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What Role Should the Federal Government Play in Consumer Protection?

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WHAT ROLE SHOULD THE FEDERAL GOVERNMENT PLAY IN CONSUMER PROTECTION?

A COMMENT ON PROFESSOR NEILSON'S PAPER

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The purpose of these remarks is to comment on and to reinforce many of the points made by Professor Neilson in his "Comment on the Recent Federal Proposals for the Rationalization of Trade Practices Regulation in Canada".[1] More broadly, I would like to take this opportunity to reflect on the motives and agenda of the current policies and constitutional reform proposals which address the role which the federal government should play in consumer protection generally.

In reading Professor Neilson's paper and in thinking about the broader questions in it, it soon became apparent that one cannot analyze the role of the federal government in consumer protection without simultaneously asking about the role of alternative regulatory institutions — in our case, provincial governments, the market and other national governments. There cannot be a regulatory vacuum in public policy.

Before addressing these questions directly, it is important to establish, at least for the purposes of this discussion, what we mean by "consumer protection". Simplistic, embarrassingly paternalistic, and ultimately frustrating consumer-protection initiatives of a quarter century ago have given way to an appreciation of the difficulty which governments face in "protecting" consumers from organized economic power in markets. In 1965, consumer protection policy meant creating abstract legal rights, and perhaps expanding legal services in an effort to enhance access to traditional redress mechanisms by consumers. Today, it is fair to say, consumer protection means:

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[1] *Supra*, this Journal, p. 70.

1. effective protection against consumer misrepresentation and fraud in marketing practices;[2]
2. the provision of information in consumer markets to reduce transaction costs and remedy market inperfections;[3]
3. the development of consumer insurance programmes;[4]
4. the development of licensing and associated regulatory measures in consumer services — notably banking, insurance, and medical and legal services — where it is difficult, if not impossible, for consumers to evaluate service quality and where the risks to the consumer are substantial if the firm or transaction fails;[5]
5. product safety regulation;[6]
6. protection of the interests of consumers in bankruptcy proceedings; and
7. the provision of effective consumer redress mechanisms.

In this comment I would like to approach in three different ways the question of the role of the federal government in delivering consumer protection services. First, one can think of the regulatory status of the federal government in the area of consumer protection in absolute terms. That is, if one assumes that the federal government has complete authority to address consumer protection issues, one can ask whether the federal government should play a more or less active role in regulating consumer markets.

Second, one can think of the role of the federal government in relative terms within the Canadian political environment. That is,

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[2] The major federal initiative in this area consists of the misleading advertising provisions in the Competition Act, R.S.C. 1985, c. C-34, as amended, ss. 52 to 60.

[3] The information may relate to specific qualities of a consumer product or service. In addition, the government can institute systematic product quality and grading standards as a means of reducing transaction costs. The federal government's role in product packaging and labelling, textile labelling, and precious metal marking comes within this sub-category. See Consumer Packaging and Labelling Act, R.S.C. 1985, c. C-38; Textile Labelling Act, R.S.C. 1985, c. T-10; Precious Metals Marking Act, R.S.C. 1985, c. P-19.

[4] See Canada Deposit Insurance Corporation Act, R.S.C. 1985, c. C-3.

[5] The federal government's activity in this arena has been limited to the licensing and regulation of federally chartered banks, trust companies and insurance companies. See Bank Act, R.S.C. 1985, c. B-1; Trust Companies Act, R.S.C. 1985, c. T-20.

[6] The regulatory activities of the Product Safety Branch of the Department of Consumer and Corporate Affairs under the Hazardous Products Act, R.S.C. 1985, c. H-3 and the Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.), as well as the activities of the Department of Health and Welfare pursuant to the Food and Drugs Act, R.S.C. 1985, c. F-27, are examples of this category.

one can inquire into the implications of a decision to devolve to the provinces administrative responsibility or constitutional authority to deliver consumer protection through the regulation of consumer markets.[7]

And third, one can think of the role of the federal and provincial governments in relative terms within a North American and perhaps international economic environment. That is, one might assess the role of the federal and provincial governments in consumer protection given the increased internationalization of financial, product and service markets.

