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THE REGULATION OF GREEN ADVERTISING: THE STATE, THE MARKET AND THE ENVIRONMENTAL GOOD*

DAVID S. COHEN†

I. INTRODUCTION

At one time, popular visions of political and economic life were simple. There was a myth that governments delivered public goods—national defence, criminal and civil justice, police protection, water and sewage infrastructure, education, and social welfare services, among others—and the formal instrument employed by governments to do this was “law”—direct commands of the state backed by its sanctions. There was, however, a second myth, that the private sector was delivering private goods—automobiles, consumer durables, chemicals, food products, capital equipment, among others. The instrument employed by the private sector to deliver these goods was the market and its aggregate of capital managed by corporate managers. Life was good, or, at least, it was simple.¹

About 100 years or so ago, depending on where one looks and how one wants to differentiate the private sphere from the public, it can be said that governments in Canada began delivering private goods as

* I would like to thank Brian Cheffins, Murray Rankin and Catherine Davergne for their comments on earlier drafts. As well, I would like to thank Paul Fairweather and Alison Taylor for their invaluable assistance in writing this paper. Without their energy and stimulating critique the paper would not have been written. In particular, I would like to thank both of them for their contribution to the discussion of “preference shaping and propaganda” in Part 6 of this paper. It is my sincere hope that they will pursue the ideas there expressed. Of course, any errors are my responsibility.

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¹ Myths, while necessary, often obscure more than enlighten. Regulatory history demonstrates that government has involved itself in the regulation of the marketplace and the “private” sector, particularly as an arbitrator of conflicting economic interests since Confederation (see C. Brown-John, *Canadian Regulatory Agencies* (Toronto: Butterworths, 1981) at 12). That is, what we call private and public is often nothing more than a reflection of what we are comfortable with at any point in history; or what we believe ought to be the difference between our individual autonomy and our community identity.

well—rail transportation², post-secondary education³, broadcast services,⁴ health care,⁵ among others. This has continued, more or less without interruption, through to the present day: Air Canada was established in 1937; the Canada Mortgage and Housing Corporation in 1946; Petro-Canada in 1974.⁶ These are notable examples among the 259 wholly government-owned or effectively government-controlled enterprises all of which, in their turn, owned or controlled 268 subsidiaries in the mid-1980s.⁷ Governments also began to use a much more

² In fact, the first modern American regulatory agency, the Interstate Commerce Commission, was established in 1887 specifically to oversee and regulate the burgeoning system of public and private railroads in that country (see S. Breyer, *Regulation and Its Reform* (Cambridge, Mass.: Harvard University Press, 1982) at 1). The Canadian equivalent, the Board of Railway Commissioners (which is similarly seen as the first modern regulatory agency in this country), was not created until 1903. Previous to that time, the regulation of Canadian railroads was handled by the Railway Committee of the Privy Council (see Economic Council of Canada, *The Emergence of the Regulatory State in Canada, 1867 - 1939* (C. Baggaley) (1981) at 77-79).

Between 1896 and 1913, the Canadian government's current expenditures quadrupled and developmental projects (railroads and other public and commercial avenues of transport) accounted for over half the increase. Almost all the federal debt incurred during the period was for railways, canals, harbours and river improvements (*ibid.* at 43).

³ Confederation and the joining of Canada by the western provinces in 1867 resulted in the establishment of a number of non-denominational state-run institutions of higher learning. Even prior to that time, the universities in Eastern Canada, most of which were independently founded with religious affiliations, were receiving some public monies (see Joseph Katz, *Society, Schools and Progress in Canada* (Oxford: Pergamon Press, 1969)).

⁴ Governments have been involved with the regulation of the airwaves since the first successful 'wireless' broadcasts in the final decade of the nineteenth century. Publicly-owned broadcasting in Canada was begun by the government of Manitoba in 1923 upon the demise of the only two radio stations in the Province, both of which had been private enterprises. The Canadian Broadcasting Corporation came into being on 2 November 1936 with the passing of the *Broadcasting Act* (S.C. 1936, c. 24). This formalized the rather loosely formed network of radio broadcasting extant to that time (see Frank Foster, *Broadcasting Policy Development* (Ottawa: Franfost Communications Ltd., 1982)).

⁵ The first public health agencies in Canada came into being in the first half of the nineteenth century to cope with devastating epidemics of communicable diseases, such as the outbreak of cholera in 1832 which occurred with the arrival of large numbers of Irish immigrants. As the existing health services were unable to address the large numbers of sick and dying, the epidemic spread through the colonies. In 1832-33, the legislatures of Lower Canada, Nova Scotia, New Brunswick, Upper Canada, and Newfoundland passed legislation establishing local boards of health to control the outbreak. A central board of health was established in 1849 and more local boards were formed through the years leading up to Confederation in 1867. Governments in Canada have continued to the present day to provide services such as communicable disease control, food and drug control, maternal and child health care, dental health care, health education services, nutrition services, public health laboratories, and research and statistics. Public hospitals and, as is well known, programs of publicly subsidized medical insurance have been provided (see Canada, Royal Commission on Health Services, *Report* (chair: Justice Emmett Hall) (1964)).

⁶ Ownership was also used to restructure or revitalize key industries: the Canadian National Railway in 1919; the Cape Breton Development Corporation in 1967; de Havilland in 1974; Canadair in 1976; and Fishery Products International and National Sea Products in the early 1980s (see K. Stein, "Canada's Programme for Privatization" in M. Walker, ed., *Privatization: Tactics and Techniques* (Vancouver: Fraser Institute, 1987) at 70).

⁷ Allan Tupper and G. Bruce Doern, "Canadian Public Enterprise and Privatization" in A. Tupper and G. Bruce Doern, eds., *Public Corporations and Public Policy in Canada* (Montreal: Institute for Research on Public Policy, 1981) at 7. The authors go on to state that "[t]he 259

complicated and sophisticated range of regulatory instruments to deliver this expanding set of public benefits.⁸ In particular, governments started to use markets and independent corporate structures to produce and allocate at least some of these goods and services.⁹ While all of this was going on, industry continued to deliver their private goods, competing head-on with government enterprise in some cases, in others, enjoying the comparative simplicity of competing only with other private-sector actors.

Recently, an increasingly cynical and disappointed public has started to demand reconsideration of the relative roles of public managers and private capital. Demands have been made that governments stop trying to pretend that they can be capitalists. The general inability of governments to operate effectively, the absence of market discipline to constrain and direct public managers, the difficulty in predicting public demand without markets, the failure of substantive equality ideology to support non-market intervention, and the fiscal constraints of deficit financing all have led to neo-conservative strategies. The message, in its most extreme form, is simple: governments should leave private-sector activities to the private sector and restrict themselves to producing and delivering only those goods that the market cannot adequately create

parent firms accounted for 26% of the net fixed assets of all Canadian corporations but less than 5% of total employment in the economy. They account for over 35% of total government employment but only about 16% of total public sector employment (which includes the education and hospital sectors)."

⁸ Governments have a great variety of sanctions, incentives and other tools at their disposal designed to help achieve their goals. These include the authority to spend money; application of threats of physical force (police and prison); initiation of litigation; creation of regulations; judicial or quasi-judicial functions; criminal sanctions; licensing authority which typically includes the authority to suspend or revoke the licence; compensation awards (workers' compensation boards, for example); and powers of investigation and disclosure (see Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy*, (Boston: Little, Brown, 1985) at 3-6).

Stein states in M. Walker, *supra*, note 6 at 72 that

Government has at its disposal a number of instruments to implement public policy. It can spend, it can tax, it can legislate and regulate, and it can own. All of these instruments have their relative strengths and weaknesses. All have to be carefully assessed and reassessed in terms of their contribution to national objectives.

⁹ Breyer and Stewart discuss direct government provisions of goods and services as an administrative function of modern government. Traditional examples include the maintenance of the post office; the construction of public works such as highways, dams and navigation improvements; the provision of police, fire and other protective services; and funding of public education. More recent additions include mass transit, communications satellite systems, government research and development programs, public hospitals and public housing. There are also a number of custodial functions carried out by government including the maintenance and administration of prisons and mental hospitals. In order to carry out these various responsibilities, government must hire personnel, acquire goods and services, and manage government-owned land and other resources. These activities are traditionally referred to as "proprietary" activities (analogous to the activities of private proprietors) as contrasted with regulation, taxation, and other functions carried on exclusively or primarily by government (*ibid* at 3).

and distribute, such as a standing military, a criminal justice system and so on.

This brings us to what may be the most recent development in the transformation of regulatory policy—the abdication by the government of what have been viewed traditionally as its appropriate responsibilities of delivering public goods and services. Until recently, privatization has involved government's returning of responsibility for delivering private goods to the private sector. This represents a much more dramatic stage of development. Within government, neo-conservatives have argued that if government has done such a poor job of delivering private goods, perhaps they have done an equally poor job of delivering public goods. Simultaneously, private enterprise has seen the opportunity to profit from government divestiture. Why should penal institutions be public? Why should health care facilities be public? Why should water and sewage facilities be public? And, most important from the perspective of environmentalists, why should environmental regulation and the delivery of environmental benefits be public?

In this paper I explore this most recent development in regulatory policy and, in particular, the role government plays when it chooses to use private markets (consumer, institutional and corporate) as regulatory instruments to produce and allocate environmental benefits. The privatization of environmental regulation by employing markets to deliver environmental benefits does not involve the implementation of public policy through executive or legislative action. Rather, it is achieved through a public choice to privatize the delivery of environmental regulation by permitting or encouraging decentralized economic power to respond to consumer demands for environmental quality.¹⁰

¹⁰ Privatization of environmental regulation reflects and is the product of several inter-connected ideas which have come together as we end the twentieth century. First, it reflects one application of the idea popularized by the Brundtland Commission — that economic decisions must integrate environmental considerations. The concept of "sustainable development" can be used to demand that environmental policy must reflect economic imperatives. This interpretation is attractive to those who advocate privatization initiatives which can be justified on the ground that environmental policy, through its allocation to the private sector, should be integrated with economic policy.

Second, privatization addresses the intractable problem faced by public choice theorists — that of identifying and measuring demand for public goods which are not delivered through market mechanisms. Using markets to deliver environmental quality assumes that there is a substantial number of individuals who are demanding improvements in their local and global environments, and who will express that demand in their economic decisions. The vast untapped demand for environmental benefits can be harnessed to the dynamically efficient and creative engine of industry for the benefit of us all. Capital markets, industrial commodity, inventory and capital equipment markets, consumer markets and labour markets can all be exploited to deliver the environmental goods, it is said.

Third, privatization means that the production of environmental policy is measured in market transactions — investment in waste management firms, increased employment and thus aggregate income in the environmental sector, investment in research and development to

In Part I of this paper I describe the dramatic transformation during the past decade in our thinking about the relative place of central bureaucracies and governments in environmental regulation, and in our selecting of one or the other to deliver environmental benefits demanded by citizens as consumers.¹¹ But that metamorphosis has had as a catalyst another paradigmatic shift—to the recognition that our traditional conception of what we mean by the environment and its relationship to the market is no longer effective in developing contemporary public and private environmental policies.

Until recently, popular conceptions of the environment have been “non-economic,” which is to say that environmental issues have been framed as the preservation of rivers, clean ground-water for human consumption, pristine views, peaceful parklands and so on. Similarly, the economy has been conceived of in “non-environmental” terms; that is, economic issues have been framed in terms of employment and productivity levels, internal rates of return, costs of capital, foreign trade surpluses, GNP, exchange transaction aggregates and others.

The recent transformation of regulatory theory demonstrates an integrated image of the economy and the environment. It is not, however, the simplistic linking of one with the other that characterizes many discussions of sustainable development. Integration of the economy with the environment means that we must come to understand these two things as one and the same.

develop products and equipment to address environmental concerns, purchases of equipment designed to reduce environmental impacts in manufacturing, and increased sales of goods and services which generate environmental benefits. Thus privatization of environmental policy means increased employment in the private sector, increases in gross national product, and associated measures of economic activity. By contrast, virtually all other “public” instruments to which we might resort in order to generate these environmental goods means increased taxation.

Fourth, privatization means that the delivery of the environmental goods is performed by corporations whose performance is measured by output in market transactions. It means that we are using mechanisms which incorporate market discipline to control employment and managerial decision-making, thus taking advantage of the alleged internal efficacy of private bureaucratic organization. Delivering environmental quality through markets means we trigger competition among decentralized actors to maximize private gain through the selection of products by consumer and corporate purchasers. The competition is enhanced through the ability of corporate actors to take advantage of regional differences in demand for environmental quality, and by the ability of corporations not only to deliver a fixed order of environmental quality efficiently, but also to act dynamically in developing new methods to address environmental concerns.

Finally, the decision to use markets as a delivery mechanism, while it usually results in inegalitarian discrimination based on wealth, does not do so in the case of purchase decisions which are intended to benefit the community at large. The beneficiaries of private market transactions motivated by environmental concerns are not only the primary purchasers, but more important, are the unknowable members of the community—who benefit regardless of assets or income.

¹¹ As I point out later, one can argue that the behaviour, preferences and values of consumers acting in markets is not at all like the behaviour, preferences and values of those same citizens acting as voters and member of the body politic. See *infra*, note 39.

One can depict the world in two ways: either as a static image representing the current state of the world or as a dynamic image representing the world in transformation. When one thinks of the environment, it is as a static image of the collection of its biophysical resources, comprising human skills and training, both intellectual and manual; diverse natural resources, including soil, air, water, forest, mineral, biological; industrial outputs and processes, and a host of others, some valued in their own right, some valued by reason of their utility to humankind. When one thinks of the economy, however, it is as a dynamic image of its institutions, comprising various markets, capital, product, and service; market players, corporate and personal; bureaucracies, centrally or decentrally directed; and others,¹² through all of which the same collection of biophysical resources is preserved, transformed, combined, processed, allocated and then distributed to corporate entities and human beings.¹³

The decision to privatize environmental regulation, thereby using the market to deliver environmental benefits, recognizes that through all of our personal, professional and corporate decisions we are continuously creating and transforming the environment. The use of markets to deliver environmental benefits recognizes that consumers are environmental planners.¹⁴

At one level, it does not matter whether we can bring ourselves to admit the duality of our identities; the failure of our individual and collective imagination is irrelevant. In purchasing consumer goods for personal use, capital equipment and supplies for industrial use; in making choices about inventory sources; and in choosing among alternative sources of inputs for manufacturing processes, purchasers are making decisions that, individually and collectively, shape and deter-

¹² One of my colleagues who read this paper pointed out, quite correctly, that this is only a partial view of the economy and environment. The transformatory apparatus represented by markets and command economies are only a subset of a range of natural transformatory processes including geological, evolutionary, and other physical and biological processes which are constantly creating new environments.

¹³ It has been a mistake to view the environment and the economy as two separate entities whether one says they are related or unrelated to one another. The economy and the environment are not two different things "linked" in the sense that we ought to think of one when we think of the other. Rather, the economy and the environment are one "thing" seen through two different lenses. That being so, implementing environmental policy should not mean thinking that we must trade one off against the other. Thus the challenge which confronts us is not the environment or the economy; it is how we can come to think about the economy and environment as one.

¹⁴ The assumption that an individual can make beneficial environmental choices at the same time as she is acting as a consumer should raise a number of concerns. I will later discuss at some length the central problems associated with this idea and the difficulties of attempting to assume a dual role of this nature.

mine the environment.¹⁵ That being so, the choice we face is either to remain blind to the environmental impact of our market decisions or to begin to develop processes and systems to inform ourselves of the extent and nature of that impact, thereby permitting us to make adjustments consistent with broader societal goals. Consumers can be good environmental planners or poor environmental planners. The fact that such planning is unpremeditated is irrelevant in considering its environmental consequences.

In Part III, I offer a number of reasons why we ought to be cautious before we completely trust markets to act as our most appropriate regulatory instruments for generating environmental benefits. In particular, I argue that markets that allocate and distribute environmental quality will likely be dysfunctional, both because of the self-interested behaviour of producers and because of the incapacity for self-correction of the market due to informational asymmetries and the inability of purchasers to monitor environmental claims. In Part IV, I explain, by way of numerous examples of green advertising from the past three years, how environmental marketing and advertising can be misleading.

