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CAN IT REALLY BE UNCONSTITUTIONAL TO REGULATE PRODUCT SAFETY INFORMATION?

David Cohen *

Introduction

Two recent decisions of the Supreme Court of Canada have confirmed the worst suspicions of many that deliberate constitutional silence on the protection of economic and property interests would be ineffective in preventing judicial interpretations which envelop a range of corporate conduct with the legitimacy of constitutional protection. Judicial interpretation of s. 2(b) of the Canadian Charter of Rights and Freedoms in *Ford v. Quebec (Attorney General)*¹ and in *Irwin Toy v. Quebec (Attorney General)*,² has extended constitutional protection to "commercial speech" — corporate expressive conduct intended to further economic interests by encouraging a market transaction, or providing information relating to the market transaction. Charter protection is subject, of course, to the government's opportunity under s. 1 of the Charter to justify the restrictions on corporate expression which were imposed by governmental action. These developments raise important questions concerning the constitutionality of much of Canada's information-based product safety regulatory framework. Judicial protection of commercial speech is a response to the typical corporate claim that:³

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¹ (1988), 54 D.L.R. (4th) 577, [1988] 2 S.C.R. 712. Canadians thus can boast of the dubious achievement of reaching, within the first decade of the Charter, the point that Americans had taken a century to accomplish. See J.W. Merrill, "First Amendment Protection for Commercial Advertising" (1976), 44 U. Chi. L. Rev. 205. Merrill reviews the history of the commercial free speech doctrine which was unprotected before 1975 under *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Until the mid-1970s, one could say with some confidence that "the Constitution imposes no . . . restraint[s] on government as respects purely commercial advertising." Merrill, *ibid.*, at p. 207.

² (1989), 58 D.L.R. (4th) 577, [1989] 1 S.C.R. 927.

³ See E. Bardach and R. Kagan, *Going by the Book* (Philadelphia, Temple University

... mandatory disclosure for such political purposes can become a mechanism whereby the government forces sellers to undertake an uncompensated program of public education — or propaganda, depending on one's viewpoint — thereby turning their packages into mini billboards for messages designed to persuade rather than to prevent deception.

In this paper, I examine the impact of these decisions on information-based product safety regulation which, in a variety of guises in Canada, can be said to restrict manufacturers', distributors' and marketers' ability to "express" themselves.⁴ In the end, I conclude that, if one appreciates the justification for and the processes by which this kind of product safety regulation is instituted, there is only a small risk that the current regulatory activity will be held unconstitutional. When one takes into account the degree of co-operation between business and government in establishing the content of most regulatory activity and the benign nature of most of Canada's packaging and labelling requirements, one is led to the almost inescapable conclusion that the Charter challenges do not pose a serious threat to the existence of these laws.

Yet that conclusion does not mean that we should completely disregard the impact of the Charter and the courts on the regulatory process. Perceived threats of constitutional challenges are now aspects of the environment in which regulators must work. There is undoubtedly an increased risk that protecting commercial speech will discourage more aggressive regulatory strategies and the enforcement of existing legislation — areas where activity is already at a near standstill.⁵ The protection of commercial speech implied by the recent events contributes to the confusion, contradiction and uncertainty of much of product safety regulation in Canada.⁶ Further policy developments will be

Press, 1982), p. 259. This is perhaps what lies behind the striking down of state legislation restricting advertising by utility companies as a conservation strategy. See *Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York*, 447 U.S. 557 (1980).

⁴ For the purposes of this paper I assume that the proposition that governmental action which requires a certain kind or content of expression, whether through negative or positive informational requirements, equally limits a corporation's choice to express "meaning" with regard to the constituents, performance, operation or other characteristic of the products it sells. See *Irwin Toy*, *supra*, footnote 2, at p. 606.

⁵ See E. Belobaba, "The Development of Consumer Protection Regulation: 1945 to 1984", in I. Bernier and S. Lajoie, eds., *Consumer Protection, Environmental Law and Corporate Power*, Royal Commission on Economic Union and Development, Prospects for Canada (Toronto, University of Toronto Press, 1985). See also, J.C. Shaul and M.J. Trebilcock, "The Administration of the Federal Hazardous Products Act" (1982-83), 7 C.B.L.J. 2.

⁶ See Belobaba, *supra*, footnote 5, *passim*, especially at pp. 46-62.

even more dependent on and influenced by legal norms — a fact which has elicited concern in the past.⁷ In the end, however, notwithstanding the enormous impact of *Ford* and *Irwin Toy* on the political economy of Quebec, regulators concerned with product safety regulation will largely go about their business the way they always have.⁸

1. The Legal Environment

In late 1988, in *Ford v. Quebec (Attorney General)*,⁹ the Supreme Court of Canada was confronted with the question of whether the Charter's "freedom of expression" section should be extended to protect corporations as well as individuals. In *Ford*, the Supreme Court expressly refrained¹⁰ from settling the question of the application of the Charter to consumer protection issues. Although the decision in *Irwin Toy*, handed down four months later, has in large measure diminished the significance of the earlier cases in regard to commercial free speech, the sentiment of the court in the earlier appeals remains instructive. In *Ford*, the court placed particular emphasis on the ability of the government to regulate the kind of information available to consumers in the market-place, and indicated that "judicial regulation of govern-

⁷ *Ibid.*, at p. 36.

⁸ That is, notwithstanding the assimilation of political debate and advertising represented in cases like *Irwin Toy*, I predict that the Charter will thus not significantly redefine the boundaries of the current regulation of the economy and economic activities by the federal and provincial governments. See T.H. Jackson and J.C. Jeffries, Jr., "Commercial Speech: Economic Due Process and the First Amendment" (1979), 65 Va. L. Rev. 1. They criticized *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976), in which the Supreme Court invalidated state legislation restricting pharmaceutical price advertising, as "a contradiction of the heretofore settled idea that the Constitution tolerates extensive regulation of the economy". *Ibid.*, at p. 32.

