
the contract was fair. Secondly, there are cases where no special relationships existed. In these cases the person who wished to avoid the contract had to show that a relationship of confidence and influence did in fact exist.10

On a wider front, Equity always claimed to have a general review power over all unfair and unconscionable transactions. But despite magnanimous judicial formulations of the doctrine,11 it was almost always applied very restrictively. It benefitted, for the most part, only such "presumptive sillies" as heirs, farmers, sailors and women.12 In such cases, again, the onus was on the stronger party.13

The doctrine of unconscionability was widely ignored for several decades. Courts were content to battle against unfair contracts on other fronts. As an example, exemption clauses to contracts were circumvented through the doctrine of "fundamental breach" - the nature of the breach is so severe, or the performance of the contract so different from that contemplated, that the clause cannot be used as a defence. Yet the cases clearly reveal that the courts do take into consideration questions of unfairness and inequality (while hiding their reasoning behind a technical facade). In the 1973 case of Gillespie Brothers and Co. Ltd. v. Roy Bowles Transport Ltd., Lord Denning M.R. admitted that what the courts were really doing was disallowing "a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so".14

11 See Wood v. Abrey (1818), 3 Madd. 417, 423; 56 E.R. 533, per Leach V.C.
13 Aylesford v. Morris (1873), L.R. 8 Ch. App. 484.
Over the past decade courts have become much more willing to express the true rationale for their decisions. The old doctrine of unconscionability has been increasingly relied upon and extended. The doctrine is being reshaped into a major tool for the avoidance of unfair contractual terms, and its application is potentially a very far reaching one. However, caution must be exercised to ensure that the doctrine does not become a catch-all phrase applied even in cases where it is quite inappropriate.

(2) Canadian developments

In the 1960's, Canadian courts began to reassert their power and set aside unconscionable agreements. Most of the cases involved relieving the seller of land from an unfavourable bargain, and fell within the traditional categories of relief. In the past few years the doctrine has been applied in a wider variety of circumstances.

In Towers v. Affleck, a 1974 decision of the British Columbia Supreme Court, the Court held that a release form signed by the plaintiff soon after a motor accident was not binding. Mr Justice Anderson stressed that the plaintiff was an old lady of "limited intelligence", and that the consideration had been totally inadequate (she had received a mere pittance). His Honour concluded:

... the plaintiff has proved by a preponderance of evidence that the parties were on such an unequal footing that it would be unfair and inequitable to hold her to the terms of the agreement which she signed.

A similar situation arose in Pridmore v. Calvert, another British

17 Ibid., p.719.
Columbia case. The plaintiff had at an early stage accepted a mere $300 in damages - her actual damages amounted to over $20,000. Mr Justice Toy applied the Towers' decision and held that the parties were on such an "unequal footing" that it was inequitable to hold the plaintiff to the agreement. 19

In both cases the judges adopted a dual test. 20 They compared the bargaining positions of the parties and examined whether the terms of the agreement as such were unfair. The Ontario Court of Appeal adopted the same test in Black v. Wilcox, 21 a case which involved the sale of property by an alcoholic at a price substantially less than its market value. The Court concluded:

... in a situation of this nature, the Court will invoke the equitable rule that a person who is not equal to protecting himself will be protected, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so by reason of their commanding and superior bargaining position. The combination of inequality of position and improvidence is the foundation upon which the doctrine is based. 22

On the question of fairness, the judges in the two British Columbia cases stressed that the weaker party had not had the benefit of independent advice. But the test of fairness was an unusually tough one: whether "a practising lawyer would have approved of the settlement". 23 Aside from all the objections that one may raise to this implicit declaration of lawyers as the sole purveyors of wisdom in this world, it also arbitrarily rejects the "reasonable man" test that suffices in other areas of the law. Is the man on the Clapham Omnibus in fact a lawyer?

19 Ibid, p.144.
20 Note also Gaertner v. Fiesta Dance Studios (1973), 32 D.L.R. (3d) 639 (B.C.S.C.). Although this case dealt directly with the question of fraud it is apparent from the tenor of the decision that the Court was influenced by the overall unfairness of the terms and the overpowering sales tactics used to obtain the contracts.
21 (1976), 12 O.R. (2d) 759.
22 Ibid., p.764
23 Supra note 16, 719.
The doctrine of inequality

The renewed reliance on the doctrine of unconscionability is not merely a Canadian phenomenon. English courts have also become more willing to openly take into account questions of unfairness and inequality. This is evident in the landmark decisions of both the Court of Appeals in *Lloyd's Bank Ltd. v. Bundy*[^24] and the House of Lords in *Schroeder's case*.

In *Bundy's case* the defendant, a farmer, had banked for many years at his local branch of the Lloyd's Bank. In 1961 a company operated by Mr Bundy's son, and which banked at the same branch of the bank, got into financial difficulties. To keep the company afloat, Mr Bundy on three occasions guaranteed the company's overdraft, each time giving charges over his farm as security. In relation to the first two guarantees Mr Bundy received advice from his lawyer, but on the third occasion he relied solely on the bank manager's advice. The company continued to flounder and within a few months collapsed. The bank made arrangements to sell the farm to enforce its guarantees. Upon Mr Bundy's refusal to leave the farm, the bank took action to gain possession.

The bank was successful at first instance. The trial judge, Mr Justice McLellan, sympathized with Mr Bundy's situation but thought that no remedy existed. The Court of Appeal reversed this judgment, unanimously deciding that Mr Bundy should be given relief on the grounds of undue influence. The Court[^25] held that in the special circumstances of the case a fiduciary duty existed between the bank and Mr Bundy, and that this duty had been breached by the failure to advise Mr Bundy to obtain independent advice. Sir Eric Sachs acknowledged that it was rare to impose such a duty between a creditor and a guarantor, but held, on the facts, that a relationship of confident-

iality did exist and warranted the imposition of such a duty.

Lord Denning M.R. went further than his fellow judges. After undertaking a wide review of the existing law, and referring to cases on duress, unconscionable transactions, and undue influence - all well-established categories - he concluded that such categories were merely instances of a wider jurisdiction. His words have subsequently been quoted by almost every writer on the subject of unconscionability:

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need knowingly consents to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.\textsuperscript{26}

His Lordship held that in this case there were three elements which combined to undermine the transaction. Firstly, the bank's consideration was grossly inadequate. In exchange for the guarantee the bank had made no promises to continue or increase the company's overdraft (in fact, the overdraft limit had been reduced). Secondly, Mr Bundy's strong affection for his son had put him in a very vulnerable position. Finally, the bank had failed to recognize that a conflict of interest arose; Mr Bundy was a customer of the bank and the bank knew that he relied on its advice. Therefore, since it was in the bank's interest that the mortgage be signed, it should have advised its customer to obtain independent advice.

\textsuperscript{26} Supra note 24, p.765.
The majority of the Court in Bundy expressed no opinion on the general theory enunciated by Lord Denning. Therefore, it does not technically form part of the ratio decidendi of the case. But many learned writers have equated his judgment to Lord Atkins' famous speech in Donoghue v. Stevenson, and predict that it may have just as pronounced effect on the law.

The House of Lords in Schroeder's case appears to have accepted Lord Denning's theory. In this case, an unknown songwriter had entered into an exclusive services agreement with a music publishing company for a period of five or possibly ten years. He signed a standard form agreement, the terms of which were grossly one-sided: The songwriter assigned full copyrights for all his musical works, but there was no undertaking by the company to publish or promote them; the Company had the right to terminate the agreement but there was no corresponding provision in favour of the songwriter. Four years later (after becoming successful!) the songwriter sought a declaration that the agreement was void. His action was successful. The judgement was subsequently affirmed by both the Court of Appeal and the House of Lords.

The House of Lords unanimously held that the contract was in restraint of trade and contrary to public policy. Lord Reid stated that whilst exclusive service contracts - which of necessity involve extensive restrictions - normally do not need to be justified, if in the circumstances the restrictions appear to be unnecessary or reasonably capable of being enforced in an oppressive way, then they must be justified. His Lordship

30 Lord Reid, Viscount Dilhorne, Lord Diplock, Lord Simon of Glaisdale and Lord Kilbrandon.
31 Supra note 3, p.622.
went on to hold that on the facts in this case the contract was far too one-sided to be equitable.

Lord Diplock was more bold and simply asked "was the bargain fair"?\textsuperscript{32} His Lordship thought that it was the court's role to assess the relative bargaining power of the parties and to determine if the stronger party had used its superior position to exact from the weaker onerous promises.\textsuperscript{33} Lord Diplock claimed that this rationale explained the Court's refusal to enforce restraint of trade contracts which were unconscionable.\textsuperscript{34}

Although Schroeder's case only dealt directly with restraint of trade principles, it is apparent from the decisions that the reasoning is not to be so narrowly confined. The decisions were explicitly based on "inequality of bargaining power".\textsuperscript{35} This principle has also been recognised and approved of in one Canadian case.\textsuperscript{36} Further, the dual test adopted in other recent Canadian cases does not appear to be very different in substance.

3. LEGISLATIVE INTERVENTION

(1) Procedural and substantive unfairness

As we have seen, at common law the courts apply a dual test when determining whether a contract is unconscionable. It is necessary to show that there is a procedural defect - an unfair act or practice at the formation stage of the contract, for example excessive sales pressure - and that the contract suffers from substantive unfairness - the actual terms of the contract are harsh. In fact, the emphasis has always been on procedural

\textsuperscript{32} Ibid., p.623.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid.
\textsuperscript{35} In Clifford Davis Management v. W.E.A. Records Ltd. (1974), 1 W.L.R.
defects; the only substantive issue considered is overall imbalance. Bad contracts, as such, are never relieved.

It has been strongly argued that this approach is too rigid. Some contractual terms are so unfair that they warrant relief without evidence of any procedural defect. But to adopt such a position forces us to address the question of how far should the law strive to protect the foolish from their own folly. The common law has certainly not shown much keenness to protect the "blind and foolish".

If relief were given in every case involving a bad contract, consumers would lack all incentive to make careful and responsible marketplace decisions. And the courts would be heavily burdened with cases brought by dissatisfied purchasers seeking relief from bad contracts! Conversely, certain terms are so grossly unfair that they should be considered unconscionable in all cases. The courts have been unwilling to classify any such terms, and legal writers doubt that they should. It has long been advocated that legislators should act to provide specific regulation of certain terms which should be considered inherently unconscionable.

Legislatures in many parts of the world have enacted statutes providing greater protection to people caught in unfair contracts. But as yet there has been no clear statement in any act stipulating that unfair terms alone can be sufficient to warrant relief. The dual test is still the basic rule.

