Consumer Protection, Environmental Law and Corporate Power

This is Volume 50 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.

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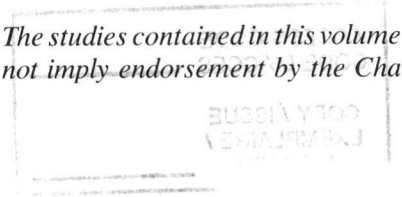

IVAN BERNIER and ANDRÉE LAJOIE,
Research Coordinators

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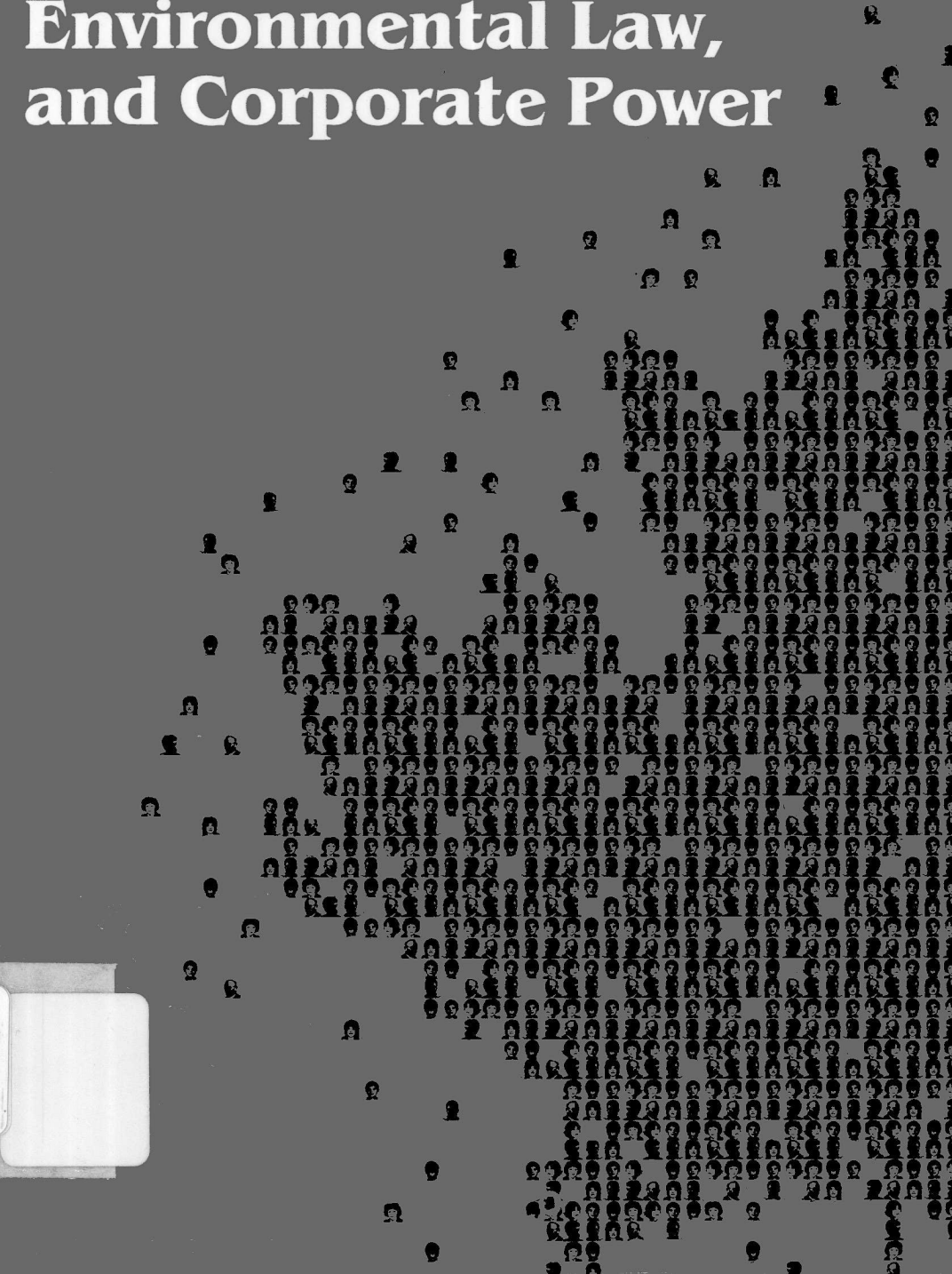

Consumer Protection, Environmental Law and Corporate Power

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AND
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Research Coordinators

Published by the University of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada

University of Toronto Press
Toronto Buffalo London

Grateful acknowledgment is made to the following for permission to reprint previously published and unpublished material: American Association for the Advancement of Science (*Science*); *Canadian Business Law Journal*; *Harvard Law Review*; *Southern California Law Review*; *University of Toronto Law Journal*; *Virginia Law Review*.

Printed in Canada
ISBN 0-8020-7296-8
ISSN 0829-2396
Cat. No. Z1-1983/1-41-50E

CANADIAN CATALOGUING IN PUBLICATION DATA

Main entry under title:
Consumer protection, environmental law, and corporate law in Canada

(*The Collected research studies / Royal Commission on the Economic Union and Development Prospects for Canada,*
ISSN 0829-2396 ; 50)
Includes bibliographical references.
ISBN 0-8020-7296-8

1. Consumer protection — Law and legislation — Canada — Addresses, essays, lectures. 2. Environmental law — Canada — Addresses, essays, lectures. 3. Corporation law — Canada — Addresses, essays, lectures. 4. Policy sciences — Addresses, essays, lectures. I. Bernier, Ivan. II. Lajoie, Andrée, 1933 – III. Royal Commission on the Economic Union and Development Prospects for Canada. IV. Series: The Collected research studies (Royal Commission on the Economic Union and Development Prospects for Canada) ; 50.

KE448.C65 1985 349.71 C85-099513-2

PUBLISHING COORDINATION: Ampersand Communications Services Inc.
COVER DESIGN: Will Rueter
INTERIOR DESIGN: Brant Cowie/Artplus Limited

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FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

INTRODUCTION

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 72 volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this allocation, and the distribution of the gains from their use. It also

considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well-deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

This volume of research is part of the output of the Royal Commission research program of Law and Constitutional Issues, and falls within its section entitled Law, Society and the Economy. This section serves as both an introduction and background to all the Commission's research on law. It analyzes how law has evolved under the pressure of social and economic changes and how it in turn has brought about changes in our social and economic conduct. Our objective was to highlight the relationship of law to the state, society and the economy. Our ultimate aim was to show how law affects Canadian society and to reveal its potential and limitations as an instrument for implementing government policy. In particular, we have addressed criticisms that focus on the multiplication of laws, regulations and tribunals as instruments of state intervention; on the complexity of our legal system and its essentially conflictual nature; and on the confusing character of the law and its apparent incapacity to respond to the needs of all Canadians.

We trust that with the inventory taken and the conclusions drawn in this section, we have provided the Commission with insight into one of the most fundamental issues confronting it — the role of the state in Canadian society. For to ask what is the role of the state is to also question the role of law.

The three studies included in this volume, although they deal with quite distinct topics, nevertheless raise a number of issues that are closely related. At the most fundamental level, each study questions the relationship between law, social policy and public policy. In particular, each confronts the same difficult problems of reconciling private goals with the public interest, a growth ethic with a quality of life ethic, and a

view of law as the cause of problems with a view of law as the cure for problems.

The studies also challenge currently popular views on these topics. Professor Edward Belobaba, in his examination of consumer protection legislation in Canada, speaks of the powerlessness of the average Canadian consumer and relates this phenomenon to failures of our legislative and political process. He concludes that problems of consumer protection are fundamentally problems of political process. Interestingly, somewhat similar conclusions are also reached by Professor Paul Emond in his analysis of environmental law and policy in Canada. Law, in his view, has not contributed much so far to finding a solution for the problem of environmental degradation. The responsibility for this situation lies squarely on the shoulders of the politicians who must create the incentives for making public law more sensitive to environmental concerns. Finally, these two topics are linked in the study by Professor Stanley Beck, which focusses on the centrality of corporate power in Canada. He concludes that there is an urgent need not only for a more sophisticated understanding of corporate power and what it entails, but also greater recognition by government of the need to come to terms with that power. For those who want to go beyond the conventional wisdom of the day in order to understand what may lie ahead, such contributions will prove most useful.

IVAN BERNIER

ACKNOWLEDGMENTS

A debt of gratitude is owed to the following individuals who were members of the Research Advisory Group for their views, ideas, and helpful suggestions regarding the studies in this section of our research program:

Harry Arthurs
Stanley Beck
Edward Belobaba
Robert Bureau
Paul Emond
Patrice Garant
Andrée Lajoie
Katherine Lippel
Roderick Macdonald
Stanley Makuch
Robert Martin
John Meisel
Johann Mohr
Patrick Monahan
Andrée Morel
Fernand Morin
Mary Jane Mossman
David Mullan
Julian Payne
Guy Rocher
Liora Salter
Daniel Soberman
Michael Trebilcock
Guy Tremblay
Joseph Weiler

I also take this opportunity to acknowledge and thank Nicolas Roy, my research assistant, for his untiring efforts and valuable help.

I.B.

1

The Development of Consumer Protection Regulation: 1945 to 1984

EDWARD P. BELOBABA

Introduction

Few areas of the law affect the average Canadian as directly or as dramatically as consumer protection. As consumers of complex goods and services we are exposed on a daily basis to problems of product safety, fair trade practices, product quality and dispute resolution. Most of the time we can resolve the problem ourselves — through discussion and compromise and without the help of law. Sometimes, though, we cannot. We need the help of law both as a benchmark and as a basis for action. We expect the law in these cases to be readily accessible and reasonably responsive. Because the problems in the area of consumer protection law are so pervasive, they can justifiably demand the best that the legal system can deliver. Large or small, consumer protection problems are important both to the individual and to society at large.

The effect of a major consumer protection problem on an individual Canadian can be devastating: product injuries can result in permanent disablement, even death; financial losses can be substantial; family and economic dislocation can be severe. Societal concerns in these areas are obvious. The effect of a minor consumer protection problem is more subtle. Societal concern about the "little injustice" is less obvious but no less important:

> The reason for our interest in little injustices is [this] . . . people care about them. Little injustices are the greater part of everyday living in a consumption society and, of course, peoples' attitudes towards the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and something else, alternatives to the law, become all they have. . . .[1]

The nature and extent of consumer protection regulation in a modern society says a great deal about that society, about its social and economic development, about its legal values, about its sense of justice, about its political sophistication and maturity.

This paper examines the development of consumer protection regulation in Canada. Primary emphasis is placed upon federal and provincial legislative developments since the end of World War II, from 1945 to the present day. As well as providing the reader with a comprehensive overview of the chronology and content of the federal and provincial consumer protection initiatives, this paper will also explore the underlying rationales — the social and political factors that led to these initiatives; their overall impact and effectiveness; their inherent design deficiencies, if any; as well as the current controversies and proposals for reform, and possible future directions.

A commentator once noted that "consumer protection is about the fundamentals of our economic system."[2] Consumer protection is indeed about the fundamentals of our economic system. But more importantly it is about the fundamentals of our system writ large — about our system of government, politics, policy making and priority setting — about the fundamentals of our system of thought, knowledge and human reasoning. In short, a serious-minded study of modern consumer protection regulation provides a microcosm of both the best and worst in modern politics and modern policy making.

Obviously no one study however long or detailed can come to grips in any meaningful sense with very many of these important issues, and certainly not a study such as this that has severe space and time constraints. Let me then, at the outset, indicate two important analytical limitations: first, in this study we will be concerned only with the "social regulation" aspects of modern day consumer protection, that is, with questions of product safety and quality, transactional fairness, etc., as opposed to the more traditional "economic regulation" dimensions of pricing, rate regulation or market structure; secondly, the focus will be limited to actual federal and provincial legislation and will not include a discussion of the equally important and increasingly studied extra-legal or non-legal marketplace norms that also form a part of consumer protection regulation. These threshold limitations — the social regulation dimensions of federal and provincial consumer protection legislation — were agreed to at the outset of this study.

But even within these limits there still remains an enormous range of relevance. And the dilemma confronting the modern researcher is well known:

> Any investigator of human activity will be in a continual tension between simplification and falsification. . . . the less he accepted as relevant, the

less he can say that is not misleading; the more he accepts as relevant, the less he can say at all.[3]

Nonetheless, an attempt will be made to summarize and then analyze the major legislative developments so that we can tell not only where we are today but also, more importantly, where we should be.

This paper is divided into five parts. The first part provides an overview of the legislative developments in consumer protection at both the federal and provincial levels. We identify the periods of legislative activity and also the precipitating social, economic or political factors that gave rise to these legislative initiatives. The second part then goes on to provide a more detailed descriptive analysis of the relevant federal and provincial legislation that is currently in place in each of the five most important and visible areas of consumer protection regulation: product safety and consumer injury; information and advertising; transactional fairness; product quality and consumer warranties; and dispute resolution and consumer access to justice. In the third part we go beyond the state of the law to assess the state of the art in consumer policy making and we identify and explain the ten most compelling observations that can be made of modern day consumer protection policy making in Canada. In the fourth part we identify the deeper problems in modern consumer policy making — the constitutional, theoretical, conceptual, empirical and structural constraints that continue to impede effective policy analysis and legislative implementation. And finally, in the fifth part, future directions are explored; both long-term objectives and short-term initiatives are identified and discussed.

The Development of Consumer Protection Legislation: 1945 to 1984

Ancient Roots

Contrary to popular belief, consumer protection regulation is not a modern phenomenon. Government regulation to protect consumers from marketplace deception, unfair trade practices or defective products has long-standing, indeed ancient, roots. "Concern about abuses in the marketplace is as old as the recorded history of civilized man."[4] From Leviticus[5] to Hammurabi,[6] from Roman times[7] to the royal edicts of medieval France,[8] from the common law doctrines of pre-industrial England[9] to the contemporary legislation of the post-industrial West,[10] consumer protection regulation has been a constant. The nature and extent of governmental involvement, the rationales or techniques employed, the regulatory successes and failures, these of course have varied from society to society, from age to age.[11] But the basic concern — about protecting consumers from marketplace abuse — has been a concern of governments for centuries.[12]

Confederation to World War II

Given these roots it is not surprising to find that significant federal and provincial consumer protection initiatives were in place soon after Confederation. At the federal level, Parliament enacted legislation to regulate weights and measures (1871),[13] adulterated foods (1874),[14] and restraint of trade (1889).[15] Although originally part of the *Inland Revenue Act*[16] the adulteration provisions were the legislative precursors to later and more comprehensive food and drug laws, and were enacted in Canada some 25 years before similar legislation was in place in the United States.[17] At the provincial level, both small claims courts and creditors' relief legislation was in place by 1880.[18]

From the turn of the century to the start of World War II were four decades of sporadic but still significant consumer law making. The federal government's jurisdiction over trade and commerce[19] and the criminal law[20] enabled it to enact legislation to control the sale of narcotics (1908),[21] and to regulate combines, monopolies, trusts and mergers (1910)[22] and misleading advertising in land sales (1914).[23] By World War I American influences were being felt and a more comprehensive food and drug law was enacted in 1920.[24] Three years later a constitutionally resuscitated federal combines law based more explicitly upon the criminal law power was enacted,[25] and in 1939, just before the outbreak of World War II, Parliament moved to regulate the cost of credit in small loans.[26]

Provincial legislatures meanwhile had passed money-lending legislation[27] by 1912, and a relatively uniform sale of goods law[28] by 1920, and by the early 1930s were beginning to enact debtor assistance legislation (1932)[29] and to move by way of registration and licensing to regulate the many suppliers of goods and services in the consumer marketplace, starting in these early years with real estate agents (1930)[30] and bill collectors (1932).[31]

By 1939 several of the legislative cornerstones of modern consumer protection regulation had been put into place at both the federal and provincial levels. The overall foundation, however, for modern consumer protection regulation was not yet complete. A great deal remained to be done.