The view that cases like *Irwin Toy* should not be interpreted as a radical judicial attack on economic regulation is supported by recent American experience as well. Tracy Westen, in "The First Amendment: Barrier or Impetus to FTC Advertising Remedies?" (1980), 46 Brooklyn L. Rev. 487, writes that the extension of commercial speech protection to "issue advertising" in the United States has led some to say that "Virginia Pharmacy and its progeny have imposed an unprecedented restraint on the FTC to police unfair and deceptive trade practices." *Ibid.*, at p. 490. She concludes, none the less, that "the commercial speech cases mandate no fundamental change in basic FTC policies". *Ibid.*

⁹ *Supra*, footnote 1.

¹⁰ The court wrote "We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example, to protect consumers)." See *Ford, ibid.*, at p. 619.

mental regulation" in this context was problematical to say the least.¹¹

The *Irwin Toy* appeal addressed the constitutionality of one of the most far-reaching information style consumer protection provisions in Canada — the prohibition of advertising directed at children in Quebec.¹² The case articulated a formal "test" for determining whether freedom of expression has been breached. If corporate activity "conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee".¹³ The definition encompasses and protects virtually the entire range of human conduct,¹⁴ and applies equally to both individuals and corporate bodies. The sheer breadth of the test suggests that a vast majority of the commercial free speech adjudication will be determined by a s. 1 analysis.¹⁵

The question of whether "information-based" consumer product safety regulation is in danger of an industry-led assault that uses C.J. Dickson's judgment in *Irwin Toy* as its main weapon, requires us to understand something about the content and processes which characterize this regulatory arena. In the next part of this paper, I briefly review the rationale for information regulation, its place in the regulatory milieu and how information policies are developed in the regulatory process.

¹¹ The court based its decision not to exclude commercial expression from constitutional protection on the fact that it, "protects listeners as well as speakers [and] plays a significant role in enabling individuals to make informed economic choices, and important aspect of individual self-fulfillment and personal autonomy". *Ibid.*, footnote 1, at p. 618.

¹² Consumer Protection Act, S.Q. 1978, c. 9 (R.S.Q., c. P-40.1), ss. 248, 249 and 252 and Regulations respecting the application of the Consumer Protection Act, R.R.Q. 1981, c. P-40.1, r. 1, ss. 87 to 91.

¹³ *Irwin Toy*, *supra*, footnote 2, at p. 607.

¹⁴ *Ibid.*, *supra*, footnote 2, at pp. 605-9. J. Weinberg, in "Constitutional Protection of Commercial Speech" (1982), 82 Col. L. Rev. 720, identifies four values promoted by the First Amendment — political self-government, self-fulfillment through self-expression, discovery of "truth" and developments through perception. While these do not precisely track the values articulated by Dickson C.J., his language in *Irwin Toy* indicates that he and Weinberg believe that the first, third and fourth are furthered by the protection of commercial speech. See *Irwin Toy*, *ibid.*, at p. 614.

¹⁵ There is a growing body of literature on the development of the court's approach to governmental attempts to justify its actions under s. 1. Most take the view that the expansive reading of the substantive freedoms in the Charter has had the effect of throwing much of the debate into s. 1. See P.A. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986), 24 Osgoode Hall L.J. 867; A. Petter and P. Monahan, "Developments in Constitutional Law: 1986-87 Term" (1988), 10 S. Ct. L. Rev. 61; and R. Elliott, "The Supreme Court of Canada and Section 1 — Erosion of the Common Front" (1987), 12 Queen's L.J. 277. All agree that the fluidity and imprecision of the s. 1 analysis largely precludes prediction based on textual analysis.

2. The Regulatory Environment

Depending on one's definition of "restrict"¹⁶ there is an enormous range of regulatory initiatives through which federal and provincial governments restrict a form of expression in order to control access by others to its meaning in an attempt to protect individuals from engaging in transactions without adequate or with inaccurate information.¹⁷ The disclosure of ingredients on food packages,¹⁸ fibre content in percentages on most cloth garments¹⁹ and safety warnings on containers of poisonous materials²⁰ are typical examples of statutorily mandated provision of information. The federal Hazardous Products Act²¹ prohibits the manufacture, sale or advertising of a collection of products ranging from science sets to carpets to bags of charcoal unless a warning referring to potential safety risks is prominently displayed on the label. Other federal statutes²² also can be seen as restricting a form of expression by requiring that certain products must be sold with specific information, presented in a specific manner. Provincial legislation, especially in the area of pesticides regulation²³ similarly contributes to the array of information-based regulatory policies employed in response to product safety risks. Mandatory disclosure of information is simply the most pervasive form of product safety regulation in Canada.²⁴

¹⁶ As I point out below, there may be an argument that government regulations which require *additional* information from commercial enterprises do not limit speech. It is equally logical, however, to treat mandatory disclosure requirements as more offensive than mere restrictions on speech conduct, in so far as they *force* individuals to say things which they do not believe.

¹⁷ This is the test applied in the majority judgment in *Irwin Toy*, to distinguish expression from non-expressive conduct.

¹⁸ See Food and Drugs Act, R.S.C. 1970, c. F-27 (now R.S.C. 1985, c. F-27). Food and Drugs Act Regulations, C.R.C. 1978, c. 870, B.01.008.

¹⁹ See Textile Labelling Act, R.S.C. 1970 (1st Supp.), c. 46 (now R.S.C. 1985, c. T-10). Textile Labelling and Advertising Regulations, C.R.C. 1978, c. 1551, s. 4.