37 The need for greater protection from unfair terms is being increasingly recognized. But most commentators favour legislative regulation to court-initiated reforms. See Arthur A. Leff, "Unconscionability and the Crowd - Consumers and the Common Law Tradition" (1970), 31 U. Pitt. L. Rev. 349; Lewis A. Kornhauser, "Unconscionability in Standard Forms" (1976), 64 Cal. L. Rev. 1151, 1160.
38 Consider for example the case where a person buys a product from a door-to-door salesman at double the normal retail price.
39 Supra note 37.
40 For a review of statutory expressions of the doctrine of unconscionability in Australia, England, Canada and America, see Trebilcock, supra note 8, vol. 1, pp.260-265.
The American Uniform Commercial Code\textsuperscript{41} unconscionability provision has been applied on this basis. Similarly, the provisions in the British Columbia Consumer Protection Act of 1967 have been very narrowly interpreted.\textsuperscript{42} Implicitly, the Trade Practices Act moves away from the strict traditional test; section 3 suggests that unfairness alone can suffice in certain situations. The approach taken by the legislatures will be dealt with more fully in the sections that follow.

(2) Trade Practices Act

The Trade Practices Act codifies the common law doctrine of unconscionability and applies it to the consumer marketplace. The Act specifically focuses its attention on consumer transactions. Section 3 of the Act contains a general description of unconscionable acts and practices, followed by a non-exhaustive list of certain classes of conduct that may be relevant to a finding of unconscionability:

3. (1) An unconscionable act or practice by a supplier in relation to a consumer transaction may occur before, during, or after the consumer transaction.

(2) In determining whether or not an act or practice is unconscionable, a court of competent jurisdiction shall consider all the surrounding circumstances which the supplier knew or ought to have known, including, without limiting the generality of the foregoing,

(a) that the consumer was subjected to undue pressure to enter into the consumer transaction;

(b) 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;

(c) 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;

(d) that, at the time the consumer transaction was entered into,

\textsuperscript{41} Section 2-302.
\textsuperscript{42} S.B.C. 1967, c.14 as amended, ss. 17-20A.
there was no reasonable probability of full payment of the price by the consumer;
(e) 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; and
(f) such other circumstances as may be prescribed by the regulations.
(3) Where there is an unconscionable act or practice in respect of a consumer transaction, that consumer transaction is unenforceable by the supplier.
(4) Nothing in this section limits, restricts, or derogates from the power and jurisdiction of the court.

The Act reflects Lord Denning's view that the law will not allow gross inequality to be exploited. But in some respects s.3 goes further than the common law position. Its wide timing provision - unfairness can arise "before, during, or after a consumer transaction" - and the explicit list of relevant factors suggest that the drafters of the Act intended judges to transcend traditional approaches to the question of unfairness.\footnote{That this was the hope of the drafters was confirmed in a conversion with William Neilson, Deputy Minister of the Department of Consumer and Corporate Affairs 1973-1976, Aug 21, 1978.}

The Act clarifies procedural abuses, and it sets out new substantive categories of unconscionability. Sub-sections (c), (d), and (e) of s.3(2) specifically draw attention to substantive matters - for instance, the reasonableness of the price, and the probability of full payment. But other provinces have gone even further in this regard. The Ontario Act protects a buyer in situations where the seller knew or ought to have known that the buyer would not receive a "substantial benefit" from the subject matter of the transaction.\footnote{S.2(b)(iii); see also Saskatchewan Bill, s.4(2)(c).} The fashionable illustration is the salesman who sells expensive vacuum cleaners to two families who he knows share the same apartment.

The object of s.3 is to provide greater protection from unfairness than is afforded at common law. However, this noble intention is thwarted by poor drafting. The section does not actually define what is an unconscionable act...
or practice. And, unlike the list of prohibited deceptive practices in s.2, the list of acts and practices in s.3 need only be considered by judges in making their determination and does not declare such conduct as unconscionable per se. Judges are directed in every case to consider "all the surrounding circumstances", including those matters specifically listed.

Enforcing contracts, and determining when they should not be enforced, has traditionally been the domain of judges. They guard these areas jealously. The Act attempts to interfere as little as possible with the courts' traditional jurisdiction. This is made patently obvious in sub-section(4), which states that s.3 should not be read as restricting the power of the courts in any way. Judges are left with unfettered discretion, and in the absence of clear guidelines to do otherwise they are left to resort to common law notions of unconscionability.

Admittedly, it is not as easy to define what conduct or terms should be classed as unconscionable as it is to define what practices are deceptive; any list will invariably result in generalities, and necessarily so for this is one area of the law where flexibility is especially required. The types of cases which will arise in the future cannot be predicted with any degree of certainty or classified into strict categories. But some guidelines can be set out.

The Trade Practices Act attempts to do just this in the list in s.3, but the wording of the section only leads to confusion. It is not at all clear if all of the listed categories of unfairness need to be present, or if it will suffice if one or more are evident in a particular case. The

45 This section was actually included so as to allow the courts to grant rescission in cases where the transaction has already been completed and non-enforcement would be an idle remedy.

46 Not surprisingly, legal writers have been confused as to the meaning to be given to the listing in s.3. Professor Trebilcock thinks that it is a list of specific prohibitions! See Trebilcock, supra note 8, vol. 1, pp.265-266.
drafters's intended to leave the possibility open to judges to declare a transaction unconscionable on the basis of only one of the listed grounds.\(^47\) Adopting this approach, the section would provide relief from certain unfair terms without the need to prove procedural defects. However, courts are unlikely to take such a radical step on the basis of the present s.3. More explicit guidance is necessary. For instance, the list could be prefaced with the words "one or more of the following can constitute an unconscionable act or practice."

**Judicial interpretation**

The stand that the courts will take towards s.3 is still largely uncertain. Over the past four years there have been surprisingly few cases argued on the basis of this section. While the Department's files show that approximately one quarter of the complaints it receives concern questions of unfairness, these cases are almost always resolved by informal means and only rarely do they come before the courts.

There has been only one case of any real significance, *Director of Trade Practices v. John's Tax Service Ltd.*,\(^48\) and this case does not augur well for a liberal approach by the courts. The Director failed in an application for an interim injunction against an income tax refund business, which charged an extortionate fifty per cent discount rate, because the trial judge refused to accept that unfair terms alone could render a contract unconscionable. He did so notwithstanding that the provincial Cabinet had passed a regulation specifically aimed at unfair tax refund discounting practices:

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\(^{47}\) Supra note 43.

\(^{48}\) Unreported decision, March 10, 1975 (B.C.S.C., Vancouver Registry); cf. *Director of Trade Practices v. Sponchia* Unreported decision, Nov 21, 1977 (B.C.S.C., Kamloops Registry). Held that practices engaged in by the defendant were unconscionable but the reasons were not elaborated upon.
... a circumstance to be considered by the court ... [is whether the] disposition by a consumer to a supplier of the consumer's right or possible right to receive now or at any time in the future, a payment, refund or other benefit, the amount received ... by the consumer from the supplier is so small in relation to the total amount to which the consumer would have been entitled if the consumer transaction had not been entered into, the result is harsh or unconscionable. 49

Mr Justice McKay felt that he needed to know the circumstances of the affected consumers before giving relief:

There is no material before me to assist in establishing the circumstances of the people who avail themselves of this "service" ... Were they taken advantage of? What was their capacity to reasonably protect their own interests? Were they literate? Were they ignorant? 50

His Honour held that a dual test had to be met. The wording of s.3, understandably, did not persuade him to take a more liberal stand. In dramatic contrast stands the case of The Queen v. Belmont Motors Ltd. and Richie Motors Ltd., 51 decided on the basis of s.2, in which the defendants were accused of engaging in a deceptive practice by giving more prominence to the monthly payment on cars than to the total price. Despite the Judge's strong sympathies with the defendants - indeed, he stressed that only a simple arithmetic calculation was required to arrive at the total cost - he conceded reluctantly that the particular practice fell clearly under s.2(3)(q) and that the defendants were guilty. 52

These two cases illustrate well that judicial conservatism can only be overcome by clear drafting. Where great discretion is left with the courts, one cannot count on radical revision to the law. 53

49 Regulation dated Feb 6, 1975. Made pursuant to powers set out in s.32(o) of the Trade Practices Act. This has been the only occasion when Cabinet has made any addition to the list in s.3 (see s.3(2)(f)).
50 Supra note 48, pp.4-5.
51 Unreported decision, June 7, 1978 (B.C. Cty. Ct., Vancouver Registry).
52 Ibid., pp.6-7.
53 Note that the Consumer Protection Act has recently been amended to include a provision which makes it illegal to discount a refund by more than fifteen per cent: S.B.C. 1977, c.6, s.37(3). See Director of Trade Practices v. Harbour Tax Services Ltd., Unreported decision, March 30, 1978 (B.C.S.C.,
Relevant time

Section 3 specifically states that unconscionable acts and practices occurring before, during or after the transaction can be taken into account. This is considerably wider than the position taken at common law, where it is assumed that only the time of contracting is relevant.\(^{54}\) Since it is often difficult to pinpoint when sales pressure or any other undue influence occurs in a consumer transaction, extending coverage to undue influence occurring before the contract is completed is desirable. But overriding contracts which are fair and reasonable at the time of contracting seems unfair to the supplier. Only if the supplier knew, or ought to have known, at the time of contracting that the consumer would not be able to meet all payments under the agreement should the transaction be regarded as unconscionable. As this situation is specifically covered by s.3(2)(d) of the Act, the wide timing provision seems totally unwarranted.

In cases where changed circumstances such as illness or unemployment turn initially fair terms into onerous ones, other forms of relief should be sought. Section 5 of the Debtor Assistance Act\(^{55}\) allows the British Columbia Department of Consumer Affairs to intervene to help debtors in obtaining postponements, adjustments or extensions of time on their debts.

(3) Credit legislation

The doctrine of unconscionability is not entirely new to the Legislature. It has been incorporated into credit legislation in most Canadian provinces since the 1960's. The present law in British Columbia is set out in the Consumers Protection Act.\(^{56}\) However, this legislation is very

\(^{54}\) Supra note 3, per Lord Reid, p.618; per Lord Diplock, p.623.
\(^{55}\) S.B.C. 1974, c. 25.
\(^{56}\) Supra note 42.
limited in scope; it only covers the cost of credit and not the other terms.

Interestingly, legislation of this nature has existed in Ontario since 1912. The other provinces were extremely slow in following the lead. Perhaps it was their fear that such legislation fell foul of the Federal Government's exclusive legislative power over "interest" matters. For it was not until the Supreme Court approved of the Ontario legislation in Attorney-General for Ontario v. Barfield's Enterprises Ltd. that they enacted similar legislation.

In essence the legislation requires lenders and sellers to disclose the cost of credit, and allows the courts to open and rewrite loan contracts "where the cost is excessive and transaction is harsh and unconscionable". Judges have as a rule interpreted this as a dual test; excessive cost of credit is merely seen as evidence that the contract may be harsh and unconscionable. Again the courts have steered well clear of protecting the foolish:

The court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. This legislation provides one method of exercising that benevolent authority. But the courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly.