Before the first question — whether the federal government should adopt a more interventionist stance in delivering "consumer protection services" — can be answered, recent federal government activity must be reviewed. It has become clear, during the past decade, that the current federal government has little interest in taking an active role in many issues which come within a consumer protection portfolio. The Product Safety Branch of the Department of Consumer and Corporate Affairs has been notably silent, at least in so far as overt regulatory intervention is concerned, since 1982. The consumer interest in bankruptcy reform, most notably in the protection of pre-paying buyers, has not been reflected in recent bankruptcy reform proposals. The recent Guidelines on Environmentally Related Advertising issued by the Product Labelling Branch of Consumer and Corporate Affairs are embarrassingly weak and largely ineffective.

As Professor Neilson indicates, we have seen a retreat from the active enforcement of misleading advertising regulation at the national level. In addition, earlier efforts to develop a federal securities market in Canada have not proved successful.[8] While we recognize that capital "knows no boundaries", provinces are entrusted with the impossible task of regulating financial institu-

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[7] It is commonly accepted that in the latter part of the 20th century, the provincial and federal governments have exercised concurrent jurisdiction over consumer protection issues largely because many of the regulatory initiatives represent policy areas which do not fit nicely within the categories set out in the 1867 British North America Act. See Norrie, Simeon and Krasnick, *Federalism and the Economic Union* (1986), pp. 49-59.

[8] Notwithstanding the fact that securities markets are becoming international in operation, shareholder protection responsibilities are increasingly the responsibility of provincial governments. As a result, there is the corresponding expense from duplication in regulatory intervention, risks of interprovincial activities escaping the purview of any regulatory authority, and risk of conflict in multi-provincial enforcement actions.

tions, the investment activities of which cannot be adequately assessed or monitored in so far as they are directly affected by extra-provincial influences.[9]

Standing back from the fray, one might infer that the federal government has taken the view that regulatory responsibility for consumer protection can and should be left to the provinces or perhaps to the market. That decision is an easy surrender to those provinces which are demanding greater regulatory power and responsibility. As well, it is consistent with recent federal privatization initiatives in those provinces which fail to act. Thus we are left with the market as our regulatory instrument. The recent constitutional reform proposals which indicate a willingness on the part of the current federal government to continue and perhaps to accelerate and make irrevocable this retreat, while disturbing, are consistent with the policies and operations of the federal government in recent years.[10]

However, while the federal government retreats from its current constitutional authority to regulate consumer markets, most provincial governments cannot realistically be expected to take up the sword, so to speak, on behalf of consumers. Provincial governments must operate within a political and economic context which severely constrains their ability to act. In particular, consumer protection initiatives must be introduced in an economic environment where consumer financial markets, service markets and product markets are becoming increasingly interprovincial and international in scope.

The past 20 years has seen the expansion of legal, financial, insurance and accounting services across provincial boundaries and across national boundaries as well. Manufacturing is being restructured in an international arena to respond to national comparative advantages in technology and labour costs and the economies of scale associated with production for world or multinational markets. Companies producing consumer goods or providing consumer services in one Canadian province have to operate in a national and international environment in terms of the location in which the goods are produced, the source of financing for the production of the goods, and the international markets in which their goods must compete.

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[9] See *McGauley v. British Columbia* (1990), 44 B.C.L.R. (2d) 217 (S.C.), leave to appeal granted 24 A.C.W.S. (3d) 476.

[10] See *Federal Proposals for Constitutional Reform* (1991), Part III, para. 26.

If I am correct in my assertion that consumer markets are increasingly national and international in scope, the serious implications of a federal retreat from regulatory intervention — whether temporarily as a matter of policy or irrevocably as a matter of constitutional reform — become clear. The abdication by the federal government of its regulatory responsibilities in these areas does *not* mean that the provinces can or will step in and fill the void.