²⁰ See Pest Control Products Act, R.S.C. 1970, c. P-10 (now R.S.C. 1985, c. P-9). Pest Control Product Regulations, C.R.C. 1978, c. 1253, ss. 27 to 39.

²¹ R.S.C. 1985, c. H-3.

²² The most significant are the Weights and Measures Act, R.S.C. 1985, c. W-6; Pest Control Products Act, *supra*, footnote 20; and the Food and Drug Act, *supra*, footnote 18.

²³ See, for example, the Pesticides Act, R.S.O. 1980, c. 376.

²⁴ The government also prohibits certain foods from being labelled in a certain manner (e.g., "low-calorie" or "for low-sodium diets") unless they meet standards set by the federal Food and Drug Act. See Food and Drug Act Regulations, *supra*, footnote 18. These regulations set standards which must be met before products can be marketed with a particular name. This type of regulation is similar in intent to the more obvious prohibition of false, misleading or deceptive packaging, labelling or advertising.

Information-based consumer protection policies can conveniently be placed at one end of a continuum reflecting the level of intervention in the market by government. Given the choice of direct government delivery of goods and services, the nationalization of private industry, taxation policy, subsidies, licensing and certification requirements, product performance and design standards, product bans, insurance requirements, it is obvious that information-based product safety policies are the least intrusive regulatory instrument available to governments whose objectives include the provision of "safety".

Even with information-based product safety regulatory policies, one can identify at least three distinct regulatory instruments available to governments, which in turn represent different degrees of government intervention in the market.²⁵ Governments may require corporations to label products with specified information in a specified form to ensure disclosure to consumers; governments can set performance and design standards that must be met before the product can be labelled in a certain manner; and finally, governments can prohibit the dissemination of information, in particular deceptive packaging and labelling, altogether.²⁶

Information-based product safety regulation of the kind described above has been the subject of considerable attention in recent years.²⁷ As the study of law and economics continues to burgeon so too do the plaudits for government regulation that relies heavily on information policies.²⁸ The regulatory objective

²⁵ See M.A. Utton, *The Economics of Regulating Industry* (1986), Chapter 4, especially at p. 38. To the information remedies I have mentioned, we can add the financing of independent organizations that provide information to consumers which inform them of product characteristics.

²⁶ Moving from information policies to those that are more intrusive, the government may employ content standards that have to be met before a product can be introduced into the market, and may ban products from the market entirely. While these are clearly more intrusive than information-based regulation, the current treatment of constitutional liberties has not extended Charter protection to trade. See, *infra*, at Part 4 where the implications of this omission are discussed.

²⁷ After occupying a "slum dwelling in the town of economics" for many years, the study of information economics has grown to the point where one somewhat presumptive theorist deemed the 1970s the "information economics decade". See M.A. Utton, *supra*, footnote 25, at Chapter 4; H. Beales, R. Craswell and S.C. Salop, "The Efficient Regulation of Consumer Information" (1981), 24 J. Law & Econ. 491.

²⁸ Those who have argued that information policies are under-utilized include R. Reich, "Toward a New Consumer Protection" (1979), 128 U. Pa. L. Rev. 1; M. Pertschuk, *Revolt Against Regulation* (Los Angeles, University of California Press, 1982), p. 149; Bardach and Kagan, *supra*, footnote 3, and Utton, *supra*, footnote 25.

that consumers possess adequate information in market transactions is consistent with an important assumption about information underlying much of modern economic theorizing.²⁹ And for many reasons, that assumption will not be realized absent government intervention.

Markets in information often fail to produce optimal quantities and quality of information to consumers for reasons which are not difficult to understand.³⁰ First, information related to product safety and performance is a public good, and because the producer cannot always appropriate the entire gains from its utilization, it will often be under-produced. Second, the marginal costs to the producer of disseminating the information will almost by definition exceed the value to it of disclosing negative product safety information, and again the information will be under-produced. Third, information may be under-produced where consumers cannot efficiently police the accuracy and completeness of the information at point of sale.³¹ Fourth, using the litigation system to internalize these costs will rarely correct the under-production given the disincentive to litigate, limits on recovery of certain kinds of losses, and the status of the distributor as a repeat player.

The resulting market failure, due to consumers' deficient information and information processing capabilities, provides the strongest rationale for most information policies. They provide an information solution to an information problem. The fact that information policies — especially mandatory disclosure — maintain the myth of consumer sovereignty and for the most part avoid the paternalistic implications³² of standard setting and product bans accounts for much of the current popularity of information policies. More important, information-based remedies permit producers to make relatively unconstrained choices about

²⁹ See Belobaba, *supra*, footnote 5, at p. 43.

³⁰ These points are developed in some detail in Beales, Craswell and Salop, *supra*, footnote 27.

³¹ Thus market failure may be most likely where the true costs and risks of a product are not obvious to the consumer at the time of purchase, conditions which are increasingly prevalent in a market-place replete with complex goods.

³² See Reich, *supra*, footnote 28. He emphasises the non-paternalistic basis of this conception of regulation. For an article that confronts and attempts to rebunk this aversion to explicit paternalistic motives, see D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982), 41 Md L. Rev. 563.

product characteristics, retaining the dynamism of the market in responding to changes in consumer preferences and technology. Finally, information-based product safety regulation permits a range of products accommodating a wide range of consumer preferences towards mixes of price, product quality and safety, rather than imposing a single choice on all consumers.

The transformation of this model of informational failure into practice through the development of information-based product safety regulation has been left in Canada to departmental bureaucrats at both the provincial and federal levels of government. An analysis of a typical regulatory institution reveals several important insights into how the economic theory justifying information-based product safety regulation is transformed in the regulatory process. It is that process which will determine the likely impact of cases like *Irwin Toy* on information-based regulatory policies which restrict commercial speech.