Moreover, the courts have not readily accepted terms as being unfair. A

57 Money-Lenders Act S.O. 1912, c. 30, ss.5-8.
58 British North America Act 1867-1975, 30 & 31 Vict., c.3, s.91(19).
60 Supra note 42, s.17.
62 Miller v. Lavoie (1968), 3 W.W.R. 359, 365, per Wilson C.J. (B.C.S.C.). Note that this case was actually concerned with s.3 of the Contracts Relief Act S.B.C. 1964, c. 11, the predecessor to s.17. of the Consumer Protection Act. Miller's case was cited with approval in Unrau's case, ibid.
very high standard of unfairness is demanded. The 1973 decision of the Court of Appeal in Wetter v. Nasgowitz\(^6^3\) is a classic example of the difficulty of proving costs to be excessive. The Court held that a mortgage yielding an annual return of thirty five per cent was not excessive, even though there were no extraordinary risks involved to warrant a high rate, and the mortgagee had encountered little difficulty in reselling it at a considerably lower interest rate.

The Consumer Protection Act has recently been radically amended. The unconscionability provisions have been brought into line with the approach taken in the Trade Practices Act;\(^6^4\) the new s.43 is almost the exact replica of s.3. However, in some respects the 1977 Act gives wider protection. Unlike the Trade Practices Act, s.42 places the burden of proof on the lender of credit to show that the mortgage transaction was not unconscionable on the day it was entered into. Further the Act expressly applies the doctrine to real estate mortgages and agreements for sale involving residential property. Even before the recent amendments, the Act was held to apply in such cases.\(^6^5\)

The relevant sections of the 1977 Act are still awaiting proclamation. The force that will be given to them is still uncertain, but in light of the problems encountered with s.3 they are unlikely to be too liberally interpreted.

(4) **American authorities**

Protecting consumers from substantively unfair terms has been a matter of great controversy in the United States for many years. For over a quarter

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\(^6^4\) Supra note 53.

\(^6^5\) Note s.20A of the old Act which was added in 1969: S.B.C., c.5, s.7.
century the Uniform Commercial Code has given the courts power to strike down unconscionable contracts. Section 2-302 of the Code states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect, to aid the court in making the determination.

This section, which is now in force in all but two states, is ambiguous as to whether it covers substantive or merely procedural matters. It has been widely criticized for this vagueness.66

An examination of the cases reveals that the courts have taken a very narrow view of the scope of the section. The judges centre their attention on the bargaining behaviour of the parties at the time of contracting, and only if oppressive terms are coupled with procedural defects is relief given. Even in cases involving gross unfairness, the typical situation being contracts for exorbitant prices, unfairness alone does not suffice; rather the courts consider the harsh terms as evidence of a defect at the bargaining stage.67 Admittably, there has been the rare decision based on substantive grounds alone, but on closer inspection the facts invariably reveal bargaining defects.68

The courts have made little effort to identify or categorize unfair terms. The most comprehensive American judicial attempt to identify

unacceptable terms occurred in the well known case of Henningsen v. Bloomfield Motors Inc. and Chrysler.\(^69\) In this case the New Jersey Supreme Court thoroughly examined whether market concentration in the automobile industry had limited the choices available to the buyer. But it should be noted that this case was not even directly concerned with s.2-302, for at the time the Code was not in force in the State.

American commentators, overall, favour the restrictive approach taken by the courts.\(^70\) They strongly advocate that, in the absence of specific legislative guidelines, the doctrine should merely cure procedural ills. Their fear is that otherwise it could enable "courts to act as roving commissions...[setting] aside those agreements whose substantive terms they find objectionable."\(^71\) It is therefore surprising that they have given tacit approval to the Federal Trade Commission's increasing activity in protecting consumers from unfair trade practices. This has been the case since the Sperry & Hutchinson\(^72\) decision in 1972. The Commission is empowered to declare unfair acts and practices as unlawful;\(^73\) in making its determinations, it has great discretion and flexibility, though some guidelines have been set.\(^74\) The breadth of this power could lead to its being used to further almost any regulatory policy, and stricter legislative directives may be needed to prevent abuse.

\(^{69}\) (1960), 32 N.J. 558.
\(^{71}\) Epstein, ibid., p.294.
\(^{74}\) 29 Fed. Reg. 1964, 8324, 8355. The Commission examines (1) whether the practice offends public policy, (2) is immoral or oppressive, and (3) whether it causes substantial harm to consumers.
CHAPTER IV

REMEDIES AND ENFORCEMENT

Legislation can be no stronger than the mechanisms it provides for its enforcement and the degree to which these are pursued. The B.C. Trade Practices Act stands strong therefore with an impressive array of remedies and an enviable record of enforcement, especially at the Ministry level. It provides a diverse range of civil, quasi-criminal, and administrative remedies against deceptive and unconscionable acts and practices.¹ A public official, the Director of Trade Practices, is primarily responsible for its enforcement, but the Act also encourages private actions by aggrieved consumers, or by interested individuals or groups. Not only does the Act give consumers considerably more protection than before, but it abolishes the old common law rules which often frustrated what otherwise might have been successful actions.

The Trade Practices Act has two distinct aims, and its remedies are framed accordingly.² These aims are:

1. To provide wide redress to the individual consumers actually affected by deceptive or unconscionable acts or practices; and

2. To protect the public at large by discouraging undesirable business practices, and thereby promoting a fairer and more honest marketplace.

An evaluation of the Act's effectiveness must consider each of these aims in turn to discern the degree of protection achieved.

This chapter will be concerned with a discussion of the Act's range of enforcement and remedial mechanisms, assessing their effectiveness in

achieving the twin goals, and examining how the mechanisms have actually been utilized. As public enforcement activities rather than private actions have played the main role in the Act's implementation, the policies and priorities of the Ministry will be closely examined. The Chapter will conclude with a review of the role of the courts, the body with whom most of the decision making has effectively been left.

1. REMEDIES AVAILABLE UNDER THE ACT

(1) Redress

For consumer protection legislation to deserve its name, it must provide comprehensive redress for affected consumers.\(^3\) In this respect the most important provision in the B.C. Act is s.20(1) which provides that a consumer who has suffered loss, as a result of entering into a transaction involving deceptive or unfair business practices, may recover damages (including punitive or exemplary damages) and may obtain full rescissionary relief. Moreover, wide discretion is left with the courts to impose any other terms which they consider just. The likelihood of individual actions is enhanced by the stipulation that such actions may be brought before small claims courts,\(^4\) where rules of evidence and procedure are relaxed, and the cost and delay of traditional court proceedings are minimized.

The inclusion of a substitute action provision, s.24, strengthens the Act's ability to provide redress. This novel provision allows the Director of Trade Practices to institute or assume proceedings, or defend an action, on behalf of a consumer or a group of consumers.\(^5\) Any damages recovered in

\(^3\) See Belobaba, supra note 1, p.360.
\(^4\) S.20(2).
\(^5\) Adopted from legislation in Victoria, Australia: Consumer Protection Act 1972, no.8276, as amended by no.8382, 1973, ss.9A-C.
such actions are paid to the consumer involved. Thus, it is possible to achieve redress even in cases where the consumer himself is not prepared, or is unable, to bring his own action.

Assurances of voluntary compliance (AVCs), under s.15 of the Act, also promote consumer redress. In cases where the Director believes that a supplier has engaged in a prohibited business practice, he may accept a voluntary undertaking to comply with the Act as an alternative to formal court actions. Without exception such assurances specify that the supplier must take all steps necessary to reimburse consumers, to make restitution, or to reword unfavourable contracts, as the circumstances dictate.

The Trade Practices Act allows for class actions to be initiated by the Director or by consumers for the restitution of money or property. A class action is a procedural device which brings together into a single action a number of claims by different persons, but relating to the same factual situation. It is as such well suited to consumer complaints for it promotes the efficient resolution of small claims which might otherwise not be worth taking to court. Most regrettably, the Act fails to provide for class actions for the recovery of damages, thereby removing much of the attraction of the device; such actions must be brought under the archaic Supreme Court rules.

6 S.24(3)(c).
7 S.16(2)&(3).
(2) Prevention

Providing redress to consumers directly affected by deceptive or unfair acts or practices is only a partial answer to the problems of the marketplace. It is widely acknowledged that prevention and not remedy is the most important goal of trade practices legislation,\(^9\) for if the repetition of detected undesirable practices is prohibited, and similar activity by other businessmen is discouraged, a large degree of protection is achieved for the public at large.

The Trade Practices Act seeks to curb offensive business practices in a number of ways. The most important public remedy is undoubtedly the provision for injunctive relief set out in s.16. This section states that the Director or any other person, "whether or not that person has a special, or any, interest under this Act or the Regulations, or is affected by a consumer transaction", may bring an action for an interim or permanent injunction or for declaratory relief.\(^10\) The wide-standing provision has not fulfilled the critics' prophesies of a flood of frivolous actions,\(^11\) but rather it provides for the legitimate interests of concerned consumers and consumer groups to be voiced. The provision of interim injunctions is designed to ensure the quick cessation of questionable practices. It is noteworthy that B.C. is at present the only Canadian province which so provides.\(^12\) Moreover, the Act facilitates the availability of this remedy by stipulating that in such actions, courts should give greater weight and importance to the protection of consumers than to the carrying out of business, and that the party bringing the action need not prove that

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\(^9\) Enemark, supra note 2, p.1.
\(^10\) Note the Ontario Act provides for no injunctive actions either private or public, see Belobaba, supra note 1, p. 359.
\(^11\) Criticism noted by Zysblat, Commentary (1976), p.104.
\(^12\) Ontario has instead adopted cease and desist orders, arguably an even more efficient and speedy remedy; see discussion infra pp.70-71.
irreparable harm would result if the remedy were denied. ¹³

The other remedies available in s.16, class actions and corrective advertizing, ¹⁴ also play a preventative role. Success in a class action would act as a greater deterrent than an individual action and it would be a spur to further litigation efforts of this kind. Not that success is all important - the adverse publicity of a class action poses a substantial threat in itself. Corrective advertizing orders serve an important educational function for the general public. ¹⁵ These provisions are indicative of the wide protection the Act intends to give consumers throughout the province.

The Act's remaining civil remedy, the substitute action, plays a key role in its enforcement strategy. The Act expressly directs that this device should be only utilized when wider interests are involved; to ensure that this provision is not abused, the Director must gain permission from the Minister as well as the consumer before making himself a party to the action. ¹⁶ Invariably, injunctive or declaratory relief as well as damages will be sought. For similar reasons, AVCs always contain a clause that the supplier will refrain in future from engaging in the questioned practices.