I argue in Part V that the state must continue to be implicated in formulating responses to the dysfunctional character of markets that hampers their ability to address issues of environmental quality.¹⁶ In particular, I argue that if markets are employed to deliver environmental benefits, we will certainly continue to require government involvement in regulating misleading advertising, and perhaps in developing more creative and effective solutions to the market dysfunction that may characterize this form of environmental regulation. But ultimately, reliance on consumer goods markets to generate environmental benefits means that we must understand the ways in which we come to think about the environment.

In Part VI, I suggest that the success of this privatization initiative will depend, in the end, on individual and collective preferences as they are manifest in markets. If we are going to use real markets to generate environmental benefits, we will have to come to terms with our concerns as citizens and our responsibilities as inhabitants of the world we share. We cannot blind ourselves to the reality that the ways we think about global warming, deforestation, incineration at sea, and other ecological ills is a product of a complicated environmental acculturation process

¹⁵ Again, the language we use to express these ideas is critical. What one should be saying is that the decisions of purchasers are the environment!

¹⁶ Most abstractly, the state permits this form of regulation rather than deploying its available resources in alternative regulatory endeavours. As well, the market and its associated components — contracts, trademark protection and the like, can only operate if the state, through the legal system, recognizes and protects contract expectations and property rights.

that we must be able to describe, evaluate and ultimately shape if we are to survive.

II. THE TRANSFORMATION OF ENVIRONMENTAL REGULATION¹⁷

For the most part, the regulation of industrial and manufacturing activities that have long- or short-term negative impacts on the natural environment has been premised on a "command-and-control" model, that is, governmental sanctions as prescribed for environmentally harmful behaviour. In the classic sense, command and control means the establishment of a standard or a rule along with a corresponding stipulation of a penalty for violation.¹⁸ The penalty may be of a quasi-criminal nature, whereby the offender is made subject to the criminal justice system,¹⁹ or it may involve ticketing,²⁰ administrative penalties,²¹ suspension or cancellation of permits,²² injunctions or restraining orders²³ or some combination thereof.

¹⁷ See M. Rankin, "Economic Incentives for Environmental Protection: Some Canadian Approaches" (1990) 1 Can. J. of Env. and Practice. I am grateful to Professor Rankin for much of the detail in the following discussion.

¹⁸ The choice of instrument and the setting of the standards or regulations has not been an "arms-length" process:

Traditionally, principles for environmental protection have been arrived at largely through a process of negotiation between the regulators and the regulated industry. Under the Government Organization Act, 1970 (R.S.C. 1970-71, c. 42 as amended by the *Government Organization Act*, 1979, R.S.C. 1978-79, c. 13) the federal Minister of the Environment was empowered to initiate and recommend programs to promote the establishment or adoption of objectives or standards relating to environmental quality or pollution control. The primary agency responsible for this mandate has been the Environmental Protection Service (EPS) of the Department of the Environment.

Constance D. Hunt, H. Ian Roundthwaite, and J. Owen Saunders, "Environment Protection and Resource Development: Legislation, Policy and Institutions" in B. Sadler, ed., *Environmental Protection and Resource Development: Convergence for Today* (Calgary: University of Calgary Press, 1985) at 12.

¹⁹ This generally tends to result in the imposition of fines, although a variety of sentencing options are open upon the entering of a conviction. For example, property may be forfeited; licences, permits and other privileges may be suspended or revoked; probation orders may be issued; restitution and compensation may be ordered; or imprisonment may result. See M. Rankin, *supra*, note 17.

²⁰ Various statutes such as the *Fisheries Act*, (R.S.B.C. 1979, c. 137), the *Pesticide Control Act*, (R.S.B.C. 1979, c. 322), the *Waste Management Act*, (S.B.C. 1982, c. 41), and the *Wildlife Act*, (S.B.C. 1982, c. 57), call for fines in the order of \$100 to \$200 for stipulated offenses. *Ibid.*

²¹ Often called civil penalties, these may be defined as administratively-imposed civil money penalties that are authorized under a statute. An example of this type of penalty can be found in the *Workers' Compensation Act*, (R.S.B.C. 1979, c. 437, s. 75) where an assessment may be made against an employer who allows or creates dangerous working conditions. *Ibid.*

²² This option is provided, for example, in s. 20 of the *Water Act*, (R.S.B.C. 1979, c. 429), and in s. 23 of the *Waste Management Act*.

²³ This remedy enables the Minister to take action in the Supreme Court of a province to prevent the offender from carrying on activities contrary to statute or the common law. For example, see s. 24 of the *Waste Management Act*, which empowers the Minister to seek a restraining order in respect of certain activities involving special wastes. *Ibid.*

Although some commentators have defended the status quo of command and control,²⁴ there is an increasingly vocal and widespread call for the implementation of new regulatory strategies based on economic incentives and on greater utilization of the marketplace. Commentators have noted a number of drawbacks to a command-and-control model:²⁵ the high abatement costs that become incentives to continue polluting rather than to begin complying with regulations; the lack of incentives to continue reducing pollution after specific emission standards are met; the lack of incentives to ensure that industrial or municipal treatment facilities are operated efficiently and effectively; enforcement delays, where recalcitrant polluters defer compliance indefinitely through the use of built-in appeal mechanisms. As well, the injunctions and other relief granted are not easily adjusted to suit either the severity of the violation or temporary economic conditions, and the fines that are levied tend to be counter-productive to the goal of environmental protection.²⁶

One can identify a number of alternatives to the traditional regulatory policies, either in place or recommended, in much of North America. These include surety bonds,²⁷ emission and effluent charges,²⁸ transferrable emission rights,²⁹ delay penalties and financial incentive

²⁴ A particularly cogent defence of the current model of regulatory practice can be found in H. Latin, "Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine-Tuning' Regulatory Reforms," (1985) 37 *Stan. L. Rev.* 1267. The author cites decreased information collection and evaluation costs, greater accessibility of decisions to public scrutiny and participation, increased likelihood that regulation will withstand judicial review, reduced opportunities for manipulative behaviour by regulated parties, and decreased likelihood of social dislocation and "forum shopping" resulting from competitive disadvantages between geographical regions or between firms in regulated industries as advantages of the current system over those proposed by economists and others. Latin, *supra* at 1271.

²⁵ See Peat Marwick and Partners, "Economic Incentive Policy Instruments to Implement Pollution Control Objectives in Ontario" (1983). M. Stone, "Pricing Pollution: Revising British Columbia's Waste Discharge Permit Fees," (Victoria: B.C. Ministry of the Environment, 1990).

²⁶ M. Rankin, *supra*, note 17; Bruce A. Ackerman and Richard B. Stewart, in a reply to Latin, *supra*, note 24, "Reforming Environmental Law" (1985) 37 *Stan. L. Rev.* 1333; D.N. Dewees, "Regulating Environmental Quality" in D.N. Dewees, ed., *The Regulation of Quality: Products, Services, Workplaces, and the Environment* (Toronto: Butterworths, 1983) at 149.

²⁷ A polluting firm or municipality would be required to deposit a sum of money with a secure governmental or private financial institution at the time an abatement program is agreed upon. As the program is completed, the money is refunded until it is paid back in full. Failure to meet deadlines or to achieve the specific results targeted could result in forfeiture of the monies.

²⁸ A comprehensive survey and assessment of the North American and international experience with emission fees is contained in M. Stone, "Pricing Pollution: Revising British Columbia's Waste Discharge Permit Fees" (Victoria: B.C. Ministry of the Environment, 1990) at 132. See also R. Hahn, "An Evaluation of Options for Reducing Hazardous Waste" (1988) 12 *Harv. Environmental Law Rev.* 213.

²⁹ The most well known of the emission trading programs now operating is that established by the United States Environmental Protection Agency in the early 1980s. See 44 *Fed. Reg.* 71779 (Dec. 11, 1979) (Original Bubble Policy) and Revisions to EPA's offset policy, *Fed. Reg.* 3274

schemes,³⁰ tax incentives,³¹ and other efforts to harness market forces, such as government procurement policies.³² In the end, the array of economic instruments and other non-coercive governmental programs available to generate environmental benefits is limited only by the imagination of the regulator.³³

The utilization of the marketplace for the furtherance of the environmentalist agenda offers a number of previously unexplored advantages. The basic case for the market solution lies in its flexibility:

its ability to guarantee the maximum of environmental improvement for any *given amount* spent on it, or, to view it the other way around, its ability to guarantee the minimum cost for any given amount of environmental improvement. Analysis of the causes of environmental degradation (or waste of

(January 16, 1979); 45 Fed. Reg. 52676 (August 7, 1980) and 51 Fed. Reg. 43814 (Dec. 4, 1986) (Final Emissions Trading Policy). By 1986 the EPA had directly approved or proposed to approve 50 bubbles, saving users an estimated \$300,000,000 over the cost of conventional controls. See Environmental Protection Agency, "Emissions Trading Status Report," January 1, 1986. See generally, R. Hahn and L. Hester, "Marketable Permits: Theory and Practice," (1989) 16 Ecology Law Quart. 380.

³⁰ Under such schemes, emission standards, schedules and deadlines would be established by the Ministry in the usual manner with prosecutions, fines and the like available. Firms would be liable for predetermined penalties or assessments if they miss deadlines, allowable emission levels are exceeded or monitoring or reporting requirements are breached.

³¹ These might include product taxes, as well as modifications to income taxes. See M. Stone, "Environmental Excise Taxes: Options for British Columbia (Victoria, British Columbia, Ministry of the Environment, 1990). A recent Canadian initiative in this area is an amendment to the *Income Tax Act*, (S.C. 1970-71-72 as amend. c. 63) permitting an accelerated capital cost allowance for firms that install pollution abatement equipment. This might be extended to similarly reward changes in a firm's production processes which achieve the same result.

³² A recent government initiative in many jurisdictions is the development of government procurement policies which demand that suppliers supply products which are environmentally preferred as compared to substitutes. One example of government leadership in Canada is the policy recently adopted by the City of Winnipeg which has developed a procurement policy to encourage the use of products "that have the least harmful effect on the environment . . .". See "The City of Winnipeg Purchasing Policy with Respect to Sustainable Development and Environmental Issues" (1990).

The Federal government's Green Plan, for all that it has been criticized, includes a clear signal to the effect that the Federal Government will develop a Federal Code of Environmental Stewardship which will, among other things "ensure that environmental considerations are integrated into purchasing policies and practices." Canada's *Green Plan for a Healthy Environment*, (Government of Canada, 1990) at 163. In the United States under s. 6002 of *The Solid Waste Disposal Act*, as amended by the *Resource Conservation and Recovery Act* (1976), all purchases exceeding \$10,000 of certain designated items must contain minimum percentages of recovered materials. The Environmental Protection Agency has set guidelines for concrete containing fly ash, lubricating oils, re-refined oil, retread tires, and building insulation products.

³³ The United States Environmental Protection Agency, for example, in addition to adjudicating violations of environmental legislation, "imposes civil penalties for violation of certain regulatory requirements; grants and revokes licenses for the marketing and use of pesticides; monitors and publicizes pollution levels throughout the nation; issues general regulations specifying required pollution-control measures; inspects polluters' records and operations; makes substantial grants for municipal waste-treatment plant construction and for environmental research; utilizes the environmental impact statement process of the National Environmental Policy Act to influence the environmental policies of other governmental agencies; and so on. Breyer and Stewart, *supra*, note 8 at 6.

natural resources) is based on what economists have long known in theory, and have often observed in practice: when individuals have property rights in a resource, they tend to use it less wastefully than when the resource is held in common. The foundation of most market-based techniques is to force users to calculate the social consequences of their use of a common-property resource by monetizing those consequences and imposing that cost on the firm, or to create property rights where these would not otherwise exist.³⁴

Even a cursory review of regulatory developments over the past decade indicates that calls for the privatization of environmental regulation have moved through several stages. The first stage was the use of incentives—effluent charges and the like—reflecting, simultaneously, market ideology and pragmatic instrumentalism. The most recent stage in this metamorphosis is that of using the markets themselves to deliver the environmental goods and, in particular, using markets for goods and services to respond to demands for environmental quality.³⁵

III. THE PROBLEM WITH MARKETS

The privatization of environmental regulation through the use of markets cannot, however, be taken to be the entire game, and there are a number of disturbing reasons why such a policy may ultimately fail. First, there is a certain internal contradiction in a policy that operates through goods and services markets while attempting to reduce patterns of producer and consumer consumption.³⁶ Specifically, producers wishing to maximize profits can hardly be expected to decrease inputs³⁷ while purchasers attempting to maximize their utility are being asked to consume less. There is a necessary contradiction between a policy that

³⁴ Richard G. Lipsey, "Greening by Market or by Command?: Rapporteur's Report and Comments" in G. Bruce Doern, ed., *The Environmental Imperative: Market Approaches to the Greening of Canada* (Toronto: C.D. Howe Institute, 1990) at 118.

³⁵ Such a shift is not discernible in any governmental programs, policies or regulatory schemes. The lack of such intervention is, of course, further evidence that governmental will is manifest in allowing the consuming public to determine the amount of environmental benefit through the marketplace. This idea is further reinforced by the massive expansion in 'enviro-marketing' practices by private enterprise, and the level of success which they are experiencing.

This is not to suggest that there is no further place for governmental regulation. Strict standards may often foster competitiveness by encouraging companies to re-engineer their technology. The result in many cases is a process which not only pollutes less but lowers costs or improves quality. See Michael E. Porter, "Essay: America's Green Strategy" *Scientific American*, (April 1991) at 168.

³⁶ I discuss the use of the market as a regulatory instrument to reduce demand for environmentally costly products in Part VI.

³⁷ Of course, I am assuming a static scientific and technological environment within which the producers operate. To the extent that research and development produce information and technology which permit producers to simultaneously increase outputs and decrease inputs, they will do so.

must minimize resource demands and pollution emissions, and that simultaneously attempts to employ an instrument, such the market, in which the relevant actors will often be attempting to increase sales and market share. So long as companies seek to maximize their profits, it is problematic to expect consumers to minimize their consumption. Put another way, although corporate actors will seek to minimize inputs, they will do so only insofar as they can maximize profits while maximizing their outputs—outputs that are themselves dynamic measures of consumer demand, production and sales. Environmental regulation may very well require a reduction in outputs—a reduction in consumption and use by the public that corporate actors will certainly oppose. Thus, we cannot rely on producers to effect the necessary reduction in inputs and consumption given that they themselves are major consumers (and so must they be in order to continue to produce).³⁸

A further explication of this point involves something of a syllogism. If a corporate entity states that it is reducing and conserving, consuming less in the manufacture of its finished product and by so doing supporting a reduction in the depletion of resources, it is in fact reducing costs, all of which is in its own best interests as a producer. Given a strong market for its environmentally beneficial products, the same producer will ultimately increase inputs as its sales increase. At the same time, when the consumer expends effort to consume less, this reduced consumption may well be good for the environment but, by clear extension, bad for the producer.

A further problem impinging on the success of environmental regulation involves the recognition that people assume different attitudes, beliefs, values and expectations as they assume different roles appropriate to different situations. Sagoff argues:

As a *citizen*, I am concerned with the public interest, rather than my own interest; with the good of the community, rather than simply the well-being of my family . . . In my role as a *consumer*, . . . I concern myself with personal or self-regarding wants and interests; I pursue the goals as an individual. I put aside the community-regarding values I take seriously as a citizen, and I look out for Number One instead. I act upon those preferences on which my personal welfare depends; I may ignore the values that are mine only insofar as I consider myself a member of the community, that is, as *one of us*.³⁹

³⁸ The point was made forcefully, if inadvertently, by the President of McDonald's who said that, "[i]f a decision will help us sell one more hamburger, I'm willing to make that decision. See J. Blount, "Battle of the Clamshells" Report on Business (April 1991) 41.

³⁹ Mark Sagoff, *The Economy of the Earth; Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 1988) at 8.