A typical regulatory apparatus which may serve this purpose is the current federal administration of the Hazardous Products Act — a department to which considerable research has been directed.³³ The Product Safety Branch administers the Act under supervision by the Minister of Consumer and Corporate Affairs. The Act is administered as criminal legislation, containing maximum penalties of up to two years in prison or six months and a \$1,000 fine. The administrative process has been described as “internally open”³⁴ and non-adversarial, where the major industry actors are involved intensively in the regulatory process, and where the system is considerably less open to other potentially affected parties.³⁵ When a product is identified as being potentially hazardous, an advisory committee is convened consisting of

³³ See R. Hirshhorn, “The Administration of the Hazardous Products Act”, in D. Dewees, ed., *The Regulation of Quality* (Toronto, Butterworths, 1983), Chapter 7; Shaul and Trebilcock, *supra*, footnote 5; R. Hirshhorn, *Product Safety Regulation and the Hazardous Product Act*, Tech. Rep. No. 10, Economic Council of Canada (Ottawa, Economic Council of Canada, 1981).

³⁴ See Hirshhorn, “The Administration of the Hazardous Products Act”, *ibid.*, at p. 177.

³⁵ *Ibid.* at p. 178. The literature advancing the theory that industry has to some extent “captured” the regulators is considerable. For an empirical study of the American scene see P. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton, N.J., Princeton University Press, 1981). One description of the Canadian experience is contained in R.G. Shapiro and D.R. Hughes, *An Analysis of the Effects of Government Regulations on the Canadian Fruit and Vegetable Processing Industry*, Working Paper No. 11, Economic Council of Canada, Regulation Reference (Ottawa, Economic Council of Canada, 1980), at p. 67.

members of the affected industry, standards organizations, importers and other government agencies.³⁶ That advisory panel co-operates with members of the Product Safety Branch in designing the regulatory response, if any, to the alleged safety risk. The relative weakness of organized consumer advocacy groups in Canada increases the relative influence of the regulated industries in this regulatory process, which combines with the structure of the regulatory process to produce what has been described as a "somewhat lax" enforcement policy.³⁷ Aggressive regulatory action has also been hindered by budgetary restraints and the absence of a reliable source of information on product-caused injuries.³⁸

While industry enjoys considerable influence in the regulatory process, it has nothing to gain by revealing this to the public. Thus, despite this congenial atmosphere, regulatory intervention is often portrayed by industry as being too heavy-handed.³⁹ A recent assessment of federal consumer protection regulation concludes "*on paper* at least, Canadian consumer protection legislation can almost compete with such pro-consumer jurisdictions as Sweden and Japan".⁴⁰

This regulatory structure is coupled with process characteristics which are extremely relevant to an assessment of the constitutional validity of information-based regulation. For more than a decade the federal government has required relatively sophisticated socio-economic impact analyses ("SEIA") to accompany each new proposed regulatory change in the "Health, Safety and Fairness" areas under federal jurisdiction.⁴¹ In order to provide

³⁶ Hirshhorn, "The Administration of the Hazardous Products Act", *ibid.*, at p. 177.

³⁷ See Shaul and Trebilcock, *supra*, footnote 5; and Hirshhorn, *Product Safety Regulation and the Hazardous Products Act*, *supra*, footnote 33, at p. 111.

³⁸ R. Hirshhorn, writing in 1980, reports that the number of staff has remained the same since the early years of the programme and suggests that the fact that Canada spends 5% of what the United States spends in this field is a disproportionately low amount. The need for a system that provides regulators with reliable information from medical practitioners on the cause of injuries is emphasized by both by Hirshhorn, *ibid.* at pp. 114, 115, and by Belobaba, *supra*, footnote 5 at p. 74.

³⁹ The setting of strict standards for hockey helmets, and the initial product ban (subsequently revoked) on 1.5L glass carbonated beverage containers have both been attacked as being inefficient. Hirshhorn, "The Administration of the Hazardous Products Act", *supra*, footnote 33, at pp. 193-4 and 184-5.

⁴⁰ Belobaba, *supra*, footnote 5, at p. 69, emphasis added.

⁴¹ *Socioeconomic Impact Analysis*, Chapter 490, Administrative Policy Manual, Treasury Board of Canada (December, 1979).

guidance to regulators and coherent rationales for regulatory intervention to the public, the federal government requires all new non-emergency regulatory amendments and additions to be subjected to an analysis which attempts to assess the social costs and benefits that would result from proposed regulatory action.

While most would concede⁴² that such cost-benefit analysis represents a useful analytical tool in complex regulatory decision-making, it is equally clear that there are dangers in employing it uncritically. The measurement of the value of differing levels of inflation, the impact of regulatory intervention on market structures, the international trade implications of proposed regulatory action, and the valuation of human life and pain and suffering are at best inexact, and at worst simply a conceptual charade. The failure to develop a reliable source of information describing product-related deaths and injuries and the problems of uncertain scientific data⁴³ lessen the supposed rationality of the socio-economic impact analyses. In addition to the problem of uncertainty, Belobaba has described the particularly narrow perspective which characterizes the economic approach to regulation and the associated implication that the "right" answer is actually there to be found, as a major impediment to better consumer protection law in Canada.⁴⁴ The danger is that regulators searching for some solidity in the shifting sand will come to rely too heavily on what can often be only marginally useful economic analyses. Tuohy fears that the impact analysis will be used in large measure as a stalling tactic when more immediate action is required.⁴⁵ The technicality of the analysis means that many unorganized and under-funded groups will be effectively marginalized from the regulatory process.