Section 25, the Act's quasi-criminal provision, provides that in addition to or instead of a civil remedy, charges may be laid for violations of the Act. Any contravention of the Act, or failure to comply with a court order or AVC, is a summary conviction offence punishable by heavy fines or imprisonment or both. Theoretically, this constitutes the Act's most forceful deterrent weapon. ¹⁷

¹³ S.17.
¹⁴ S.16(1)(b).
¹⁵ In William Stubbe & Director of Trade Practices v. P.F. Collier Ltd. (1977), 3 W.W.R. 495, 543 (B.C.S.C.), Mr Justice Aikens held that the power was to be used to benefit the public by correcting lingering misimpressions, not to punish offenders.
¹⁶ S.24(2).
2. OPERATION OF THE ACT

(1) Redress for consumers

There have been disappointingly few actions initiated by private individuals under the Trade Practices Act. This is at first puzzling because the Act specifically provides easy access to small claims courts for damages claims; their simplified procedures and informal nature suggests their suitability for consumer actions. But on reflection there are a number of possible reasons why this might be. The average consumer - as opposed to the business man - has a great reluctance to bring anything before a court. To him even the supposedly inexpensive and speedy small claims forum is complex and threatening; where the amounts involved are quite small, it is often simply not worth pursuing his claim. Studies show that only seven per cent of all actions brought before the B.C. Small Claims Courts involve consumer complaints. Indeed, as has been the pattern throughout North America, the courts have become the forum of the small businessman, typically to enforce consumer debts!

Moreover, consumers are by and large unaware of the existence of small claims courts and of their legal rights. When they do come into contact with the court, the forms and procedures involved are baffling to the layman. A

17 However, the harshness of this section is mitigated by the provision of a due diligence defence in s.25A.
18 The dimensions of the problem are well outlined in Mary Gardiner Jones & Barry B. Boyer, "Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies" (1972), 40 Geo. Wash. L. Rev. 357, 359-364.
20 Ibid. Study revealed that 60 per cent of all claims involved debt actions. Not surprisingly, most were initiated by corporate plaintiffs (normally small local businessmen); see p.106. Note similar findings in the B.C. Justice Development Commission Small Claims Project, Final & Interim Reports, 1976.
frequently voiced complaint is that the ill-trained court staff are unable to provide much assistance either on procedural or legal questions.\(^{21}\) Yet individuals are encouraged to represent themselves; few cases involve large enough sums to warrant lawyers' fees, and in any event legal fees cannot be recovered.\(^{22}\)

Even when consumer complaints are brought to a small claims court, redress is normally sought under the older and more complex common law forms of relief - misrepresentation, fraud, fundamental breach - and not under the new provisions of the *Trade Practices Act*. This is, no doubt, due mainly to a lack of familiarity with the new legislation on the part of both lawyers and the public generally. Fortunately, the Act provides that it may apply even if it is not specifically pleaded,\(^{23}\) and due to the efforts of small claims court judges, the Act is being applied wherever possible.\(^{24}\)

Where a consumer claim exceeds $1000, the action must be brought before the B.C. Supreme Court.\(^{25}\) The cost and formalities involved in such an action would act as a strong deterrent. High legal fees are invariably incurred and the case could be drawn out considerably, especially if there are appeals. Indeed, the writer is only aware of one case to date brought before the Supreme Court by an individual on the basis of the *Trade Practices Act*, and that case involved a small businessman who sought protection through the Act's coverage of first-time business opportunities.\(^{26}\)

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\(^{21}\) Ibid., pp. 21-22.

\(^{22}\) *Small Claims Act* R.S.B.C. 1960, c.359, s.80. This section expressly stipulates that no counsel fee of any kind whatsoever shall be charged against either party.

\(^{23}\) S.35.

\(^{24}\) Conversation with Judge O'Donnel of the B.C. Small Claims Court, Nov 27, 1978. Note, in some cases relief is given under both the old rules and the new statutory provisions: *Findlay v. Couldwell*, Unreported decision, June 10, 1976 (B.C.S.C., Vancouver Registry).

\(^{25}\) S.4 of the *Small Claims Act*, supra note 22, limits the court's fiscal jurisdiction to a $1,000 maximum (prior to 1973 the maximum was only $500).
Most actions for individual redress under the Trade Practices Act have, in fact, been taken by the Director of Trade Practices. This may well have been a response to the reluctance of consumers to initiate their own actions, although it must be remembered that the Director will only act for a consumer when it serves a greater public good.

Since the introduction of the Act, the Director has become involved in over thirty substitute actions. A number of these have actually involved defending cases on behalf of consumers. These actions have almost always been successful in winning satisfactory redress for the consumer involved. Notably, in two class actions brought upon this basis, restitution orders to specific groups of consumers were awarded. But not every substitute action or defence reaches the courts. In almost half of the cases to date, the Director has accepted an out of court settlement, though one would suspect that the terms were more favourable than the consumer alone might have achieved.

The Ministry's impressive record with regard to substitute actions has been sullied in the past year by a sharp policy reversal. Rather than being readily used in all cases, the device is now strictly reserved for cases with very strong precedent value. The Director only intervenes or brings

27 Ministry's public files and Enforcement Reports show 34 substitute actions and defences between July 1974 and Nov 1978.
proceedings in cases which involve a point of law not previously decided upon by the courts. As a consequence, it is to be expected that many legitimate claims will now go unredressed.

However, most of the Ministry's assistance to consumers has not been through formal court actions, but through its informal mediation services. This aspect of the Ministry's work has always been emphasized, and the results have been very gratifying. Last year alone over $1 million in rebates was obtained for consumers.  

Section 4(b) of the Trade Practices Act stipulates that the Director shall receive complaints and attempt to mediate on behalf of consumers. Storefront offices have been set up for this purpose. The staff of consumer aids has remained relatively stable, but the volume of complaints handled has increased over the years from only 4000 in 1974 to 7000 in 1978. The number of enquiries received is, in fact, even greater, for the Ministry only proceeds to open a file and attempt to mediate once it has established the likely legitimacy of the consumer's claim and that it relates to a questionable practice. The Ministry's small staff have coped well with the growing number of complaints, and have a surprisingly high success rate with mediation. Over 90 per cent of all cases are resolved in this manner. A phone call or a letter will often suffice. The basic problem appears to be that the majority of suppliers are unaware of, or choose to turn a blind eye to, a consumer's complaint, and are more than willing to resolve the matter once the consumer's case - and that he has the backing of the Ministry - is

33 Conversation with Galichenko, ibid. See also Enforcement Report, Aug 24, 1976 (Noted that mediation was the most widely used facility).
brought to their attention.

Initially, consumer aids were under the control of the Director, but they have recently been moved to an administrative section of the Ministry - the Operations Branch.\(^3^{4}\) Still, they are closely tied to the enforcement branch of government, and do refer cases for formal resolution where mediation does not succeed or the case involves a "flagrant violation" - a deliberate contravention of the Act.\(^3^{5}\)

The Act also encourages consumer store-level bargaining. Discussions with people who have worked with the legislation have revealed that its very existence gives consumers considerably more bargaining leverage than before.\(^3^{6}\) If an aggrieved consumer has received some legal advice, from a lawyer or through the Ministry - or he knows his rights already - he soon realizes that he is in a very strong position, and is often able to resolve his claim satisfactorily through private efforts.

While to the legally trained mediation and consumer self-help lack the glamour of court litigation, they play an extremely important role in the area of consumer redress, and their value must not be underestimated. They offer the most expedient and efficient means of resolving routine, minor consumer complaints, which form the bulk of all complaints. However, there will always be some which cannot be satisfactorily resolved through mere discussion, persuasion, and compromise, and in such cases consumers must have ready access to a convenient decision-making forum. Moreover, redress

\(^3^{4}\) The staff of the Trade Practices Branch of the old Department of Consumer Services have been split between the Operations Branch which concerns itself with complaints and administrative matters, and the Enforcement Branch which deals with investigations and formal enforcement of the Trade Practices Act. The Director of Trade Practices is now more correctly called the Director of Enforcement.

\(^3^{5}\) See Enemark, supra note 2, p.6, for exact definition. Conversation with Morris, supra note 30, concerning policy of direct referral of flagrant cases.

\(^3^{6}\) Conversation with William Neilson, Aug 21, 1978.
alone is never sufficient to counter serious on-going practices. Such practices must be dealt with more strongly.

(2) Protecting the public at large

The Act allows consumers and consumer groups to privately bring actions for injunctions, but few have availed themselves of this opportunity. An interesting exception is the case of Walter Stubbe, who brought an action against P.F. Collier. But Stubbe's motivation and interest were exceptional, as seen by his being the president of a local branch of the Canadian Consumers Association. The failure of consumer groups in general to actively participate in the enforcement of the Act is surprising, but this may be because of the active role played by the government watchdog, the Ministry of Consumer and Corporate Affairs.

The Director of Trade Practices has certainly played the major role. It is simply impossible to police all marketplace activities and detect every offence; rather, the aim should be to strongly enforce the legislation in selected cases, thereby discouraging undesirable practices generally. The Director is best suited to this task as his position allows him to act in a coordinated and centralized manner. Legal commentators are in agreement that private actions alone produce at best random and fragmentary law.

The Trade Practices Act itself has a preference for government enforcement. The Director is given very wide powers, placing him in the forefront of the Act's implementation. His primary role is to enforce the Act, but ancillary to this he has wide investigatory powers, and the responsibility to educate both consumers and businessmen as to their rights and duties under the Act.

37 Supra note 15.
38 See Belobaba, supra note 1, pp.366-367.
Activities and policies

The B.C. Act was the first of its kind to be introduced in Canada, and the response it would receive was uncertain. The then Department of Consumer Services was faced with a difficult balancing act - on the one hand demonstrating that its provisions would be actively and strongly enforced, and on the other giving suppliers an opportunity to familiarize themselves with the new rules. In the light of these factors, the milder enforcement options - AVCs and civil (as opposed to criminal) actions - were originally stressed. Moreover, the framework of the Act suggests a preference for these methods.

Voluntary assurances, the Act's major administrative remedy, have the advantage that while they are a formal method of enforcement, they do provide much flexibility in form. They have a deterrent value in their publicity, which has always been regarded as a non-negotiable term of the agreement. Other terms vary according to the specific circumstances, though s.15 does set some general guidelines. Compliance is assured by s.25 which makes its breach a prosecutable offence. Theoretically, a supplier could incur a double penalty - first for having breached the assurance, and secondly for having engaged in the prohibited practice which constituted the breach. But how seriously the courts will view a breach of an AVC remains to be seen.

Over forty AVCs have been signed by suppliers since mid-1974, many incorporating novel terms. The 1975 MacLean Hunter assurance, where a major Canadian magazine company agreed to establish a $10 000 trust fund as

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39 S.4. For general discussion of the Director's administrative duties and powers, see Gall, supra note 1, pp.37-41.
40 Conversation with Hanson, supra note 30. See Neilson, "Consumer Protection and Public Administration" (1977), 178-179.
41 Ministry public files and Enforcement Reports show 45 AVCs between July 1974 and Nov 1978.
security for compliance with the Act, illustrates the possibilities. AVCs are not suitable in all cases though; the supplier may resist the "terms" offered in an AVC, and the Director may consider the offence to be sufficiently serious to warrant a civil action or prosecution.