Thus we have another paradox, that of citizens' and consumers' calling for increased governmental regulation of corporate polluters, all the while consuming and discarding inordinate amounts of goods in their daily lives. Or that of voters' electing to office the "environmentally friendly" political candidate, having acted true to their values in their role as citizens, all the while continuing to waste resources in their roles as consumers. This inherent and unavoidable inconsistency over both the short- and long-term reduces the possible success of any market-based environmental regulation in isolation. As Sagoff notes, and as I deal with in greater detail in Part VI, "these problems are primarily moral, aesthetic, cultural, and political and ... they must be addressed in those terms."⁴⁰

Markets might also fail if there are substantial numbers of opportunistic free-riders who, while gaining from the environmentally appropriate choices of others, themselves still refuse to make the personal sacrifices required of them to allow the market to determine the amount of environmental benefit.⁴¹ Moreover, product markets alone cannot be expected to monitor environmental behaviour because they operate in conjunction with capital markets that may or may not be operating according to an environmental agenda, or that at least may be responding to tastes different from those driving consumer-goods markets.⁴² Nor do consumer-goods markets operate independently of organized labour. The latter might be expected to oppose policies that result in

⁴⁰ *Ibid.* at 6. I should point out, however, that recognizing that individuals might have different preferences depending on the context in which they are making choices does not depend upon an argument that in one case they are altruistic and in another self-interested. Rather, whatever they are, they are different in different roles.

⁴¹ This dilemma may very well result in the disintegration of the market. What is required here is a dramatic change in ethics — the reputation of free-riders must be such as to pressure them to bear social costs at least equivalent to the environmental costs of their decisions.

⁴² The public at large may not be represented in capital markets and the taste of investors for environmental quality might be significantly different than that of a broader cross-section of the community. Even if it were not, investor preferences must necessarily be filtered through institutional agents such as pension fund managers and mutual fund managers who filter the preferences of their principals and, thus, necessarily have to put their own interpretations on the environmental demands of their investors. More important, there is the popularly held view that corporations should only act according to economic imperatives, leaving it to shareholders to use the profits from that activity in any way they see fit. The argument is that managers know only that investors demand the maximization of income streams, and any other demand must be expressed individually not collectively. Equally important is the knowledge that many investors and managers are influenced by short term profits, while choices which reflect environmental values are often associated with uncertain profits which, if generated at all, will be received at some unknown future date. Finally, information about a particular firm's environmental behaviour is complex, not generally known, and cannot be determined without a substantial investment of resources and the introduction of highly subjective interpretations by investment firms.

However, capital markets will respond to expected income streams. If consumer markets are, in fact, favouring environmentally preferred products, capital markets should follow, and firms which are successful in the former should find their cost of capital both in equity and debt markets decreasing.

substantial shifts in market shares and fluctuations in unemployment levels across industries.⁴³ Markets also fail to take into account demand for environmental quality from the impoverished populace of the present and future whose interests—except to the extent that they are actually reflected, if at all, in the decisions of current market participants—are under-represented in markets.⁴⁴

Finally, and most importantly in the immediate context, sound use of markets is put at risk by the self-interested, non-social-welfare maximizing behaviour of producers who may, innocently or deliberately, exploit both the ignorance of the public and the transaction costs of the market to their own advantage. Professor Arthur Leff, showing brilliant if not prophetic insight in his book *Swindling and Selling*,⁴⁵ described what is going on here as a “God con.” Phenomenal profits are available to those who can sell environmental salvation at practically any price to consumers, who will gladly pay. Deep concerns about the environment and the opportunity to save oneself and the world are intoxicating inducements to many of us. They offer artists the outrageous opportunity to sell something to buyers who cannot possibly discover that they have been conned until it is too late to do much about it. What is especially disturbing about the environmental congame, is that like the “God con,” the environmental con permits opportunists not simply to exploit consumers’ private greed but also to profit from other-regarding mo-

⁴³ A quite well known example of the opposition by organized labour markets to shifts in demand associated with environmental concerns is the experience of Lily Cups with the shift by McDonald’s restaurants from polystyrene clamshells to waxed paper. Reports suggest that Lily Cups was forced to lay off between 35 and 46 people, representing 8 - 10% of its staff, because of the change in demand by McDonald’s. See J. Blount, *supra*, note 38; see also V. Gault, “Casualties of the Environmental Wars,” *Globe and Mail* (23 February 1991) D2.

The shift in demand sets up the well-known confrontation between organized labour and environmentalists which is played out not only in forests but also in consumer markets. For example, the Graphic Communication International Union which represents employees in the polystyrene industry states that the 10,000 workers in that industrial sector feel insecure and are “scared that the public backlash against polystyrene might mushroom into the rest of the business.” (V. Gault at D2.)

This opposition will not likely be effectively offset by the purely hypothetical support for the shift in markets, which might be expected from as yet unidentified employees, managers and shareholders from as yet unidentified firms. Transition strategies which operate to make the employment transfer both personally and politically more palatable must be developed to counteract the asymmetry. One example of a private corporate transition strategy is the case of Lily Cups and McDonald’s who together subsidized job-search counselling and termination pay beyond contractual requirements when some 35-40 employees of Lily Cups were permanently displaced as a result of McDonald’s decision to shift from polystyrene clamshells to waxed paper. (V. Gault at D2.)

⁴⁴ One might find that wealthier consumers may be more sensitive to environmental risks than are poorer consumers. Thus, their tastes would be over-represented in markets for environmentally sensitive products. However, they may purchase more, possibly more than offsetting their demand for environmental quality on a per item basis by increased consumption and the commensurate environmental costs.

⁴⁵ A. Leff, *Swindling and Selling* (New York: The Free Press, 1976) at 56-88.

tives, those altruistic concerns for one's community, future generations and the planet.⁴⁶

What Leff recognizes as operative in all markets, including markets in environmental goods, is the immediately recognizable self-interest of suppliers when they "sell the environment":

The green movement is seen by some as an ideal opportunity to market all sorts of products that carry an environmentally sound claim but in fact may be bogus. Salesmen and consultants will line up outside your door to offer you everything from environmentally sound pencils to plastic wrap to waste audits.⁴⁷

Misleading advertising harms more than just the individual who mistakenly purchases a product or service unaware of its real environmental characteristics. Of far greater concern, however, is that misinformation may generate considerable harmful cynicism about all environmental claims, including responsible ones. This cynicism, captured by the truism that "bad money drives out good," detracts from the benefits of private-market and government initiatives that attempt to use market and purchaser preferences to generate environmental benefits to be enjoyed by the public at large, to effect an environmental good. The quite understandable inability to distinguish accurate information from misleading information means that most if not all such information could be discounted by purchasers, substantially reducing the expected return on otherwise desirable investments in research and development, product design and packaging, transportation systems, and other areas.⁴⁸ Distrust of such information, without regard to its accuracy, creates a situation that is fundamentally worse than the fraud or theft resulting from misleading or inaccurate claims about the non-environmental attributes of products. Because the very point of the

⁴⁶ Of course, it may be possible that businesses would disclose the misleading information disseminated by dishonest competitors. However, that has not been a common phenomenon in advertising in general. As well, if consumers cannot affirm the accuracy of any claims, one would have to ask why they would choose to believe the "honest" competitor.

⁴⁷ B. Fleming, "Reducing Environmental Impacts and Creating Environmentally Preferred Products," (4th Annual Purchasing Management Conference, "Institute for International Research," 26 February 1991) at 8. (Paper on file at the University of British Columbia.) There have been several notable examples of alleged private exploitation of consumer demand for environmentally sensitive products. I describe numerous examples of these in the paragraphs below. Others are contained in "Time to Regulate the Environmental Bandwagon," *Ottawa Business News* (12 August 1989) 9.

⁴⁸ A recent survey of 1,400 shoppers in Britain indicated that 56% of those surveyed are now suspicious of claims that products are environmentally friendly, up from 43% the previous year. Furthermore, the proportion of people who said they were willing to buy green products even if such products underperform conventional alternatives had dropped from 24% to 18%. See "Friendly to Whom?" (7 April 1990) *The Economist* 83.

green-advertising exercise is to ensure that environmental information is available for consumer use, consumer distrust of that information will ultimately result in the collapse of any market system designed to supply it.

The problem of market dysfunction is exacerbated by the fact that purchasers acting as environmental planners cannot test the veracity of the information disseminated by market actors; environmental claims, unlike virtually all other product claims, are not subject to empirical testing by the consumer. We are all familiar with the two basic approaches to product information verification, namely search and experience. Product quality and performance—durability, servicing costs, output levels, “fit” with existing systems and products, toxicity, weight, tensile strength among others—can be and often are tested and rated through the purchaser’s experience with the product. While not necessarily the best method to ensure that one’s expectations are met, it is at least, available to purchasers. Conversely, many if not most environmental characteristics—preservation of bio-diversity, reduction of ground-water toxicity and carbon emissions, among others—are not, and might never be, verifiable through product end-use. The impossibility of verifying environmental claims creates incentives for producers to supply misinformation; the necessity of independent pre-purchase claims verification therefore, is increasing in urgency and importance.

The claims verification problem is far more serious than might first appear. It is obvious that the use of inaccurate or incomplete environmental information to influence purchasing decisions represents a coerced transfer of wealth from purchasers to suppliers. Purchasers whose expectations of environmental benefits are not fulfilled are being deprived of wealth non-consensually, given that their consent to the purchase was obtained as a result of misleading information about the environmental characteristics of the products purchased. But individualized losses represent only the most trivial of problems in light of the systemic market and environmental consequences of misleading advertising. The comparative inability of consumers to verify environmental claims means, unfortunately, that the immediate results of using environmental products and adjusting life-styles so as to reflect that interest and of “doing one’s bit for the planet” although manifest are not readily realizable. In fact, the beneficial results of large numbers of consumers changing their behaviours may not be evident even within those consumers’ lifetimes. Given that fact, a distrustful public with no way of verifying environmental benefit claims may be prone to ignore even those that are legitimately made and to continue to use those products

that give the best immediate results, irrespective of their environmental value, in their quests to get clothes whiter, dishes cleaner, and infants diapered more conveniently, all the while producing increasingly irre-medial environmental degradation.

In Part IV, I explore in detail the market failure associated with information asymmetries in consumer markets and the exploitation of consumer ignorance by producers who market goods based on environment-related information.

IV. EXPLOITING ALTRUISM: THE PHENOMENON OF GREEN ADVERTISING

Deciding how we should respond to the risks of the environmental con game and the systemic environmental degradation that it produces must begin with an appreciation of the subtlety and rhetoric of "green advertising." The following discussion represents a brief analysis of several ways in which environmental claims might be less than accurate, and thus illustrates the complex problem that one must address in designing systems to respond to this phenomenon:

1. Some information about environmental characteristics—although it is impossible to know what percentage—might be explicitly inaccurate. While one suspects that this may be the case in only a small proportion of claims, one will still come across claims that a product is "CFC free" when in fact, it is manufactured using CFCs. Or a product said to be made from "recycled" fibre is made from virgin fibre. One can find examples of products that are described as "non-polluting" but that are disposable and that use an ozone-depleting substance in their manufacture.
2. Some claims are intentionally vague, and thus subject to considerable misinterpretation; for example, one can point to numerous claims that a product is "environmentally friendly" or "environmentally responsible." The kinds of misinterpretation generated by these claims are quite complicated. At best, the product represents some reduced risk to the environment as compared to one alternative elected by the producer. It may also be, however, that the product does *not* represent a reduced environmental risk compared even to that alternative. And more important, the product will almost always *not* represent a reduced environmental risk as compared to another alternative. One can be certain therefore that the product does *not* present an environmental benefit.⁴⁹

⁴⁹ It might be said that any label which makes reference to the environment will place the product in the "good" category. Plastic bottles of Lever Brothers' products such as Wisk and All carry a label which says "support plastic recycling". The company, in another label on the back, states that it is now "using technology that can include recycled plastic in our bottles at levels between

3. Some environmental claims, while not explicitly inaccurate, represent implicitly inaccurate information where, for example, they provide irrelevant but still misleading information. One might read claims that a product is "CFC free." But if that claim is made in respect of a product that was never made with CFCs, one has to ask what the motive for the claim was. One concern about this kind of claim is that it generates an inference from the "CFC free" statement that the product was previously made with CFCs and thus that the manufacturer has voluntarily taken steps to improve the environment, where no such steps had ever been taken,⁵⁰ or perhaps where legislation made it mandatory to effect the change.⁵¹
4. A variant on this kind of implicitly inaccurate information occurs when suppliers provide accurate information that is misleading because of purchasers' unsophisticated knowledge of environmental risks. A product may be represented, for example, either through words or images, to be "CFC free" when in fact the product contains HCFCs. Here the statement leads to an inference that the product has no ozone-depleting characteristics, when it does, albeit of a type that is less damaging than that which it replaced.⁵²
5. A further variant on the implicitly inaccurate information situation is presented by claims which while facially accurate, omit pertinent environmental information. A supplier, for example, may represent that a product is "CFC free" where the product uses pentane or another

25% and 35%." Yet nowhere does it state whether any recycled plastic is actually used in the container and company officials have admitted that individual bottles may or may not contain recycled plastic. See "Coming Clean on Products: Ecological Claims Faulted" *The New York Times* (12 March 1991) C1.

Eveready Canada Inc. recently backed down from a claim of "environmentally friendly" for its alkaline battery and has replaced it with "environmentally safer." The original claim was based on the fact that mercury content had been reduced in the battery by some 90%. The switch was made when environmentalists and some competitors (including Duracell Canada Inc., which had also reduced mercury content in their product although not to the same extent) complained that no battery could be described as environmentally friendly. Alkaline batteries contain heavy metals such as manganese and cadmium that could leak from landfill sites and contaminate drinking water. Some batteries also produce only 2% of the energy that went into making them. See "Consumer Update - Green Power" (March 1990) *Canadian Consumer* 6.

⁵⁰ A similar strategy was demonstrated when an automobile manufacturer in Britain recently advertised one of its cars as being "as ozone-friendly as it is economical" because it runs on lead-free gasoline. As was pointed out in the article describing the advertisement, "lead may be bad for the brain, but nobody blames it for holes in the ozone layer." See *supra*, note 48.

⁵¹ The claim of "CFC free" is a particularly pervasive example of this type of advertising. Many aerosol products make the claim that they use no CFCs. In fact, the use of CFCs in aerosol spray cans has been banned in Canada since 1980 due to the damage they do to the ozone layer. To make a claim that one is not using a substance that has been prohibited for eleven years seems somewhat self-righteously advantageous, at the least.

⁵² HCFC-22 (or Formacel-S, the registered product name of a product distributed by Du Pont Canada Inc.) is not as inert as CFC and tends to break up in the lower atmosphere where its component chlorides can still be washed down by precipitation. It is, over its lifetime, only 5% as destructive as CFC, which can be viewed as a 95% reduction in ozone depletion or as a 5% increase once CFC is gone. It is not benign. See "Earthly Goods" (July 1990) *Canadian Consumer* 14.

foaming agent. The problematic inference from the statement presented is that the product presents no environmental risks in light of the displacement of CFCs. In fact, the product does present a range of environmental risks, including depletion of non-renewable resources, and costs, including energy, solid waste disposal and hydro-carbon emission costs.⁵³

6. Still another variant within this implicitly inaccurate information category is a product claim that the lay public might interpret as an environmental benefit, but where there is considerable evidence that the product represents an environmental cost. Perhaps the most notorious example of this involves claims of biodegradability. The problem is that two inferences from that word may not be true, the first inference being that biodegradation occurs. In fact, there are many who would argue that biodegradation may not occur in practice given the absence of light and/or air in landfills.⁵⁴ The second inference from the statement is that biodegradability is beneficial to the environment. But that benefit may be more apparent than real. Recent evidence suggest that the environmental character of degradable products depends on the by-products of degradation, some of which may represent serious environmental risks.⁵⁵ More-

⁵³ This is an example of the situation where the maker of the statement fails to take into account the environmental costs associated with a substitute component or design. In other words, product life-cycle environmental impact assessment involves relative assessments of alternative product designs and production processes, not simply an assessment of an individual variable associated with a particular component or process. Pentane, for example, contains no chlorine and will likely degrade into its component hydrocarbons in the lower atmosphere. However, it is itself a volatile organic compound and, in large quantities, may be a component in the formation of smog.