Nonetheless, the economic model which justifies information-based regulatory intervention, together with the administrative structures and analytical processes involved in regulatory intervention in this area, provide the government with a powerful

⁴² For two vocal opponents of the use of cost-benefit and cost-effectiveness analyses, see M. Kelman, "Cost-Benefit Analysis — An Ethical Critique" (1981), 5 *Regulation* 33; and D. Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1983), 33 *Stan. L. Rev.* 387.

⁴³ See C. Tuohy, "Regulation and Scientific Complexity: Decision Rules and Processes in the Occupational Health Arena" (1982), 20 *Osgoode Hall L.J.* 562.

⁴⁴ Belobaba, *supra*, footnote 5, at p. 54.

⁴⁵ Tuohy, *supra*, footnote 43, at p. 575.

weapon with which to demonstrate to the judiciary that its regulatory intervention was justified. Moreover, given the relatively non-intrusive character of most information-based product safety regulation, the courts are unlikely to be aggressive participants in a close technical re-evaluation of the social cost-benefit analysis on which the information-based product safety regulation is supposedly based. Not only is the analysis complex, the data uncertain and the valuations imprecise, but, as one commentator has put it, "One can find . . . some spill-over cost rationale for regulating almost anything."⁴⁶

3. Does Protecting Commercial Speech Matter?

The Supreme Court decision to assimilate political debate to advertising and thus the creation of a guarantee of freedom of commercial expression in the Charter has generated serious doubts about the constitutionality of much of the information policies currently employed in Canada. The equal footing that corporate entities and individuals are given in Dickson C.J.C.'s judgment in *Irwin Toy*, and the fact that two of the five sitting judges⁴⁷ did not see Quebec's violation of s. 2(b) as justified under s. 1, would seem to support that concern. As Bob Sharpe predicted, however, a more careful analysis of the landscape should dispel much of that fear.⁴⁸ That is, the characteristic structure of most of our federal and provincial information policies, the extent to which they are enforced, the role the regulated enjoy in formulating policy, and a consideration of recent Charter adjudication all suggest that radical fears of the Charter being used to strike at these provisions are almost totally unjustified.⁴⁹ The reasons why the Supreme Court's posture does

⁴⁶ S. Breyer, *Regulation and Its Reform* (Cambridge, Harvard University Press, 1982), pp. 23-6.

⁴⁷ McIntyre and Beetz JJ. dissented in the result, writing that freedom of expression, commercial or otherwise, "should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community". *Irwin Toy* (1989), 58 D.L.R. (4th) 577 at p. 637, [1989] 1 S.C.R. 927.

⁴⁸ R. Sharpe, "Commercial Expression and the Charter" (1987), 37 U.T.L.J. 229.

⁴⁹ Thus again Canada will track the American experience. See J. Weinberg, "Constitutional Protection of Commercial Speech" (1982) 82 Col. L. Rev. 720. As he puts it, "a restriction on particular commercial speech will always be valid where the restriction does not interfere with the transmittal of the information in question to the public." *Ibid.*, at p. 747.

not pose a serious threat to *existing*⁵⁰ information-based product safety regulation can conveniently be divided into two categories. The first, which I call “doctrinal”, can be developed from the language and rhetorical elements in *Irwin Toy* and *Ford*. The second, which I call “practical”, reflects the *Realpolitik* of product safety regulation in Canada.

While I am not suggesting that reading past Supreme Court judgments concerning the Charter will provide us with an answer as to how the court will act in the future, such an exercise will help us to recognize strands in certain judges’ thinking that may come together in the future.⁵¹ That there are ready-made formal responses that can be employed to defend an attack on the constitutionality of information policies — especially mandatory disclosure — is certainly of considerable import.

The first argument which one can make to defend most of the current information-based product safety regulation is that state action which requires information about product safety does not “restrict” expression. As we have seen, the major policy strategy employed by regulators in Canada requires mandatory disclosure of certain information. This regulatory strategy permits the logical argument to be made that requiring the disclosure of information does not entail a “restriction” on expression. Mandatory disclosure certainly diminishes corporations’ absolute freedom with regard to the entire informational package associated with a particular consumer product, but it does not prevent corporations from displaying whatever message, in whatever form they wish, so long as it is not deemed to be deceptive or misleading.⁵²

⁵⁰ As I argue below, however, what is disturbing is that the courts may use the Charter to regulate more intrusive regulatory intervention which employs information-based policies to achieve product safety objectives.

⁵¹ That is, the exercise involves identifying ideas in which judges have faith, and assumes that judges will, at least in the short run, act consistently within their own belief system.

⁵² Of course, precisely the opposite argument can be made — that is, that forced speech is even more demeaning to one’s sense of identity and exercise of autonomy in the marketplace. My point is that the formal arguments can be structured, not that they are in any sense at all determinative. And I realize, of course, that mandatory disclosure can be said to restrict expression in so far as it is impossible to say simultaneously what the government demands you say, and say what you would say without state intervention. The decision one reaches on this kind of argument depends on whether one chooses to conceive of the “package” of speech as a whole — which permits one to say that the state has restricted expression; or whether one chooses to conceive of the “package” of speech as consisting of two parts — which permits one to say that the state has not restricted expression, but has simply required additional expressive conduct. Of course, it is impossible to say which conception is the right one.