The Director has rarely brought actions for injunctive relief alone (s.16). In those that he did bring, the courts were generally most reluctant to grant an interim - let alone a permanent - injunction, in contrast to their responsiveness to substitute actions. Only 4 permanent injunctions have been granted since 1974.

Prosecutions under s.25 were until most recently also rare, with charges being laid in only the most flagrant of cases. But under a reversal of policy, made public in October 1977, the Ministry is now taking a much tougher line; prosecutions are now preferred to all other remedies, and their number has risen tenfold in the last year. Only a single AVC was signed in that time, and to obtain it the supplier had to admit actual contravention of the Act.

Any discussion of the Ministry's enforcement record must make mention of its investigatory activities. The team of investigators, who form the backbone of the Director's Enforcement Branch, have always been very active; in addition to researching complaints referred to them, they carry out independent investigations in selected areas of business. Over the last

42 Feb 27, 1976 (not reported in the Enforcement Reports).
43 Interim injunctions were granted in the Collier case, supra note 15; Director of Trade Practices v. Apollo Manufacturing Co., reported in the Enforcement Report, May, 1976; but see Director of Trade Practices v. John's Tax Service Ltd., Unreported decision, March 10, 1975 (B.C.S.C., Vancouver Registry).
45 Enemark, supra note 2.
47 See supra note 34.
summer, they undertook a "test shopping" programme in the field of car and appliance repairs; firms were selected at random to repair items with known defects so as to assess if unnecessary or faulty repairs were made. In view of the high standard of proof which must be met in prosecution cases, convictions would be impossible without the use of such tactics - though their morality may be questioned.

Publicity and consumer education form an important role in the Act's preventative scheme. Enforcement activities are outlined in the Ministry's Enforcement Reports which are published on a regular basis and are widely distributed. It is in these reports and not the law reports where consumer law in this province is to be found.

When the Trade Practices Act was first introduced, a 20-page brochure was sent out to every household in the province. Efforts at educating the public as to their new rights were intense, and a major mass-media public information campaign was set in motion. Today the main thrust of activity is at the school level, although occasional use is made of the mass media to warn of particular abuses and promote increased general awareness. Public speaking engagements by the Ministry's staff, at conferences and public meetings, continue to play an important educative role.

A special division within the Ministry concerns itself solely with the education of businessmen. The Trade Liaison Group, which was set up after a survey revealed that the initial advertising campaign had failed to reach the business community, provides businessmen with advice and information, and sets out broad guidelines for specific industries to follow.

The Ministry's achievements in the field of public protection cannot be

49 See Zysblat, supra note 11, p.100.
50 Conversations with Morris, supra note 30, and with Rick Stevens, Information Officer, Ministry, Nov 27, 1978.
51 See Neilson, supra note 40.
measured purely on the basis of successful cases or the degree of investigatory activity.\textsuperscript{52} An actively enforced consumer protection Act has an immeasurable general deterrent effect. Shady dealers are unlikely to move to this province if their present abode treats them more kindly. And businessmen already within the province, once they realize that the legislation is being policed, will be motivated to comply. Although these factors cannot be quantified, it is strongly felt within the Ministry that the \textit{Trade Practices Act} has had this effect.

3. \textbf{EVALUATION OF THE MINISTRY'S ACTIVITIES}

The B.C. Ministry has had \textit{prima facie} a very impressive record of enforcement activity, quite in contrast to Alberta and Ontario which reflect the normal poor level of government activism in this field. Alberta's activity has been restricted to the occasional AVC, and Ontario has been only marginally better.\textsuperscript{53}

But a high level of enforcement activity does not necessarily mean that the B.C. Act is being \textit{effectively} enforced. The policies and priorities of the Ministry must be more closely examined to assess whether they are compatible with the Act's dual goals. A corollary question is what role should the Ministry play in consumer protection.

\begin{flushright}
\textsuperscript{52} See Enemark, supra note 2.
\textsuperscript{53} The sum total of Alberta's formal enforcement activity to date is 19 AVCs: Alberta public Records (up to Oct 13, 1978). Until March, 1977 Ontario's record was 10 cease and desist orders, 3 AVCs and 2 prosecutions, but enforcement efforts have intensified over the past year and there are now over 100 charges outstanding: Ontario News Releases and the Annual Report, March 1978. Generally, see: Belobaba, supra note 1, pp.380-382; Ellen Roseman, "The Consumer Game", The Globe and Mail, Nov 27, 1978 (Ont.).
\end{flushright}
(1) Enforcement tools and policies

While the wide use made initially of AVCs was undoubtedly a major factor in the Act's smooth implementation, their importance has often been overrated. In essence they provide a compromise between no action at all and formal court action, forming a suitable tool in cases where the offence is of a relatively minor nature and can be quickly rectified. As a primary remedy in all cases, it could easily lead to the adoption of a "soft approach" favouring settlement to court action even in the worst cases, for the adverse publicity value of a court action far exceeds that of an AVC.

Now that the Act is well known to businessmen, stricter terms in the AVCs and the more frequent use of other tools are warranted. However, the Ministry has completely overreacted; AVCs are no longer actively solicited, but are only considered where the supplier makes a written request for such an agreement, and will not be considered at all in cases of flagrant violation. Leaving it to the supplier to make the necessary moves neglects the fact that the staff within the Ministry are in the best position to discern when AVCs are suitable.

The substitute action provision has been acclaimed as the single most significant feature of the Trade Practices Act. The lack of a similar provision is sadly felt in other Canadian provinces. It provides a great "levelling" device, for it pits the Ministry rather than the small consumer against the offending supplier. Moreover, it allows the Director to shape the jurisdiction of the Act through the careful selection of good test cases, rather than having to rely on consumers being sufficiently motivated to seek redress.

Restricting the use of such a strong and successful device to cases of

54 See Enemark, supra note 2, p.7.
55 Belobaba, supra note 1, p.372.
precedent value considerably weakens the enforcement capabilities of the Act. But it is reasoned that if the Director brings actions merely because the consumer is financially unable to assert his own rights, it is tantamount to replacing Legal Aid.\textsuperscript{56} A compromise position must be found. One suitable test for the Director to adopt would be to ask whether the public as a whole would be less protected if the case were not brought or the case were lost due to the consumer's inability to argue it well. If this criterion is met no qualms need be felt in bringing the action. Such a system would allow the experience and expertise of the Ministry to be more fully utilized for the general benefit in considerably more cases than the present policy.

The importance of using substitute actions is highlighted by the difficulty of otherwise obtaining injunction orders. Despite the Act's rhetoric, judges are disinclined to make such awards without some proof of actual (or very likely) harm. This point is well exemplified in the decisions in the \textit{Household Finance}\textsuperscript{57} case and the \textit{John's Tax}\textsuperscript{58} case.

A fault common in all injunction actions has been long time delays. Cases have generally been drawn out over many months - if not years. The Collier\textsuperscript{59} case took over two years before a final decision was reached. Section 16 has clearly failed in its design to provide a quick method of curbing undesirable practices. The question arises whether a Director-initiated prohibition order (cease and desist order) needs to be introduced into the B.C. Act. Such a provision already exists in Ontario\textsuperscript{60} and is proposed in the Saskatchewan Bill.\textsuperscript{61} While there has been long been talk of

\begin{footnotes}
\footnote{56}{Conversations with Morris and Hanson, supra note 30.}
\footnote{57}{Supra note 44.}
\footnote{58}{Supra note 43.}
\footnote{59}{Supra note 15; Rehearing, [1978], 3 W.W.R. 257 (B.C.S.C.).}
\footnote{60}{S.6(1).}
\footnote{61}{S.14(1).}
\end{footnotes}
such a remedy in this province, to date no firm commitment has been made. Undoubtedly, such a remedy would strengthen the preventative aspects of the Act for not even ex parte interim injunctions are as immediate as or as convenient as such orders. But it would also greatly increase the powers of the bureaucracy and care would need to be taken to ensure fairness to suppliers. Appeal rights, and perhaps the right to prior hearings, would need to be stipulated.

A further administrative remedy, rule-making powers, also deserves serious consideration. Such powers, which have been widely adopted in American jurisdictions and in Britain, would provide an easy and convenient means of clarifying the scope of the Act's protection. Basically, the Minister or some other official would be given power to issue binding trade rules detailing what conduct falls within the existing lists of prohibited practices. This would work towards removing imprecision and uncertainty in the Act.

The Ministry's new policy of stressing prosecution actions to the neglect of all other options not only fails to solve old problems, but also introduces new ones. The high evidentiary standards which must be met in criminal cases make it very difficult to secure convictions. Even laying charges is a difficult matter, as Crown prosecutors are reluctant to bring cases for what they consider (often quite rightly) to be very minor offences; if charges are laid, the case is given very low priority and suffers long time delays.

The major deficiency of prosecution cases is that they fail to provide any redress to affected consumers. While it is possible to proceed both

62 See discussion in Belobaba, supra note 1, pp.368-371.
civilly and criminally under the Act, stressing an enforcement tool which completely neglects one of the dual goals is unsatisfactory. Unless and until the criminal sanction is amended to provide for some degree of redress similar to a civil order, it should be resorted to only in cases of particularly abusive practices where punishment of the offender is the highest priority. In other cases, the very civil nature of the offence should be respected.

The cases to date indicate that prosecutions are unlikely to meet even the aim of deterrence. Only half of the cases heard in court have resulted in convictions, and the fines imposed have been generally trivial. The alert businessman will soon realize that deception can still be a lucrative business! More importantly, the strict implementation of such almost unworkable policies could lead to the demise of the entire Act. Its provisions in general could lose credibility and hence effectiveness. Making the Ministry's enforcement policies publicly known only increases the chances of unfavourable repercussions.

Despite all the difficulties encountered with the present enforcement policy, and the widely held view outside the Ministry that criminal sanctions are inappropriate in the enforcement of consumer legislation, the Ministry have evinced a desire to continue the present policy and to apply it even more strictly. A more recent internal policy statement advocates that not only should prosecutions be the main weapon, but that if any other

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65 E.g. See the Personal Motors Ltd. case, reported in the Enforcement Report, Nov, 1978 (both prosecution and substitute action pending).
67 E.g. The Queen v. Traders Home Furnishing and Appliance Ltd., reported in Enforcement Report, May, 1977. Defendant fined a mere $200 for failing to give equal prominence to the total price, as against the monthly price, in advertising his appliance.
68 Legal writers generally favour prosecutions only as a last resort measure, see Belobaba, supra note 1, pp.373-375.
action is preferred, a prosecution action must accompany it.69

The most politically expedient way of weakening any popular programme is by an ostensible show of strength. In view of the current enforcement policy of the Ministry, one cannot resist wondering whether the Trade Practices Act is being deliberately undermined. The criminal sanction may be the toughest section in the Act, but it is also the most difficult to use effectively.