The Modern Phase: 1945 to 1984

The vast bulk of what we have come to know as modern consumer protection legislation was enacted in the years following World War II and especially since the mid-1960s. Indeed, one can identify with some precision three distinct phases of consumer law making in the modern postwar period. The first and major burst of legislative activity, particularly at the federal level, occurred in the mid- to late 1960s; this was followed by a levelling off to the mid-1970s; and then by a general decline

or retrenchment in the late 1970s and early 1980s. It is useful to consider each of these phases in turn: the nature and extent of the legislation that was enacted in each and the social, economic, and political factors that gave rise to the various federal and provincial initiatives.

The Big Burst: The Mid- to Late 1960s

The roots of consumer protection regulation are ancient, but in many ways the reality of consumer protection in Canada is only 20 years old. One can trace the beginning of the modern consumer protection era to the mid-1960s, in particular to 1966–67. It was in this year that Parliament established the Department of Consumer and Corporate Affairs,[32] and began to enact legislation to address a series of growing concerns in an age of mass production and mass consumption. An "orderly payment of debts" provision was added to the federal bankruptcy law (1966)[33] and for constitutional reasons was made conditionally available to over-indebted consumers in those provinces where these federal protections were proclaimed effective.[34] Federal laws were also passed to regulate the sale of hazardous products (1969)[35] and motor vehicle safety (1970)[36]; textile labelling (1970)[37] and consumer packaging legislation (1971)[38] was enacted and the now century-old weights and measures law was revised and modernized (1971).[39] And special amendments were made to the bills of exchange legislation (1970)[40] to provide specific statutory protection for consumers using promissory notes and third-party financing arrangements.

Not all of the federal consumer protection initiatives were enacted into law. The most conspicuous failure was the controversial competition bill (1971).[41] The opposition to this major reform of combines legislation was simply too formidable to allow its passage.[42] Nonetheless the legislative advances made at the federal level in the mid- to late 1960s and early 1970s in such areas as product safety, consumer packaging and labelling, and bills of exchange were significant, even surprising.

A similar degree of legislative activity also took place at the provincial level. The late 1960s and early 1970s saw the enactment of a large number of provincial consumer protection laws. Consumer protection ministries were established and their bureaus given specific legislative mandates.[43] Legislation was enacted to regulate consumer credit practices,[44] truth in lending,[45] and door-to-door selling.[46] Specific laws were also passed to police mortgage brokers,[47] motor vehicle dealers[48] and bill collectors.[49] Law reform commissions were asked to study a wide range of contemporary issues in consumer regulation.[50] Even more legislative intervention was being considered.

What accounts for this flurry of legislative activity? What social, economic or political factors help explain these mid-1960s developments? At least five factors have been identified by commentators[51] as being the most directly influential: first, the emergence in postwar

Canada and the culmination by the mid-1960s of a fully mature mass production–mass consumption society and the associated and growing concerns about product quality and transactional fairness; secondly, a buoyant and prospering economy that allowed the development of broader policy-making agendas that could afford to include issues of consumer protection, issues that were not only of concern to sensitive politicians but were also manageable in terms of statutory specificity and electoral fall-out; thirdly, a widely shared popular consensus and confidence in government and government regulation; fourthly, and more specifically, the decided impact of several strategic legislative studies by certain select committees and by the Economic Council of Canada on consumer credit[52] and consumer affairs,[53] all uniformly urging major federal and provincial consumer protection measures as well as related institutional initiatives; and finally, the influence of a growing "consumer movement" in the United States, inspired in part by President Kennedy,[54] dramatized successfully by Ralph Nader[55] and Senators Kefauver and Magnusson,[56] and fuelled in large measure by an electoral phenomenon called "entrepreneurial politics."[57] These five ingredients combined with a buoyant and idealistic decade to provide an easy recipe for legislative action.

A Levelling Off: The Mid-1970s

The factors that gave rise to the burst of consumer legislation in the late 1960s — a strong economy, an electorally attractive social planning agenda, a confidence in government and government regulation — were on the decline by the mid-1970s, largely because of a deteriorating economy. By 1975–76 postwar productivity and prosperity had given way to post-OPEC stagflation: high unemployment and double-digit inflation. These economic repercussions were soon felt in the development and design of legislative agendas. Although several major studies were still in progress, consumer legislative activity began to level off.

At the federal level, the stage I amendments to the *Combines Investigation Act* passed successfully (1975)[58] and a broader range of misleading advertising and trade practice abuses were brought within federal scrutiny.[59] Parliament moved to regulate motor vehicle tire safety (1976)[60] and income tax rebate discounting practices (1978).[61] But the two most important federal initiatives attempted in the mid-1970s failed to become law: neither the *Borrowers and Depositors Protection Act* (1976) nor the extensive stage II amendments to the *Combines Investigation Act* (1977) achieved sufficient support to ensure passage.[62]

There was also a levelling off in legislative activity at the provincial levels, albeit less dramatic. Provincial legislatures were still able to enact legislation in two important areas: consumer sales practices and product warranties. Between 1974 and 1978 six provinces passed trade practices laws[63] and three enacted comprehensive consumer product warranty

legislation.[64] There were also a number of other more specific provincial measures during this period dealing with consumer credit reporting (1973),[65] debtor assistance (1974),[66] collection practices (1975),[67] travel industry regulation (1974),[68] new home warranties (1976)[69] and class actions (1978).[70]

Increasingly, however, the shared governmental commitment to consumer protection in the 1960s was giving way a decade later to a more regional and provincially disparate commitment to selected consumer problems. Advances were being made in consumer credit reporting and trade practices, but difficulties and delays were beginning to be encountered in competition policy, consumer product warranty regulation and class action reforms.

Decline and Fall: The Late 1970s and Early 1980s

As the economy deteriorated and confidence in government's problem-solving capability declined, popular and political enthusiasm for further consumer protection reforms began to disintegrate, indeed disappear. This seemed to be the case in Canada and was certainly so in the United States.[71] By 1979, a former policy advisor to the Federal Trade Commission could begin his assessment of contemporary consumer protection developments in a leading American law journal with the words: "Consumer protection is everywhere in retreat"[72] and, if anything, be guilty of understatement.

In the United States certainly, the political repercussions of an economic recession, fuelled by the president's adoption of an electorally attractive neo-conservative deregulatory perspective, were being felt everywhere. Agency budgets were cut. Staffs were decimated. And new regulatory strategies were designed.[73] The consumer movement in the last years of the 1970s stopped dead. Even the editorial writers at the *Washington Post*, long-time and liberal supporters of many consumer protection initiatives, were urging a moratorium, criticizing the Federal Trade Commission (FTC) as nothing more than a "national nanny."[74] Indeed the FTC itself was almost abolished outright, only narrowly escaping the wrath of a cost-cutting Congress.[75] Consumer protection, indeed government regulation generally, was no longer being accepted uncritically.

Why was this happening? The recession, obviously. And a related and growing disenchantment, alienation and distrust on the part of the average citizen. A distrust not just of big business but now also of big government. The average consumer-taxpayer was becoming increasingly disillusioned and cynical. Government was losing the confidence of the governed.[76]

And as the average consumer became increasingly apathetic, business lobbies became more active. Faced with the real or perceived costs of excessive or inefficient government regulation, corporations in the

United States began to form sophisticated and well-funded political action committees to brief, lobby, cajole and generally participate much more openly and less self-consciously in regulatory policy making.[77] This uneasy combination of economic recession, governmental ineptitude and consumer cynicism led to the predictable political reaction: a deregulatory redesign and in particular an abrupt reformulation of the consumer policy-making agenda.

In the United States today very few federal or state-level consumer initiatives are moving through the legislative process. What few measures can be identified go more to doctrinal consolidation and preservation of the status quo than to progressive or even incremental law reform.[78] There has indeed been a "pause" in the consumer protection movement.[79] For some commentators the pause is only temporary, reflecting in large measure a political reaction to the economic difficulties of our day. For a growing number of commentators, however, the pause is more principled and from their point of view more permanent, reflecting a perspective that is critical of many of the consumer protection initiatives of the past and reflecting a growing scholarly literature that challenges their basic assumptions, purposes and overall regulatory effectiveness.[80]

The extent to which these American developments have influenced the policy-making process in Canada is difficult to measure. True, there has been a growing deregulatory rhetoric in both federal and provincial politics. There has also been a broadly worded reference to the Economic Council of Canada to study governmental regulation in full.[81] And at the provincial levels one can spot a return to a much narrower and more traditional doctrinal perspective on the part of recent law reform commission projects and studies. In Ontario, for example, the Ontario Law Reform Commission's (OLRC) reports on sale of goods (1979),[82] products liability (1979),[83] as well as its current contract law amendment project (1984),[84] reveal a decided return to the more discrete and insular research methods of academic yesteryear. The only law reform commission project completed at the provincial level that suggests otherwise was the OLRC's report on class actions (1982) but even this, as will be discussed later, is academically fussy and doctrinally cautious.[85]

In terms of actual legislation, the record in Canada seems to parallel developments in the United States. The only federal enactment of note during the last several years and one that appears consistent with a deregulatory mood was the repeal of the *Small Loans Act* in 1980[86] and the amendment of the *Criminal Code* to regulate loan-sharking and unconscionably high interest rates with a "criminal rate" concept.[87] At the provincial levels, there has been virtually no legislative activity in consumer affairs save for some minor reforms in some provinces of small claims court procedures.[88]

Do these incidents demonstrate a complete Canadian parallel to the deregulatory program that appears to pervade American policy making? There is some evidence of this to be sure, but simple parallels cannot be drawn. The Canadian context, for reasons that will be described later, is markedly different from that of the United States. Suffice it to say here that the average Canadian consumer by 1984 was no longer enamoured with or in awe of Big Brother. Canadian consumers today are becoming increasingly critical and even cynical of what big government can do. Professor Ziegel may well be right: "Consumer legislation has reached its peak. The 1980s will be a period of consolidation if not actual retrenchment."[89]

But the outlook need not be bleak. Progress in consumer regulation and deregulation — and indeed "progress" can include aspects of both — will depend to a great extent on our familiarity with and our understanding of the modern consumer protection regime as it actually exists both in law and in fact. We turn next to consider where we are today.

The State of Law Today: Consumer Legislation in Overview

In this part we provide a brief overview of the current state of the law in the five most relevant and visible areas of federal-provincial consumer protection. A detailed treatment will not be attempted. The scholarly literature in each of these areas is considerable and the leading studies will be identified, but the objective here is simply to provide the reader with a quick snapshot of the legislative landscape in each of the five areas.

Each area will be described with the following issues in mind: first and basically, what has been done and why. (Here we will identify the fundamental concerns or problems in the area, the federal and/or provincial legislative responses and their general regulatory designs, and the rationales behind the governmental interventions.) Secondly, how well has it been done? (This analysis will include a brief reference to any impact studies completed to date in each area, the enforcement problems if any, the deeper design or context problems, and finally, current controversies concerning possible law reforms and future directions.)

For purposes of both manageability and brevity, we have compressed a wide-ranging array of consumer protection topics down to the following five:

- product safety and consumer injury;
- information and advertising regulation;
- transactional fairness;
- product quality and consumer warranties; and
- dispute resolution and consumer access to justice.

Product Safety and Consumer Injury

The top priority on any civilized consumer protection agenda has to be health and safety and, particularly in the consumer context, product safety: the regulation of safe product design and the provision of a fair and efficient compensation system for injuries sustained by consumers in the use of today's complex products. The magnitude of the product liability problem today is considerable. Each year, according to statistical extrapolations that we compiled in our recent study of product injury in Canada,[90] approximately 3.5 million Canadians are injured in product-related accidents annually with nearly 2.4 million occurring in the home, 11,000 of those injured are permanently disabled, and 3,000 to 5,000 Canadians are killed.[91] In addition to the obvious physical and emotional traumas and attendant family disruptions, the financial dimensions are also substantial: the cost of product injury to Canadian society exceeds $2 billion per year.[92]

The "products liability crisis" has achieved a degree of notoriety in the past decade and has precipitated a series of major investigations and law reform commission inquiries in the United States, the United Kingdom, the European Economic Community and also here in Canada. But the actual issue of product safety and government regulation is an old one. Government has always intervened in matters of food quality and product safety.[93] The basic rationale for governmental intervention has been expressed traditionally in language such as "hidden dangers" or "unknown hazards" and recently and more fashionably by the economic vocabulary of "externalities and spillovers" or "information market failure."[94] The growing controversy in this area of government regulation is more about the degree and design of appropriate regulatory intervention than it is about the basic principle of government involvement.

In Canada, federal and provincial governments have divided responsibility for product safety and consumer injury compensation along both functional and constitutional lines. The federal government has taken primary responsibility for legislating product safety regulations, not only because Canadians enjoy a national market for their goods and services but also because, constitutionally, federal product safety regulation falls easily within the criminal law power.[95] As noted above, federal involvement in product safety regulation can be traced to 1874 and the first food adulteration laws; to the 1920 enactment of the *Food and Drug Act*; and to the emergence of modern product safety laws in the late 1960s, most notably the *Hazardous Products Act*, the *Consumer Packaging and Labelling Act*, the *Motor Vehicle Safety Act* and the *Motor Vehicle Tire Safety Act*. Put simply, each of these enactments provides a detailed legislative framework for the regulation and, where necessary, prohibition of adulterated, hazardous, dangerously packaged or defective prod-

ucts. The basic legislative approach in each of these enactments depends generally upon the criminal law jurisdiction (hence criminal prosecutions as opposed to civil or administrative regulatory techniques) and more specifically upon regulation by departmental regulation making.[96]

The provinces have enacted some localized quality control measures, for example, in the regulation of upholstered furniture.[97] They have also directed their attention to regulating the quality of consumer services and especially professional services via certification and licensing.[98] In the main, however, provincial legislatures have concentrated their efforts both functionally and constitutionally (given the wide reach of the property and civil rights jurisdiction)[99] on the product injury and injury compensation dimension: improving the tort litigation system; on occasion moving more dramatically to implement a province-wide and publicly funded hospital insurance program; or replacing tort altogether with a first-party no-fault state administered accident insurance scheme such as workers' compensation.[100]

There are points of controversy and concern at both levels of regulation in this area. At the federal level the agenda for future reforms includes includes such questions as the basic degree and design of federal product safety regulation: the rationale, the regulatory instrument, the extent to which a civil and administrative approach should be adopted.[101] Included in this agenda is a growing scholarly literature that challenges from a neo-conservative perspective many of the assumptions about consumer product safety regulation at the federal level as well as its cost effectiveness.[102] Thus far, federal consumer policy makers in Canada have not entered the fray — in part because there is no lobby favouring major regulatory change in this area, in part also because, even if there were, several formidable constitutional obstacles would have to be overcome before more modern civil or administrative regulatory techniques could be employed by Parliament to regulate product safety.[103]

Some commentators nonetheless are urging the adoption of at least civil recall powers for the Hazardous Products Branch of the Department of National Health and Welfare.[104] They are also urging a review of the departmental decision-making process that is currently being used to determine product risk and product safety questions. In particular, they are advocating the adoption of a "consultative" rather than an "adjudicative" model with respect to risk assessment and product safety decision making.[105] These suggestions, however, are fairly recent and to date there has been no governmental response.