⁵⁴ For example, the Mobil Chemical Company recently settled out of court a lawsuit brought against it by six states, led by the Attorney General of New York. The suit alleged that claims of degradability made by the company regarding its plastic trash bags were false and misleading. The company agreed to pay a total of \$150,000 and to stop making the claim that the bags would photodegrade when used and disposed of in an ordinary manner. The suit contended that the bags simply ended up in landfills. See "Mobil Settles on Hefty Bags" *New York Times* (28 June 1991) D4.

⁵⁵ A recent study indicates that many so called degradable products including sandwich bags, plastic egg cartons and disposable food containers decompose merely into smaller pieces of plastic. See "New Study Challenges 'Biodegradable' Claims" *New York Times* (5 March 1991) B7.

"Biodegradability" clearly implies a reduction of solids into organic matter through a biological process. Plastic is a non-organic synthetic, not a biological substance, and therefore cannot degrade into organic matter. Furthermore, to degrade something, micro-organisms must be able to digest or wet it. Micro-organisms cannot wet plastic. At best, they can disintegrate it into plastic dust over an indeterminate period of time.

Recently, starches have been added to the plastic which manufacturers claim will enable the product to break down. Scientists have pointed out that this is fallacious. Micro-organisms need air, something they will not find in landfill sites, to break substances down and anaerobic bacteria, which do not require oxygen to break down matter, cannot degrade polyethylene. The added starch, but not the plastic, will biodegrade.

Finally, some argue that degradation is the last thing which is wanted in a landfill. Rotting or decaying material can produce methane gas or toxic leachate; it is far better that a dump be a tomb where things remain inert.

Most major retailers in Canada have stopped using biodegradable plastic checkout bags. Shoppers Drug Mart recently announced that they would no longer be selling biodegradable

over, the introduction of degradable plastics into the solid waste stream may have significant adverse environmental impacts if one recognizes the impact of contaminated inputs on plastic recycling programs.

7. A slightly different example of implicitly inaccurate information consists of a claim that has not been empirically verified. One can claim, for example, that a product is "phosphate free" or that it is "recyclable." The problem here is that this is a single-component environmental adjustment in a situation where a net environmental benefit may not be demonstrable, because of pre-existing environmental costs, because a substitute design was utilized, or because in practice such products are not recycled given current recycling infrastructures.⁵⁶
8. A more complicated example of the problem involves information about a product reformulation that generates a reduced risk to the environment. The representation appears to be accurate but ignores other environmental risks. One might imagine, for example, a situation where a claim of "phosphate free" is made for a product that is free of phosphate, and where the substitute component is environmentally benign. Such a claim, however, may still represent a single-component environmental adjustment with a marginal environmental improvement, at the same time generating a significant shift in market share or price without a correspondingly significant improvement in environmental quality. The difficulty here is that purchasers (and for that matter governmental regulators) are unable to quantitatively assess the environmental improvement, given its marginal nature and the time-span over which the improvement will take place. This inability may mean that the purchaser is paying too much for the improvement.⁵⁷

garbage bags when their current supplies run out on the basis that they "don't really make a valid contribution to the environment." See "Earthly Goods" (July 1990) Canadian Consumer 12.

See also L.R. Krupp, "The Biodegradability of Modified Plastic Films in Controlled Biological Environments" (Masters Thesis, Cornell University, 1991) [unpublished].

⁵⁶ The concern about recyclability being misleading because of the fact that the infrastructure for recycling is not in place is in part the reason behind the public concern about McDonald's claims that its polystyrene containers were recyclable. While there were pilot collection programs in place in limited locations, the vast majority of polystyrene was not, in fact, being recycled. Furthermore, even if polystyrene was being collected, it was not evident that it would be economically recycled into new products. Finally, a substantial portion of the polystyrene used in McDonald's restaurants is removed from the premises by the consumer and, thus, does not enter the recycling stream. Other concerns about recyclability claims involve omitting information about the continuing emission problems surrounding polystyrene production and omitting information about the use of hydrochlorofluorocarbons (HCFC's) to replace chlorofluorocarbons (CFC's) in the manufacturing process. See J. Blount, *supra*, note 38.

⁵⁷ Another aspect of the same phenomenon is the addition of environmental claims to items which pander to a specific audience and, perhaps, tend to add a note of forgiveness to the modern sin of "conspicuous consumption." The Terra Verde Trading Co., for example, markets toasters that the store says are made to last a lifetime. Part of the display includes a label which reads, "Every appliance that can be fixed is one less piece of junk in the landfill." The toasters cost \$240 (U.S.) for a two-slicer and \$320 (U.S.) for a four-slicer, a seemingly high price to pay for even a lifetime of toast. See "Environmentally Yours" (17 March 1991) New York Times Magazine 70.

9. The final example of implicit inaccurate information is that of image advertising. Here we see that a company is concerned about the environment through representations in music, general philosophical positioning, colour, and words. It is impossible, however, to know whether the entire corporate activity is generating environmental benefits or even reducing environmental risks, and one has a very real suspicion that the reality might be quite different from how it has been portrayed.⁵⁸

Since this brief narrative description of "green marketing" cannot possibly convey the same power of the full range of visual and sensory images now employed to persuade consumers to base their purchase decisions, at least in part, on environmental concerns.⁵⁹ But it does confirm that markets in "green information" are not yet perfect and will not likely develop to perfection for several reasons. First, we will never eliminate the self-interest of suppliers who are making these claims. Second, purchasers, except in the context of the most substantial purchase decisions, cannot make the required investments in research and analysis to assess the information and thus monitor and correct supplier misinformation. Third, the scientific and technical environmental data on which the claims are made are rapidly evolving, increasing the likelihood of even well-intentioned suppliers' making substantial errors in environmental impact assessment and biasing the information they disseminate in turn to purchasers.⁶⁰

The obvious risks associated with these purely private environmental marketing claims have led to a number of initiatives, both public and private, aimed at assisting in the development of more accurate, com-

⁵⁸ The continuing efforts of major manufacturers to enhance the image of disposable diapers is a well-known example of this phenomenon. One advertisement which was widely criticized by environmentalists showed the life cycle of a disposable diaper based on the 80% compostable materials that went into its manufacture. In graphic representation, the diaper is shown disintegrating in a composting process until, in the final event, a sapling is shown sprouting from the soil left from the decomposed diaper. As one environmentalist commented, trees do not grow from diapers! See Alecia Swasy, "P&G Gets Mixed Markets as It Promotes Green Image but Tries to Shield Brands" *Wall Street Journal* (26 August 1991) B1.

⁵⁹ As I noted earlier, however, there is a real risk that all information will be discounted if consumers become cynical about the veracity of the information and are unable to verify its accuracy. See *supra*, note 46.

⁶⁰ Another problem with ensuring accuracy in environmentally related advertising, which I discuss in detail in Part 6, is that the environmental objectives and preferences of numerous purchasers cannot be expected to be identical. Suppliers are in the unenviable position of having to supply environmental product information to purchasers who are not uniformly interested in the same kind of information. Even if they are interested, they may react in radically different ways to the same data.

parable and verifiable environmental information to be made available to purchasers. I will briefly review some of the more important responses to the kinds of marketing activities described above.

V. REGULATORY RESPONSES TO ENVIRONMENTAL CLAIMS

There are two obvious roles for the state in a world where private markets are employed to deliver environmental benefits.⁶¹ The first is to create new and recognize existing private property and contract entitlements in activities that generate environmental benefits. These would include ownership, through trademark and patent protection, of the output of research and development in environmentally sensitive products, and, under legal protection, inclusion of applicable standards of environmental quality within the bundle of product attributes to be marketed to purchasers. The latter would necessarily mean that producers would be encouraged to inform prospective purchasers of the environmental benefits associated with their purchase decisions. The second and more obvious role of the state is the role governments take in assisting producers and consumers to assure that information about the environmental characteristics of products and services is accurate.

Given the myriad ways in which markets do not work, one critical and continuing role for governments would seem to be called for in assisting consumers and corporate planners to assess critically those environmental claims being made by suppliers. Several possible responses to the problem of exploitation and misinformation that consumers face present themselves. These range from the institution of direct, coercive regulation in the form of prosecutions under the federal *Competition Act*⁶² to purely private initiatives, including the development of sophisticated product life-cycle environmental impact assessments by manufacturers. Pragmatic arguments can be made to the effect that each of these responses has an appropriate place in addressing the

⁶¹ Of course, governments are necessarily implicated in markets in a variety of ways through the recognition of intellectual property rights, in decisions to influence capital investments and research and development investments through, for example, tax policy, government procurement policy and in promoting environmental education policies.

⁶² R.S.C. 1985, c. C-34, as am. S.C. 1986, c. 26, s. 19 (formerly *Combines Investigation Act*). Other federal legislation, such as the *Textile Labelling Act*, R.S.C. 1985, c. T-10, the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, also contain provisions with consequences for commercial advertising. Provincial legislation such as the British Columbia *Trade Practice Act*, R.S.B.C. 1979, c. 406 and the Ontario *Business Practices Act*, R.S.O. 1980, c. 55 further constrain false or misleading advertising by commercial interests.

The applicability of this secondary federal legislation as well as the relevant provincial legislation to misleading environmentally related advertising, raises essentially the same issues as the *Competition Act*; therefore, I will be addressing my remarks to that legislation.

problems associated with the publishing of environmental product claims by the private sector.

A. THE REGULATION OF MISLEADING ADVERTISING

The most coercive response of governments is increased direct regulation of misleading information under provincial trade practice legislation and federal misleading advertising legislation.⁶³ There is some evidence that this may in fact be happening now. The Director of Investigation and Research under the *Competition Act* noted in April 1990 that the federal Department of Consumer and Corporate Affairs would be employing the *Act* to deter "vague, incomplete or irrelevant" claims that may confuse purchasers and that may diminish the credibility and effectiveness of such advertising.⁶⁴ The current legislative framework at the federal level, however, treats misleading advertising as a criminal offence, thus demanding proof beyond a reasonable doubt of the commission of the offence and utilizing the criminal justice system as the enforcement institution.⁶⁵ Given current enforcement policy and

⁶³ A complete discussion of the success or failure of the purposes of the misleading advertising sections of the *Competition Act* is beyond the scope of this paper. There are, however, statistics indicative of enforcement policy which are readily available and of interest here. Section 52(1)(a), the section most directly referent to the promulgation of false or misleading advertising, has only resulted in prosecutions since its inclusion in the *Combines Investigation Act* in 1969. Since 1969, the section has been used in much more vigorous fashion. The most recent issue of the Canada, Department of Consumer and Corporate Affairs, *Misleading Advertising Bulletin* (January - March 1991), for example, shows a total of 66 convictions resulting from 282 charges for the current fiscal year for violations of the misleading advertising provisions of the *Act*. This total is consistent with the totals from the previous eight to ten years. See V. Black, *infra*, note 65 and accompanying text.

⁶⁴ See Canada, Department of Consumer and Corporate Affairs, "Environment-related Advertising (Green Advertising)" *Misleading Advertising Bulletin* (April-June 1990) at 1. The difficulty of applying general misleading advertising legislation to environmental advertising has led at least one jurisdiction to introduce legislation directed specifically at the problems generated in this context. In 1990, the California legislature enacted a bill which amended the *Business and Professions Code*. The bill extends the truthful advertising laws by requiring that products sold with environmental impact claims meet specified criteria. It defines the terms "ozone friendly," "biodegradable," "photodegradable," "recyclable" and "recycled" for the purposes of advertising and also requires that persons making general environmental claims about their products (e.g. "environmentally friendly," "eco-friendly" or "a green product") maintain records which substantiate the claim and which are available to the public upon request. Violators are subject to a term of imprisonment of up to six months or to a fine of up to \$2500.

The definition of "recyclable," for example, requires that the article can be "conveniently recycled . . . in every county in California with a population over 300,000 persons." It is to be noted that upon signing the bill, the governor objected to this term particularly as being "impermissibly vague to be the basis of a criminal statute because it does not clearly state what is necessary to meet the test of convenience." He cited other definitions in the bill as either too vague or too strict. The major objection is that, in the face of such vague language, manufacturers may forego providing any labels at all (even where the packaging is more environmentally friendly than other packaging). This would be counterproductive to the goal of encouraging packaging which is environmentally sound and recyclable.

⁶⁵ Section 52(1)(a) of the *Competition Act* makes it an offence to make any representation to the public which is false or misleading in a material respect. Section 52(1)(b) makes it an offence to

the context in which misleading environmental advertising occurs, it is unlikely that the *Competition Act* will be used except in the most egregious cases of misleading environmental information.

A search of the relevant sources has thus far failed to reveal a single instance of a prosecution under the federal *Competition Act* for misleading or false advertising in relation to the environmental benefits of a product or package. This may change as the use of "green" labelling in advertising and promotions increases, and less-than-scrupulous firms continue their attempts to manipulate the market through the use of incomplete or untrue information. Nevertheless, it is worth noting that prosecutions are, in any event, less likely given the fact that consumers do not suffer direct economic losses as a result of claims about the environment in relation to a given product. For the most part, prosecutions under the relevant legislation proceed on the basis of potential or direct economic loss to consumers upon the failure or inability of the product to perform as advertised. And while s. 36 of the *Competition Act* permits a person who is injured through a violation of the *Act* to sue for and recover any such loss, it is obvious that such litigation in an individual case would be time consuming, uncertain and extremely expensive relative to the expected gains. Simple altruism might motivate a consumer to purchase certain products on the basis of their environmental characteristics; only super-altruism, however, would motivate a consumer to litigate the corresponding misleading environmental claims under s. 36 of the *Act* for the public good.

Most important, enforcement of the *Act* is extremely difficult in light of the current scientific uncertainty expressed in debate about many of the claims made by manufacturers. Much of the uncertainty is due to the virtual impossibility of generating credible cradle-to-grave environmen-

make any representation to the public concerning the performance, efficacy or length of life of a product that is not based on adequate and proper testing. One complication with this section, which reveals just how ill-conceived the *Competition Act* is as an effective regulatory instrument in this context, is that it might not even apply to this situation since environmental claims may not be claims relating to "performance, efficacy or length of life."

Section 52(5) of the *Act* contains the schedule of penalties for violation of s. 52(1). Upon conviction as an indictable offence, the offender is subject to a fine at the discretion of the court or a maximum five years in prison or both. On summary conviction, there is a fine not to exceed twenty-five thousand dollars or a maximum one year in prison or both. The average fine per charge for violation of s. 52(1)(a) has not been large nor would it seem to be of significant deterrent effect. In 1987-88, for example, the average fine per charge was \$2,393 which was in line with the averages for the previous eight years. The average fine per conviction was \$6,653. Fines for corporate offenders were generally larger than those for natural persons. In 1987-88, the average fine for corporations convicted of violating s. 52(1)(a) was \$7,635 while for individuals it was \$2,688. See Canada, Department of Consumer and Corporate Affairs, *Misleading Advertising Bulletin* (1989).

For a more complete discussion of the provisions of the *Competition Act* as they relate to advertising, with particular emphasis on how the decision to use a criminal law model has effected the type of controls which have been developed, see V. Black, "A Brief Word About Advertising," (1988) 20 Ottawa L. Rev. 509.

tal impact analyses.⁶⁶ The due-diligence defence permitted in s. 52(1)(b) of the *Act*⁶⁷ would permit manufacturers to avail themselves successfully of the due diligence defence to demonstrate that they took reasonable care in assessing the environmental impact of a product, which would also present a substantial impediment to successful prosecutions in all but the most flagrant violations of the *Act*.

Paradoxically, but not surprisingly, we find that the *Competition Act*, which incorporates a command-and-control model of regulatory intervention, is the primary instrument available to the government in dealing with the second-order difficulties produced by an imperfect economic regulatory instrument. Nonetheless, because the *Act* is "enforced" through non-coercive instruments as well as through the criminal justice system, it remains of considerable interest as a regulatory tool in addressing the problems associated with misleading environment-related advertising. In particular, companies engaged in environment-related advertising can and should appreciate that the Bureau of Competition policy focuses primarily on ensuring compliance through initiatives in communication and education. One aspect of the Bureau's compliance policy is the proffering of advisory opinions to suppliers who wish to avoid coming into conflict with the *Act*.⁶⁸ Although not binding, the Director of Investigation and Research takes into account prior case law, outside legal opinion and departmental policy in considering whether a specific marketing or advertising practice violates the misleading advertising provisions of the *Act*.⁶⁹ A recent example is the advisory opinion issued by the Department suggesting that any general claim, such as "Environment Friendly," that implies an environmental benefit "should be used with extreme caution and be made meaningful by providing specific product characteristics that set out the reason for the claimed benefit."⁷⁰

⁶⁶ I describe the intractable problems of producing reliable product life-cycle analyses in Part V.