(2) Priorities within the Ministry

While the Director himself is nowadays only directly concerned with enforcement, the Ministry as such is still very involved with complaint handling. Mediation is stressed as the first step in almost all cases.70 Yet while mediation offers an attractive, simple and expedient resolution mechanism, care must be exercised in its use. For instance, simple rescission of a contract for the purchase of a car because of non-disclosure of previous accidental damage cannot guarantee that the supplier will not commit the same offence with the next buyer. In such a case the deterrent remedies provided in the Act need to be utilized - for example, an AVC stipulating disclosure of the car's previous history.

There is always a danger that a mediation-orientated approach will stifle enforcement activities. For it is often the worst offender who is the most willing to settle at the mediation stage if the opportunity is afforded. As a result the enforcement body is left with marginal rather than strong cases. Fortunately, in B.C. consumer aids have been asked to refer all "flagrant violations" directly to the Director for enforcement.71 Only

69 Conversations with staff within the Ministry, Dec 1978.
70 Supra note 35 and text.
71 Ibid.
in cases where the practice is not a breach of the Trade Practices Act, or there is only a "probable offence" (where the supplier's act was an isolated and inadvertant incident) is mediation pursued.\textsuperscript{72} It is interesting to note that while the substantive provisions in the Act itself deliberately do not require proof of intention, the staff do take questions of good faith into account in enforcing the Act - not that this is at all unusual amongst administrators of regulatory statutes.\textsuperscript{73}

At the enforcement level the Ministry's priorities often seem confused. Rather than focusing on serious on-going practices which affect a substantial number of people, time and limited resources are frequently wasted on minor violations of the Act. This problem is exaggerated by the present strict enforcement policy which dictates that any breach of the Trade Practices Act, even if only technical, must be the subject of a prosecution.

Finally, in view of the great potential of consumer education as a preventative device, the Ministry needs to reassert this aspect of its work. Educating our youth will pay long term dividends, but it is the adults of today who need to become more aware of their rights, and of the methods of redress which are available.

(3) Staff and funding

The high level of enforcement activity of the B.C. Ministry suggests that it is both well funded and well staffed. While its current operating budget of only $2 million is very generous in comparison to other consumer

\textsuperscript{72} Definition found in Enemark, supra note 2, p.6.
\textsuperscript{73} Studies both in Canada and England show that moral fault is a very important consideration in the enforcement decisions of regulatory bodies. See Law Reform Commission of Canada, \textit{Studies in Strict Liability}, 1974, 70-137.
agencies, it has forced it to operate on a small and relatively stable body of staff.\textsuperscript{74} The staff increases that have taken place have all been at the executive level (to manage the separate branches of the expanded Ministry).\textsuperscript{75} It is suggested that the money that this bureaucratic expansion has required could have been more productively spent recruiting additional consumer aids and investigators, or supporting community service groups which provide advice and mediation services to consumers outside the major centres serviced by storefront offices.\textsuperscript{76}

4. \textbf{EVALUATION OF THE ROLE PLAYED BY THE COURTS}

The \textit{Trade Practices Act} essentially leaves the question of what is deceptive or unconscionable to court determination. With the exception of AVCs, all of the formal remedies must be enforced through this body. This is in contrast to the American tradition of establishing administrative agencies to directly enforce trade practices legislation.

The courts, long renowned for their conservatism, have made the implementation of the Act's innovative provisions more difficult. This is especially noticeable in the area of civil enforcement. Judges have in several cases adopted a restrictive rather than a policy-oriented approach to the Act's provisions. But it is fair to say that, for the most part, the courts have adopted a liberal approach towards the Act's substantive sections.\textsuperscript{77} A more pronounced problem has been the general reluctance to

\textsuperscript{74} Conversations with Galichenko, supra note 32; and with Hanson, supra note 30.
\textsuperscript{75} \textit{Inter alia}, the newly created positions of the Director of Information, the Director of Operations, the Director of Consumer Credit and Debtor Assistance, and the Director of Policy and Planning.
\textsuperscript{76} See \textit{Ministry News Release}, Sept 11, 1978 (grants to eleven groups totalling $140 000). Plans to promote such services in more remote northern regions of the province are contingent on additional funding; conversation with Galichenko, supra note 32.
grant injunctive relief, thereby defeating the aim of s.16 which was designed to provide a quick method of curbing abuses. The problems encountered have been all the more acute in cases not involving actual complainants.

The "judicial unresponsiveness" displayed in some of the earlier cases cannot be viewed as entirely the fault of the judges. The drafting of certain provisions creates ambiguity, and there has been a lack of strong test cases to invite judicial sympathy. As these problems are rectified and the judges become more familiar with the legislation, one can expect a more liberal response.

The courts have always been regarded as strong upholders of justice and individual rights. Administrative agencies may be more flexible and more vigorous in enforcing new far-ranging provisions, but there is a marked tendency for them to mellow with age, and thereafter to serve the interests of business. This observation doubtless influenced the enforcement choice in B.C. But more immediate and practical reasons also played a part; it was feared that such a radical Act would be rejected outright if the courts, which represented a stabilizing force, were replaced by other resolution mechanisms.

It is felt that public enforcement of the Trade Practices Act is most effectively pursued by a blend of both court enforcement and administrative powers, a view shared by Professor Belobaba. The present system is workable, but the introduction of further administrative weapons such as the cease and desist power, if well circumscribed, could add to the

77 Especially in relation to the deceptive practices provision, see generally discussion in Chapter 2.
78 For a discussion of this problem from a Canadian perspective, see Michael J. Trebilcock, "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose" (1975), 13 Osg. Hall. L.J. 619.
79 Conversation with Neilson, supra note 36.
80 Supra note 1, 382-387.
effectiveness of the Act's preventative aspects.

However, real problems still arise in the area of private actions. Despite the Act's provision for easy access to small claims courts and the willingness of judges at this level to strongly enforce the legislation, consumers have sought redress in the court only rarely. There is a compelling need to remedy this. Either the present court system must be made much more accessible and attractive to consumers generally, or alternative dispute resolution mechanisms must be introduced. The question of a suitable forum for individual redress will be examined in the next chapter.
As has been seen, mediation is a very effective and efficient means of resolving the vast majority of consumer complaints. Although there is little interest here in B.C. in replacing mediation with some other initial redress mechanism, the questions of whether the government should be acting as the mediator, and more generally of "who should mediate", are attracting much debate. This chapter begins with an examination of these questions, but then moves to review popularly advanced formal mechanisms for private consumer actions. When mediation fails, the only resort for the consumer is to formally bring his complaint before an adjudicative forum, in B.C. typically a small claims court. But the neglect that small claims courts have received from consumers in this province suggests that reform is needed. The most favoured changes are restructuring the present system, and setting up an arbitration system for consumers. The merits of both proposals are evaluated. Finally, a radically different non-adjudicative scheme of "no-fault compensation is examined.

1. WHO SHOULD MEDIATE

Legal writers are beginning to critically question the merit of government bodies being closely tied to individual complaint handling, advocating instead that their time and resources would be better and more effectively spent on enforcing legislation vigorously for the benefit of all.1 As a corollary to this it is suggested that business or trade

1 See John A. Serbert, "Enforcement of State Deceptive Trade Practices Statutes" (1975), 42 Tenn. L. Rev. 689; and "Consumer Protection in the
associations, or consumer groups, could successfully mediate consumer complaints. That this discussion is more than theoretical is reflected in recent policy developments in B.C., both at the federal and provincial levels of government, which indicate a growing desire to move away from complaint resolution. Funding cutbacks within the Federal Department of Consumer and Corporate Affairs has resulted in a reduction in its complaint handling staff, and accordingly this aspect of its work is being deemphasized. At the provincial level, while mediation is still actively pursued, the idea of a "marketplace institute" is presently being seriously voiced. Essentially, this would involve a business operated mediation scheme in certain industries, instead of or to supplement the present government scheme.

The sheer volume of consumer complaints handled by government departments suggests the need for diversification, and budget restrictions limiting staff size can hamper the effectiveness of government activity. Still, moves away from government supervision are regrettable as there are many strong reasons for its continued participation. For one thing, a government clearing-house provides a valuable source of data, which is essential in the formulation of new legislation or amendments to the old. For another, it acts as a filtering device, isolating out cases which are worthy of at least further investigation, if not actual enforcement activity. Outside bodies are most unlikely to refer bad cases if the supplier is willing to mediate and compensate the individual involved in an existing dispute.

More importantly, studies of existing mediation panels (and arbitration


2 This is reflected in the recent neglect of Box 99 (the Government's general complaint handling scheme).

3 Conversation with Michael Hanson, Dec 1, 1978.
panels) established by business, consumer, or public organizations have shown that they have had only very limited success. Trade associations which are funded by businessmen can hardly be expected to vigorously and disinterestedly solve consumer problems. Nor do consumers believe that they will act impartially. In a similar vein, consumer groups and panels have been severely criticized for their pro-consumer bias. Government bodies at least have an aura of independence and impartiality. Outside groups do not overcome the problem of limited resources and staff either. In fact, they are often more poorly off than government departments. It would be far more sensible to increase available government funds through business licencing fees, or making the disputing parties pay a small amount for the mediation service, than to remove government control on purely economic grounds.

2. ADJUDICATIVE FORUMS

(1) Small claims courts

When small claims courts were first conceived at the turn of the century, their goal was to allow judges to reach decisions by means of relatively informal rules and procedures, and to provide the public with a speedy, inexpensive, and convenient venue for their complaints. They have every potential for being a very useful mechanism for the resolution of consumer complaints. But they are not. Fortunately, most problems can be


5 See Roscoe Pound, "The Administration of Justice in the Modern City" (1913), 26 Harv. L. Rev. 302.
overcome by relatively minor changes.\textsuperscript{6} The courts need to be more accessible to consumers. If courts were operated on more flexible timetables, with evening and weekend sittings, the frequent complaint of the day's wages lost in pursuing a claim being more than the claim itself, would be alleviated. Equally as important, the courts need to be conveniently located to promote their use. Unfortunately, B.C. is at present moving further away and not closer to this ideal, by becoming even more centralized; the high volume of cases and shortage of judges working in this area dictates that localized hearings are not possible.\textsuperscript{7}

Pre-screening devices, an example of which is mediation, should be used to ensure that court time is not wasted on cases which could be easily settled by informal means. There has already been some experimentation in B.C. Within the courts themselves. In the summer of 1975, a pilot court-mediation programme was implemented by the Justice Development Commission.\textsuperscript{8} Despite its success, it was stopped within a short period. A new project of pre-court hearings is currently being introduced. While the scheme is ostensibly aimed at helping the parties present their cases, and ensuring that they have collected together the necessary documentation, it is envisaged that many disputes will, in fact, be successfully mediated at this stage.\textsuperscript{9}

In the absence of a pre-screening device, a judge would, in addition to acting as adjudicator, have to adopt the role of an active investigator who questions both parties extensively, as envisaged by Ison.\textsuperscript{10} This confusion of roles could lead to a lack of confidence in the impartiality of the

\textsuperscript{6} For extensive survey of the problems of small claims courts in Canada see Sigurdson, Consumer Redress Mechanisms, 1977.
\textsuperscript{7} Conversation with Judge O'Donnel, Nov 27, 1978.
\textsuperscript{8} See Sigurdson, supra note 6, pp. 72-86.
\textsuperscript{9} Judge O'Donnel, supra note 7
\textsuperscript{10} Terence G. Ison, "Small Claims", (1972) 35 M.L. Rev. 18.
The notion of minimum recovery provisions to encourage private actions is now in vogue. Several American jurisdictions provide for minimum recoveries ranging from $25 to $200, and at least one commentator has advocated their introduction in Canada. This writer disagrees sharply. While such provisions undoubtedly provide a strong financial incentive to consumers to press claims which might simply be impractical, they operate very unfairly against suppliers. Such a provision effectively forces the supplier to give in to every claim, regardless of legitimacy, whenever his chance of losing exceeds the ratio of the claim to the minimum recovery plus the cost of lost time in court. Thus, if the minimum recovery is $200, the cost to the supplier of lost time is $50, and the claim is $50, then it would be in the supplier's interest to settle out of court even when he is 80 per cent in the right!