The likelihood that the court will view mandatory disclosure in this fashion is reinforced by the language on the constitutional values underlying the protection of commercial free speech in both *Ford* and *Irwin Toy*. The objective of most information-based regulation — that informed consumers are essential to the fair and efficient functioning of a free market economy⁵³ — is almost identical to Dickson C.J.C.'s idea that the protection of commercial speech is founded on the constitutional value of permitting Canadians to make informed economic choices, and thus through the market achieve autonomy and self-fulfillment.⁵⁴ Disclosure can be seen as facilitating the development of a competitive market-place, rather than as "substituting regulation for competition".⁵⁵

That is, mandatory disclosure helps to create those "autonomous and informed consumers" with whom the court is so concerned in both *Ford* and *Irwin Toy*. The objective of mandatory disclosure and the justification which the court uses in *Ford* for limiting governmental control of information are identical. If *Irwin Toy* manifests judicial concern with the consumer's need for truthful information, then regulation involving mandatory disclosure is consistent with the achievement of the judicial goal.⁵⁶

Even if information regulation is said to violate s. 2(b) of the Charter, there is a strong intuition that information-based product safety regulation will be particularly easy to defend and thus be "demonstrably justified" in accordance with s. 1 of the Charter. The not so "stringent standard of justification" of the *Oakes*⁵⁷ test will likely permit the governments to defend successfully Charter challenges.⁵⁸

⁵³ See, for example, Fair Packaging and Labeling Act, 15 U.S.C. (1976), ss. 1451-61.

⁵⁴ *Ford v. Quebec (Attorney General)* (1988), 54 D.L.R. (4th) 577 at p. 618, [1988] 2 S.C.R. 712.

⁵⁵ Breyer, *supra*, footnote 46, at p. 161.

⁵⁶ Moreover, mandatory disclosure of certain information on packages and labels is not, most would agree, a substantial infringement of producers' expressive rights. Perhaps Wilson J.'s words that not every trivial or insubstantial effect on one's rights constitutes a breach of the Charter, would be used by judges to justify upholding the legislation in these circumstances. See *R. v. Jones* (1986), 31 D.L.R. (4th) 569, [1986] 2 S.C.R. 284.

⁵⁷ This is the language used in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103 at pp. 138-40. Some argue that the test has been relaxed in *R. v. Edward Books and Art Ltd.* (1986), 35 D.L.R. (4th) 1, [1986] 2 S.C.R. 713, but the precise formulaic expression is hardly determinative.

⁵⁸ This is the approach, not surprisingly, which has been adopted in recent American

The second aspect of the proportionality test articulated in *Oakes* — presumably the most difficult to meet — requires that the government demonstrate that it violates one's rights "as little as [is reasonably] possible".⁵⁹ It is particularly well-framed to permit justification of information-based product safety regulation policies. As we have seen, requiring certain information to accompany products introduced into the market is traditionally regarded as a relatively non-intrusive regulatory instrument. Even the prohibition of certain information on a package or label presumably infringes one's freedom to operate in the market-place only marginally when compared to the alternatives — product design and performance standards and product bans.

More important than the formal reasons for the view that the status quo will not be affected by *Ford* and *Irwin Toy*, are the practical political realities of consumer product safety regulation. The picture drawn earlier of the operations of the federal Product Safety Branch leads to a conclusion that most information-based product safety regulatory initiatives are not presently in danger. The fact that regulators and representatives from the regulated enterprises co-operate to a large degree in policy formulation means that the resulting legislation is often not particularly damaging to large segments of the industry.⁶⁰ Even a cursory review of the information policies used in Canada now indicate

decisions which protect commercial speech, but build in a more relaxed standard of judicial review. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976), which rejected the distinction between commercial and political speech, but which went on to hold that commercial speech would not be protected in the same manner, nor to the same degree as other speech. See also, *Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York*, 447 U.S. 557 (1980).

The case has been criticized for largely the same reasons as the *Irwin Toy* decision. That is, expression deserves constitutional protection in so far as it is connected to effective self-government, and individual self-fulfillment through free expression. As Jackson and Jeffries argue, *supra*, footnote 8, at p. 6, the protection of commercial speech serves "aggregate economic efficiency and consumer opportunity to maximize utility in a free market — [but] these values are not appropriate for judicial vindication".

⁵⁹ *Oakes*, *supra*, footnote 57, at p. 139 S.C.R. See also, *Irwin Toy*, *supra*, footnote 47, at pp. 624-30.

⁶⁰ This point is developed in the American context in C.E. Lindblom, *Politics and Markets: The World's Political-Economic System* (New York, Basic Books, 1977). Michael Pertschuk, a former Chair of the Federal Trade Commission has written that government decision-making in the field of consumer protection has responded to the needs and demands of business, and that there has been a failure of equity in government decision-making affecting business and consumer. See Pertschuk, *supra*, footnote 28 at pp. 114-15.

that the full potential of mandatory disclosure to further the interests of consumers as not been realized.⁶¹

Larger industries, which have a greater influence on the regulatory process, are simultaneously more capable of absorbing compliance costs. These same companies are more likely to have an interest as repeat players, as well as the resources, to challenge regulatory action as compared to small businesses and importers who confront considerably more risks in complex regulatory schemes. Thus the incentive to challenge the provisions by those in the best position to do so is lowered as the regulations serve in some instances as effective barriers to entry into the industry.⁶² Furthermore, corporate actors in many industries welcome government regulations to the extent that regulations restore the confidence of the consumer in the safety of the product.⁶³

To an outsider, mandatory disclosure of product safety risks and prohibitions against disseminating information that is misleading or deceptive are clearly not in the interests of any particular industry participants. Nevertheless, the lack of serious enforcement of many of the regulatory policies, the interests of the most powerful in the industry in perpetuating the status quo, and the risks of increased negative publicity in relation to product safety, all combine to support a prediction that it is unlikely such provisions will be challenged in court.

Finally the existence of detailed socio-economic justifications of all new regulatory action in these areas since 1978 provides a powerful justificatory and legitimating weapon to the government. Confronted with the apparent rigour of the analyses and evidence of the delicate and rational balancing of costs and benefits that is much of modern regulation, the courts will likely defer to government in the case of most mandatory disclosure regulation.