⁶⁷ The Supreme Court of Canada in the recent decision of *Wholesale Travel Group v. R.* (24 October 1991) file nos. 21779, 21786, upheld the constitutionality of the "reverse onus" provision of s. 52 of the *Competition Act*. Seven members of the Court held that the reverse onus provisions violated s. 11(d) of the *Charter of Rights and Freedoms* by denying the accused the benefits of a presumption of innocence in a prosecution under the *Act*. However, three of those seven found the reverse onus provision justified under s. 1 of the *Charter*, and these three, combined with the two members of the Court who found no violation of s. 11(d) constituted a majority in the result which upheld the constitutionality of the provision.

⁶⁸ See, for example, note 70 and accompanying text.

⁶⁹ The Department's compliance and enforcement policy is described in detail in Canada, Department of Consumer and Corporate Affairs, Director of Research and Investigation, *Competition Act*, "Program of Compliance," Information Bulletin No. 3 (June 1989).

⁷⁰ See Canada, Department of Consumer and Corporate Affairs, "Summaries of Advisory Opinions" *Misleading Advertising Bulletin* (January-March 1991) at 8. The *Bulletin* goes on to specify that:

The deployment of advisory opinions and communication strategies to displace the criminal justice system in achieving the regulatory objectives of the *Competition Act's* misleading advertising provisions is believed by most to be an important advance in regulatory policy.⁷¹ This framework of moderated negotiation and planned communication between the regulatory agency and the private sector has culminated in the development, undertaken in cooperation with the federal Department of Consumer and Corporate Affairs, of voluntary codes of advertising practice that are intended to address misleading environmentally related advertising in Canada.

B. VOLUNTARY ADVERTISING CODES

A second response to the difficulties that consumers confront in assessing environmental claims has been the development of codes of advertising conduct either by regulatory agencies, as in the United States⁷² and Britain,⁷³ or by cooperative government-industry initiatives, as in Canada.⁷⁴ The Canadian Department of Consumer and Corporate

Moreover, the claim should also indicate whether it is related to the product or the packaging materials. In addition, a representation that conveys a message of overall environmental benefit due to the absence of a substance known to be environmentally harmful should not be used unless it can be demonstrated that the product is less damaging overall to the environment as a result of the absence of that substance. That is, it should not contain any other substances that are equally or more damaging to the environment.

This advisory opinion specifically takes into account the Guiding Principles for Environmental Labelling and Advertising, which the Director has stated will be considered in the application of the misleading advertising and deceptive marketing practices provisions of the *Competition Act*, particularly ss. 52 (1)(a) and 52(1)(b).

⁷¹ See Canada, Department of Consumer and Corporate Affairs, *Effective and Equitable Enforcement, Report of the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act* (1991) at 7-10 and Canada, Department of Consumer and Corporate Affairs, "An Analysis of Proposals for Administrative and Civil Enforcement Powers in a Federal Trade Practices Act" (William A.W. Nielsen and Edward P. Belobaba) (1981).

⁷² See Attorney Generals for California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Utah, Washington and Wisconsin, "THE GREEN REPORT II: Recommendations for Responsible Environmental Advertising" (May 1991).

⁷³ In addition to voluntary codes of practice in Britain, certain media advertising is subject to approval by a regulatory authority. The Independent Television Commission established under the *Broadcasting Act*, 1990 has issued a draft Code which provides that:

No advertisement may encourage behaviour prejudicial to the protection of the environment... All claims relating to environmental impact must comply with guidelines approved by the Commission from time to time for this purpose.

The ITC must clear all television advertisements through its ITA COPY CLEARANCE SECRETARIAT and may seek justification for environmental claims before allowing an advertisement to be transmitted. As well, it may respond to consumer complaints and take appropriate action after inquiring into the relevant circumstances.

⁷⁴ Industry self-regulation is generally an amalgam of three categories: promotional (designed to benefit, foster or generate commercial activity within the industry); standard setting (promulgated to protect the public from unethical practitioners); and enforcement. Although compli-

Affairs, for example, recently initiated and participated in a government-industry initiative designed to produce a code of green advertising that will provide guidance to industry in an effort to promote veracity and enhance comparability of marketing claims.⁷⁵ This joint government and industry task force resulted in the issuance in 1991 of the *Guiding Principles for Environmental Labelling and Advertising*—guidelines that were held out as assisting (although certainly not resolving the difficulties of) those purchasers unable to assess critically environmental product claims.⁷⁶

The *Principles*, which are to be adopted by the wide range of industry sectors involved in their development, direct that:

ance with such regulation is voluntary and non-statutory (as distinguished from those professions and industries which require adherence to statutory schemes of self-regulation, such as physicians and surgeons, lawyers, engineers, teachers and stockbrokers), governments may maintain their legislative supervision but play a residual role. As Mr. Justice Douglas remarked, "Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." (R.S. Karmel, "Securities Industry Self-Regulation - Tested by the Crash" (1988) 45 Wash. & L.R. 1297).

Support for schemes of self-regulation includes the arguments that not only is the taxpayer seemingly spared the cost of regulation, but the industry is more efficiently policed by those with the greatest expertise and knowledge — members of the relevant industry. As the codes are voluntary, it is thought that industry members will more closely adhere to the spirit of the regulations and not attempt evasive, lawyerly tactics to avoid compliance. The non-statutory nature of the regulatory scheme also circumvents the expense, delays and complexities of the legal system. Self-regulation is better designed to address ethical, as opposed to legal, conduct and is often more flexible than any scheme of governmental regulation thus allowing for greater latitude in addressing a given set of issues.

These perceived benefits are countered by arguments that self-regulation is subject to bias and conflict of interest charges in the application of the regulations as firms serve as judges in their own cause. Furthermore, the public is generally very poorly represented in any enforcement procedures. Self-regulation has also been criticized for serving as a barrier to entry for new competitors unable or unwilling to meet unrealistic or self-serving standards set by an entrenched industry. As well, enforcement of self-regulatory codes is commonly done privately, thus attenuating the powerful reputational effects of public enforcement mechanisms. Finally, self-regulation through voluntary codes often fail to respond to systemic problems within an industry insofar as they focus only on individual violations of the standards.

See generally M. Blakeney, "Leaving the Field - Government Regulatory Agencies and Media Self-Regulation" (1986) 9 University of New South Wales L.R. 53 and R.S. Karmel, *supra*.

⁷⁵ A similar initiative has been taken in Britain by the Committee of Advertising Practice (CAP). In February 1990, the Advertising Standards Authority of CAP issued a guidance note addressing environmental claims which is substantially the same as the guidelines recently published in Canada. See Lovel, White and Durant, "Marketing the Environment, A Guide to Legal Issues Concerning 'Green' Advertising and Labelling" (on file at the University of British Columbia).

⁷⁶ See Canada, Department of Consumer and Corporate Affairs, "Guiding Principles for Environmental Labelling and Advertising" (1991). The trade associations involved in developing the principles included the Association of Canadian Advertisers, the Canadian Advertising Foundation, the Canadian Cosmetic, Toiletry and Fragrance Association, the Canadian Council of Grocery Distributors, the Canadian Manufacturers of Chemical Specialties Association, the Consumers' Association of Canada, the Grocery Products Manufacturers of Canada, the Packaging Association of Canada and the Retail Council of Canada. In addition, there was late and limited consultation with some environmental groups, legal firms industries, foreign governments and all levels of government in Canada.

1. Industry is responsible for ensuring that any claims and/or representations are accurate, and in compliance with the relevant legislation.
2. Consumers are responsible, to the extent possible, for appropriately using the information made available to them in labelling and advertising, thereby enhancing their role in the marketplace.⁷⁷
3. Environmental claims and/or representations that are ambiguous, vague, incomplete, misleading, or irrelevant, and that cannot be substantiated through credible information and/or test methods should not be used.
4. Claims and/or representations should indicate whether they are related to the product or the packaging materials.⁷⁸

The *Principles* encourage marketing claims that include specific and quantifiable information and that exclude absolute claims. In addition, the *Principles* explicitly address current marketing activities involving such claims as "Recycled," "Recyclable," and "Degradable" and further direct precisely how and in what circumstances those words may be used in marketing programs.⁷⁹ The *Principles* are to supplement the *Canadian Code of Advertising Standards* enforced by the Standards Division of the Canadian Advertising Foundation—a wholly controlled industry association. They will also be considered by the Director of Investigation and Research in the application of the misleading advertising and deceptive marketing practices provisions of the *Competition Act*, which remains the major avenue of enforcement in this area.

⁷⁷ The preamble, however, goes further and provides that

while detailed technical product information is not always readily available, there are a number of sources for credible information that will assist consumers to become informed on the various waste reduction and recycling programs available within their communities.

This statement reveals a certain naivety in the drafters of the guidelines. It is left unstated where one may obtain that information or how it might be linked to consumers' purchase decisions. Also, the question of lack of information is much broader than lack of knowledge about the presence of waste management programs.

⁷⁸ *Ibid.* at 7.

⁷⁹ An example of the way in which the Guidelines might operate can be taken from their treatment of the concept of "recyclable." The Guidelines provide at 10 that

extreme care should be taken when making the claim of recyclability on products or material for which a recycling infrastructure does not generally exist. Claims of recyclability by industry (retailers, manufacturers and distributors) should not be made simply because the material is *technically* recyclable. (emphasis added)

The message, of course, is that vague claims of environmental benefit cannot be made unless the claims are founded upon appropriate and reliable scientific and technological information which is substantiated and verifiable in practice. The weakness of the Guidelines is that they do not set standards for the use of this or other terms. In comparison, the State Attorney-General's Task Force Report recommends that such claims only be made "in a manner that clearly discloses the general availability of the advertised option where the product be sold." See Recommendation 2 in *supra*, note 72 at 18.

The purported object of the *Guiding Principles for Environmental Labelling and Advertising* is to ensure that those characteristics that allegedly make a product a better choice for the environment should be rendered obvious to purchasers. This initiative is important to consumers who need aids to interpreting environmental claims with some sense of the meanings accurately attributable to the variety of words and symbols commonly used, and who need the advantage of a possible enforcement mechanism administered by the Standards Division of the Canadian Advertising Foundation.

Self-regulation through marketing guidelines, however, raises serious concerns about the commitments both of private-sector industries and of public-sector regulatory authorities in responding to abuses in this area. The *Principles* are drafted in extremely vague language. Moreover, they simply fail to address the enormous range of product-specific environmental claims that consumers confront. The *Principles* are, for example, premised only on the short-sighted view that the problem is purely the result of a dysfunctional marketplace. While this is true, perfect information alone will not solve the environmental problems that are the result of the aggregated purchase decisions of large numbers of corporations and consumers.⁸⁰

What the *Principles* lack is an unambiguous signal to industry of the elevated standards expected of them once it has begun to exploit consumer demand for the environmental good.⁸¹ Misleading advertising in the area of environmental claims is quite unlike many other consumer problems. As I argued earlier, the impact of market dysfunction in this case is much more serious than misinformation relating to product quality and performance. Consumer errors, taken in their aggregate, shape Canada's economy and environment in irremedial ways, and it is next to impossible for individual consumers to monitor contractual compliance. The *Principles* should also urge the participation of environmental groups and concerned individuals in the enforcement process.⁸²

⁸⁰ See Part VI.

⁸¹ The Guidelines' effectiveness might be enhanced if it were made clear that they are linked to a much broader regulatory agenda which will include full enforcement of the relevant federal and provincial statutes which exist to address instances of misleading advertising. The educative function of the document should extend beyond its narrow terms and reinforce a more rigorous program of enforcement than is now apparent, at least in the federal arena.

⁸² The absence of environmental representation in the enforcement process is paralleled by their absence in the production of the Guidelines. Although there was some consultation with environmentalists and others, the make-up of the working group which developed the Guidelines reveals an overwhelming predominance of industry trade associations. Information about the complex ways in which products and packaging affect the environment is not uniquely within the understanding of industry. At the very least, it should be incumbent upon Consumer

Finally, the *Principles* reflect only a simplistic and naive appreciation of the complexities involved in product life-cycle analysis. They prohibit, for example, claims of environmental benefit based on the absence or removal of an environmentally harmful substance if the product contains other substances that are equally or more damaging to the environment. The drafters appear to have been optimistic about the complexity, certainty, and normativeness of environmental impact assessment. It is not clear how one would demonstrate or indeed justify a conclusion that a particular substance is "more or equally damaging to the environment."⁸³ Similarly, the Application section provides that environmental claims, where applicable, are to be premised on appropriate, reliable, and verifiable scientific and technical information. But this statement does not go far enough. Prior to their being made in public, all statements by industry relating to the environmental characteristics of their products should be grounded in the verifiable existence of a comprehensive product life-cycle environmental impact assessment. Representations of environmental benefit, if consumers believe them, generate inferences that environmental assessment research has in fact been undertaken by the advertiser. The failure of industry during the past two centuries to engage in the kind of research capable of identifying the environmental costs of product manufacture, transportation, use and disposal is one of the reasons we now find ourselves living on a planet at risk. It would be far better that no environmental claim be permitted unless and until that life-cycle assessment has been performed.⁸⁴ Lacking a requirement that suppliers assess environmental claims on the basis of a cradle-to-grave environmental impacts analysis

and Corporate Affairs to include substantial representation from environmental groups across the country on future work in this area. Such groups can and will bring scientific and technical expertise, the organized voice and opinions of thousands of environmentalists, and significant legitimacy to the entire process.

⁸³ Another example of the naivety of the drafters of the Guidelines is the discussion of "recyclability", which indicates a fundamental lack of understanding of an important environmental issue associated with recycling. The technical feasibility of recycling is not the critical variable in determining the environmental characteristics of a product. To determine whether a recyclability characteristic is "good", one would have to know the environmental costs of recycling, something which, as I point out later, is not easy to demonstrate. As well, the supposed environmental benefits associated with recyclability do not come from the collection of waste. An important benefit of a recyclability characteristic is that waste is transformed into industrial or consumer goods and, thus, reduces demand for renewable or nonrenewable resources. Unless both collection facilities and markets exist within the particular geographical area for collected goods, the environmental benefits of "recyclability" are not obvious.

Similarly, the treatment of degradability ignores considerable data which suggest that degradability may interfere with recycling efforts and may result in substantial environmental risks associated with the byproducts of degradation. That research is now very well known, and the fact that there is little discussion of it confirms the benefits which would be associated with implementing suggestions to include environmental expertise on any further work in this area.

⁸⁴ This is, admittedly, one step further than what has been recommended in the United States. See Recommendation 1.7 in *supra*, note 72 at 11.

of the product or service, the veracity of all environmental claims in the meantime must be doubted.⁸⁵ Ultimately, the enforcement of the *Principles* becomes as problematic as the enforcement of the misleading advertising provisions of the *Competition Act*, and for similar reasons.⁸⁶

The *Principles*, despite their shortcomings, represent a only a tentative first step toward addressing the rapidly expanding growth in misleading environment-related advertising. But given the serious negative environmental impacts generated by this kind of misinformation in the consumer marketplace, together with the serious substantive deficiencies of the *Principles* as presently drafted and the absence of an independent, public enforcement institution, it is unlikely that this particular regulatory instrument alone, at least in its present form, could ever address the problem adequately.

C. ENVIRONMENTAL LABELLING PROGRAMS

Government intervention in the market place is recognition that for consumers to make environmentally appropriate choices when canvassing the marketplace, they must have easy access to environmental impact information that is accurate, reliable and independently verifiable. Just behind regulation and voluntary advertising codes, the third, and much more sophisticated government initiative intended to assist purchasers in comparing and verifying environment-related product claims, is the variety of recently developed public⁸⁷ and private⁸⁸ environmental labelling programs. Such programs represent a relatively new

⁸⁵ The document thus directly contradicts the fundamental tenet of environmental analysis represented in the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.). As I point out in Part V, such analyses are extremely difficult to perform with any degree of confidence in their outcomes. Nonetheless, there is nothing in the Guiding Principles which would encourage manufacturers to invest the resources in developing the methodology to do product life cycle analyses.