At the provincial levels, the product liability and compensation dimension poses no serious constitutional problems. Were the provinces to choose to abolish tort litigation in the products liability area outright, they could do so. Thus far, however, in this area of product injury compensation, Canadians must remain content with what has been

described as a "three level hodge-podge" of first-party no-fault schemes intermixed with tort litigation fragments.[106] The result is a wasteful conglomeration of fault and no-fault fragments that only confuse and confound injured Canadians. The various first-party no-fault compensation schemes are financially substantial — their cost approaches $5.5 billion annually — but thus far they remain discrete, disparate, uneven and uncoordinated.[107]

The policy-making agenda here seems to have been defined by the recent flood of product liability and product liability insurance studies in the United States, the United Kingdom and in Europe: the U.S. Inter-Agency Task Force and its recommendation of a Draft Uniform Product Liability Act, the report of the Pearson Commission in the United Kingdom, the Strasbourg Convention and the EEC Directive in Europe and the Ontario Law Reform Commission's proposal for a Defective Products Act in Ontario.[108] Put simply, all of these studies urge the adoption of a strict liability rule for product injury or at least consumer product injury.

The real question however is not strict liability but overall institutional design: do we continue on with the existing patchwork or do we attempt some degree of rationalization and consolidation? What we do in the future with respect to this question, whether we maintain and embellish the expensive crazy quilt of current schemes or whether we begin to rationalize them into a comprehensive first-party no-fault universal accident compensation plan that would eventually be extended to disability overall, will say a great deal about us as a society and about the intellectual integrity of our policy makers. The most recent Canadian study of this question concluded as follows:

1. Federal and provincial health authorities should give immediate priority to the establishment of a national electronic injury surveillance system such as the National Electronic Injury Surveillance System (NEISS) currently in operation in the U.S.
2. Provincial legislators should not waste precious legislative time debating strict liability tort reforms.
3. Instead, policy makers should seize the opportunity for rational and responsible law reform and begin the task of developing an integrated and comprehensive first-party no-fault accident compensation scheme.
4. Policy makers should view the adoption of universal accident compensation as a first step to the eventual enactment of universal disability insurance.[109]

Information and Advertising Regulation

Having disposed of the first priority in consumer policy making, we can now begin to discuss more chronologically the modern consumer trans-

action and attendant consumer protection requirements. The first stage of the consumer transaction is the informational or advertising stage. The requirement that the consumer be an informed participant in the marketplace in order to make a knowledgeable decision about goods and services is a requirement that is not only intuitively obvious but also serves important theoretical prerequisites for modern economic and consumer behaviour theorizing, the former concerned with maximizing market efficiencies and the latter with facilitating rational and predictable behaviour.[110] Government involvement then, in maintaining an informational marketplace that is reasonably informative in both qualitative and quantitative terms, is not surprising. Here again, as in the area of product safety, few would deny in principle the justification for at least some degree of government intervention to correct or at least to minimize informational market failure. If nothing else, "the informed choice assumption of market economics requires government regulation just to make the theory practicable."[111]

Government regulation of the information marketplace by way of labelling laws and mandatory disclosure of fair advertising requirements has credible rationales even in the economic literature. The marketplace alone cannot be counted on to police the quality or quantity of desirable information. Information about light bulb durability, octane efficiency, tar and nicotine content, mileage per gallon capability or textile care requirements would not have materialized without mandatory disclosure laws.[112] In each of these areas the existence of an "information market failure" — whether because of monopolistic or oligopolistic market structures, or because of competitive disincentives in health or safety risk information provision, or because of the lack of marketplace incentives to self-police — had quietly ensured non-disclosure and resulting inefficiency. Few would disagree with Pitofsky: "Some form of government regulation of the advertising process is warranted."[113]

But how much regulation is justifiable and what regulatory techniques should be employed? Here the controversy begins. The degree and design of appropriate information remedies for various kinds of information market failures, the extent to which recent impact or effectiveness studies justify the cost incurred in maintaining these various information remedies, the capacities of the human brain to absorb the "information overload" that is said to exist in many areas of information disclosure regulation — these are the concerns in the recent literature.[114]

In Canada we have had information and advertising regulation at both the federal and provincial levels since the late 1960s. Constitutionally, both levels of government have jurisdiction in this area, the federal government from a criminal law and interprovincial trade perspective[115] and the provincial legislature from a property and civil rights (business regulation and trade practices) perspective.[116]

Dealing first with information and advertising regulation at the federal level, two things can be said. First, the regulatory techniques remain

traditional and rely largely on the criminal law jurisdiction. And secondly, the regulatory involvement by Parliament is quite recent. Apart from weights and measures and trademark regulation, most of the other informational and labelling laws, as well as the modernization of the misleading advertising provisions, have only been enacted in the past 15 years.[117] These federal informational initiatives can be found in the labelling and deceptive advertising provisions of the federal *Hazardous Products Act*, the *Food and Drug Act*, the *Consumer Packaging and Labelling Act*, the *Motor Vehicle Safety Act*, and the *National Trademark and True Labelling Act*.[118] Each of these enactments provides a fairly wide range of labelling requirements (or compositional standards, under the *Food and Drug Act*) and prohibits false or misleading advertising on product packages or in the promotional media. The most important regulation of advertising at the federal level is found in the *Combines Investigation Act*, recently amended to include a wide-ranging scrutiny of not only false and misleading advertising practices but also increasingly pervasive consumer abuses such as bait and switch, double ticketing and pyramid selling.[119]

The literature in this area is still slight. A major study of federal misleading advertising regulation was completed in 1976 and advocated wide-ranging reforms but failed to attract a sympathetic audience.[120] Some attempts have been made to analyze the effectiveness of some of the labelling initiatives,[121] as well as some of the regulations under the hazardous products regime,[122] but generally, with one or two isolated exceptions,[123] the nature and extent of federal involvement in national advertising regulation has not recently attracted scholarly study. The few studies that have urged regulatory redesign and the adoption of civil or administrative regulatory techniques have been ignored for two reasons: the absence of any pro-consumer lobby either inside or outside the legislative process, and the presence of major constitutional barriers. We will return to this point later in the paper.[124]

The regulation of information disclosure and fair advertising at the provincial level has been more modest. With respect to labelling, provinces have historically confined their involvement to regulating the grading and labelling of natural products. Beginning in the mid-1960s, however, many provinces moved to require truth-in-lending and cost-of-borrowing disclosure in consumer credit transactions.[125] Then, in the mid-1970s, they began to deal under an unfair trade practices umbrella with misleading advertising and pre-contractual misrepresentations.[126] Unfortunately, as will be seen below, what little enforcement initiative exists remains mainly at the federal level and not the provincial.

In terms of future direction, the challenges that lie ahead are formidable. The first need is to clarify the constitutional basis for federal regulation in this area (and if need be, to revitalize a long-neglected federal power over trade and commerce), and to reassess the regulatory

techniques employed. Virtually all of the information, labelling and advertising laws enacted by Parliament to date are based on or judicially justified as an exercise of the federal power over criminal law. The regulatory design reflects this: the primary enforcement technique is via criminal prosecution. Increasingly, however, commentators are questioning the efficacy and efficiency of criminal prosecution in the context of national advertising regulation and are urging that we consider the possibility of adopting a more civil and administrative approach, such as the techniques employed in the United States by the Federal Trade Commission advertisement substantiation, corrective advertising, etc.[127] There is, to be sure, a debate in the literature as to whether or not a move toward a more civil or administrative capability at the federal level here in Canada should be attempted in principle and, if so, whether such a move should focus on advertisement substantiation or corrective advertising as the primary regulatory technique.[128] Increasingly, also, there is discussion as to what the appropriate standard or criterion ought to be with respect to governmental regulation of the informational marketplace: who exactly should be protected, the credulous consumer or the reasonable and informed consumer?[129] There is even a growing literature suggesting that society should move beyond deception in advertising and begin to regulate overall unfairness and "image appeal" advertising.[130] The first step, though, is constitutional clarification by way of judicial resuscitation of the federal trade and commerce power.

Secondly, but of equal importance, the challenges ahead involve the need to begin a more serious study of the nature of information generally and human information processing, indeed, the entire question of "information overload." The work in this area is still in its infancy. It may simply be that we have not as yet been exposed to the controversial dimensions of the topic that are currently stimulating research in the United States — the various anecdotes and "horror stories" arising out of the allegedly over-regulated and largely ineffective truth-in-lending requirements, such as the infamous "Regulation Z."[131] Or it may be that the lack of empirical study in Canada reflects a more mature methodological realization: that the art or science of information provision is still in its embryonic stages. After all, we still do not know very much at all about what kind of information, in what sorts of circumstances, people really believe is worth processing and responding to in terms of knowledge or behaviour.[132] One thing is clear: the catalogue of horror stories about information disclosure overload will continue to grow.[133] Here is one example:

> To meet the requirements of federal disclosure regulations, a Minnesota bank sent to 115,000 customers a 4,500 word booklet setting forth prescribed details about its electronic funds transfer services; in the middle of the booklet the bank inserted a sentence offering $10.00 to any customer who could write "Regulation E" on a postcard and send it to the bank. Not one person answered.[134]

The difficulty of course is that information is a complicated commodity. Part of the problem is educational: we simply have not learned when and how to use the information provided. As Cranston reminds us, the failures in disclosure regulation may be more attributable to educational immaturity than to institutional ineptitude:

> Disclosure regulation can perform a useful if supplementary role in consumer protection. Its continued and more extensive use, together with rising levels of consumer education, will render it more worthwhile with time. For these reasons it is misguided to adopt the attitude that because consumers at present will not use information, there is no need for it.[135]

The situation today is this: federal and provincial policy makers are limiting their discussions in this area to problems of agency staffing and budgets, and to the enforcement of the laws as they now exist. We may see some movement provincially in such areas as lawyer advertising and federally in bank-loan disclosure requirements or life-cycle cost labelling. Perhaps even some further tinkering with enforcement techniques under the current *Combines Investigation Act*.[136] The pressure for any further or more substantial reform, however, is simply non-existent.

Transactional Fairness

We move now to the next stage in the consumer protection chronology: the consumer transaction itself. Here our concern is with the transactional or "deal quality" dimensions, with such matters as sales practices and tactics, the readability and understandability of the modern, invariably standard-form contractual document, and the remedial integrity of any attendant credit and financing arrangements. The topic of transactional fairness then, includes three areas of concern: trade practices, standard-form contracts and recourse rights in third-party financing. We will deal with each of these in turn.

Provincial regulation of the trade practices component is a recent legislative development. Legislation in this area was only set in place in the mid-1970s. Six provinces have now enacted trade practices statutes.[137] As we have noted in an earlier work, at least four factors prompted these provincial initiatives: first, a growing realization among provincial policy makers that the common law, notwithstanding its doctrinal flexibility, simply could not be counted on to police the consumer marketplace in this area; secondly, a legislative concern to modernize, clarify and ultimately consolidate the existing contractual doctrines into an easily itemizable legislative index of transactional fair practice rules; third, a concern to supplement the traditional victim-initiative model of marketplace regulation with a more expanded governmental component in such areas as investigation and enforcement and with such administrative enforcement techniques as substituted actions, cease and desist procedures, and voluntary compliance mechanisms;

and fourth, the growing influence of American state-level developments in this area.[138]

The provincial trade practices laws are primarily concerned with doctrinal clarification and administrative supplementation. Doctrinal problems such as scope of contract, classification of contractual terms, the admissibility of parole evidence and the range of available contractual remedies were clarified to accord more with the realities of the modern day sales transaction and with the reasonable expectations of the consumer purchaser. To provide guidance for the judiciary, the legislation also provided a detailed but non-exhaustive "shopping list" of certain prohibited trade practices that are deemed to be deceptive or unconscionable and will presumptively permit contractual rescission or any other relief that is deemed appropriate in the circumstances.[139]

Although the courts are retained as the primary vehicles for the enforcement of individual consumer complaints, several important administrative remedies have also been provided. With some variation, the provincial director of trade practices has been given a wide range of investigatory and enforcement powers: not only the traditional powers of search and seizure or freeze of assets but several significant administrative enforcement techniques as well. In some provinces the director of trade practices has been given the authority to negotiate and enforce assurances of voluntary compliance (AVC), to institute "substitute actions" in place of or on behalf of consumers or consumer groups injured by unfair trade practices, or to issue immediate cease and desist decrees where immediate compliance is "necessary for the protection of the public."[140] In summary, the provincial trade practices enactments have attempted to provide an integrated framework of doctrinal reforms, consumer redress remedies and governmental enforcement techniques.[141]

These provincial initiatives, although significant, have not escaped scholarly criticism. For some commentators the problem was one of design. The argument has been made that the provincial trade practices enactments are fundamentally inadequate in their scope of scrutiny, itemization of prohibited practices, range of private and administrative remedies, reliance on the criminal sanction technique and deficient or non-existent rule-making procedures.[142]

For other commentators the more important problem was not design but delivery. The allegation has been that the provincial trade practices laws are simply not being enforced. Although few impact studies have been done to date, the evidence thus far supports the allegations of governmental indifference and ineptitude. It appears that governmental commitment and enforcement in this area of trade practices regulation has been non-existent, or at best sporadic, erratic and ad hoc. A study by Samuels of the enforcement record under the Ontario *Business Practices Act* concluded that government enforcement, although well-intentioned,

was in fact uneven, unprincipled and uninformed.[143] Indeed, Samuels discovered that the Ontario government has not only turned a blind eye to the necessary funding and staffing requirements for an effective trade practices enforcement division but also has yet to enact the guidelines that are necessary for the voluntary compliance procedures.[144] A recent study by Neilson of provincial experience with AVCs found "mixed results" and "uneven, often erratic enforcement experiences."[145] We will return to the enforcement problem below in the section on consumer policy making in transition.

In terms of future directions in this area, governmental commitment and administrative enforcement remain the most pressing concerns. There may be some minor legislative reforms, the elimination of some of the archaic statutory language contained in many of the trade practices provisions, or the addition of one or two administrative enforcement techniques, such as substitute actions. There may also be a move to harmonize interprovincially the six existing provincial trade practices enactments. Any further reforms in this area must await the emergence of a consumer lobby or a renewed governmental interest in consumer protection. Neither of these developments appears likely.

Turning now to the second area of concern: the standard-form nature of the modern consumer contract. One commentator has suggested that 99 percent of all modern consumer transactions involve a fine-print boilerplate standard-form contract. Certainly the vast majority of consumer transactions today use pre-printed standard forms.[146] Although policy makers have been familiar with the standard form contract problem for over 40 years, the matter remains as complex and controversial as ever. Scholarly fascination with the standard form has yielded a voluminous analytical literature but little by way of prognosis or problem resolution. Four decades have passed and "there is still no powerful legal theory successfully grappling with one-sided consumer deals."[147]

The basic problem remains problem identification: what exactly is the abuse that policy makers ought to be concerned about in the consumer standard-form contract area? Is it the fine print and the problem of readability? Or is it transactional behaviour and the denial to the consumer of a reasonable opportunity to read and understand the documentation before signature? Is it unfairness and surprise in the substantive content of the fine-print terms that are foisted upon an unsuspecting consumer when a good faith complaint is pursued? Or is it market structure and inequality of bargaining power?

The literature provides a wide range of disagreement about diagnosis and prognosis. Depending upon one's ideological starting points, the scholarly analyses range from a free market "no problem unless fraud or duress" point of view,[148] to a more liberal unconscionability and unfair surprise concern,[149] to a Galbraithian market structure and inequality of bargaining power perspective,[150] to a cynical reification analysis of "contract as thing."[151]

The legislative response to the standard-form contract problem in various jurisdictions has also been wide ranging: legislatively prescribed but judicially administered unconscionability provisions in the United States;[152] legislatively itemized "reasonableness" precepts in the United Kingdom;[153] ad hoc regulation under consumer product warranty statutes in Saskatchewan;[154] mandatory disclosure requirements in Quebec;[155] and a complicated legislative-judicial combination of curial and institutional pre-screening procedures in Israel.[156]

Thus far in Canada, apart from two isolated provincial legislative experiments with mandatory disclosure,[157] the approach remains the traditional one. The courts retain their historic jurisdiction of quality control in this area. Their quality control techniques are the common law doctrines of unconscionability and inequality of bargaining power. Recently, the Ontario Law Reform Commission has urged the enactment of a U.K. style "unfair contract terms" provision[158] to deal with not only unfair contractual terms but adhesion contracts in general. Of course, even with these additional legislative prescriptions, the primary policing responsibilities will remain with the judiciary.