For example, if the federal government cannot find the resources to address the misleading advertising activities of national and international firms, it is unlikely that most provincial governments will be able to do any better. The ability of a "local" government to engage in regulatory intervention different from that of its political competitors is directly related to the market power of the economy within which that provincial government operates.[11] Provincial initiatives which do not closely parallel those of Ontario and Quebec may do little more than persuade the relevant industry or business to stop serving the relevant market.[12] Advocates of provincial constitutional authority seem to ignore the fact that they cannot direct the output of capital and product markets to their citizens. The advantages of economies of scale associated with federal action over a broad range of consumer-protection activities, most notably standard-setting and product-labelling, will be forgone if authority over those matters is devolved to the provinces.[13]

My thesis is not a complicated one. I cannot think of any policy consideration which would argue in favour of further decentralization of legislative authority to direct consumer policy in Canada. There are no serious justifications which can be offered for expanding provincial authority over consumer protection matters.

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[11] I should note that, except at the extreme, consumer protection initiatives which involve the enactment of legal rights consisting of damage actions are not subject to this constraint. Thus Saskatchewan and New Brunswick, two of the smallest consumer markets in Canada, were able to enact very progressive consumer sales legislation more than a decade ago with no apparent adverse consequences to consumer markets in those jurisdictions. See Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1 and the Consumer Products Warranties Act, R.S.S. 1978, c. C-30.

[12] Of course, the same can be said of Ontario in relation to the consumer-protection policies of any of the northeastern states or the federal government in the United States.

[13] It is difficult to see the advantages in the formulation, co-ordination and enforcement of 10 divergent standard or labelling regimes. Indeed this is one area of consumer protection where the federal government, in the interests of creating a "more perfect economic union", has deemed it appropriate to retain its constitutional jurisdiction.

One common argument in favour of designing constitutional arrangements to allocate legislative power to the provinces is that the community which is calling for regulatory intervention exists at the provincial rather than federal level. The commonality of interests among members of a group, the sense that "we" means people within a province rather than within the nation, can and does justify provincial legislative authority in many cases.[14] For example, governments regulating trade practices must make difficult but necessary tradeoffs which recognize, for example, the cost to producers of ensuring accurate information and the ability of a diverse population of consumers to interpret necessarily ambiguous and incomplete information. Many of us, reflecting on who should regulate in this area, conclude that the choices required in developing misleading advertising policy should be made by the political representatives of those groups.

Similarly, developing product-safety standards involves mediating between the interests of actors in private and public medical insurance programmes and the interests of members of the community adversely affected by product-safety risks, reflecting both their attitudes towards risk and their sense of the importance of sharing personal injury losses across all members of the community. Throughout this balancing act the technical and financial ability of industry to respond to regulatory intervention must be taken into account. Again, an argument can be made that this process should be the responsibility of the political representatives of those groups. The result, given the unique history, culture, social, political and legal institutions and economic circumstances of sovereign political units, are consumer protection policies which can and should differ from country to country.

But I cannot accept that that argument holds across Canadian provinces. Do Nova Scotians and Manitobans differ so much in their attitudes towards product safety, or their interest and ability to process consumer-product information, or their concern about sharing the losses of other members of their respective communities, that those differences ought to be reflected in political autonomy to regulate in those areas? Certainly, as Andrew Petter has argued, "the opinions and priorities of Canadians in one region may well differ from those of Canadians in other regions".[15] But I cannot believe that this is true in respect of the

[14] See R. Simeon, "Criteria for Choice in Federal Systems", [1983] Queens L. Rev. 131.
[15] See A. Petter, "Meech Ado About Nothing? Federalism, Democracy and the Spending

values implicated in consumer protection policies of the kind we are considering here.

I do not believe that the provinces have been demanding constitutional authority to regulate in many of the traditional areas of consumer protection. I would think, given the internationalization of financial and consumer markets, that few provinces could believe that their respective economic bases would be sufficient to support political agendas which differed significantly from those of their political and economic competitors.