⁸⁶ See Part V.

⁸⁷ In Canada, the federal government's Environmental Choice Program, established in 1989, represents the only public environmental labelling program now in existence. The history of the program and its regulatory rationale is described in D. Cohen, "Procedural Fairness and Incentive Programs: Reflections on the Environmental Choice Program", (1991) *Alberta Law Rev.* (forthcoming).

⁸⁸ While some would argue that a governmental presence in ecolabeling programs is extremely important, a purely private initiative has been organized in the United States. The American Green Seal program, given the market impact of American manufacturers and purchasers, could very well become the standard in North America. A description of the Green Seal program may be found in D. Hayes, "Harnessing Market Forces to Protect the Earth", (Winter 1990-91) *Issues in Science and Technology* 46. However, private initiatives run the risk of industry-capture and substantial consumer confusion if environmental standards which lack rigour are developed. See "Eco-babble", (21 September 1991) *The Economist* 84. It may be that, ultimately, we will need to develop regulatory instruments to address the problems associated with this regulatory instrument, which itself is designed to address the problems associated with the use of markets to regulate the production of environmental quality!

example of economic instruments designed to regulate corporate and human activity affecting the environment.⁸⁹

Specifically, these programs attempt to modify producer behaviour in product research and development through the creation and distribution of a marketable entitlement. In the case of the federal government in Canada, this entitlement consists of a license to use an *Ecologo*,⁹⁰ a graphic signature of the company's commitment to the environment for display in its advertising and on its packaging. The primary public policy objective of environmental labelling programs is to reduce the rate of environmental deterioration through the substitution in relevant markets of "ecolabelled" products, services and processes for products currently distributed in those markets.⁹¹ It is clear that these programs can also play an important role in addressing the market dysfunction represented by consumer confusion and exploitation related to private initiatives involving environmental advertising.⁹²

Although the ecolabelling programs now in place in Europe and North America are extraordinarily diverse, they nonetheless share some fundamental characteristics that have been currently incorporated in the Canadian Environmental Choice Program. The Canadian program, which is perhaps the most sophisticated and well-developed of the existing programs, involves four stages. First, the Environmental

⁸⁹ An interesting but naively optimistic proposal for the development of an environmental labelling initiative in the United States is found in J.P. Kimmel, Jr., "Disclosing the Environmental Impact of Human Activities: How a Federal Pollution Control Program Based On Individual Decision Making and Consumer Demand Might Accomplish the Environmental Goals of the 1970s in the 1990s," (1989) 138 U. Pa. L. Rev. 505.

The first example of this type of program was begun in West Germany in 1978, apparently at least in part in response to a Recommendation adopted by the Council of the Organization for Economic Cooperation and Development (OECD) in 1976 which urged member countries to develop comprehensive waste management policies. The "Blue Angel" logo is now carried by over 3000 products in some 60 product categories. Canada and Japan were the next to adopt such programs, in 1988 and 1989 respectively. Similar efforts are planned or underway in Norway, Sweden, France, the Netherlands and, through a number of mainly private agencies, the United States. See "Eco-Labels: Product Management in a Greener Europe" (Camberly, U.K.: Southwell Press Ltd., 1989), on file at the University of British Columbia and OECD, *Environmental Labelling in OECD Countries* (Paris, 1991).

⁹⁰ The Canadian Ecologo is a stylized maple leaf formed from the wings of three intertwined doves, with "Environmental Choice" and "Choix Environnemental" encircling the leaf. The program requires disclosure of relatively specific information respecting the particular environmental "benefit" associated with the use of the product.

⁹¹ Other public policy objectives might include the development of a subsidy program to encourage research and development in "environmental know-how" and technology, with resources for the subsidy coming from the marketplace rather than taxation revenues, and the generation of a generalized awareness of the complex links between private consumptive behaviour and the condition of the public biophysical environment.

⁹² To date, the program has addressed some fifty categories ranging from re-usable diapers to re-refined motor oil; from low solvent water-based paints to fine paper products made from recycled fibre; and from light bulbs to newsprint.

Choice Board⁹³ selects and tentatively defines a product category.⁹⁴ Very early on in this process, a life-cycle biophysical-environmental impact review of the products constituting the proposed product category is prepared.⁹⁵ The second stage involves further development, through the Canadian Standards Association (C.S.A.)⁹⁶ and the voluntary multi-sectoral task forces,⁹⁷ of the environmental guidelines issued by the Minister of the Environment under the *Canadian Environmental Protection Act*. These guidelines, which are based on environmental impact assessments, are specific to each product category and address the performance and design specifications to which products must comply in order that they may be allowed to display the federally owned Ecologo.⁹⁸ After the guidelines have been fully developed at the task-forces level, they are then made subject to review by the independent, scientifically competent Co-ordinating Technical Committee and to a 60-day public-review process. The third stage follows the promulgation of the new environmental guidelines and involves the licensing, for a fee,

⁹³ The Board is established under s. 5 of the *Canadian Environmental Protection Act* as an Advisory Board to the Minister of the Environment. It consists of fifteen persons and a Chair appointed by the Minister for indefinite terms. Currently, the Board consists of representatives of consumer groups, environmental groups, several science and social science disciplines and industry.

⁹⁴ Product category suggestions are sometimes generated internally within the program. More often, the Board draws on suggestions from external sources, including product manufacturers and suppliers, environmental and consumer groups and individual consumers. Serious concerns have been raised by industry about the lack of an early warning system which would inform them of prospective categories and the absence of a systematic approach to the prioritization and rejection of proposed product categories.

⁹⁵ The Environmental Choice Program, like more formal regulatory authorities and the private sector, has had to develop data bases and a methodology to perform product life cycle review without the benefit of a pre-existing body of knowledge and expertise in this field. There can be little doubt that the life cycle analyses and reviews employed by the Program are subject to precisely the same criticisms that have been made about life cycle analyses produced by the private sector. See Part V(D).

⁹⁶ Environment Canada has contracted with the Canadian Standards Association (CSA) to provide this service. The CSA has substantial national and international credibility in developing consumer and industrial standards. However, the CSA is simply an administrative infrastructure. It provides secretariat services for the task forces which consist of voluntary industry, environmental and consumer and government representatives. The CSA does not set standards, nor does it engage in research on which the standards are based.

⁹⁷ Concerns have been raised regarding the constitution of these task forces. Environmentalists, although partially funded, have undoubtedly been under-represented in the guideline development process. As well, the participation of smaller firms has been uneven due, at least in part, to the research resources available to larger established firms. To a limited degree, the under-representation of those groups has been offset by the use of program staff and Environment Canada resources to ensure that all information is subject to independent verification and assessment.

⁹⁸ In developing the environmental guidelines, Environment Canada has been guided by a concern that all proposed products and services encompassed by the program will generate a net environmental benefit taking into account the entire life cycle of the service or product. Consistent with the complete product life cycle concept inherent in the *Canadian Environmental Protection Act*, the Environmental Choice Program employs a preliminary environmental impact assessment of all proposed product, service and packaging categories.

of Ecologo use in the product marketing of individual manufacturers, importers and retailers that meet or exceed the guidelines. Important to the licensing program is product testing and confirmation undertaken by the C.S.A. to ensure that a particular product or group of products complies with the environmental guideline requirements. This is the fourth and final stage, where all licensed users are continuously monitored to ensure compliance with the environmental guidelines and the terms of their licences. The licensing period is three years, and the licensing agreement permits spot-auditing of manufacturing plants with immediate access to all relevant production and purchase records. Sanctions for non-compliance include contract termination, product recalls and even damage recovery by the government,⁹⁹ but is not clear whether non-compliance lists will be made public under this program.

One can immediately identify several advantages of this form of regulation over the command-and-control model, exemplified in the *Competition Act*, and over the employment of industry-dominated voluntary guidelines and processes. Environmental labelling programs are attempts at generating reliable environmental impact assessments across a broad range of products. These product-specific impact assessments are public records, for use by private producers who may be completely independent of any association with the public regulatory program. The assessments, themselves produced independently of any single industry sector, present an extraordinarily valuable data base. And if a product life-cycle analysis is incorporated into the environmental labelling program, together the analyses provide some assurance that purchase decisions will generate environmental benefits.

Further, environmental guidelines can, and often do, address the full range of environmental characteristics consumers consider in evaluating environment-related product logos and conflicting environmental claims made by suppliers.¹⁰⁰ The use of multi-factorial environmental impact assessments and/or multi-factorial environmental guidelines substantially reduces the risks associated with uni-dimensional environmental adjustments that characterize many private initiatives. As well,

⁹⁹ See "Environmental Choice Licensing Contract", on file at the University of British Columbia. What remains to be answered, however, is whether the enforcement and compliance process within environmental labelling programs will be subject to the same paralyzing political pressures that have characterized environmental compliance and enforcement policies in Canada in recent years.

¹⁰⁰ For example, Environmental Guidelines on all-purpose cleaners will likely address surfactants, builders, solvents, scouring abrasives, stabilizers, disinfectants, bleach, preservatives, propellants, perfumes and deodorizers. The Guidelines will likely address a wide range of environmental impacts including resource and energy use, packaging, chemical and biophysical impacts, ecological toxicity, VOC levels, biodegradability, eutrophication and aesthetic degradation, human health risks, delivery systems and disposal methods. See "Briefing Note on All Purpose Cleaners," (1990), on file at the University of British Columbia.

such programs will often ensure that the environmental guidelines address non-environmental performance characteristics, thereby also addressing the concern that environmental benefits associated with a product are not offset by inadequate performance.¹⁰¹ Also, the guidelines are reviewed tri-annually, ensuring that the standards are both current and effective in generating the environmental benefits sought. More importantly, this tightening of environmental standards means that corporate investment in research and development will be rewarded through the development of guidelines that reflect increasingly higher standards of environmental performance.

Perhaps most important of all, environmental labelling programs using easily identifiable and verifiable logos reduce purchasers' search costs to the absolute minimum. And to the extent that these programs also rely on certification, compliance and verification requirements,¹⁰² they represent a credible signal that the product so endorsed will conform to the broad range of environment-related criteria discussed earlier. These programs thus reduce the need for consumers to educate themselves about the overwhelmingly technical, frequently complicated environmental issues that must be addressed in environmental planning.¹⁰³

¹⁰¹ For example, the environmental benefits potentially generated by market shifts to paints which are formulated to reduce the release of volatile organic compounds which contribute to the formation of local air pollution as well as to global warming is reduced to the extent that the performance of such paints require more frequent use. Thus, environmental guidelines must incorporate product performance standards to ensure that the environmental benefits of the product are, in fact, produced. See Environmental Choice Guideline, "Water Based Paints", ECP-12-1990.

¹⁰² Under the Canadian program, the Environmental Guidelines are enforced through compliance and verification measures developed and implemented through the Canadian Standards Association, generating confidence that the actual products purchased comply with the guidelines. Thus, consumers utilizing the program can have confidence that the specific products purchased conform to the product specific environmental criteria contained in the applicable Guidelines. In addition, the licensing contract imposes strict self-monitoring and reporting requirements with significant penalties imposed for non-notification. Finally, the Guidelines demand that licensed suppliers certify that they are in actual compliance with local, provincial and national environmental legislation. Therefore, purchasers have some indication that their procurement decisions, and the profits generated by those choices, are directed at a subset of the industry which is not violating mandatory environmental regulations.

¹⁰³ However, environmental labelling programs assume that the environmental preferences of consumers can be identified, are generally identical, and are identical to, or complementary with, the environmental objectives of the individuals developing environmental guidelines within the environmental labelling programs. Confidence in this kind of regulatory instrument as an effective and defensible vehicle to generate environmental benefits is reduced to the extent that the labelling programs cannot know the environmental preferences of consumers to the extent that the preferences vary significantly across the population and differ from those of the individuals designing the guidelines.

Another, perhaps more fundamental, problem with such programs is that they might very well lead consumers to believe that increased consumption will benefit the environment. That will rarely, if ever be the case, and the communications policy of the Environmental Choice Program attempts to be sensitive to this issue. See "If You're in the Market for a Better World,

Even from this cursory analysis, what should be obvious about environmental labelling programs is that they represent a radically different regulatory approach to misleading advertising in comparison with the traditional command-and-control instruments developed earlier in this century and codified under the federal *Competition Act*. But all three of the regulatory responses to misleading environmental advertising—mandatory regulations, voluntary guidelines, labelling programs—require that either the private-sector actor or the public-sector regulator possess data on which to base, respectively, its environmental marketing claims or enforcement decisions. Without the necessary resources and methodologies with which to produce reliable environmental impact assessments of consumer products and services, we have little reason to be confident that either marketplace operation or government intervention will be sufficient to generate genuine environmental benefits.

D. THE DEVELOPMENT OF PRODUCT LIFE-CYCLE ANALYSES

What all of this tells us is that the problem we face is not necessarily represented by a choice from among different forms of regulation that address misleading environmental advertising; rather, much, if not all, of the private and public debate surrounding this issue is due to the absence of refined, sophisticated methodologies capable of producing reliable life-cycle environmental impact analyses¹⁰⁴ of the products and services so heatedly discussed. Given all of the ways in which environment-related product information can be misinforming, the problems brought about specifically by the inability to verify claims based on such information are substantial. Put simply, without better methodologies, neither private-sector actors nor public regulators have any assurance that their marketing and enforcement decisions are soundly based on an accurate understanding of the environmental impacts of the products and services that are the subject of regulation.¹⁰⁵

Read On," (16 September 1991) 104 MacLean's Magazine (insert). However, private sector advertising of licensed products may very well be designed to encourage consumption of products with serious adverse environmental impacts. For example, Eveready batteries have been advertised with language which suggests that "nothing... is kinder to the environment" than a battery!. See *Globe and Mail* (20 September 1991) A3.

¹⁰⁴ Product life cycle assessment can be defined as the "systematic identification and analysis of the environmental and health impacts associated with a product or service through all stages of its life cycle". See Marbek Resource Consultants, "Product Life Cycle Assessments: Key Issues and Options for the Environmental Choice Program," (May 1991) at 1.

¹⁰⁵ Virtually everyone who has examined this issue recognizes that these issues must be resolved if consumer product markets are to be effectively employed to generate environmental benefits. See *supra*, note 72 at 11-17 and Society of Environmental Toxicology and Chemistry, "A Technical Framework for Life Cycle Assessment" (1991) at 1-8 ["Framework"].

Thus, the most important initiative being taken in response to the general needs of the consumers to verify and compare environmental claims is the joint development by government¹⁰⁶ and industry of credible, reliable environmental impact life-cycle analyses focused on those products and services consumers have come to expect will slow the rate of environmental degradation. Development of such analyses will go some way toward ensuring that producers address the issue of potential environmental impacts during the earliest stages of their research and development.

Recent studies by the Environmental Protection Agency, in the United States, suggest life-cycle analyses should focus on a broad range of environment-related product and package variables, including content status as recycled or toxic; potential degradability, recyclability and reusability; pollutive impacts on air, water, soil; and, potential for energy and other forms of resource conservation.¹⁰⁷ Studies elsewhere have recommended that life-cycle analyses should comprise two distinct stages. The first would involve a quantitative inventory of material and energy needs, and waste emissions levels (solid, liquid, gaseous, released into the air, water and soil). The second stage would involve assessment and characterization of the effects related to this material-energy-emissions inventory in terms of potential risk to the ecology in general and human health, habitats, and aesthetic surroundings in particular.¹⁰⁸ To the extent that one or more of these environmental variables can be

¹⁰⁶ One of the more important and often ignored initiatives in the National Packaging Protocol is the "development of methodologies and guidelines to be used in conducting environmental profiles of packaging, allowing users to compare packaging choices." See Canadian Council of Ministers of the Environment, National Packaging Protocol, Policy #1. As well, the Protocol anticipates that industry will undertake environmental profiles of their packaging in accordance with the guidelines.