(2) Arbitration

Arbitration in its most general sense is the submission of the parties in dispute to the decision of an independent arbitrator. To formally apply arbitration to a particular field of law requires the development of a model that specifies the method of submission, the selection of arbitrators, the degree of compliance with the relevant body of law, the requirements for appeal, and so forth. Distinctive models can be found in the commercial law and labour law fields, reflecting the extensive use made of arbitration in these areas. Commercial arbitration, as traditionally used and understood, involves voluntary submission to an arbitrator selected by both parties,

who, on the basis of the personal equities in the particular case, reaches a binding and conclusive decision. North American labour arbitration is founded on the notion of self-government by the parties, recognizing the continuing nature of the labour relationship. The parties specify their own terms and conditions in their collective agreement, and in cases of dispute, a selected arbitrator attempts to realistically interpret these terms, imposing a binding decision. Arbitration statutes govern voluntary arbitrations in a more general sense, but do little more than reflect these well established models.

Because of the success which arbitration has enjoyed in these contexts, efforts are now being made to promote it as a suitable forum for consumer disputes. The flexibility, informality, and the private nature of this mechanism make it a very attractive alternative to the present litigious model. Implementing an arbitration scheme is a far bolder step, though, than merely streamlining the present small claims courts. Care must be taken to ensure that the model which is introduced is suited to the special needs of consumer law. There is no guarantee that any existing model would fit the requirements. The very opposite would seem to be true. American legal commentators have severely criticized the use of commercial arbitration principles in the consumer area; they acknowledge that disputes between merchants are the closest analogue to the consumer complaint situation, but stress that the differences are greater than the similarities.

A possible consumer arbitration model is proposed below.

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13 Commercial arbitration is widely used in the U.S.A. For discussion see Jones & Boyer, supra note 4; Aryeh Friedman, "The Effectiveness of Arbitration for the Resolution of Consumer Disputes" (1977), 6 N.Y.U. Rev. of Law & Social Change 175. In Canada its use has been more limited, see Roine, supra note 4, p.169.
14 The Labour Code of British Columbia Act S.B.C. 1973, c.122 as amended, sets out basic guidelines for arbitrations within this province.
15 For instance, see the B.C. Arbitration Act R.S.B.C. 1960, c.13(1).
16 See Friedman, supra note 13, pp.196-199.
A model for consumer arbitration

Arbitration should be offered on a comprehensive basis, preferably covering all consumer complaints relating to goods and services. Certainly it should apply to disputes involving unlawful as well as lawful conduct, for otherwise the process would not be a private alternative to the official government mechanisms.\(^{17}\) However, it would again be wise to make the forum available only after some effort has been made to mediate the dispute.

Voluntary submission has been almost universally regarded as an essential feature of arbitration. But in the consumer field it may be more suitable to leave the decision at the discretion of consumers alone, or to make it compulsory for both parties to submit, for otherwise the supplier might never concede to arbitration, preferring to go to court in all cases. If this scheme were adopted, it would be best implemented through statutory directives. A rather weaker alternative would be to encourage standard form contracts that guarantee arbitration as the dispute resolution mechanism.

On reflection, there seems to be no reason why arbitration should not be made compulsory for consumers as well as suppliers in relation to minor claims (e.g. under $200). Claims that the arbitration forum would not be readily accepted by consumers under such circumstances are mere conjecture;\(^ {18}\) its acceptability could only be determined once it was put into practice. It should be noted that compulsory consumer arbitration schemes have already been in operation in other jurisdictions for some time, and have worked reasonably well.\(^ {19}\) A compulsory scheme would offer many advantages. Most importantly, it would simplify the whole process for the consumer; provision of alternative routes to achieve redress is often

\(^{17}\) See Eovaldi & Gestrin, supra note 4, p.312.

\(^{18}\) Cf. Sigurðson, supra note 6, p.89.

treated as a desirable goal in itself, but for the average consumer who is unable to comprehend or evaluate the merits of different forums, it is only likely to cause confusion. And provision for court review of such decisions should alleviate fears of injustice.

A different approach could well be justified in cases involving larger sums. Because of the importance of the transaction or the amounts in question, the procedural safeguards and evidentiary standards prevailing in courts, either at small claims or at higher levels, may be warranted. In such cases, arbitration should be used as a matter of choice, preferably at the request of both parties.

Further moves away from the notion of arbitration as a purely private system may be necessary, especially with regard to selection of arbitrators. As consumers will generally not be in a position to choose wisely, nor would they want to be bothered with finding a suitable candidate, the decision may need to be made by other persons. The best solution would be to establish a tripartite board, consisting of business, consumer and community representatives (including government staff) to screen and assign arbitrators. If the decision were made solely by trade associations or by consumer groups, the selection would lack credibility; if it were made entirely by the Ministry, to ensure impartiality, the system might not be as readily accepted by either businessmen or the public generally.

The arbitrator need not be an expert in a particular trade, nor need he necessarily be a lawyer! A better system would be to select mature and intelligent people from various fields, provided that they possess a broad background and wide-ranging interests. With a minimum of training, such

20 The need for fiscal distinctions was emphasized by the Consumers Association of Canada in its brief on redress mechanisms, Nov 1973 (cited in Roine, supra note 4, pp.195-197).
21 See Friedman, supra note 13, p.213.
people should become proficient in basic arbitration techniques and principles, and it would no doubt streamline the costs and formalities involved in arbitration proceedings. To compensate for their lack of expertise in the technical aspects of various trades and the finer points of law, their terms of reference should allow for wide access to the services of professionally qualified people.

A major concern with the introduction of a consumer arbitration scheme is that because of its very flexibility, it could well work to a consumer's disadvantage. Unlike a judge who is bound to apply the substantive principles of law, and take into account such factors as consistency and legal principles of certainty, an arbitrator is generally not bound to strictly apply rules of law, but rather considers the personal equities of the parties before him. In the consumer field the enactment of statutes such as the Trade Practices Act treats consumers very favourably, and non-compliance with legal principles could lead to more harsh results in borderline cases. The problem would be more acute if arbitrators without legal training were selected. Of course, in areas not yet covered by statute law or seriously dealt with at common law, the arbitrator's decision must be based on the equities of the case, and this could well be to the consumer's advantage.

To ensure that consumers are afforded the protections offered in more recent statutes, wide scope for judicial review must be permitted. Courts should be entitled to overturn decisions on the basis of an error of law or fact, or a breach of natural justice. But no award should be overturned

22 Jones & Boyer, supra note 4, pp.388-391; Friedman, ibid., p.212.
without strong persuasive reasons being presented. Moreover, appeals should be limited to one hearing before a small claims court or county court, depending on the amounts involved. Small claims courts' appeals operate on a similar basis, and they have been far from excessive in number. An alternative approach would be to stipulate that arbitration awards are merely advisory. For instance, the Swedish Public Complaints Board is only empowered to make recommendations, not binding decisions, in relation to consumer complaints brought before it. However, the former approach is to be preferred; it does not compromise a consumer's legal rights, but it does give greater weight and authority to arbitration decisions.

Arbitration hearings should remain private, but to promote consistency and fairness, written awards and a form of reporting comparable to the records kept by small claims courts should be required. Although the most important function of reporting, the principle of stare decisis, is not applicable, the opinions would be persuasive in guiding later arbitrators. This has been the case in the labour sphere where a distinct body of arbitral jurisprudence has developed. The benefits of a reporting system would appear to justify the additional cost.

Before leaving the question of hearings, it should be mentioned that the notion of "documents only arbitration" is being increasingly advocated. In England, the Institute of Arbitrators has for some time offered low-cost arbitration along these lines. The idea offers many attractions, especially in relation to very small claims where more formal

24 In B.C. during 1975 less than one per cent of all judgments were appealed: Sigurdson, supra note 6, p.108.
25 For reviews see Donald B. King, Consumer Protection Experiments in Sweden, Fred B. Rothman & Co., South Hackansack, New Jersey, 1974; Roine, supra note 4, pp.151-153.
26 See Friedman, supra note 13, p.199.
27 See Roine, supra note 4, p.182.
28 Ibid., pp.165-168.
actions seem unnecessary. But for the scheme to work, provision must be made for the parties to be assisted in drafting their submissions and compiling their documentation. Otherwise, the more experienced party or the one who could afford to hire a lawyer would have a considerable advantage over the other. An even cheaper and perhaps better scheme along these lines might be for the arbitrator to communicate simultaneously with the parties by means of a three-way telephone connection.

An objection to all such schemes, however, is that unless the parties are actually physically present during a more formal hearing, they may well lack confidence in the process. The old saying that justice must be seen as well as done must not be ignored. But this should not deter reasonable experimentation.

If formal proceedings are adopted, they should be as flexible and relaxed as possible. The procedures and rules should be simple, so that parties can be represented by themselves, or by lay advocates. They also need to be held at convenient times and places. As has already been noted in relation to small claims courts, it is a prerequisite to any consumer grievance forum that it must be physically close to consumers and reasonably accessible to suppliers. An arbitrator or arbitration panel could well be more mobile and flexible than judges in this regard.29

Time limits would also need to be well circumscribed. Long delays in initiating the action, in the length of the hearing, or in the time it takes for an award to be issued - a real problem in commercial and labour spheres - would reduce the effectiveness and acceptability of the consumer arbitration forum.