The problem with this approach is twofold. The first concern is an institutional one: to rely on the court system for the policing of modern trade practices problems is both expensive and inefficient. The judicial control model depends upon victim initiative and can only proceed case by case. And "case by case sniping"[159] is not a terribly principled process by which to police the modern marketplace or to make policy about investigation and enforcement priorities. The second but related concern is an analytical one. It questions the overall manageability of such open-textured doctrines as unconscionability or inequality of bargaining power and asks "whether the inequality of bargaining power concept is fruitful or even meaningful as a guide to the legal regulation of consumer transactions."[160]

A recent review of the case law in this area does little to reassure even the consumer advocate, notwithstanding that on occasion the common law court was able to come to the "right result." More disturbingly, even the consumer advocate is beginning to realize that the sloppily doctrinal and result-oriented nature of the common law adjudicative method is not even yielding a pro-consumer "right result." Consider, for example, the decision of the House of Lords in *Schroeder v. Macaulay* and the devastating economic critique of the court's application of the modern but increasingly meaningless "inequality of bargaining power" doctrine;[161] or the mangled and ultimately misdirected anti-consumer result of Lord Denning's decision in *Levison v. Patent Steam Carpet*;[162] or, finally, the doctrinally refreshing resort to "unfair surprise" analysis by the Ontario Court of Appeal in *Tilden Rent-A-Car v. Clendenning* that was unfortunately marred by the conclusion reached in the actual case.[163]

But even as the scholarly literature is building what appears to be an unanswerable case against the judicial misuse of a doctrine such as

inequality of bargaining power to police standard-form contracts, the commentators leading the assault still believe that "a general doctrine such as inequality of bargaining power [can] be an effective instrument in controlling transactional abuses," so long as it is "sharp in its focus, conceptually sound and explicit in its policy underpinnings, and operational in terms of both . . . process and . . . remedial instruments. . . ."[164]

Future directions in the area of standard-form contract regulation will depend to a great extent upon how the two issues of problem identification and appropriate legislative design are resolved. The former will clearly influence the shape of the latter. Depending on how the problem is presented and then proceeded with, the range of legislative choice in terms of appropriate regulatory instrument is enormous: voluntary measures or trade association cooperation can be encouraged; "plain English" legislation can be enacted as has been done in the United States;[165] and legislative-judicial combinations with "reasonability" guidelines[166] or "presumptive unenforcibility" stipulations[167] can be attempted. If the appropriate legislative design is deemed to be legislative-administrative, then a further range of questions arises relating to institutional design, administrative enforcement techniques and political accountability.[168]

In all likelihood, however, only minimal legislative tinkering will be attempted in the years ahead. We will probably see the enactment, in Ontario at least, of a British-style "legislative guidelines" approach. Saskatchewan may use its existing legislative authority to regulate the content and design of manufacturer's written warranties. And "plain language" laws may be enacted. Any further reforms in this area appear unlikely.

Finally, we come to the third component of transactional fairness, the credit or financing dimension — in particular, consumer recourse rights against the third-party financier. As we noted above, government involvement at the federal level has been somewhat uneven. The wide-ranging procedural and substantive protections that would have flowed to depositors, borrowers and mortgagers by way of the federally proposed *Borrowers and Depositors Protection Act* failed to be enacted. More successful at the federal level was the passage in 1970 of Part V of the *Bills of Exchange Act* that had the effect of requiring all consumer notes and bills to be marked "consumer purchase" and allowed the consumer purchaser to raise the same defences against the holder in due course of such an instrument as he could have raised against the sellers. Finance companies could no longer hide behind "cut-off clauses" or "holder in due course" doctrines.[169]

At the provincial level, in addition to almost uniform regulation of cost-of-borrowing disclosure requirements (discussed above), there have also been provincial amendments to protect the consumer buyer in

third-party financing arrangements. These provisions have provided for the non-excludability of the implied sales law conditions of fitness for purpose and merchantability, and have extended the preservation of these defences to third-party financial assignees, albeit with some variation in the nature and extent of third-party liability.[170]

The critical literature in this area is very slight and mainly economic. Future directions will have to await further empirical studies of the efficacy and efficiency of existing federal and provincial consumer recourse provisions. The feasibility and function of such empirical assessments is discussed below in the section on deeper problems and dilemmas.

Product Quality and Consumer Warranties

Thus far we have explored three stages in the consumer transaction chronology: the ex ante product safety regulation stage, the information and advertising stage, and the contractual-transactional stage. We come next to the post-contractual performance stage. Here the concern is product quality and durability: how well the product works, how long it will last, the content and design of the warranties or guarantees that accompanied the product at time of sale, and the nature of the rights and remedies provided to the consumer who finds himself suffering financial loss because of a defective or poorly performing product. A product quality–related financial loss may be substantial, as is the case in an automobile or large appliance breakdown, or it may be minimal but nonetheless aggravating. The defective or "shoddy" product that causes only financial loss is one of the most pervasive of modern day consumer problems. A recent Nader study found that one out of every four products purchased by consumers today will prove to be faulty or defective in either design or performance.[171]

The rationale for government regulation in this area of consumer protection where the concern is not physical safety or "unknown dangers" but only marketability or durability is not as immediately obvious as was the case in the earlier areas. However, an economic rationale does exist, albeit to a more limited extent. Some degree of governmental regulation to compel disclosure or the fair labelling of product quality can be justified even by pro-market economists.

In a well-known economic analysis, Akerlof discusses "the market for lemons" in many trading and exchange contexts and concedes the need for some kind of governmental regulation to preserve quality differentiation, either via disclosure and labelling requirements or minimal quality statutory guarantees.[172] In Akerlof's terms there is a sub-optimal equilibrium in unregulated markets whenever an asymmetrical information problem persists, i.e., where sellers know the actual quality of their goods but buyers only know the average quality of all the goods in the

market. Thus low quality "lemons" will drive out the high quality products, higher quality products will not be traded, "lemons" will be overpriced, inefficiencies will result and thus regulation by way of information disclosure or quality standards will be needed to correct the "market failure."[173] The extent to which a "Say's Law of Lemons" analysis can be employed to legitimate government-prescribed minimal quality standards generally is yet to be satisfactorily determined. Although the Akerlof analysis is attractive, it is not easily generalizable to all areas of quality failure. However, so long as the legislative intervention is limited to quality regulation by such open-textured norms as "reasonable durability" or "reasonable acceptability given all the circumstances of the transaction," it may be explained and forgiven as simply a clarification of pre-existing rights at common law.

As noted above in the section on the development of consumer protection legislation, the constitutional jurisdiction to regulate in this area is, in the main, a provincial one. Most of the provincial legislatures to date have been content with providing legislatively for the non-excludability by the retailer in a consumer sales context of the implied conditions of fitness and merchantability that exist at common law and now in provincial sales legislation.[174] For many consumer commentators this limited intervention in product quality and consumer warranty regulation left a lot to be desired both doctrinally and, given the realities of the modern consumer marketplace, institutionally.

The break-through came in 1972 with the publication of a study by the Ontario Law Reform Commission (OLRC) of consumer warranties and guarantees.[175] This study concluded that Anglo-Canadian sales law was "no longer adequate to the task of ensuring a fair balance between those who manufacture and distribute consumer goods and those who purchase and use them."[176] It recommended comprehensive provincial-level product warranty legislation that would prescribe minimum product quality standards, resolve doctrinal problems, particularly those involving parole evidence and vertical and horizontal privity, and establish more informal dispute resolution procedures. In Ontario itself, both the report and the proposed consumer product warranties bill were shelved indefinitely.[177] And nothing further developed.

Two provinces however, accepted the general thrust of the OLRC study and enacted comprehensive consumer warranty laws. The Saskatchewan *Consumer Products Warranties Act*[178] and the New Brunswick *Consumer Product Warranty and Liability Act*[179] attempt to provide a comprehensive legislative framework for the regulation of both consumer product quality and consumer warranties. Both enactments are discussed in detail in a recent federal study of warranty regulation in Canada.[180]

By way of summary here, the following can be said. In addition to modernizing contract doctrine and problems of representations, parole

evidence and privity, both of the enactments statutorily provide a non-excludable core of consumer product quality obligations that are couched in the general language of "acceptability" and "durability." As well, the doctrinal problems relating to choice of remedy are clarified and modernized by the provision of a detailed statutory itemization of remedies available to the consumer in a breach of warranty case. The Saskatchewan act further provides a regulation of the contents of manufacturers' "additional written warranties" by requiring the disclosure of specified informational items and by prohibiting the use of certain terms. Saskatchewan also establishes a non-judicial alternative for the resolution of disputes. Consumers with defective product claims may take the matter to a government official who will then endeavour to settle the dispute through mediation or, with the consent of the parties, submit the dispute to arbitration. Saskatchewan has also provided for extensive regulation-making powers that would allow the provincial cabinet to define with more precision, inter alia, the form and content of manufacturers' warranties, the nature of a supplier's obligation to provide reasonable repair facilities and the various time periods permitted the warrantor for the reasonable repair of the defective product. For the most part, however, the provincial warranty initiatives, both in Saskatchewan and New Brunswick, have been more legislative than administrative in nature — at least to date.[181]

A third province, Quebec, approached the problem of product quality regulation from a more limited perspective. Unlike Saskatchewan or New Brunswick, Quebec did not set out to enact a comprehensive or omnibus consumer product warranties statute. Instead it chose to deal with certain high profile warranty problems in a more or less piecemeal fashion. For example, one section of the recently amended Quebec *Consumer Protection Act* [182] deals with automobiles, another with motorcycles and a third with household appliance repairs. There is also a more generalized section that provides consumers with new and expanded statutorily implied warranties — of fitness for purpose, of reasonable durability, of the availability of spare parts and repair facilities, etc. What is particiularly interesting about the Quebec legislation is its specific delineation of mandatory warranties and mandatory warranty time periods.

There is a possibility that other provinces may follow the lead of Saskatchewan, New Brunswick and Quebec, but the possibility remains slight. Here, although the consumer lobby or the existence of media support for better quality and more durable products is intuitively present, larger theoretical and empirical questions have injected a surprising degree of controversy on at least three different levels.

First, the problem of problem identification. What exactly is the problem here? Is it one of information disclosure, accurate labelling or fair advertising? Does it relate to the trade practices surrounding the sale of a particular product? Or is the concern with the content and

design of the standard-form warranty document that is rarely if ever read or understood by the consumer before the product is purchased? If so, is the problem then one of readability? Or is it one of opportunity to view the warranty documentation prior to sale? Or does the problem relate to the substantive quality of the fine-print terms of the standard form of warranty? Does this then suggest a market structure problem? To what extent is the alleged "one-sidedness" the result of economic inequality of bargaining power between the original parties to the transaction, or the result of warranty industry practices and the use of "inboarding" or "outboarding" of warranty service responsibilities and related warranty service difficulties? Or is the matter more a problem of post-purchase complaint handling and dispute resolution, i.e., consumer access to justice? Problem identification here again is an increasingly complicated but still unresolved threshold requirement.

Secondly, controversy abounds as to the theory that can best explain the reason for or the role of the modern consumer product warranty. What exactly accounts for the content or design of the warranty document? Is it simply a manifestation of market power rooted in some kind of "exploitation theory?" Or is the warranty intended more as a marketing or informational tool, a "signalling theory?" Can either of these theories find support in empirical study? According to Priest, the theory that best explains the modern consumer product warranty and one that accords with existing empirical evidence is his "investment theory," a theory that sees the warranty document as nothing more sinister than the result of a mutually beneficial and cost-effective allocation of insurance risks.[183] For Professor Priest,

> A warranty is viewed as a contract that optimizes the productive services of goods by allocating responsibility between manufacturer and consumer for investments to prolong the useful life of the product and to ensure against product losses. . . . The terms of the warranty contracts are determined solely by the relative costs to the parties of those investments.[184]

Priest studied 62 modern consumer product warranties — their terms and conditions, the coverage provided to the consumer buyer, the various exclusion and disclaimer clauses, etc. — and found that insurance or investment has a lot more to do with warranty content and design than market exploitation or informational signalling. As soon as Priest's study was published, however, Professor Whitford responded and criticized both the assumptions and the methodology employed.[185] Whitford conceded that warranty content is to some extent determined by mutually beneficial insurance risk decisions, but argued the equal relevance of other factors such as market structure and bargaining power. However, a fair-minded analysis of the empirical evidence collected by Priest does not give much support to the Whitford rejoinder.

Even if Priest's theory gains acceptance in the literature or attracts

further empirical support from other studies of warranty content and design, it would still remain a "partial theory" because it could not explain or justify the problems that arise beyond the document itself, problems of poor warranty service or complaint handling. It is in this area of warranty performance that most of the abuses occur and from which calls for reform originate.[186] The point here is simply this: the theoretical literature, although growing, is still very much incomplete and highly indeterminate.

Thirdly, and to make matters even more complicated, are the counter-intuitive findings that have recently come forward as a result of "before and after" empirical studies measuring the effectiveness of warranty disclosure regulation[187] and also the hidden costs of longer warranties.[188] The first series of studies, conducted mainly by the Federal Trade Commission, have found that warranty disclosure regulation has not had much of an impact to date.[189] The second series of studies conducted by the Centre for Policy Alternatives at the Massachussets Institute of Technology (MIT) used hedonic price analysis and discovered that long warranties may in fact cost the consumer more than they are worth.[190]

In Canada, the literature remains in its infancy, particularly with respect to problem identification and legislative impact analysis. Kennedy, Pearce and Quelch have completed one such study,[191] Romero another.[192] Their findings, although useful in other respects, do not provide clear policy guidelines for either problem identification or appropriate legislative design.The only comprehensive study to date of consumer product warranty regulation in Canada was one that we completed last year.[193] This study was based on nearly three years of research and covered a wide-ranging agenda regarding the problems and possibilities for consumer warranty reform in Canada. It will be useful to list from this study the ten most significant empirical findings about the nature and extent of the consumer product warranty problem today.

1. Consumers generally do not see consumer product warranties as a high priority consumer protection problem.
2. There are, however, several serious problems that can be specifically itemized and addressed.
3. Many of these specific problems relate to the general structure and strains of modern consumer warranty systems, warranty service capability, warranty service willingness, consumer knowledge and beliefs regarding repair cost and services, and problems of shared data collection and federal government anti-trust policies.
4. Consumers neither read nor care about the consumer product warranty before making a purchase.
5. Information disclosure requirements and truth in warranty regulation to date have not had much of an impact.
6. There is some evidence of "better warranty" coverage.

7. But there is very little evidence that disclosure regulation has improved warranty readability or understandability.
8. The average Canadian consumer has no awareness of his or her legal rights in this area.
9. Current advertising and information techniques have not worked.
10. Longer or "better" consumer product warranties may cost consumers more than they are worth.[194]

The empirical results of another and more recent study of reliability and durability in major appliances by the MIT Centre for Policy Alternatives also deserve emphasis. The researchers found that the modern white goods industry neither tests for product reliability in any prospective sense, nor can be it be expected to develop any such forecasting techniques in the foreseeable future. Both the theoretical and technological barriers to generalized testing of useful product life are too great. The four policy alternatives then suggested were these: the unbundling of warranties; the use of independent testing labs; the use of individualized life cycle/cost data labelling; and the publication of product life data based on actuarial surveys.[195]

Clearly, the problem of consumer product warranties today is analytically more challenging than was the case in 1972 when the Ontario Law Reform Commission published its then important report. The implications that flow from these recent empirical studies will be discussed below. Suffice it to say here that armchair theorizing or intuitive empiricism will no longer serve as an adequate substitute for actual research. The modern consumer product warranty problem can no longer be perceived as a single problem requiring a single, omnibus solution. The matter is much more complicated.