One argument in favour of government activity in this area involves the public good character of the methodology involved in carrying out life cycle analyses. Once the methodology is produced, it is difficult if not impossible for a private producer to monitor its use, and, thus, to capture the profits from its investment in developing the methodology. Simultaneously, once produced, the information can and should be transferred virtually costlessly from one producer to another. Finally, it is arguable that under-capitalized businesses, which cannot afford the initial investment in developing the methodology, might very well benefit most from having access to it.

Another reason for government involvement in developing the methodology for life cycle analyses is that development of efficient markets in environmental goods will be facilitated if the relevant environmental information is presented in a manner which assists purchasers in making comparisons across products and services. Comparability is assisted if suppliers are using a uniform methodology in their product specific environmental assessment processes.

¹⁰⁷ See United States, Environmental Protection Agency, Office of Research and Development, Risk and Reduction Engineering Laboratory, *Background Document on Clean Products Research and Implementation* (June 1990), ch. 3.

¹⁰⁸ This stage must necessarily involve risk assessment, which uses the information in the first stage, determines the fate and transport of the releases and then addresses the pathways by which humans and other organisms will be exposed to the emissions. However, risk assessment will not be useful in addressing some impacts including ozone depletion, greenhouse gas impacts, habitat loss and soil loss. See "Framework", *supra*, note 102, ch. 10.

ignored or overlooked in the analyses, consumers, producers and regulators risk making decisions on the basis of distorted images of the environmental impact of relevant products.

But interpretation and productive use of life-cycle analyses are complicated processes, requiring approaches ranging from simple pass-fail matrices and qualitative impact assessment to more intricate quantitative weighting assessment schemes.¹⁰⁹ (On the other hand, going no further than the inventory stage of identifying and quantifying particular emissions without concern for environmental impacts is arguably a valid approach as well.¹¹⁰) Although the methodology may or may not acknowledge scientific uncertainty and the interaction of such uncertainty with raw data, it will always impute assumptions about the mixes of technologies used and about the assessment methodologies used to transform the data into environmental impact assessments.¹¹¹ Any such analysis must acknowledge the assumptions inherent in its development—relevant temporal and geographical boundaries; energy input mixes; transportation modes and distances; disposal and recycling technologies and related facilities; and “fate” environments, such as rivers, groundwaters and airsheds.¹¹²

Available information on private-sector development of product life-cycle environmental impact analyses indicates that industry is only now beginning to develop standard data bases and methodologies capable of helping suppliers to evaluate product claims of the simplest (though often misleading) order.¹¹³ But consumers who act as environmental planners, along with regulators, can, and should, demand access to the impact assessment results and undertake critical evaluation of them on the basis of such ideas as have been presented above. Environmental impact assessment studies currently are, and will likely remain the most important source of environmental data upon which consumers and regulators can rely in making their decisions.

¹⁰⁹ *Ibid.*, ch. 4.

¹¹⁰ See United States, Environmental Protection Agency, Office of Research and Development, Risk Reduction Engineering Laboratory, “Technical Work Plan on Development of a Consumer Product Lifecycle Analysis Methodology” (August 1990) at 10. There are obvious problems with an inventory approach which simply discloses inputs and outputs. At the very least, they are subject to significant misinterpretation if readers believe that they characterize the environmental impact of the product; they appear quantitatively unassailable but are often plagued by substantial uncertainties in the data on which they are based; and the use of national data can hide regional or site specific variations. These and other related concerns are addressed in an industry workshop document, “LCA Implementation Strategy” (Ad hoc Implementation Strategy Planning Committee, 23 August 1990), on file at the University of British Columbia.

¹¹¹ *Ibid.* at 11-12.

¹¹² See “Framework”, *supra*, note 102 at 31-33.

¹¹³ *Ibid.*; *supra*, note 104; and The Conservation Society, “Product Life Assessments: Policy Issues and Implications,” (Washington: The Conservation Society, 1990).

VI. PREFERENCE SHAPING AND PROPAGANDA¹¹⁴

For the most part, this article has been formulated upon the optimistic premise that consumers, when supplied with appropriate, accurate, reliable and verifiable information, will tend to make those purchasing decisions most likely to effect the greatest environmental good or, at least, do the least environmental harm. There is, one hopes, at least a little truth in that premise. One hopes that people, generally, are not cynics. Nor are they masochists. They will tend to do "the right thing," assuming that to mean doing what brings the least harm to themselves and others insofar as they are aware of the harmful potential of their decisions. I have assumed most people to have what is, in the words of Terry Eagleton, "a fairly sharp eye to their own rights and interests," and to be "uncomfortable at the thought of belonging to a seriously unjust form of life."¹¹⁵ Is there any reason to suspect that the vast majority of people would be comfortable seeing themselves, even in the abstract, as members of a terminally polluting, environmentally haz-

¹¹⁴ I should point out at the outset of this discussion that I am not advocating environmental propaganda as government policy. We can talk about the role of governments in providing information, information about information, public education, the opportunity for dialogue, propaganda and so on, without ever agreeing on when one turns into the other. Categorizing the experience of environmental acculturation will not assist us in thinking seriously about the role of the state in the production of a particular set of environmental norms. I have chosen to use the term "propaganda" rather than a less emotionally laden word to bring out for the purposes of this paper the very worst images of a state destroying the freedom of its citizens to define for themselves the way they want to live their lives.

My sense here is that the dispensing of pure factual information, if such a thing is possible, is only a more covert form of propaganda. The very selection of what information to give, the manner in which it is presented, the context and medium in and through which it is received and so on, combine to determine its meaning. While that means that there is no distinction between "information" and "education" and "propaganda", I think that a persuasive argument can be made that we should recognize a distinction in designing regulatory instruments.

Regulation through information disclosure accepts consumer tastes as given and simply ensures that the information base on which comparisons are made is as accurate as possible, accepting that the production of information itself is a costly endeavour. Regulation through propaganda refers to something more than the government merely conveying objective facts. Propaganda is a system through which image, colour, and appeals to human emotions are employed in complicated ways to persuade consumers that they ought to engage in a certain kind of activity. It is not enough to inform consumers that a particular species might be adversely affected by their purchase decisions taken in the aggregate. For the market to work as a regulatory instrument, consumers must come to care about the existence of that particular species, want to take personal steps to assist it, believe that they must change their behaviour out of concern for that species and know that they ought to alter their personal choices to reflect concern for that species.

In the case of consumer product markets and the environment, information might consist of data about the number of trees which are required to be processed to produce a consumer good, or information about the biological differences between old-growth forests and tree farms, or about the implications on fish resources of the forestation practices of relevant members of the forest industry. Conversely, propaganda might consist of how the information is communicated, what images and emotions are evoked by the information and whether the reader should care about forests and fish and the natural environment.

¹¹⁵ T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991) at 27.

ardous life form, a life form that through its wastefulness and inefficiency is befouling its planet and killing itself?

The answer to that series of questions is obviously no, yet the problems of indiscriminate pollution, hazardous waste and inefficient use of resources continue to plague us. And the marketplace holds alluring solutions, some of them pragmatically persuasive. But to leave the inference that marketplace mechanisms alone could suffice to alleviate our environmental ills would be to misread this paper and much of what has preceded it in the work of others. The technical objections to the marketplace as a panacea are only one of the many sorts of hurdles to be overcome in this area.

Speculating on the use of real markets, in which concern for delivery of environmental benefits or at least in which the reduction of environmental harm could dominate, requires our going beyond the kinds of analyses usually undertaken by economists. In a hypothetical market—what we can call an environmentally neutral product market¹¹⁶—only a small interest in the way in which consumer preferences for competing products is shaped. There, we can accept the tautological argument that the collective outcome of consumer decisions based on those preferences—that is, the mix of competitive products produced by the mix of consumer preferences—is the one that we “ought” to have. But where we attempt to use preferences for the environment as determinant of the level and direction of environmental regulation—as in an environmentally positive hypothetical market—individual and collective preferences for environmental quality become critically relevant.¹¹⁷

What this means should be obvious. The regulatory impact of markets in “green” products will necessarily be a function of two variables—impact assessment data and consumer preferences.¹¹⁸ The

¹¹⁶ There may be very few completely environmentally neutral markets, but leaving aside for the moment the potential environmental costs associated with the resources used to manufacture, transport, distribute, use, reuse and then dispose of a tennis racket, that product, to use a limited example, is not environmentally harmful. When a consumer chooses a particular racket, there is very little external interest in that purchase. When one ignores the environment, the only affected parties are the manufacturer, competitors, distributors, relevant investors, creditors, employees and the consumer.

¹¹⁷ When environmental concern is superimposed upon the marketplace, the market assumes unprecedented importance to previously uninterested parties. What each consumer does in an environmentally sensitive market is of import to other consumers and non-consumers alike. The failure of the market to respond to the dominant concern is premised upon the inability of all the interested parties to exert influence using instruments purely of the market such as supply, demand and price.

¹¹⁸ It is also a product of prices. It is clear that as the prices of environmentally preferred products fall, more will be purchased. If the shift to these products is from products which generate more environmental harm, then the effectiveness of using this kind of a regulatory instrument might be enhanced by government policies which might reduce the price of the environmentally preferred product. These might include a tax policy and an environmental labelling entitlement pricing policy.

first I have already addressed: regulation of environmental information simply demands, within limits, accurate information about the environmental consequences of market activity. What I have attempted to demonstrate so far is that the pursuit of accuracy in this context presents a complicated set of problems that are exacerbated by our lack of relevant scientific expertise, rendering all but ineffective the traditional regulatory instruments currently used to address misleading advertising.

The second variable, that of preferences, consists of the ways in which environmental information is interpreted by consumers. The significance and normative aspects of consumer preference information—for example, whether consumers are concerned about global warming or about the use of virgin, unrecycled materials in product manufacture—are, of course, equally crucial to a full appreciation of whether or not any particular manipulation of the market can effect any particular change.

Environmental regulators must appreciate that the collective preference for environmental improvement (assuming it can be reflected in market choices at all) cannot be taken as given. Our choice of regulatory instrument must be predicated on a specific regulatory objective and on an educated forecast of the instrument's potential effectiveness in achieving that objective. Without knowing the shape of each individual consumer's utility functions or the degree to which such functions can reflect preferences about environmental quality, we simply cannot accurately picture the ultimate environmental effect of regulatory intervention.

Of greater concern is the realization that attitudes towards the environment are engendered through acculturation and socialization, which are the result of complex interaction between formal education, family orientation, market advertising, employment experience, community participation, as well as a host of other factors, knowable and unknowable, that make us who we are. Relying on markets to generate environmental benefits means that we are faced, at the most elementary level, with the need to understand (and perhaps modify) the attitudes, the beliefs, and ultimately the behavioural patterns of consumers and producers.

In Part II, I described the classic response of governments and economists, which has been primarily to focus on producers' activities and to legislate the computation of environmental degradation into production costs.¹¹⁹ By externalizing the production costs associated

¹¹⁹ In the market the price system is used to convey information to both producers and consumers; prices reflect society's preferences for certain goods and services. There are, however, situations where market prices do not convey accurate information. These situations arise when exter-

with the disposal of pollutants, in all their forms, industry ends up producing more than is economically and socially efficient and, accordingly, setting lower-than-efficient prices. Economic inefficiency is the excess production that causes too much effluent to be dumped into the environment. Its source is the incorrect pricing of the product: the market price only reflects a firm's marginal private costs of production but not the marginal social cost associated with that production.¹²⁰ Thus, the market price does not accurately reflect society's preferences for the product because it fails to take into account whatever damage the production may inflict on third parties.

Through the use of direct regulation aimed at forcing producers to internalize these costs,¹²¹ governments have intervened in the market in an attempt to minimize the social costs associated with using the environment as a receptacle for the by-products of the production process. If direct regulation is effective, the firm is forced to internalize a cost that it had previously externalized, thereby increasing their production costs accordingly. One can think of the goal of supply-side regulation as reconciling the marginal social-cost-of-production curve with the firm's supply curve.

But in order to force the internalization of all of the costs of production to such an extent that the firm's marginal social-cost curve becomes its supply curve, the government must have perfect information about the negative environmental impact of the firm's activities.¹²² Clearly, the government does not have perfect information about the environmental impact of production processes, nor could it perfectly enforce cost-internalization strategies were it to have access to perfect information. While direct regulation of firm and industry activities would force some internalization of the social costs of production, this internalization would necessarily be incomplete. Government failure is surely no less frequent than market failure, and in an imperfect world, government regulation will, at best, allow for market prices to reflect imperfectly the external costs of production.

If one accepts that simply by focussing on producers it is impossible to internalize perfectly the negative externalities associated with producers'

nalities are present. An externality occurs whenever the activities of one economic agent affect the activities of another agent in ways that are not taken into account by the operation of the market. W. Nicholson, "Externalities and Public Goods" in *Microeconomic Theory: Basic Principles and Extensions*, 4th ed. (Chicago: The Dryden Press, 1989) at 718.

¹²⁰ R.S. Pindyck and D.L. Rubinfeld, "Externalities and Public Goods" in *Microeconomics* (New York: Macmillan, 1989) at 621.

¹²¹ See Part 2, *supra*.

¹²² The government must have perfect knowledge about the marginal social cost curve associated with every firm, it must be able to formulate regulatory policies which will force complete internalization of these costs and it must be able to perfectly monitor the activities of the firms in order to ensure that there is complete compliance with these regulations.

activities, an immediate alternate focus of regulation presents itself. Like producers, consumers—as well as other actors in the market—can become the focus of regulatory intervention. Traditional regulation of consumer behaviour may take the form of consumer information policies and consumption taxes. What I am proposing, however, is very different—quasi-regulation by government through propaganda and education of environmental behaviour. In short, consumer preferences can be shaped and behavior patterns altered to follow a more “environmentally correct” path.

What current and proposed economic instruments have in common is that they take consumer preferences as given, yet even this is problematic.¹²³ The regulatory instrument that I will briefly explore here is what Richard Stewart calls “preference-shaping,” that is, convincing consumers of why and how to change their consumption patterns. As a form of regulatory intervention it is much less developed. Such an approach to minimizing the external costs associated with production of a certain output involves influencing demand for that output through modification of consumer attitudes and preferences for the sake of a particular environmental good.

If the demand for consumer products with adverse environmental consequences were lower, their prices should fall¹²⁴ and their supply should decrease accordingly. We assume also that as outputs fall, the amount of pollution the firm causes likewise decreases. The government could use propaganda¹²⁵ to influence consumer demand so that consumers “choose” not to demand a product whose production generates negative environmental externalities. This choosing results in an inward shift of the demand curve; consumers demand less of the good at every

¹²³ As Richard Stewart points out, it may be difficult to justify the development of regulatory policy taking consumer preferences as given, in light of the facts that the regulatory policies themselves may change these preferences, the preferences might be different if premised on different information and the preferences in an area as volatile and dynamic as the environment may very well be in a constant state of transformation as they are informed by political debate. See R.B. Stewart, “The Reformation of American Administrative Law,” (1975) 88 Harv. L. Rev. 1667 at 1704-5.

¹²⁴ A major difference between traditional environmental policies which involve direct regulation of the supply side and regulatory measures which indirectly influence the demand side is their affect on price. In both cases, the equilibrium level of output is lower than before the government intervened. When the government intervenes through adjusting private costs to reflect social costs, prices increase to reflect the latter social costs associated with production. When the government intervenes to alter tastes, consumer demand declines and as a result, prices fall. It is not, therefore, the market price which changes to reflect the social costs of production; rather, a lower consumer demand takes into account those social costs.

¹²⁵ Regulatory intervention to correct market failure associated with imperfect information is, of course, the least intrusive and most well-developed form of state action. See S. Breyer, *Regulation and its Reform* (Cambridge, Mass.: Harvard University Press, 1982) at 161-64 and J.P. Kimmel Jr., *supra*, note 89 at 530.

price. The new demand curve is lower than the old industry demand curve, reflecting this change in tastes.¹²⁶

The new consumer demand can be thought of as representing a demand curve having internalized the external social costs associated with the production of a good; the new demand curve then represents consumers acting like environmentally sensitive citizens, that is, some choosing to consume less of the hazardous good, while others none at all. The change in consumption patterns in response to the propaganda occurs because the government has persuaded some consumers to act like environmentally concerned citizens rather than self-interested consumers. Thus, governments can use propaganda to influence consumers to internalize the social costs associated with products the production of which generates adverse environmental impacts.¹²⁷

What is clear, however, is that regulatory intervention to move the demand curves of lawful products is still an under-developed form of regulation; that government-funded environmental labelling programs have both informational and propaganda characteristics,¹²⁸ and that demand-side regulation through propaganda is likely to be far more effective than supply-side cost internalization.