⁶¹ Life-cycle costing is an area which has not yet been fully developed in Canadian regulatory policy. See Belobaba, *supra*, footnote 5, at p. 38.

⁶² This point was made about fair packaging and labelling legislation in the United States in the context of package size standardization. See Pertschuk, *supra*, footnote 28, at p. 147. Similarly, advertising bans have been said to create barriers to entry, and "so to solidify or magnify any monopoly power wielded by existing successful" firms. See R.H. Porter, "The Impact of Government Policy on the U.S. Cigarette Industry" in *Empirical Approaches to Consumer Protection Economics*, P.M. Ippolito and D.T. Scheffman, eds. (Washington, D.C., Federal Trade Commission, Bureau of Economics, 1984), p. 659.

⁶³ See P. Quirk, "The Food and Drug Administration" in J.O. Wilson, ed., *The Politics of Regulation* (New York, Basic Books, 1980), p. 193.

4. It Does Matter After All

I do not mean by all of this to be saying that the *Ford* and *Irwin Toy* decisions will have no significant influence on regulatory policy in Canada. General restrictions on advertising, which I have purposely set aside in this paper, will very likely suffer serious constitutional defeats. That is, the language in *Irwin Toy* is a clear signal that judges will be somewhat more aggressive in assessing legislation that prohibits the disclosure of certain information, or that prohibits advertising in general, in contrast to their response to regulation which requires the mandatory disclosure of specified information. The latter, of course, furthers the professed value which the court implies into the Charter — the creation of autonomous and informed consumers. The former, as one American jurist put it, involves covert state action to manipulate individual choice by depriving the public of information required to exercise their autonomy.⁶⁴

Second, if judges *really* demand that the regulatory agency adopt the least restrictive regulatory alternative in order to pass the impugned legislation under the *Oakes* test, there will obviously always be less intrusive information-based regulatory policies available to governments, including the provision of information directly by the government,⁶⁵ and the funding of independent agencies to produce information whether on a for-profit or a not-for-profit basis. That is, legislation which prohibits advertising generally, and perhaps more traditional mandatory disclosure policies as well, will be said to come within the Charter protection as defined in *Irwin Toy*, and may very well be struck down as being too intrusive.

Third, anyone who reads the Supreme Court's language in *Irwin Toy*, in respect of "vulnerable groups" who are vulnerable to seduction and manipulation,⁶⁶ must have serious doubts about the constitutional validity of information policies designed to "protect" adults from making choices about their own welfare.

⁶⁴ See *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, footnote 58, at p. 575.

⁶⁵ See, for example, the discussion of the information generation and dissemination activities of the American Consumer Product Safety Commission in F. Thompson and L.R. Jones, *Regulatory Policy and Practices* (New York, Praeger, 1982) p. 68.

⁶⁶ The court, in applying the first branch of the *Oakes* test, is required to say that the regulatory objective relates to concerns which are "pressing and substantial in a free and democratic society". See *Oakes*, *supra*, footnote 57, at pp. 138-9 S.C.R.

There is certainly a strong sense that future courts will be asked to limit *Irwin Toy* to the protection of children and similar vulnerable groups.⁶⁷ Where the alleged regulatory beneficiaries are adults and not children, the pressing and urgent reasons to justify regulating speech conduct will be somewhat harder to come by. While this will not of itself mean that the legislation will fail, it will almost certainly justify a higher degree of scrutiny in the latter stages of review under s. 1.

A fourth concern is an increasing sense that claims that mandatory disclosure policies are an effective regulatory technique cannot always be defended. While the literature in this area is somewhat rudimentary, there are several studies which demonstrate that consumers often do not take advantage of the information they are provided with in purchase transactions.⁶⁸ The difficulty with making greater use of information policies is that it assumes that we can convey extremely complex and uncertain technical data, showing some increased cost or risk, in an unambiguous yet accurate and useful manner across enormous numbers of relatively insignificant consumer transactions. The fact that many product safety risks are imposed on those who are not parties to the original purchase (externalities or spillovers to economists) suggests a stronger form of regulation may be necessary. Even the most outspoken opponents of standard setting and outright product bans recognize the need for them in

⁶⁷ The language in *Irwin Toy* is reminiscent of Blackmun J. who in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, *supra*, footnote 58, railed against its "highly paternalistic approach" and counseled the opening of "the channels of communication".

⁶⁸ See D. Dewees, "The Quality of Consumer Durables: Energy Use" in D. Dewees, ed., *The Regulation of Quality*, *supra*, footnote 33, at p. 207. E. Belobaba, in *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (Ottawa, Consumer and Corporate Affairs, 1983), argues that many consumers neither read nor care about the consumer product warranties, and that information disclosure requirements and truth in warranty legislation have not had much of an impact on consumer decision-making.

That is not to say, of course, that information policies are ineffective *per se*. See R.A. Posner, "The Federal Trade Commission's Mandated-Disclosure Program: A Critical Analysis", in H. Goldschmid, ed., *Business Disclosure: Government's Need to Know* (New York, McGraw-Hill, 1979). Posner finds that after the cigarette companies starting disclosing tar and nicotine levels on their packages the market share of the cigarettes in the lower categories climbed dramatically. See also Pertschuk, *supra*, footnote 28, at pp. 148-9, who describes the effectiveness of information disclosure in the case of automobile gas mileage ratings, energy consumption of consumer durables and the tar and nicotine levels of cigarettes.

certain instances.⁶⁹ The question becomes not whether but when and how.