Future directions in this area are difficult to assess at present. We may see one or two provincial legislatures follow the lead of Saskatchewan and New Brunswick and enact discrete consumer product warranty legislation. There is also the possibility that similar protections will be extended beyond goods to include consumer services.[196] And the growing popularity of the "extended service contract" in new product purchases may call for the regulatory review of their design and content from a provincial insurance law perspective.[197] The tendency in recent years in this area of product regulation has been to proceed incrementally, in a discrete, problem-specific manner. For example, the resolution of car repair disputes by the means of a consumer-dealer arbitration system[198] and the possible enactment of "lemon laws" to deal with the newly purchased but recurringly defective automobile[199] are two measures that are currently being discussed at the provincial levels.

Dispute Resolution and Consumer Access to Justice

The final stage in the consumer transaction process is concerned with the problem of consumer dissatisfaction with goods or services — the

problem of complaint handling and dispute resolution. Although it is the final stage chronologically, this topic area remains one of the most important for modern consumer protection planning. Indeed, after the top priority concern for product safety and personal injury, the issue of how and how well consumers are able to pursue complaints and redress grievances is next in order of importance. The reasons for this are obvious when one considers the financial losses that flow from an unresolved automobile or appliance warranty dispute. The reasons for a policy-making priority in this area are less obvious but equally important in the area of small claims as well. We adverted to the importance of providing mechanisms for the resolution of minor consumer disputes in the introduction to this paper. The point made there bears repeating:

> The reason for an interest in little injustices is [that] . . . people care about them. Little injustices are the greater part of everyday living in a consumption society, and, of course, people's attitudes towards the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and something else, alternatives to the law, become all they have. . . .[200]

For the policy maker the main concern here is not problem identification. The problem can be identified fairly easily: to provide accessible and workable consumer dispute resolution mechanisms. In Canada thus far, for constitutional and functional reasons, the matter has remained with the provinces. And to date, the primary provincial response has been by way of small claims court reforms. Reform initiatives have been undertaken to modernize the small claims courts system, improve overall accessibility and availability in various communities, extend hours of operation, improve staffing and consumer assistance facilities, etc.[201]

All of these reform initiatives, however, have continued to give primacy to individual consumer action. The aggrieved or victimized consumer is expected to commence and maintain the action against the allegedly defaulting supplier. This victim-initiative model, however, has come under increasing attack in the literature for reasons that by now are well known.[202] The various financial, psychological and institutional disincentives that work to preclude any serious use of small claims dispute resolution centres have been sufficiently documented. The average Canadian consumer will never litigate the small claim.[203]

Various alternatives to the small claims court system have been urged over the past two and a half decades. In 1972, in its report on consumer warranties and guarantees, the Ontario Law Reform Commission argued for the informalization of consumer dispute resolution. The OLRC urged provincial legislatures to amend consumer protection laws and allow provincial consumer protection bureaus to act as third-party mediators. They also advocated the use of informal arbitration procedures in order to avoid many of the financial and institutional disincentives associated with small claims court litigation.[204] Only one province, Saskatchewan,

has taken up the suggestion and has provided for a mediation alternative for the resolution of product warranty disputes.[205] But, as Romero discovered in his recent study of these procedures, few consumers are aware of them and they are rarely, if ever, used.[206] Nonetheless the scholarly literature continues to expound upon the need for a non-curial, more informal, community-level mediation and arbitration alternative to the small claims court model. The answer for many is still the "neighbourhood arbitration centre."[207]

These proposals for a more informalized consumer redress vehicle are understandably popular. However, the basic assumption that underlies these proposals — that a more casual justice is appropriate for the smaller, consumer claim — is coming under increasing attack from equally pro-consumer-minded scholars. In a series of major studies of the access to justice problem in the United States, Laura Nader found that "third-party intermediaries have been of little help to the consumer" and that "without the force of law as back-up, third-party complaint handlers will be of limited use."[208] Similar conclusions have also been reached by Ramsay in a recent study of consumer redress mechanisms in Canada.[209] Ramsay's data confirms that consumers are very reluctant to use third-party services. More importantly, Ramsay criticizes the popular assumption that consumer claims require casual justice. For him, "informal private systems of individual complaint resolution, whether administered by business or government, simply diffuse a complaint and leave the consumer with the impression that his claim is trivial."[210] Approaches to consumer problems that stress mediation, conciliation and arbitration contain for Ramsay "a latent value judgment that consumer claims are trivial or simple and therefore do not require full-scale adjudication."[211]

The empirical studies of both Nader and Ramsay persuade them that the popular assumption of informalization should be reconsidered. Their basic point is twofold: consumer justice must not be second-class or casual justice — it cannot be trivialized; and, to be effective and have marketplace impact, individual consumer claims have to be aggregated, collected and consolidated through a larger, class redress vehicle.

The realization that individual consumer redress in the small claims area requires at the very least a procedural mechanism to allow the aggregation and enforcement of these claims on a class basis is now an accepted insight in the literature. For reasons of both consumer compensation and marketplace deterrence the importance of the class action vehicle cannot be overstated. Individual consumer policing of marketplace abuses simply does not work. As Professor Whitford found:

> Experience has shown undisputedly that consumers simply do not utilize private compensatory remedies with sufficient frequency to provide any meaningful incentive for compliance with the vast majority of consumer protection legislation.[212]

Whitford would still retain a private remedies provision in modern consumer protection enactments to allow recovery for the occasional litigious consumer, but would in the main urge greater reliance on public remedies such as injunctions coupled with class action procedures — what he calls a "hybrid" approach.[213] Ramsay, in his study of Canadian redress practices, arrived at a similar conclusion. "The key to successful consumer protection lies in measures which are able to reconceptualize little injustices as collective harms."[214] For Ramsay as well, the development of a consumer class action vehicle is the single most important advance that can be made in this area. For the infrequent but still important individual consumer dispute, Ramsay would retain and improve the small claims court system. A more accessible and informal but still "judicial" dispute resolution mechanism, such as the small claims court, would be superior to third-party mediation or arbitration: "it would produce the greatest psychological satisfaction and reinforce a consumer's feeling of competence."[215]

One can now understand why the class action mechanism is materializing as one of the most important items on the consumer access to justice agenda. In Canada thus far, only Quebec has specifically revised its rules of practice to provide for a separate class action procedure.[216] But other provinces may soon follow this lead. Much will depend upon the reception that is accorded the comprehensive study on this subject that was released by the Ontario Law Reform Commission in 1982. The OLRC's three-volume study of class actions concluded by urging the adoption in Ontario of a class action vehicle for the recovery of compensatory damages in various areas of injury, including consumer trade practices.[217] The legislative design suggested by the OLRC may prove somewhat controversial. The commission recommended the adoption of a modified version of the American Federal Rule 23 approach with an overall design that stresses victim initiative and judicial supervision.[218]

The basic points of controversy that will have to be resolved in Ontario and in other provinces that may consider the class action proposals are these:

- whether and to what extent the class action vehicle should be available only to private litigants or only to consumer protection agencies acting on behalf of aggrieved consumers, or indeed to both (that is, whether the legislative design should adopt a private, public or hybrid approach);
- the role of the judiciary in supervising a class action litigation and the nature and extent of judicial control;
- the legislative design of the certification process and whether or not there should be (as the OLRC has suggested) a "preliminary merits" test and "adequacy of representation" criterion, or a "cost-benefit" stipulation;

- the nature and design of the costs rule; and
- the availability of contingent fees.[219]

Future directions in this area are both exciting and important. At the level of individual redress, the choice for policy makers is wide-ranging, from reforming small claims courts to providing general or ad hoc mediation and arbitration alternatives.[220] At the class redress level, there is every possibility that provincial legislatures will move to enact class action procedures, if not in the foreseeable future, then certainly by the end of the century. Whatever we do, we have to acknowledge the point made by Ramsay:

> There is a need in Canada for serious socio-legal research on the pathology of consumer disputes, on the roles of the actors involved, on the functioning of the various formal and informal redress mechanisms, and on the role of governmental regulatory agencies in this process. . . . We know little about the private decisions and behaviour which determine the nature and number of problems which are brought to public officials and institutions . . . the lack of any systematic socio-legal research in this and in other areas is a serious indictment of the Canadian academic legal profession. Without this type of research it must, unfortunately, be concluded that policy-making in this area, as in other areas of consumer protection, will remain what it has always been — at best "an exercise in accidental wisdom."[221]

The State of the Art: Consumer Policy Making in Transition

Are the critics right? Has Canadian consumer protection regulation been nothing more than "an exercise in accidental wisdom"? It is time now to take stock of what we have done and what we have learned in consumer protection regulation both federally and provincially over the past two and a half decades.

In this part we attempt to summarize the most important conclusions that can be drawn about consumer policy making in Canada. Because of constraints of space and time, we have tried to identify the ten most important features of the policy-making experience in consumer protection. The first five observations relate to the legislative landscape, the law on the books, if you will. The last five points turn from statutory rhetoric to street-level reality, and focus on the actual impact of these federal and provincial initiatives on Canadian consumers and consumer transactions.

The Legislative Landscape: The Law on the Books

The first point that can be made is by now an obvious one: the extent of federal and provincial legislative involvement in consumer protection

regulation has been on balance quite substantial. This point is often misunderstood in the literature. Modern consumer commentators, myself included, impatient with the many policy-making failures in this area, tend to underestimate the volume of consumer legislation that has been enacted by both federal and provincial legislatures over the past 117 years. In each of the five important areas of consumer concern — product safety and consumer injury, information and advertising, trade practices, product warranties and dispute resolution — a significant array of statutory protections has been set in place.

The fact that federal and provincial lawmakers have been active in consumer protection matters over the past several decades and particularly since the mid-1960s is at one level quite remarkable. Given the litany of problems associated with consumerism — problems of organization, financial incentives, free rider effects, etc. — the wonder is that we have as much consumer protection legislation on the books as we do. Remember, these various federal and provincial initiatives were enacted despite the absence of any consumer lobby favouring such measures and also despite the presence of a growing and sophisticated business lobby that has consistently, and perhaps understandably, directed its energies against further governmental involvement in the marketplace. According to Ziegel, "almost every important piece of postwar consumer legislation has been opposed by some segment of the business community."[222] Our analysis in the first two parts of this study of the many failures and delays at both the federal and provincial levels of major consumer protection initiatives would confirm that the blockages were business induced and were consequently quite formidable. Nonetheless, a great many consumer reforms were enacted into law.

Federal and provincial legislators must have recognized very early the institutional, functional and remedial limitations of the common law/free market system as a primary policing vehicle and quality control device. The legislators, intuitively or otherwise, understood the enormous informational, transactional and remedial problems that plague the modern day consumer goods and services marketplace. They must also have understood the consequent need for some degree of public involvement and governmental regulation, all of this occurring primarily in the mid-1960s without the advantages or pretensions of the currently fashionable economic vocabulary of "externalities" or "market failures." A substantial amount of eminently sensible consumer protection regulation was enacted not only in the early days of confederation but indeed throughout the last two decades of heightened consumer consciousness, often on nothing more than a common sense or intuitive basis.

Federal and provincial policy makers were obviously able to avoid many of the false dichotomies that permeate the scholarly literature: for example, the alleged dichotomy between private and public, or between

"free market" and "government regulation" — as if the distinction can be made definitionally precise or can be maintained as historically accurate. Neither distinction is tenable; we have never had a truly unregulated or "free market,"[223] nor have we ever had a complete or literal "freedom of contract." Even in the heyday of 19th-century laissez-faire liberalism, there were significant extra-legal norms as well as pervasive and flexible common law doctrines and liability rules that were sufficiently teleogical or just-result oriented to ensure that "state law," whether legislated or common, intervened to maintain some semblance of transactional fairness.[224] The point then and now remains "not whether but how."[225] That is, the controversy about government involvement in marketplace regulation has been historically, and remains today, a controversy that is concerned more with matters of regulatory degree and design than with the dogma of the private-public dichotomy.

The fact that federal and provincial regulatory involvement in the consumer marketplace has increased is thus not terribly surprising. And it has increased. On paper at least, the range and coverage of Canadian consumer protection legislation, with one or two exceptions, remains quite impressive. On paper at least, Canadian consumer protection legislation can almost compete with such leading pro-consumer jurisdictions as Sweden or Japan.

Cost Benefit: The Evidence To Date

The second but perhaps equally important point that can be made about consumer policy making in Canada is this: notwithstanding the growing popularity of a deregulatory vocabulary and the increasing criticism of government ineptitude and bureaucratic inefficiency, the economic studies completed to date have found that on balance the social regulatory consumer protection initiatives of the past several decades have been cost justified.[226] This assessment may be difficult to accept, given the nature of Canadian federalism. After all, we have 11 governments on two different levels, each jurisdictionally empowered to deal with consumer protection and each enacting a wide range of legislative initiatives. A two-tiered, federal system of government regulation provides enormous and costly possibilities for both regulatory inefficiency and redundancy.

The problem is particularly acute in the Canadian context because of the existence of a fundamental jurisdictional and institutional asymmetry. The market for consumer goods and services in Canada is a national one, but the primary responsibility for its regulation remains provincial. This asymmetry in the legal and market decision-making institutions can have significant inefficient and redistributive effects. For example, the existence of different provincial consumer-product-warranty initiatives could result in costly consumer interprovincial cross-subsidizations.

Consumers in less protected provinces would be subsidizing consumer purchasers in the more protected provinces.

The absence of a symmetrical parallel between national markets and federal law could indeed yield, on a theoretical level, such costly cross-subsidizations. But this kind of analysis assumes significant interprovincial differences in consumer protection, or at least significant differences in de facto regulation. It further assumes that these cost differences are not translated into parallel price differences — that all consumers, whether in protected or less protected provinces, will pay the same price for the product. If these assumptions were correct, then there would indeed be income redistribution or economic spillover through a market system transfer. In Canada, however, we have not yet reached the stage of significant interprovincial legislative difference in consumer protection statutory design. And even where such differences can be identified, de facto enforcement is either non-existent or so minimal that no discernable impact on marketplace behaviour can be discovered. We will pursue this line of discussion below in the subsections on government enforcement and consumer awareness. Suffice it to say here that the suggested theoretical inefficiencies arising out of federal-provincial regulatory asymmetry have not and probably will not materialize in fact.

But the concerns about cost justification of consumer protection regulation are not merely interjurisdictional. The main concerns are intrajurisdictional — the unprincipled, inefficient and arguably cost-unjustified consumer protection regulations that affect suppliers either nationally or in their respective provincial markets. Very few empirical studies have been done in this area thus far. In the United Kingdom, one study concluded that British consumer protection legislation in 1978 cost consumer taxpayers more than £150 million.[227] No attempt was made, however, to identify or quantify the "benefits" of such regulation, and indeed methodologically this might well have proven quite difficult if not impossible.