The effectiveness of cost internalization strategy in reducing environmental harm depends on two groups of factors. It depends first on the ability of the government to align an industry's marginal social-cost-of-production curve with its corresponding supply curve.¹²⁹ As discussed earlier, the extent to which firms will internalize the social costs of production in response to regulation depends on the ability of the government to ensure compliance with its regulations. Ensuring compliance with environmental regulations requires a substantial commit-

¹²⁶ The new equilibrium level of output will result in a lower level of pollution generated in the production process. As well, the new equilibrium price is lower than it was, reflecting the fact that at every price consumers are willing to purchase less output.

The fact that a government propaganda campaign aimed at changing consumer tastes for a certain good does not result in a complete collapse in demand reflects the fact that some consumers will not be affected by the government's educational efforts. Some consumers will be indifferent to the deleterious effects the production of the good has on the environment. Those consumers who choose not to consume the good or to consume less of the good do so because they derive utility from not consuming a good whose production is environmentally harmful (or they derive disutility from knowingly consuming an environmentally unfriendly product).

¹²⁷ In one sense, this is similar to the government using supply side regulation in an attempt to get producers to act like socially responsible members of society and internalize the social costs of production.

¹²⁸ See *supra*, note 89 at 38, in which reference is made to the facts that labelling programs do not simply provide information and that the label represents a conclusion "as to which product *deserves* to be chosen on environmental grounds."

¹²⁹ Put more simply, the effectiveness of cost internalization depends on the extent to which government regulation forces individual firms to internalize the environmental costs associated with their productive activities.

ment of resources to enforcement, including both monitoring industry participants and penalizing violators. The problem of information asymmetry, also discussed earlier, renders it impossible for the government to monitor perfectly industry participants and, as a result, impossible for it to ensure complete cost internalization.

The effectiveness of a cost-internalization strategy also depends on the market structure of the industry and on the price elasticity of the product's demand. Assuming, for example, that an industry consists of a single firm, essentially a monopoly, and that the price elasticity of demand for its product is inelastic, it becomes obvious that the effectiveness of a cost internalization strategy can be substantially reduced. Since the monopolist faces an inelastic demand for its product, any increase in price due to an internalization of the social costs of production will have very little effect on consumer demand.¹³⁰ The increased production costs are passed directly on to consumers, who end up paying a higher unit price without consuming any fewer units. In this case, a cost-internalization strategy with the objective of decreasing supply of the environmentally unfriendly good is defeated. An inelastic demand for a product produced in a competitive market will have a similar effect. There, because demand is inelastic, the increase in costs will be passed on to the consumer through higher prices, with the industry levels of supply and demand remaining approximately the same.

What begs explanation is the relative paucity of regulatory initiatives involving "demand side" regulation. The explanation lies in the myth that the state is not, and should not be involving itself in shaping the development of consumer tastes. Some believe that it is permissible for the state to be implicated in developing intellectual faculties that permit individuals to participate in markets and in ensuring the accuracy of information about available market choices, but no further. How we citizens choose what we choose is somehow not to be the business of the state.

But this proposal generates its own (and perhaps even more difficult) set of questions that cannot, like questions about informational accuracy, be addressed through the merely mechanical process of insuring access to accurate data. What is the "correct" set of environmental preferences the state ought to persuade people to exhibit? What are the covert and overt methods it should use to shape those preferences? And ultimately, which institutions should the state endow with the responsibilities of urging such preferences and teaching such methods?

¹³⁰ Of course, if demand for the product is perfectly inelastic, an increase in price will have no effect on the level of demand.

The first question, of how we are to determine the "correct" set of environmental preferences, is perhaps the most difficult. Certainly we must acquire sufficient data on the complicated and inter-connected environmental impacts of our behaviours to understand the biophysical implications of what we are choosing to do. But data alone does not, through any purely logical process, generate answers about which preferences we ought to have. At its most extreme, what might be an environmental good to some people might be an environmental bad to others. One could argue, for example, that some residents of areas experiencing long-term water shortages might support shifts in markets that would sacrifice solid-waste reduction measures in order to conserve water supplies. Simultaneously, urban dwellers in regions with abundant water supplies might very well be willing to trade off water conservation in order to preserve remaining land fill sites. We are a long way from developing the political processes and methodologies that might be used to determine the correct set of environmental preferences, those that ought to be reflected in our market and regulatory activities.¹³¹

Assuming that we have arrived at a correct set of preferences, the second question, of what methods are effective in shaping attitudes to these preferences for the sake of the environmental good, is no more easily answered than the first. Environmental acculturation is a constant, ongoing process involving learning of a kind that is all at once direct and indirect, overt and covert, formal and informal, structured and random, appropriate and necessary and, occasionally, inappropriate and harmful. Such learning can take place at varying levels of consciousness, sophistication, and moral and material ethos, but, at least for purposes of this discussion, the most valuable and socially significant learning takes place during our continual interaction with others; composed of the responses that carry us forward in our environmental affiliations and responsibilities. It is what eventually determines our understanding of certain environmental expectations—those things expected of us and those things we expect of others. Some of this learning is formal in the sense that the other participants in our lives (parents, teachers, mentors and institutions, such as church and school) tell us explicitly what we should be doing in a given situation, what response would best fit the predominant environmental ethos. A great deal of such learning, however, is acquired in less formal ways—

¹³¹ To say that the process is "a social policy, political decision" and to delegate responsibility to elected representatives to make the choice in their benevolent wisdom is as naive as to have blind and tautological faith in the market to achieve the "right" outcome. See J.P. Kimmel, *supra*, note 89 at 536.

through our friends and family, and even through strangers. Such learning is the sum total of our understanding of the environmental norms, values, mores and beliefs that we, as members of our particular groups and subgroups, will have internalized over the course of a lifetime.

Our attitudes and responsibilities to the environment (or at least our understanding of those responsibilities) are determined in precisely the same manner as the determination of anything else we learn, such as the norms of our cultures or the skills of reading and writing. Still, this is not to suggest that we are taught these things explicitly. The process of learning our environmental responsibilities, like the process of acquiring our cultural norms or reading and writing skills, is a process so complex as to be effectively indescribable.¹³²

Furthermore, there is nothing to suggest that the short-term learning of new behaviour will have the desired long-term effect (such as the reduction of environmental harm) unless a similar change (the result of learning) also takes place in the attitudes, values and belief systems that ultimately determine that behaviour. In fact, there is nothing to suggest that there could be any real and lasting behavioural change without appeal to such overriding ideals.

And if all of that is true, the third, and ultimate, question remains to be answered: If it is environmental beliefs, values and attitudes that must be changed or re-learned, who will be supervising the effort to effect that learning? To suggest that government and other such formal manifestations of the public will are not involved in shaping attitudes, values and belief systems would be entirely specious.¹³³ Nevertheless, we live in a

¹³² Clearly, we learn from others through a variety of media and from experience. We might also recognize a difference in the types of learning which we do. Learning a skill, or set of skills such as reading and writing, is quite different from learning attitudes, opinions and beliefs. Nevertheless, the question might still be asked, how do we decide what we will learn, i.e. what criteria do we use to determine which bits of the tremendous volume of information with which we are assaulted, seemingly on a daily basis, to internalize and include?

Some of the information merely reinforces what we already know and believe, leaving aside for the moment the question of how the *echte*-knowledge came to be, and some is simply ignored, misunderstood or not comprehended. But some of the bits are selected, processed, accepted, internalized and become part of our total world view. Although it is clear that some of our learning must gain the status of belief based upon the source which presents it, and perhaps the manner in which it is presented, it is equally clear that we occasionally believe something because we simply do, with no explicit knowledge of how we came to believe it or where, in fact, it first impinged upon our consciousness.

¹³³ Our education systems, for example, are channels of just that type of learning. It has been suggested that the *only* reason that we send our children to school is for acculturation, with reading, writing, mathematics and sciences merely acting as the vehicles through which the inculcation of the dominant ideologies can be accomplished. Be that as it may, there is clearly no reason to doubt that a certain amount of such learning must go on. In fact, for an institution like a school system, a bureaucracy of some complexity, to function at all efficiently there must be some teaching of, at least, the culture of the institution. Insofar as the institutional culture

society that espouses the tenets of liberalism as being fundamental to our democratic forms of government, to our respect for individual choice and autonomy, and to our willingness to cede to each person the responsibility of individual self-determination.

While environmental preference-shaping through propaganda would seem to be a necessary and extremely effective component of market-based environmental regulation, engaging in propaganda raises the spectre of what Hannah Arendt and others call "the core evil—the official determination of the truth or falsity of political opinion,"¹³⁴ and what is, in Arendt's own words, "possibly the most important instrument of totalitarianism for dealing with the nontotalitarian world."¹³⁵ Most of us are willing to accept that children should be overtly and explicitly taught in state-run institutions about their roles in society, and that to be included in this teaching are those values and beliefs that are widely considered as non-controversial, namely, altruism, cooperation, courtesy and general avoidance of evil lifestyle influences. But once we have accomplished such learning and the years of public education are behind us, there is something more than a little distasteful about Orwellian thought-police silently invading the sanctity of our homes armed with messages about values, ethics and beliefs.¹³⁶

Under certain circumstances, we have been willing to acknowledge and accept the government's invading our innermost thoughts.¹³⁷ During times of war and other crises, the seemingly natural pulling together of society leaves us vulnerable to government manipulation and propaganda, even when no effort is made to disguise it as something else.¹³⁸ Occasionally the subject-matter will determine the acceptance of the message.¹³⁹ Governments, however, are not generally in the business of

and that of the dominant society overlap, there is a commensurately high degree of learning going on which is designed to influence one's ideas about role, expectations, responsibilities, rights and obligations.

¹³⁴ T.H. Jackson and J.C. Jeffries, "Commercial Free Speech: Economic Due Process and the First Amendment", (1979) 65 Va. L. Rev. 1 at 39.

¹³⁵ H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, Jovanovich, 1951) at 42.

¹³⁶ This myth, that the state can only legitimately control the images and ideas communicated to children and others in need of protection, and the complementary myth that the state does not and cannot be permitted to regulate the images and ideas communicated to adults lies behind and is captured by the Supreme Court of Canada's recent decisions surround commercial speech, culminating in the striking down by the Quebec Superior Court of the federal government's legislative ban on tobacco advertising. See A. Hutchinson, "Money Talk: Against Constitutionalizing (Commercial) Speech", (1990) 17 C.B.L.J. 2.

¹³⁷ At least in overt fashion. That it goes on covertly, all the time according to many commentators, is quite another question.

¹³⁸ Depending to a large extent on the general popularity of the cause or the severity of the crisis and the empathy which can be generated thereby.

¹³⁹ The Participation program, sponsored by the federal government, has enjoyed phenomenal success during its twenty year lifespan and has gone almost completely unremarked by those

attacking the status quo, not generally in the business of persuading people against purchasing legally available products.

Yet if this is true, if the government is an inappropriate messenger in the minds of most, what then is our alternative? Are environmental groups, in their enormous diversity, more suitable? Due in part to years of dis-empowerment in the face of serious environmental crises, environmental groups, although serving an important if not vital role, often lack the stature and credibility (not to mention the resources) necessary to mount continuous programs of public education. Nevertheless, if one is convinced that environmental advocacy groups are the most appropriate messengers, which group or groups should be chosen? Earth First?¹⁴⁰

But if not to governments and if not to environmentalists, are we then to cede responsibility for environmental acculturation to private industry? Despite the conceptual allure of the somewhat romantic, somewhat stylized vision of human learning presented above, it is increasingly clear that the most insidious and effective learning/teaching dynamic at work on the continent of North America is of the type initiated by the various forms of mass media, that is, advertising in general and television, radio, newspaper and magazine advertising in particular.¹⁴¹

for whom a natural inclination to distrust everything said by Ottawa would seem to make it a particularly vulnerable target. Clearly a mandate to suggest that good health through an active lifestyle, rather than being subject to unfavourable comparisons to sixty year old Swedes, is considerably less controversial than a scheme designed to revise patterns and habits of consumption learned over a lifetime and which would result in a lessening, in many cases, of comfort, leisure and convenience.

¹⁴⁰ Earth First! is a radical environmental group, advocating not only passive civil disobedience, but active acts of industrial sabotage. See "Radical Group suspected in British Columbia", *Vancouver Sun* (20 September 1991) A1 and D. Foreman, *Ecodefence: A Field Guide to Monkey Wrenching* (Tuscon: Ned Ludd Bks., 1987).

¹⁴¹ There is no denying that the media, particularly that part of the media made up of advertisers devoted to selling not only products but lifestyles carrying the stamp of approval of corporate North America, have devoted tremendous amounts of time and effort, not to mention money, in learning how to affect the attitudes, beliefs and value systems of those exposed to their messages. The reason should be clear. Consumers who have bought the value system, will buy the product by which it is represented. Consequently, the underlying message in most of what we watch is that consuming is good, not bad.

B.H. Bagdikian states at 142 in "Dr. Brandreth Has Gone to Harvard" in *The Media Monopoly* (Boston: Beacon Press, 1983),

At one time or another, advertisers have *successfully* demanded that the following ideas appear in programs around their ads.

All businessmen are good or, if not, are always condemned by other businessmen. All wars are humane. The status quo is wonderful. Also wonderful are all grocery stores, bakeries, drug companies, restaurants, and laundries. Religionists, especially clergy, are perfect. All users of cigarettes are gentle, graceful, healthy, youthful people. In fact, anyone who uses a tobacco product is a hero. People who commit suicide never do it with pills. All financial institutions are always in good shape. The American way of life is beyond criticism.

The above messages, to cite only a few, are not vague inferences. Major advertisers insisted, successfully, that these specific ideas be expressed not in the ads but in the

The liberal vision of various independent groups struggling on, in good faith, in complicated but earnest dialogues with public and private sectors in endeavouring to merge and render into reality our societal and environmental ideals cannot be reconciled with the conflicting visions of the despotic governments, radical environmentalist factions and rapacious entrepreneurs I have alluded to. But can we do nothing at all? The intractable questions of the "right" set of consumer preferences for the environment, of the ways in which we want to shape those preferences, and of the identities of the institutions we think we should employ to perform the task of preference-shaping cannot be answered here. Most disturbing is that far too few of us are trying to think about these questions at all.

VII. EPILOGUE

Returning briefly to our example of the unjust society and reference about a world that is peopled not with cynics or masochists but with people as they generally are, the point to be emphasized is that we must believe that either "the injustices are en route to being amended, or that they are counterbalanced by greater benefits, or that they are inevitable, or that they are not really injustices at all."¹⁴² In substituting the words "environmental damage" for injustices we immediately realize that this is very much the way Western societies have tended to view the problem of ecological destruction. Given our naive belief in the immortality of the species and the rightness of our continued technological progress, is it any wonder that we continue to do the very things that will cause the most damage to our environment and do the most harm to ourselves? Consider our many outlooks and the ways we rationalize them. Environmental damage will eventually be fixed, someday, by somebody. Environmental damage and its costs are outweighed by the benefits of a greater economic good. Environmental damage is inevitable simply because there are too many people for too few resources. Environmental harm is merely a myth caused by environmentalist fringe groups' overreacting, crying wolf. Reasoning along any of these lines unfortunately not only fails to inspire people to take responsibility, it further serves to reinforce and perpetuate that failure. We then end up either leaving it to others—generally those possessed of greater expertise, skill and learning—to fix things for us, or consoling ourselves with hopeful

ostensibly 'independent' news reporting, editorial content, or entertainment programs of newspapers, magazines, radio, and television.

¹⁴² T. Eagleton, *supra*, note 115 at 27.

calculations of economic benefit over environmental detriment. Or fatalistically separating ourselves from the possibility of any workable solution. Or worse, blinding ourselves to our very desperate need for one.