All of this leads us to the position articulated by Professor Neilson — that both functionalism and pragmatism suggest a role for the provinces in consumer protection which is limited to those relatively narrow matters which can most efficiently be performed by governments at the provincial level.[16] However, business interests can legitimately claim that their ability to compete in international markets is hampered by provincial standard-setting activities. There is no evidence that provincial governments would be more sensitive to the conditions which produce personal losses experienced by consumers in market transactions. These kinds of functionalist arguments suggest that provincial activity should be focused on the provision of effective redress at the local level for violation of legal standards whether legislative or contractual; the regulation of local service industries though licensing standards and insurance programmes; and the establishment of mandatory "default" contract terms in consumer product and service contracts. All of this is extremely important and, as Professor Neilson recognizes, is now undoubtedly within provincial legislative competence.[17]

What then is the explanation for a federal initiative to give the provinces more legislative authority than they currently exercise? The conclusion I have reached is an admittedly cynical one, but it does recognize that few provinces seem to be demanding this grant of legislative authority. Edward Belobaba recognized several

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Power", in Swinton and Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (1988), at p. 176.

[16] See A. Scott, "An Economic Approach to the Federal Structure" in *Options: Proceedings of the Conference on the Future of the Canadian Federation* (Toronto, University of Toronto Press, 1977), at p. 270.

[17] One additional role for the provincial governments might be to participate in a more active federal-provincial inter-governmental policy instrument which would ensure that consumer interests are adequately represented in the federal arena.

years ago that the organization of corporate lobbying on consumer protection issues focuses on the federal government:[18]

> At the federal level, the strength of the business lobby ensured the failure of the proposed amendments to our competition law, of suggestions to redesign federal regulation of advertising, [and] of the federal proposal for a comprehensive borrowers and depositors protection law.

It is this, I think, which explains Professor Neilson's data indicating an enforcement strategy which has resulted in less than 14% of the federal government's case load involving "interprovincial or national practices or impacts of any significance beyond local markets". If that is true, then one *might* despair that the same corporate lobby will, in the future, be able to confront the governments of Manitoba or Nova Scotia should they engage in dramatic consumer protection initiatives.[19] And while an offsetting consumer public interest lobby in the federal arena is at best weak, it simply does not exist in many of the provinces. At the same time that production and distribution of consumer goods become a truly international phenomenon — with product design, material inputs, component production and ultimate manufacturing taking place in a number of jurisdictions — we see a deliberate attempt by the federal government to ask the provinces to take on a responsibility which I do not believe they can meet.

However, that story is only one of many. If the provinces cannot or will not take on the regulatory agenda which is being handed to them by the federal government, and if they are unable to obtain

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[18] E.P. Belobaba, "The Development of Consumer Protection Regulation: 1945 to 1984", in *Consumer Protection, Environmental Law and Corporate Power*, Ivan Bernier and Andree Lajoie, eds. (Toronto, University of Toronto Press, 1984), at p. 37.

[19] It may be, however, that the provinces are better able than the federal government to take a more active role in consumer protection. Certainly, one can point to a record in many provinces which includes the enactment of farm implement legislation, mortgage relief legislation, seize or sue legislation, trade practice legislation, and class action legislation, much of which has a strong interprovincial character to it. This record suggests, somewhat paradoxically, that the functionalist argument which suggests that the provinces ought to be entrusted with authority over only local matters has not been taken far enough. That is, pragmatic arguments which focus only on the economic character of the relevant transaction support Professor Neilson's thesis. However, if those arguments are extended to take into account the nature of the political process through which the legislative and regulatory activity must be filtered, we may be led to the conclusion that the provinces are better situated to address so called "national" consumer protection issues where they are insulated from the power of "national" corporate lobbying efforts due to the particular distribution of production facilities and employment across the country.

the resources to do so, then the regulatory instrument which we can expect to address consumer protection concerns is the market. Jacob Ziegel wrote in 1981 that "the 1980s will be a period of consolidation if not active retrenchment" in consumer legislation.[20] History has proven him correct. Yet recent events would appear to take deregulation one step further. Proposals to constitutionalize the devolution of authority over consumer protection issues are in fact proposals to make effectively irrevocable the current federal government's abdication of responsibility in this context. One might, on reflection, support the assertion that the federal government was right when it decided that no substantial consumer protection initiative has been justified in recent years. But are we so absolutely certain of that that we would make it part of our constitutional identity?

[20] J. Ziegel and B. Geva, *Commercial and Consumer Transactions: Cases, Texts and Materials* (Toronto, Emond-Montgomery, 1981), p. 21.