The suggestion here is not that cost-benefit analysis cannot be attempted. Clearly it can. And clearly one could discover a number of "consumer protection" initiatives that on closer inspection become nothing more than trade protection laws, favouring one particular group of producers at the expense of another and at the expense of consumers generally.[228] One could also discover — and this was done by the Economic Council of Canada in its 1981 study of government regulation — a number of areas of so-called "consumer protection" that deserve immediate and legitimate deregulation.[229]

But most social regulatory initiatives in health and safety and consumer trade practices have thus far withstood the force of deregulatory cost-benefit analysis. A recent study of the regulations that were largely intuitively enacted under the federal *Hazardous Products Act*[230] found that the vast majority of the product safety regulations were inherently

cost justified.[231] More generally, the Economic Council of Canada has recently concluded that the cost of consumer protection regulation to date is not excessive in relation to the benefits derived:

> Whereas in some traditional areas of direct regulation the gradual dismantling of certain regulatory restrictions may now seem appropriate, the cumulative evidence available to the Council does not support the view that regulation in the area of consumer protection . . . is excessive. The studies do not suggest by and large that the cost of regulation in this area is excessive in relation to the benefits derived.[232]

The Basic Design of the Legislation

We have now said two things. First, we have a great deal of consumer protection legislation on the books. Second, much of it is cost justified. We come now to our third point: although Canadian consumer protection initiatives have been influenced by developments in the United States, the basic legislative design features have remained curiously Canadian.[233]

Two reasons for this can be advanced. The first is a jurisdictional one. Ours is a uniquely Canadian system of federal government, a system with a judicially developed balance of power between federal and provincial jurisdictions in the matter of consumer protection. This has resulted in a confusing but unique constitutional backdrop for the exercise of legislative power and for the respective development of regulatory techniques. At the federal level, the judicial attenuation of the federal trade and commerce jurisdiction and the still unresuscitated "second branch of *Parsons*"[234] continue to complicate federal policy-making initiatives and compel federal lawmakers to use a cumbersome criminal law jurisdiction to police marketplace abuses. The decision to regulate, the design of the regulatory instrument selected, the continuing absence in the federal arsenal of civil or administrative regulatory techniques — all of these remain attributable to real or perceived constitutional constraints. And the recent decisions of the Supreme Court of Canada in *CN Transportation*[235] and *Wetmore and Kripps Pharmacy*,[236] although providing the federal government with an unexpected blanket endorsement of prosecutorial capability, have only fuelled the frustrations of federal policy makers with respect to a trade and commerce jurisdiction that still appears to be beyond reach.[237]

At the provincial level the constitutional constraints are less dramatic. They relate not to the provincial jurisdiction to regulate property and civil rights, a jurisdiction that is both primary and ample for consumer protection purposes, but rather to the continuing provincial inability to develop innovative administrative regulation techniques and dispute resolution mechanisms without violating the judicially invented and now constitutionally entrenched jurisdictional monopoly of superior courts.[238] Section 96 of the *Constitution Act 1867*, originally "a simple

appointing power," has become a formidable constitutional obstacle for provincial policy makers.[239] This combination of constitutional incapacity at both the federal level with respect to trade and commerce regulation and at the provincial level with respect to administrative innovation in agency design has yielded a uniquely Canadian response to problems in modern consumer protection.

But the constitutional constraint is not the only factor that has coloured the legislation in this area. A second factor has been the actual choice of regulatory instrument. The last decade has yielded a rich literature in the selection and design of regulatory instruments and has identified with considerable sophistication the "spectrum of choice" available to innovative governmental policy makers.[240] Proceeding from least interventionist to most interventionist, the spectrum can range from moral suasion to voluntary action, to self-regulation, to information and disclosure policies, to non-exclusionary certification or registration, to licensing, to standard setting, to prohibitions and bans, to tax policies and subsidization techniques, and finally to government provision.[241]

Thus far, however, the selection and design of the regulatory instruments employed by federal and provincial policy makers in their respective areas of marketplace involvement have remained fairly traditional. Federal policy makers have relied primarily, for reasons developed above, on the criminal prosecution technique. And where administrative regulation was deemed appropriate, the techniques employed have been mainly three: disclosure, standard setting, and prohibitions and bans.[242] More innovative administrative enforcement techniques such as cease and desist, consent decrees, advertisement substantiation or corrective advertising, have not been attempted.

At the provincial level, where provincial initiatives have primarily focussed on matters of product quality, transactional fairness and dispute resolution, the legislative design or regulatory instrument selected, without exception, appears to share several of the following common features or characteristics.

1. The use of a comprehensive or omnibus legislative technique that attempts to address and resolve the entire problem area in one fell swoop.
2. A legislative or academic consultant's bias for treating as a priority the clarification and modernization of common law doctrinal difficulties.
3. The continued retention of the judiciary and the court system as the primary mechanism for quality control.
4. With some exceptions, a largely victim-initiative enforcement model.
5. A continuing reluctance to develop any significant governmental presence in marketplace regulation — either in the enforcement area

(by way of substitute actions, etc.), the administrative regulation area (by way of rule-making procedures), or the consumer dispute resolution area (via experimentation with non-curial mediation or arbitration techniques).

Put simply, provincial legislatures have proceeded by way of omnibus, doctrinal reform, employing a legislative-judicial model and focussing on modern relational, consumer transaction problems as essentially "discrete" phenomena.[243]

The Formulation of Legislative Policy: The Players and the Participants

Our fourth observation also relates to the question of legislative design. It is an obvious observation: the design of legislative policy is shaped by the players and participants in the legislative process. In Canada, at both the federal and provincial levels (and especially at the provincial levels), the formulation of consumer protection legislation has been the result of an amalgam of three interrelated influences.

First, on the part of the legislators themselves, there is a postwar legislative posture that is largely reactive. Consumer protection laws are enacted in response to real or perceived "problems" in the consumer marketplace. The history of Canadian consumer protection legislation is largely a history of ad hoc legislative reaction. Sometimes the "need" for legislative intervention is prompted by media publicity, other times by anecdotal evidence. Sometimes the lawmakers respond in good faith to actual problems of consumer health or safety: for example, the injuries caused by exploding soft-drink bottles in 1978, or the health and home losses associated with urea-formaldehyde foam insulation.[244] Other times, the legislative intervention is less principled, even hysterical: for example, the enactment by Parliament in 1978 of legislation to regulate the practice of income tax rebate discounting, legislation that was given three readings and parliamentary approval in less than 23 minutes.[245]

A second and also uniquely Canadian ingredient in the formulation of consumer protection legislation has been the enormous reliance by federal and provincial legislators on one narrow group of academic specialists — law professors — for purposes of both problem identification and appropriate legislative design. This long-standing relationship between legislatures and lawyers, and especially law professors, is understandable. Legislation and law reform was long believed to be the exclusive domain of lawyers or academics who researched and taught the common law in law schools. We are slowly beginning to appreciate that matters of law reform, affecting as they do a wide range of social, economic and political issues in modern society, are much too important to be left to lawyers and law professors, however knowledgeable they

may be in their narrow specialties. Unfortunately, our history in law reform has been a history of lawyer domination, as confirmed by the design of law reform agendas and resulting legislation. Indeed, examples of the continuing influence of this legal-academic, judicial-doctrinal mindset in the formulation of law reform agendas abound: see, for example, the reports of the Ontario Law Reform Commission on sale of goods (1979), products liability (1979), and contract law amendment (1984). This "fascination with doctrine" was aptly criticized by Professor O'Connell in his indictment of contemporary products liability and tort law reform scholarship:

> It is the fascination of us lawyers with our own energetic and gallant ratiocinations — ratiocinations that ignore the big issues while taking years and sometimes even generations to work out the small ones — which has so largely caused the almost unimaginable grief that the tort liability system inflicts on everyone (except lawyers). . . .[246]

Fortunately, the charge that much of contemporary law reform, particularly at the provincial level, is wasteful, misdirected and academically self-indulgent is beginning to attract growing support in the literature.[247]

The third influence in the formulation of consumer protection legislation has already been mentioned: the presence of an imperfect but increasingly sophisticated business lobby that has managed to shape the timing and direction of consumer policy making in Canada for decades. Although we have not yet reached the stage of American-style "political action committees" that appear to be a growing part of the business lobby scene in the United States, we have had our share of clearly business-directed "legislative decisions."[248] At the federal level, the strength of the business lobby ensured the failure of the proposed amendments to our competition law, of suggestions to redesign federal regulation of advertising, of the federal proposal for a comprehensive borrowers and depositors protection law. And at the provincial level, the design or the delay in implementation of virtually every major consumer initiative has been directly influenced by business reaction: from truth-in-lending to trade practices to consumer product warranties to class action reforms. In each of these areas, as noted above, the role of the business lobby has been a significant one.

The results of this amalgam of legislative adhockery, law-professor law reform and business lobby influence are not enviable. Commentators have come to describe our experience in consumer protection policy making by using such phrases as: "unprincipled," "ad hoc," "largely reactive," "more symbolism than substance," "more piecemeal than planned."[249] Indeed, no comprehensive or synoptic planning has been attempted or achieved. There has been very little by way of multidisciplinary or extra-legal approaches to the design and development of law reform agendas. The general approach has favoured com-

mon law tinkering and court-focussed incrementalism. Notwithstanding some suggestions to the contrary, there have been few legislative attempts to experiment with non-curial reforms in either adjudication or rule making.

Current Directions in Consumer Law Reform

All of this has, of course, a continuing and significant influence on the design of the law reform agenda at both the federal and provincial levels. As we noted briefly above, in each of the five important areas of consumer protection the foreseeable agenda in law reform, at least in the short term, remains fairly traditional and predictable. Some law reform research using a broader, interdisciplinary approach is being attempted[250] but, in the main, the current directions in consumer law reform reflect our long-standing fascination with the court-focussed, the doctrinal, the piecemeal.

In the product safety and consumer injury area, for example, and notwithstanding the critiques of product safety regulation described above, no reforms at the federal level are foreseeable. The most that might happen at the provincial levels is the adoption of an apparently progressive strict liability standard. The wasteful and retrogressive nature of this upcoming legislative debate, and the real need to consolidate and rationalize the existing first-party no-fault personal injury schemes into a more efficient universal accident compensation plan, may not become obvious for several more years.

In the information and advertising regulation area we can expect a more intelligent research agenda exploring the parameters of appropriate disclosure regulation design and the implications for modern policy making of the psychological findings of human information processing. Such items as life cycle/cost labelling at the federal level or information-use education at the provincial level deserve our encouragement. Further research in this important area of consumer protection is required, and there is every indication that it will continue. On the advertising regulation side, however, much less will be attempted. The proposals referred to earlier for a redesign of federal enforcement techniques along civil and administrative lines appear to have been shelved indefinitely. Very little in the way of regulatory reform will be forthcoming for at least a decade.

The same can also be said about trade practices and transactional fairness regulation. We may see one or two more provinces move to enact a trade practices statute, but in all likelihood few, if any, will push forward to allow greater governmental involvement in either investigation or enforcement than is currently the case.

In the consumer product quality and warranty area, there will be little, if any, legislative activity. There is only a slight possibility that one or two

provinces may decide to follow the lead of Saskatchewan and New Brunswick and enact discrete consumer product warranty legislation.

Finally, with respect to consumer dispute resolution and access to justice, apart from tinkering with small claims court procedures and the odd legislative experiment in consumer dispute arbitration (e.g., the current Ontario experiment with auto repair arbitration), most of the discussion and debate will focus on the OLRC's report on class actions.[251] The desirability and design of an appropriate class action procedure at the provincial level will undoubtedly occupy the attention of policy makers in this area in the years ahead. And it may be several years before any legislative action materializes, even in Ontario where the class action study has been tabled. The enactment of a class actions procedure in the common law provinces may well take years, and the legislation that finally is enacted will in all likelihood be even more watered down and procedurally complicated than the proposal being discussed today.

In sum, then, the consumer law reform prognosis is "more of the same" -- perhaps more accurately, "less of the same." At one level this may be a disheartening observation for consumer advocates, but at another it reflects a fundamental and growing realization on the part of government, business and the more sophisticated consumer commentators that consumer protection policy making is much more complicated than first appears. Problem identification is not a simple matter. Neither is legislative design. And even if they were, legislative policy making would still be complicated and confused by the reality of what happens when statutory rhetoric is translated into street-level relevance.

Street-Level Realities: Government Commitment and Enforcement

Every policy maker, even intuitively, can appreciate the need to enforce legislation that is enacted. Over 70 years ago Roscoe Pound offered this obvious insight: "The life of the law is in its enforcement."[252] The importance of this point cannot be overstated. The nature and extent of governmental commitment to, and enforcement of, its legislative initiatives, particularly in the consumer protection area, is dramatically relevant to legislative success or legislative failure. "Experience teaches that the commitment of the agency to enforcement of the legislation is far more important in determining levels of compliance than the enforcement powers of the enforcing agency."[253] The first priority in consumer protection administration is the enforcement of the laws that are already on the books. A government's commitment to consumer protection is reflected more in the street-level enforcement of the laws that exist than in the academic-level debate of laws that might be.

On this question of commitment and enforcement, governments at both the federal and provincial levels in Canada have failed miserably.

Study after study is showing that there is little if any commitment by governments to enforce consumer legislation that is on the books or even to publicize its existence. From product safety regulation,[254] to the prosecution of misleading advertising,[255] to trade practices enforcement,[256] to consumer product warranty regulation,[257] to the provision of dispute resolution mechanisms[258] — the emerging pattern of empirical studies suggests the existence of an enormous gap between statutory rhetoric and street-level enforcement reality. Legislation has been enacted, but it is not being enforced.

Street-Level Realities: Legislative Impact and Consumer Awareness

This failure to publicize and enforce existing laws has a second dimension at the street level: the existing laws have had no discernible impact on consumer awareness. Few, if any, Canadian consumers even know about the existence of these laws purporting to protect them. A recent study has found that more than 60 percent of Canadian consumers cannot even identify one consumer right that they think they may have under federal or provincial law.[259] This is a staggering empirical discovery. The fact that almost two-thirds of Canadians cannot even identify one consumer right carries not only an indictment of the modern regulatory state but also implications for informational and educational policy making. This lack of knowledge on the part of Canadian consumers is a point that is neglected time and time again by professional law reformers.

Related to this lack of legislative impact and consumer ignorance of legal rights is the finding that only a tiny fraction of aggrieved consumers will ever bother to complain or take legal action in otherwise deserving situations. One study has found that although 14 percent of the consumers surveyed believed they were cheated or deceived in consumer transactions over the past year, fewer than two percent took any action, including complaint.[260] Another study found that, although one of ten consumer products purchased over the past year were determined "faulty" by the consumer purchaser, the vast majority did nothing about it.[261]

In fairness to governments, there have been some attempts to publicize the existence of consumer trade practices or product warranty laws by way of media advertising or door-to-door brochures. Also, some provincial ministries of education have encouraged the teaching of basic legal rights courses at the high school level that would stress inter alia existing federal and provincial consumer protection rights. Unfortunately, the few empirical studies that have been completed of the street-level impact of provincial advertising campaigns are discouraging. For example, a recent Saskatchewan publicity campaign to inform con-

sumers of the existence of the newly enacted consumer product warranties law showed no discernible increase in consumer awareness of this law, even though a substantial amount of money had been spent to purchase advertising space in both the electronic and print media.[262] The high school law course approach to consumer legal education has not yet been empirically assessed, although the anecdotal evidence thus far is encouraging.[263]

The entire question of consumer legal rights education raises a number of difficult and long-standing policy-making concerns. The informational approach, the design of the copy, the manner of delivery, the amount of public funding that is deemed appropriate, the costs of empirical impact analysis — we are only beginning to appreciate the analytical and logistical problems in this area, let alone the appropriate solutions. And of course, dominating this entire area of discussion are two modern behavioural insights: first, we still do not know very much about the human brain and human information processing;[264] secondly, it may very well be rational for the average consumer with an "it won't happen to me" attitude to ignore these informational or educational attempts and to do so in a manner that is wholly consistent with efficient, interest-maximizing marketplace behaviour.[265]

However, while federal and provincial policy makers are sorting out these matters in the years ahead, they could take some steps in the interim to improve consumer knowledge of existing legal rights. The first and most important step would be to rid existing laws of the handiwork and imprint of the many lawyers and law professors who have been involved in consumer protection problem solving. Their legalistic and heavily doctrinal legacy, as evidenced in the words and phrases of the statutes that they drafted, should be eradicated. Examples of archaic and confusing statutory language, even in modern consumer protection enactments, abound.[266] A simple decision by federal and provincial legislators to draft and enact consumer legislation in plain, easy-to-read English or French would be a major advance. Then, the (albeit) rare consumer who chooses to take the initiative to inform himself about existing laws, could go to a public library, find the relevant legislation and actually understand the nature and extent of the rights being provided. As things stand now, the existing statutory language is just one more barrier to consumer knowledge and effective action. The link between knowledge and action or, if you will, knowledge and power, is a link that is well recognized. It is also a link that carries circular implications:

> Lack of knowledge leads to powerlessness which leads to apathy toward acquiring new information, which reinforces lack of knowledge. . . . a critical question is whether the circle can be cut by providing consumers with more information about legal rights and procedures for complaining. The answer probably is that this information will not penetrate as long as

consumers continue to experience failure in their attempts to redress grievances.[267]

The street-level realities in consumer protection are clearly not just about governmental enforcement, legislative impact or consumer knowledge. They push the policy maker to problems in the modern political process and to what Laura Nader calls "endemic powerlessness."[268]

The Changing Nature of the Consumer Policy-Making Debate

Just as this "range of relevance" is widening in some quarters, the nature of mainstream consumer policy making is also starting to change. For the most part, it still clings to the fairly traditional legal-doctrinal approaches described earlier, but the literature and the legislators' response to it is changing. Slowly, to be sure, but changing.