Finally, one should not think that courts will necessarily agree that “concrete, material facts found in advertising concerning price, quality, and product safety [are] . . . matters which are . . . ascertainable by the purveyor and also by the regulator”.⁷⁰ The presentation of socio-economic impact analyses of proposed regulatory activity will generate an image of a rationalist model of regulation — but the reality of regulation is necessarily much less coherent and much more complex than the model. The reality of regulation may mean that governments will have only the most rudimentary cost-benefit analyses, if they have any at all, to defend violations of commercial expression under s. 1 of the Charter.

I suspect that it is for this reason that the Quebec government chose not to file numerous reports and studies used by it both in enacting the advertising ban and subsequently in reviewing its operation — an omission noted by the majority in *Irwin Toy*.⁷¹ I suspect that any regulatory agency would have to hesitate before presenting a judge with a cost-benefit analysis of regulations under the federal Transportation of Dangerous Goods Act,⁷² which calculated the value of a human life saved as \$500,000 *corrected from American dollar values and for inflation*.⁷³ The problem becomes transparent when one considers an assessment of flammability standards under the federal Hazardous Products Act, which took a range of values approaching \$1,000,000 for the expected 17 lives saved as a result of modified mattress standards.⁷⁴ The apparent objectivity and rationality of this approach are further compromised by evidence that much of the information required for the analysis is provided by industry representatives⁷⁵ who by definition have an interest in minimizing government intervention.

⁶⁹ Bardach and Kagan write that “of course an information strategy is . . . inappropriate for certain problems and certain objectives.” See, *supra*, footnote 3, at p. 248.

⁷⁰ See Sharpe, *supra*, footnote 48, at p. 236.

⁷¹ See *Irwin Toy* (1989), 58 D.L.R. (4th) 577 at p. 618, [1989] 1 S.C.R. 927.

⁷² R.S.C. 1985, c. T-19.

⁷³ See *Transport Canada, Impact Assessment, Transportation of Dangerous Goods Regulations* (Ottawa, Transport Canada, 1981), at VI-22.

⁷⁴ See *Socio Economic Impact Analysis of the Proposed Regulations Concerning Mattress Flammability*, Secor Inc. (Montreal, 1978), p. 36. The concern is not only with valuing social benefits but in discounting the benefits enjoyed by future generations. See E.M. Gramlich, *Benefit-Cost Analysis of Government Programs* (Englewood Cliffs, N.J., Prentice-Hall, 1981), Chapter 6, “Valuation of Resources Used or Benefits Created at Different Times”.

⁷⁵ The SEIA produced in the aftermath of the 1.5L bottle ban contacted 55 sources, all but

Equally significant will be evidence, available in almost all cases, that product safety regulation is motivated by a complex array of institutional, economic, social and political considerations which come together to move governments.⁷⁶ The realities of regulation may shatter arguments that the decisions are in some sense technical and thus beyond the institutional competence of the courts to review in most cases.⁷⁷ The statement in *Irwin Toy* that all the regulatory agency has to do is to have “had a reasonable basis ... for concluding that the [regulatory action] ... impaired freedom of expression as little as possible given the government’s pressing and substantial objective”,⁷⁸ is bizarre if it means what it says — that all the regulatory agency has to do is demonstrate that it had evidence to justify its own conclusion that its actions were constitutional!

Conclusion

The consequences of treating commercial speech as a constitutional right go beyond my concerns that we will have restricted a range of possible future choices by regulators to develop more effective information regulation policies. Paradoxically, the decision to give some protection to commercial expression may justify more aggressive, and perhaps unjustifiable, use by regulators of *more* intrusive performance and design standards and product bans. Despite being more interventionist, so long as the court has not yet “interpreted” economic liberties into the Charter, product bans do not appear to be subject to constitutional review. On the other hand, the adoption of new more intrusive and effective information policies may be discarded despite the fact that Charter attacks on such legislation may in the end be unsuccessful.

One would be foolish to take my conclusion — that most

seven of them connected the soft drink industry. See Department of Consumer and Corporate Affairs, “Proposed Order and Regulations respecting glass containers of a capacity of 1.5 litres or more containing a non-alcoholic carbonated beverage”, *Can. Gaz. Part I*, Vol. 114, No. 31, August 2, 1980, p. 4574.

⁷⁶ See “Ad ban motivated by politics, tobacco firm tells court”, *Globe and Mail*, September 26, 1989, p. B 9. See also, D. Cohen, “The Public and Private Law Dimensions of the UFFI Problem: Part I” (1983-84), 8 C.B.L.J. 309; Breyer, *supra*, footnote 46, at pp. 34-5.

⁷⁷ It all depends of course on the attitudes which judges bring to demands that they “assess competing social science evidence”. See *Irwin Toy*, *supra*, footnote 71, at p. 626.

⁷⁸ *Ibid.*

existing information-based product safety regulation is not in imminent danger of judicial nullification — as an excuse for complacency. As we have seen, many of the reasons for this conclusion are cause for concern: the absence of a demonstrated political will to push reform further, the power of business interests to influence the regulatory process, the uncritical use of cost-benefit analysis in the decision-making process, and the lamentable enforcement record of many of the information-based product safety regimes in Canada combine to suggest that the impact of the Supreme Court's creation of constitutionally protected corporate commercial speech will perpetuate a status quo which has little to support it. Simultaneously, cases like *Irwin Toy* and *Jones* place potential reforms focusing on rigorous generalized advertising prohibitions⁷⁹ at serious risk of constitutional challenge. Like most of what we call law, the Charter will likely operate openly to keep the world as it is; it will equally operate insidiously against the making of a better world.

⁷⁹ Other examples of information-based regulation which may be at risk include strategies like that adopted in s. 52(1)(b) of the federal Competition Act, which requires information disseminated by producers to be verified by adequate and proper tests. See Competition Act, R.S.C. 1985, c. C-34, as amended.