To make arbitration truly accessible to consumers, it should involve no cost, or only a small nominal fee, for the individual complainant. The

29 Jones & Boyer, supra note 4, p.396-398, stress this factor.
economic burden, as such, should be borne by consumers as a class. The 
question is how to best achieve this. An idea now gaining currency is that 
the cost should always be paid by suppliers, who are in a good position to 
spread them out by including such expenses in the price of their goods and 
services. But the fairness and workability of such a scheme are suspect. 
No doubt they should pay costs in cases where they lose, but if suppliers 
are always liable, it would discourage them from using arbitration 
altogether. A better approach is for the government to pay the costs where 
the consumer loses. But safeguards need to be introduced to ensure that 
consumers do not waste public funds by initiating frivolous actions. One 
such safeguard might be to always make mediation a prerequisite for "free" 
arbitration, for it can be safely assumed that cases in which the government 
is prepared to mediate have substance to them.

The arbitration forum must have at its disposal some means of ensuring 
that the successful consumer is actually paid his damages. Collection of 
judgments has always posed a major problem in small claims courts, and 
there is no reason to expect that arbitration would be any better. Several 
means of overcoming this problem suggest themselves. One would be to 
encourage trade associations to demonstrate their good faith in the forum by 
guaranteeing payment of their members. Another would be to directly pay 
consumers out of a central fund established especially for this purpose, 
leaving the fund to pursue collection. Finally, the government could 
directly supervise the collection process, initiating court proceedings in 
cases of default.

30 See Friedman, supra note 13, p.212; Eovaldi & Gestrin, supra note 4, 
p.308.
31 Note (1976), 49 Temple L. Rev. 459. But see Friedman, ibid. He argues 
that making arbitration expenses tax deductible would entice suppliers to 
participate.
32 See Sigurdson, supra note 6, pp.20-21 & 57-59.
3. ARBITRATION WITHIN THE B.C. FRAMEWORK

Arbitration offers an attractive means of dealing with consumer complaints, but it need not entirely replace the courts. The ideal scheme would allow for binding arbitration as an alternative to court action, with provision for some degree of judicial review. Schemes along these lines have already been introduced in New York City and amongst the Spanish-speaking community in San Jose. However, for small claims (under $200), compulsory arbitration seems the most realistic solution, perhaps with a choice being offered during a transition period. In relation to the dual system, a decision would have to be made as to whether to make the arbitration forum completely distinct from the courts, or to merely make it an adjunct to the court system, possibly even within the same building. The presence of judges nearby may give the proceedings a stamp of legitimacy which they might not otherwise have, but it would detract from the purported private nature of arbitrations, and necessitate that the forum be as centralized as the courts and generally less flexible.

If consumer arbitration were introduced and its use were actively encouraged, the courts would undoubtedly play only a secondary role, serving for the most part as a last resort mechanism. Consequently the urgency of reform at this level would be reduced.

Role of the Government

The introduction of consumer arbitration would not erode the importance of the Ministry of Consumer and Corporate Affairs. Rather, the need for a

33 For discussion see D.W. Determan, "The Arbitration of Small Claims" (1975), 10 Forum 831; Roine, supra note 4, p.164.
35 Sigurdson, supra note 6, pp.88-89.
central administrative body would be even more pronounced; it could perform many functions which would be difficult to achieve by other means. The Ministry should be given the primary responsibility for implementing the scheme, overseeing its operation, and suggesting changes and modifications as their need becomes apparent.

At the individual level, the Ministry's staff should assist the disputing parties in presenting their cases for arbitration, thus ensuring that the proceedings go as swiftly as possible, and more importantly, that the arbitrator will be put in a position to fairly judge the merits of the case. Further, it should play some role in the selection of arbitrators, in channelling the most suitable people to particular cases, and in helping the arbitrator to organize the time and venue of the hearing. The Ministry also should take the prominent role in educating consumers as to their new rights and duties under whatever scheme is adopted. Without wide-scale publicity and education programmes, arbitration could be just as neglected as the present small claims system.

The other aspects of the Ministry's work, providing mediation services and strongly enforcing consumer protection legislation, would continue to be very important. On the enforcement front, the Director of Trade Practices would be in a position to concentrate almost solely on the preventative aspects of the Trade Practices Act, seeking injunctive relief or prosecutions in serious cases of marketplace abuse. Substitute actions, in contrast, would be considerably less important if effective forums were accessible to consumers for private actions, especially if the Ministry played an active role in preparing consumers for taking such actions.

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36 See Jones & Boyer, supra note 4, pp.402-405; Roine, pp.180-183.
4. A RADICAL ALTERNATIVE - "NO FAULT" COMPENSATION

Perhaps only to provoke debate, Professor Rosenberg has suggested an alternative to the usual adjudicative framework for the resolution of consumer complaints. He has proposed a "no-fault" compensation scheme, similar to the kind now prevalent in the field of automobile accidents, which would automatically reimburse every small claim (say up to $200) that is applied for.

While the scheme offers the attraction of an instant remedy for consumers, coupled with bureaucratic simplicity, it encourages widespread consumer abuse. Rosenberg refutes such claims:

Some will say the plan is naive and that consumers will cheat on a massive scale by presenting dishonest claims. An antidote might be to use the type of spot checks that income tax collection services use - apparently with good results.

Heavy fines and spot checks might discourage deliberate cheating, but it would not prevent consumers from seeking full redress for every complaint of partial validity. Indeed, almost all consumer complaints have some merit. The scheme would remove all incentive for consumers to take care in making their purchases, and since Rosenberg favours distributing the cost of initiating and maintaining the scheme evenly, through some means of public funding, it would eliminate all incentive for suppliers to act with integrity, and thereby it would penalize the honest ones. These reasons alone are sufficient to dismiss the scheme from serious consideration.

37 Maurice Rosenberg, "Devising Procedures that are Civil to Promote Justice that is Civilized" (1971), 69 Mich. L. Rev. 797.
38 Ibid., p.815.
British Columbia is widely acclaimed to have some of the best and strongest consumer protection legislation in Canada. On a comparative basis this may well be correct, but in many respects it still falls short of the protection ultimately desired, and needed, by consumers today. Most protection for consumers in this province stems from the recently enacted Trade Practices Act which seeks to give comprehensive and timely relief from undesirable business practices generally, both to individual consumers and to consumers as a class. Like other legislation of its kind, it attempts to rectify the great imbalance presently existing between consumers and suppliers, and in so doing it must balance the needs of consumers against fairness to businessmen and overall efficiency of the market. This thesis has been concerned with investigating the nature of the relief offered in the Trade Practices Act, and how it has been interpreted and implemented, highlighting the shortcomings and problems which have become apparent. The Act has accomplished much for consumers, but it does not satisfy all their needs, nor does it always keep within the bounds of fairness. Changes are needed, both minor ones that are easily implemented, and some major reforms.

The Act's achievements are manifold. It has codified conduct that is unacceptable, and it allows relief on the basis of expansive statutory prohibitions, rather than on antiquated and often restrictive common law rules. Very wide protection is given against deceptive practices, providing in statutory form the level of protection which has developed in America only slowly through administrative decisions and court proceedings. The old
doctrine of unconscionability, as adopted by the Act, should prove to be a useful tool for consumers. The Act has specifically applied the doctrine to consumer transactions, and has expressed it in wider terms than has been the case at common law, despite recent developments there. The chances of success in court actions has been enhanced by the removal of the old barriers to relief such as the rules relating to privity and parol evidence.

The introduction of wide ranging consumer protection measures has necessitated the establishment and later expansion of a government agency to oversee its implementation and enforce its provisions. B.C. has been fortunate to acquire a Ministry which is actively committed to pursuing the interests of consumers. From the outset, it has sought to make the legislation meaningful, and its enforcement record is impressive, despite difficulties encountered in the courts. The mediation scheme operated by the government has been especially successful and has resulted in the satisfactory resolution of the great majority of legitimate consumer complaints.

The Act also recognizes the need for private actions, and has provided consumers with a wide range of remedies, notably a comprehensive damages provision which can be readily applied through as simple and inexpensive a forum as a small claims court. But apart from formal activity, the Act forms an important weapon for consumer store-level bargaining and negotiation. Moreover, the Act's mere existence has had a strong deterrent effect, and is felt to have resulted in higher business standards generally.

Despite this impressive list of achievements, the Trade Practices Act has many weaknesses, both in form and in implementation. Its provisions go too far in some respects, not far enough in others, and enforcement policies have not always served well the interests of consumers.
Courts have accepted the extensive nature of the protection offered against deceptive practices in most respects, but the question of what is materially deceptive, and the related question of the time period covered by the Act, need further clarification. The difficulty lies not so much in judicial reluctance to accept new and innovative legislation, as in the lack of strong and well argued test cases brought before them. It may be necessary for the Legislature to provide more specific guidelines as to what conduct is unacceptable, though there is always the danger that such specification will work against the residual generality of s.2.

The unconscionability provision suffers from timid drafting, failing to even define what is unconscionable conduct. Given the difficulty which courts have always had in accepting and defining substantive unfairness, more specific legislative directives as to what terms or circumstances are to be considered unconscionable are essential. If these directives were expressed in new language, for example, only in terms of unfairness and harshness, then it would help free judges from the limitations of their previous decisions.

The adoption of a strict-liability test for deception is an instance of the Act's being overly protective. It should be possible to allow suppliers at least a limited defence in all cases of innocent deception, as is now done with regard to prosecutions only, without overly depriving consumers of needed protection. Moral fault has in practice always been a consideration in determining whether to resolve a case through informal or through formal means, and it is only fitting that the courts be given similar discretion.

Though the Act's dual goals of redress to consumers and elimination of undesirable practices have been substantially met, most success has been at the informal level; the formal enforcement activities of the Ministry have produced only mixed results. The present policy of prosecutions only is
quite misdirected, and is likely to lead to the rapid decline to the Act's effectiveness. The enforcement tool in any particular case must be chosen with flexibility and discretion, and full use should be made of the broad range of options provided for in the Act.

The lack of private actions brought under the Act illustrates that further encouragement is needed to motivate consumers to pursue their claims. Provision of a suitable forum is a major concern, and experimentation is required to ascertain what methods of redress are truly appropriate. On analysis, the answer still appears to lie within the mediation-adjudication framework, but with court actions preferably being replaced or supplemented by arbitration proceedings.

It is concluded therefore that further legislative reform is needed to ensure that the Trade Practices Act provides the full coverage it intended to give. The modifications called for to ss.2 and 3 are not radical in a true sense, but clarification and minor amendments could vastly alter the impact and scope of the Act. Further administrative remedies, notably cease and desist orders and rule-making powers, would further enhance the Ministry's ability to respond quickly and effectively to problems which arise in the market.

In the medium term, more substantial reform in the consumer protection field must be considered. A pilot arbitration scheme should be implemented to test its attractiveness to consumers and the extent to which it might be used. Legislation, of comparable forcefulness to the Trade Practices Act, is still needed in the areas of land dealings and mortgage transactions - two of the most important of all consumer transactions. There is also a need to give consumers better protection in relation to private sales.
British Columbia still has a way to go before it provides consumers with the protection that they need in today's marketplace. But in view of the rapid advances made in the past few years, and the expertise which has been acquired in trade practices and consumer legislation, it is possible to look forward optimistically to continued improvements in the foreseeable future.


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