In 1975, Professor George Stigler concluded his assessment of contemporary consumer scholarship with the following words: "The intellectual quality of the reform literature is on all except its very best pages rankly deplorable."[269] In 1975 this was not an inaccurate assessment. Apart from the exceptional interdisciplinary study, most of the law reform and law journal literature still had a heavily doctrinal focus.[270] The analyses of problem identification or appropriate legislative design were legalistic and narrow. And the more wide-ranging piece was more polemic than principled research.[271]

In the past nine years, however, the quality of consumer scholarship has improved considerably. Interdisciplinary research in the resolution of modern consumer problems and in the design of appropriate legislation has become a given in the methodology of acceptable scholarship. Few if any serious studies today will attract the attention of policy makers if they lack the multidisciplinary perspective: a perspective not just from law, but also from economics, sociology, psychology and political science. The work that is having an influence today is work that contains one or more of these wider perspectives.[272]

The impetus for greater interdisciplinary study of modern policy making came from a law and economics literature that began growing in the United States in the early 1970s.[273] As the American economy deteriorated and a deregulatory vocabulary became electorally attractive, the law and economics literature, largely dominated by the neoconservative philosophy of the "Chicago school" scholars began to occupy centre stage in policy-making discussions.[274] The limitations of this Chicago school approach to regulatory and liability rule reform were soon exposed[275] and even ridiculed.[276] By the late 1970s, the highly simplistic and ultimately unhelpful assumptions of the Chicago school literature had been replaced with a more sophisticated, more workable,

law and economics approach. But the legacy of Friedman, Posner, Coase and Stigler in this area of scholarship was enormous. Although their work was narrow minded and conceptually flawed, they precipitated a tenfold improvement in the quality of contemporary debate. By exposing law reform, legal institutions and liability rules to economic analysis, they placed a sophisticated array of hitherto neglected questions on the modern consumer law reform agenda: questions of problem identification, "market failure," governmental intervention, appropriate regulatory design, legislative impact analysis and overall regulatory cost. Although dogmatic in their vision of modern marketplace behaviour, these early law and economics scholars laid the foundations for a more sophisticated and flexible interdisciplinary approach that began to emerge in the late 1970s.[277]

This emergence of a more sophisticated, indeed flexible, adaptation of the Chicago school approach — a post-Posnerian "softer" version — continues to enrich the scholarship of modern policy making. Various studies at the federal[278] and provincial[279] levels provide examples of this more sophisticated, softer version of the market failure — deregulation vocabulary. This new and improved version of law and economics theorizing is dominant today. But it will in turn give way to other disciplines and other disciplinary perspectives. After all, even the relatively enlightened assumptions of the post-Posnerian "softies" are deeply flawed and ultimately unhelpful when the more complicated aspects of human behaviour are discussed. Anthropology, sociology, psychology and political science will soon begin to have equal claim to law reform agenda relevance. And this is all for the good.

The only negative legacy of this current fascination with consumer law reform via microeconomic price theory precepts may be in its perpetuation of the belief that modern policy making in a complex society can be "rational" and "systematic." Virtually all of the literature in this area has a decided objective/quantitative bias. Modern public choice theorizing — its belief in and endorsement of socio-economic impact assessments or cost-benefit analysis, its use of a single economic vocabulary for the analysis of complex human and institutional interaction — displays the common characteristics of many of the leading studies in the literature.[280] The implications of this shift in consumer scholarship from legal-doctrinal in the 1970s to analytical-rational in the 1980s will be discussed below. Suffice it to say here that the last nine years have seen a major shift in both approach and analysis in the better consumer literature — a shift that is changing dramatically the nature of the consumer policy-making debate.

Growing Uncertainty and Controversy

The change in the nature of consumer scholarship and debate about regulatory reform is undoubtedly part of a larger phenomenon of grow-

ing uncertainty and controversy in regulatory policy making generally. The last five years have seen a major transformation in both public opinion and policy scholarship. In the vocabulary employed and the values espoused, the regulatory debate has become explicitly political. And in this politicization of theory and empirical argumentation, uncertainty and controversy continue to grow.

Consider first the confusion in public opinion about government and government regulation. Opinion polls in both the United States and Canada are finding that consumers no longer speak with one voice. Indeed, even an individual consumer can no longer be counted on to speak with one voice. The uncertainty of the times is such that the same consumer will in one breath express outrage at the growth of government and "over-regulation," and in the next breath encourage even more regulation. A recent survey of American consumers found that by a margin of two to one, Americans wanted their government to "stop regulating business and protecting the consumer and let the free enterprise system work."[281] But an "overwhelming majority," however, went on to express their support for the continued regulation of industrial safety, auto emissions and product safety, and even urged "more regulation designed to strengthen consumer rights and remedies."[282] This growing confusion in the public mind about the actual costs and benefits, even existence, of government regulation is nicely captured in the following anecdote from Pertschuk:

> In the Spring of 1980 Bill Moyers devoted a segment of his television journal to an examination of the [Federal Trade Commission's] difficulty with Congress. In the course of our conversation he told me that he had first been drawn to an examination of the FTC by the laments of a friend, his "every man", a Mineola, Long Island, druggist and member of the local Chamber of Commerce who had complained bitterly that FTC regulations were driving him to the brink of despair. Yet when Moyers in the course of preparing his program sat down with his friend to elicit his specific complaints, the druggist was unable to identify a single FTC case or rule that in any way affects his business.[283]

From the various opinion polls that have been completed in the last several years in the United States, two clear points emerge: Americans want consumer protection regulation[284] but are becoming increasingly concerned about bigness — both big business and big government.[285] The confusion felt by average consumers reflects a largely unarticulated concern about growing alienation and powerlessness, about their involvement with or input into a political process that is allegedly democratic, about their loss of individual autonomy.[286]

These American analyses also apply to Canada. Here too, recent consumer surveys have found similar internal contradictions: 59 percent of Canadians surveyed believe there is "too much government"; 86 percent go on to say that existing consumer protection and environmen-

tal regulations have been "worthwhile."[287] Indeed, the Economic Council of Canada discovered a queue of groups and organizations that were urging even more regulation by government of the modern marketplace.[288]

The uncertainty and controversy in public opinion is paralleled in the policy scholarship. The growing controversy in the scholarly literature is no longer superficial. It is not simply the result of isolated design errors or unexpected side effects — for example, the unforeseen emergence in the regulation of children's clothing of the flame-retardant chemical Tris as a carcinogenic hazard;[289] or the many errors that have been made in information disclosure regulation.[290] The controversy goes deeper. It touches fundamentally both theoretical starting points and the nature of empirical argumentation.

The theoretical starting points now range across the ideological spectrum, from Friedman's belief that "the market best protects the consumer"[291] to Cranston's commitment to consumer regulation by "public law measures."[292] For each of them, as for every scholar in this area, the theoretical starting points, the assumptions, beliefs and values are deeply ideological and ultimately untestable. When the theories are purportedly "tested" or "proved," the methodologies employed and the resulting empirical argumentation breeds even more disagreement and debate. For every study by Peltzman "demonstrating empirically" the accident-inducing costs of seat belt regulation,[293] there is an equally persuasive rejoinder criticizing the unscientific nature of the research, the assumptions, the biases, the hidden variables;[294] for every study urging the deregulation of food and drugs or product safety,[295] there is a more liberal rebuttal "proving" the studies wrong.[296] Similar controversies about starting points and "data" also abound in the other major areas of consumer protection regulation.[297] Truth-in-lending regulation, fair credit billing laws, "cooling off" rules have all been criticized in the literature, and studies have "found" that the discernible result of these regulatory initiatives was anti-competitive: larger firms benefitted at the expense of smaller firms.[298] For McChesney, consumer protection regulation merely redistributes income: "Consumer regulation generally favours unions, higher income consumers and larger firms; it penalizes unorganized labour, lower income consumers and smaller firms."[299]

The impact of this growing controversy in the scholarly literature has been substantial. The shift in vocabularies and the heightened ideological self-consciousness has prompted many traditional pro-consumer advocates to question their own assumptions and starting points. Both Robert Reich and Michael Pertschuk, respectively the former policy advisor and liberal chairman of the Federal Trade Commission, are now urging a presumptively pro-market approach in regulatory intervention,[300] Reich in particular advocating a "non-paternalist" approach to consumer protection regulation. Other leading consumer

commentators, such as Michael Greenfield, are also beginning to express serious doubts about the direction and design of recent consumer protection initiatives.[301]

Both consumers and scholars in the United States and Canada are beginning to recognize the dilemma of our times, what Goudsblom calls "the problem of nihilism":

> Have we not learned as members of a civilized society that we must be prepared to discuss and examine the reasons why we act the way we do? And yet, do we not find time and time again that not a single argument with which we may wish to justify our judgments and decisions can withstand critical analysis? To recognize this dilemma is to face the problem of nihilism.[302]

The State of the Art: Common Sense, Contradiction and Confusion

By way of summation, one can say this: modern consumer policy making is in equal parts common sense, contradiction and confusion. We discussed the common sense component above: the common sense of federal and provincial legislators that prompted the enactment, even in the early days of confederation, of regulatory legislation in each of the five important areas of consumer protection.[303] The common sense component remains the dominant ingredient in the policy-making recipe. However, a precise delineation of its constituent elements is not possible. "Legislative common sense" has varied and will continue to vary with the changing economic and political requirements of the society it serves.

The contradiction component can be more easily identified. We have already explored the contradictions that arise in problem identification, legislative design, choice of regulatory instrument, the selection and design of the appropriate enforcement technique, the nature and extent of government commitment to both consumer education and legislative enforcement, etc.[304] In each of the five areas of consumer protection discussed above,[305] contradiction is alive and well.

In the product safety and consumer injury area, for example, we as a society have conceded the institutional superiority of a first-party no-fault accident compensation scheme for injuries incurred in the workplace[306] or on the roads,[307] but are still reluctant to extend the logic of this reasoning to product-related accidents that cause injury at home.[308] Instead, the consumer home accident problem is being approached by provincial policy makers from a blinkered, wasteful and fundamentally unprincipled products-liability tort law reform perspective.[309]

In the information and advertising regulation area, contradictions arise both in problem identification and legislative design. Information-disclosure impact studies and psychological discoveries about human

information processing continue to confound historically intuitive legislative prescriptions.[310] In advertising regulation, the need for national regulation is conceded, but our continuing reliance on the cumbersome criminal law for primary enforcement and our reluctance to adopt civil or administrative approaches belies a belief that we know what we are doing.[311]

In trade practices regulation there are contradictions both in legislative design and legislative commitment. The continuing design problem was recognized by Professor Leff:

> Our problem here is that we want simultaneously to produce and protect market efficiency and to achieve non-exploitative market results. But given individual differences among people and innocently achieved superior information, market power and pure luck, we cannot have both at the same time. We cannot have perfect freedom and perfect fairness. What we have instead is unconscionability, a legal device that allows us inconsistently and with only symbolic impact, an occasional evasive bow in the direction of our incoherent heart's desires.[312]

The contradictions in legislative commitment have already been discussed.[313] Governments, it seems, are committed to the enactment of laws but not to their enforcement.[314]

The product quality and consumer warranty area has attracted a further range of conflicts, in the articulation of the problem and in the determination of appropriate legislative response.[315] Legislative tendencies to regulate minimum standards of product quality or the design of standard-form consumer warranties are being contradicted by theoretical research exploring the nature of the consumer warranty and empirical studies questioning the overall cost of longer warranties and generally urging their "unbundling."[316]

Finally, in the consumer access to justice area, the traditional assumptions favouring a more informalized dispute resolution process for consumers are being contradicted by empirical studies suggesting the exact opposite.[317]

These contradictions in modern consumer policy making are not simply a series of problem-specific disagreements in the literature. The contradiction component in modern consumer policy making is more overarching and far-reaching. It may be found in theoretical starting points, empirical methodologies, the deeper insights of Sagoff or Schulze that suggest an unresolvable schizophrenia in the average citizen-consumer's public and private postures,[318] or in Hirschman's notion of "shifting involvements" between private interest and public action:[319] contradiction is a long-standing and ultimately ineradicable component of policy making. The most we can do is attempt to identify and eliminate the contradictions that are avoidable and then learn to live with those that are not. We will return to this point below, in the section on future directions.[320]

This leaves the third component: confusion. The point has already been made. Modern consumer policy making is fraught with confusion — about starting points and first principles, problem identification, legislative design and enforcement strategies, legislative impact assessment techniques, evaluation criteria, etc. We have adverted to these "confusion traps" in the earlier parts of this paper in our discussion of each of the five areas of consumer protection.[321] Here again, much of the confusion is avoidable and will have to be addressed. Some of it, however, is unavoidable. As we will argue below, the mature and modern policy maker will have to learn to identify the former and live with the latter.[322]

This then is where we are today. The ten observations described above tell us something about the problems inherent in modern day consumer protection regulation. But the observations only scratch the surface; the real problems in policy making go much deeper. The real problems and constraints in consumer protection regulation are much more fundamental; they go to the very heart of our current thinking about law, policy making and political democracy. We turn to them next.

Deeper Problems and Dilemmas

There are in our view at least five deep-structure constraints in modern policy making that continue to frustrate consumer protection initiatives, impede their timely enactment and enforcement, or undermine their overall effectiveness. These five constraints, in ascending order of their increasing significance, are: constitutional; theoretical or philosophical; conceptual or attitudinal; empirical or behavioural; and structural or political.

Constitutional

The constitutional constraints on federal and provincial consumer policy making have already been referred to, albeit briefly.[323] Any modern federal system of government will, of course, have more than its share of constitutional difficulty. In Canada, with 11 legislatures effectively exercising a consumer protection jurisdiction, problems of planning, coordination, uniformity, overlap and duplication, legislative contradiction and regulatory inefficiency abound. Federal-provincial interaction and interprovincial harmonization can alleviate or minimize some of these difficulties. But much of the cost is inherent in the federalist concept and is the price a federal system must pay for the other advantages that are deemed worthwhile in such a political union.

Our concern here is not with the politically unavoidable, indeed necessary, constitutional impediments. Nor is it about the impact of the most recent constitutional development, the Canadian *Charter of Rights*

and Freedoms. Clearly the mobility, legal rights and equality provisions of the *Charter* will have an impact on the design and delivery of consumer protection regulation as well as the federal or provincial enforcement strategies employed in the years ahead.[324] But here again the *Charter of Rights* can now be perceived as a political given, a necessary and unavoidable constitutional constraint.

Our concern is with those constitutional constraints that are unnecessary and avoidable, constraints that have resulted largely from wholesale judicial invention and unwarranted federal and provincial passivity. The decisions of the Supreme Court of Canada in matters relating to federal-provincial jurisdiction in the consumer protection field, particularly in the last two decades, have led to the development of at least three major policy-making problems. First, for the federal policy makers, the continuing erosion of the scope and content of the federal trade and commerce power; for the provinces, the judicial over-interpretation of section 96; and for both federal and provincial law makers, the post-*Hauser* jurisdictional question of federal enforcement of federal law.[325] This last matter was "resolved," albeit in a doctrinally perplexing manner, in the fall of 1983 when the Supreme Court gave its decisions in *C.N. Transportation*[326] and *Wetmore and Kripps Pharmacy*[327] and granted the federal government an exclusive jurisdiction for the enforcement of its federal law.

The other two areas of difficulty remain, however, and dominate federal-provincial policy-making discussions. The perceived federal constitutional inability to establish civil and administrative structures in such areas as product safety, advertising or national trade practices regulation remains a formidable constraint in legislative design. Were the Supreme Court of Canada to resuscitate the so-called "second branch" of *Parsons* ("the general regulation of trade affecting the whole dominion")[328] and re-establish a more balanced federal trade and commerce power, then a wide variety of experiments at the federal level could be initiated using the more modern civil and administrative enforcement technique.[329] Such possibilities as a federal trade commission or a federal Consumer Product Safety Commission or even a nationally legislated Trade Practices Act would be attainable constitutionally.

There are some indications in recent cases that the Supreme Court of Canada is willing to reconsider the attenuation of the federal trade and commerce power and, given the right circumstances, build on the foundations set in place by Laskin C.J. in *Vapor Canada*.[330] In *C.N. Transportation*, Chief Justice Dickson articulated a constitutional matrix that could permit a much broader view of the reach of section 91(2),[331] a view that would avoid the "single industry" analytical trap that was set by Estey J. in *Labatt's*.[332] Unfortunately, Dickson C.J. was content with the "single industry" mindset in his rejection of a section 91(2) basis for federal *Food and Drug Act* provisions in *Kripps*.[333]

At the provincial level, the only constitutional constraint is section 96.[334] The reach of this provision, however, has been significant. Recent provincial attempts to experiment with more innovative and accessible consumer protection and dispute resolution mechanisms were stopped in their tracks by the "judicial gloss" that has been added to section 96 and that has transformed it from "a single appointing power" into a virtual separation of powers doctrine.[335] In *Crevier*[336] and also in *McEvoy*,[337] the Supreme Court of Canada made clear its desire to entrench constitutionally the exclusive jurisdiction of superior, county and district courts.[338] Given this explicit commitment, it is unlikely that the courts alone can be counted on to reestablish a more balanced interpretation of the language of section 96. Indeed, provincial initiatives in this area may have to await a constitutional amendment of section 96. Fortunately, one has recently been proposed.[339]

In both of these areas — federal trade and commerce and provincial section 96 — constitutional difficulties have developed mainly as a result of judicial interpretation. But another factor is equally relevant: the complacency or passivity of federal and provincial attorneys general in constitutional matters. In our view, federal and provincial attorneys general have failed in two important ways: first, by misunderstanding the nature of constitutional adjudication and judicial decision making; and secondly, by continuing to take constitutional decisions much too seriously. The best literature in the field reminds us that constitutional adjudication in a modern and complicated federal system is and must be an ad hoc, interest-balancing, issue-specific, generally teleological and consequentialist process.[340] The criteria for choice in a federal-provincial dispute for a particular judge are inherently value laden and political. What influences the judicial decision is not doctrinal detail but his "concept of federalism."[341] What prompts a particular decision on a particular set of facts is the particular issue at the bar and not a doctrinally sophisticated and over-arching jurisprudential theory.[342] For example, the decision by the Supreme Court of Canada to hold unconstitutional the federal government's attempt to regulate the labelling of "lite beer"[343] should not have influenced federal prosecutors to withdraw dozens of charges under other federal regulations. And yet it did.[344] The decision in *Labatt's*, although suggestive of a deregulatory sensitivity on the part of certain members of the court, should not have pre-empted legitimate federal policy-making initiatives in other related areas. The Supreme Court of Canada in its decision intended only to resolve the dispute at hand; it did not intend the articulation of a theoretical superstructure for a federal trade and commerce power. The case-specific, fact-specific, circumstance-specific nature of modern constitutional adjudication is evident when one considers the many "leading cases" that the court is able to conveniently ignore when the facts, issues or circumstances change even slightly,[345] or when a particular

judge's concept of federalism compels a diametrically different decision.[346]

The chilling effect of certain Supreme Court pronouncements is understandable, given an Anglo-Canadian legal tradition that has accorded primacy to doctrinal, non-political, "legal" analysis — as if law can somehow stand apart from the society it serves, as if it can truly be extra-systemic, "out there." We are, of course, slowly beginning to realize that there is nothing "out there."[347] Judicial reasoning, and thus constitutional argumentation, has been and will remain case specific and value laden. It will be shaped primarily by judicial notions of "political appropriateness." Legal argumentation will still have to be sophisticated and doctrinally compelling, but there will be much more room for creative persuasion. In sum, a more mature understanding of the nature of constitutional adjudication and a more aggressive attitude in both law making and public litigation will go far to eliminate the constitutional constraints and encourage the judicial development of the only workable jurisdictional scenario: functional federal-provincial concurrency.[348]

Theoretical

Of course, even if these interjurisdictional constitutional constraints were removed, and functional concurrency could develop, real problems would still remain. Within each of the 11 jurisdictions, consumer policy makers would still have to proceed "sensibly," and would have to develop and rely on some "theoretical perspective" as to what they are doing and why they are doing it. The need for a theoretical starting point to inform both problem identification and appropriate legislative design is a given in the literature. The commentators favouring deregulation or urging even more regulation point to their particular theoretical understanding of marketplace behaviour and appropriate governmental response. Unfortunately, the value and workability of consumer theorizing is becoming increasingly constrained by the growing tendency in the scholarly literature to employ a single vocabulary and single-answer mindset. Single-answer theorizing abounds in the scholarship. And in our view, the implications for effective policy making are serious.

The best example of the tendency toward single-answer theorizing can be found in the growing attractiveness to many scholars and policy makers of the law and economics approach to consumer regulation. We have already described the genesis of the law and economics movement, the rise and fall of the Chicago school and the current transformation of this literature into a new and improved post-Posnerian version.[349] We want to return to this point for one further reflection. It is this: even as the simple-minded and overly rigid theoretical superstructure of the Chicago school gave way to a more sophisticated, more refined version, the microeconomic vocabulary was still retained and single-answer theorizing still prevailed. And this "pursuit of the truth imperative"[350]

continues to attract a growing following in this age of uncertainty. The legal literature is chock-full of economic analyses of virtually every phenomenon in human behaviour, from government regulation and liability rule reform[351] to a privately functioning "market for babies."[352]

Even a moment's reflection, of course, will remind one that the economic approach to policy analysis is not the only one. Nor is it the most important. After all, marketplace efficiency is only one of many goals in modern society. The privatization of education or policing or broadcasting or the "baby market" carries consequences that would not be tolerated by other cultural, religious or political values in our community. As Okun has noted: "Society refuses to turn itself into a giant vending machine."[353]

This continuing fascination with a more "scientific," economic-analysis approach to modern regulation leaves a great deal to be desired on a second level as well. Even where an economic analysis of "market failure" or "externalities" is appropriate, such as in product safety, advertising, trade practices or consumer product quality regulation, the utility of the analysis is quickly limited by the elasticity and malleability of the very concepts employed. As Breyer has noted: "One can find some spill-over cost rationale for regulating anything."[354] Or, one might add, for regulating nothing.

But the point that concerns us here is not in the political or analytical limitations of the predilection for economic analysis — these are many and are slowly being acknowledged — but rather in its continuing attraction to policy makers. There is value in economic analysis to be sure. But the value continues to be overstated and reflects a prevailing tendency to search for single answers.

A second example of the same point can be found in a parallel development: the continuing denigration of incrementalism as unprincipled ad hockery and the deification of comprehensive or synoptic planning as the only legitimate policy-making goal. Here again, one must be careful. There have been, to be sure, substantial contributions in the literature of policy making and modern policy analysis to the identification and resolution of modern day consumer problems. Books by Stokey and Zeckhauser,[355] Breyer,[356] Bardach and Kagan,[357] Graymer and Thompson,[358] House[359] and Lave[360] provide important insights for the modern consumer and policy maker. And the techniques employed in modern policy analysis are becoming increasingly sophisticated: probability theory, econometric queuing, defusion and demographic modelling, discounting analysis, linear programming algorithms, multiple regression analysis and shadow pricing.[361]

One can probably understand the growing confidence in the scholarship that comes with these techniques and the belief that comprehensive policy making and synoptic planning are now attainable. Lindblom's prognosis in 1959 that "muddling through is the best we can

do"[362] is remembered more as a platitude of a cynical incrementalist than a pragmatic prediction for modern policy making.

This reluctance to take Lindblom's analysis seriously persists. But fortunately some headway is being made in the literature. In an important article published in the *Harvard Law Review* in 1981, Diver criticized the tendency to denigrate incrementalism. In his view, "only a superhuman could adhere faithfully to the ideal of comprehensive rationality."[363] Comprehensive rationality, he argues, is not always possible, nor is it always desirable. Indeed, in some areas of consumer protection, an ad hoc incrementalist approach would prove to be more advantageous and more legitimate. The basic problem is this:

> Our social philosophy exhibits a troublesome tendency to vacillate between polar extremes. The solution to synoptic failures is not a blind retreat to incrementalism. What is needed is a sense of balance, a recognition of the finite reach of our means. . . . A fully mature theory of policy-making should be able to accommodate both, with each as master in its appropriate realm. [364]

Like our fascination with the more "scientific" law and economics approach to modern regulation, our parallel fascination with "comprehensive planning" and our denigration of incrementalism reflect a deeply rooted and continuing preoccupation with single-answer theorizing.

The hold that philosophical monism has on our culture is quite understandable. It reflects, and reflects deeply, one of our basic needs for certainty and order.[365] But it is not the most mature approach. In an increasingly polycentric world of multi-tiered analyses and conceptual trade-offs, where "there is no single correct criterion of optimal resource allocation,"[366] the single-answer theorist quickly appears simple-minded and naive. Isaiah Berlin recognized this when he said:

> The right policy cannot be arrived at in a mechanical or deductive fashion — there are no hard and fast rules to guide us; conditions are often unclear and principles incapable of being fully analyzed or articulated. We seek to adjust the unadjustable, we do the best we can.[367]
>
> . . .
>
> The notion that there must exist final objective answers to normative questions, truths that can be demonstrated or directly intuited, that it is in principle possible to discover a harmonious pattern in which all values are reconciled, and that it is towards this unique goal that we must make, that we can uncover some single central principle that shapes this vision, a principle which once found will govern our lives — this ancient and almost universal belief, on which so much traditional thought and action and philosophical doctrine rests, seems to me invalid, and at times to have led (and still to lead) to absurdities in theory and barbarous consequences in practice.[368]

The irony is that few modern policy makers and scholars would take objection to Diver's or Berlin's analysis. Indeed, they would be offended that their work is being perceived in such crude, categorical fashion.

They would be among the first to agree with Leff that: "We shall have to continue wrestling with a universe filled with too many things about which we understand too little and then evaluate them against standards we don't even have."[369] But then, having voiced this agreement, they would return only somewhat unnerved to their warm and cosy rabbit holes. Business as usual.

The Leff-Diver-Lindblom-Berlin perspective argues for a more mature, a more sophisticated, a more radically pluralistic theoretical approach to modern consumer protection. It is not nihilistic, nor is it cynical. Rather, it urges the adoption of broader perspectives, a more wide-ranging vocabulary[370] that stresses and concedes complexity and confusion, and that lives comfortably with strategy and tactics that are, on occasion, ad hoc and incremental. A Greek philosopher, Archilochus, observed that "the fox knows many things but the hedgehog knows one big thing." The need in Canadian consumer protection policy making is for fewer hedgehogs and more foxes.[371]

Conceptual

The pursuit of the "truth imperative" and the tendency to value single-answer theorizing can be traced to an even deeper constraint, a conceptual or attitudinal one. The way we approach problem solving, the way we reason, the primacy we give to rationality — these roots go deep, indeed to the very core of our Anglo-Canadian culture and Western traditions. We cannot begin to do justice to these complicated notions in several paragraphs in an already long paper. All we intend here is to draw attention to our deep belief in rationality and the power of human reason and to some of the implications for modern policy making that flow from this belief.

The importance we place upon rationality and human reason in all areas of policy making, including consumer protection, requires no documentation. Virtually every law reform commission study, Economic Council report or scholarly article begins or ends with a plea for "rationality" in modern regulation.[372] Implicit in this plea is the deeply rooted faith in the almost infinite capability of human reason. The belief in rational man permeates modern policy analysis and reaches to the top of the policy-making pyramid. Indeed our former prime minister, Pierre Trudeau, in his final address to the nation on June 14, 1984, made explicit this widely held assumption:

> Liberalism is dealing with change. It is meeting challenge. Liberalism is reform. We have the inheritance of Locke and Jefferson, of Montesquieu and Mill. They taught us that problems that men create can be solved by men of goodwill if they apply their reason to those problems and that's what Liberals do.[373]

Some commentators have criticized the rationality assumption as nothing less than "the arrogance of humanism"[374] and have urged us to come to terms with "our irrational faith in our limitless power."[375] Professor Ehrenfeld for one has argued that "absolute faith in our ability to control our own destiny is a dangerous fallacy,"[376] and has urged policy makers to adopt a more mature, more tentative perspective. Other commentators have taken up this theme of "bounded rationality" to argue that public policy analysis is more art than science, more "common sense" than "rational analysis."[377] Nonetheless, for most scholars and policy makers, rationality and the belief in human reasoning retains a powerful hold and continues to influence the design of research agendas and regulatory response. It will undoubtedly continue to do so in the years ahead.

It is important to note, however, that even this long-standing and deeply cultural commitment to human reason and rationality is giving way to the findings of modern psychological and epistemological research. Consider first the work of the psychologists. Professor Simon and others are studying the role of reason in human affairs[378] and the limitations of the human reasoning process. According to Simon, "reason is wholly instrumental. . . . It is a gun for hire that can be employed in the service of whatever goals we have, good or bad."[379] At the individual level, the capacity of human reasoning is much more limited than is believed and is very much bounded by a particular situation and by the computational powers of the human brain. At the institutional or policy-making level, other limitations arise: limitations of attention and cognition; an inability to place the entire range of public questions simultaneously on the same agenda at the same time; limitations of multiple values and interpersonal comparisons; and cognitive limitations of policy makers when confronted with questions of risk assessment or uncertainty.[380]

This latter limitation — the cerebral capability of the human mind — is very topical in the psychological literature. And the findings are both interesting and disturbing: risk assessment is inherently subjective due to enormous and unavoidable judgmental limitations: both policy makers and consumers use heuristics or shorthand decision-making techniques to get through difficult risk assessment decisions; but because these heuristics are faulty and biased, they lead to systematic and predictable errors in judgment about problem identification and appropriate legislative design.[381] Because human beings are "poor probability assessors"[382] and "systematically violate the principles of decision-making,"[383] major policy-making errors are committed. The literature is rich and growing. The work of Kahneman, Slovic, Tversky, Fischoff, Lichtenstein, Sask, Kidd and Hammond[384] will become more familiar in the years ahead. The basic problem, and one that carries enormous implications for our culturally comfortable belief in human

reason is this: "Man's cognitive capacities are simply not adequate for the tasks that confront him."[385] Put simply, the growing psychological literature documenting our use and abuse of heuristics and faulty decision rules totally confound marginal utility analysis and renders even more vulnerable any inflexibly held commitment to human rationality.[386] Put more bluntly: "Man is in the most fundamental sense of the word irrational, and no amount of reasoning no matter how sophisticated will produce a complete and consistent account of human behaviour, customs or institutions."[387]

The work in recent years of philosophers and scientific historians has travelled a parallel path. From Poincaré[388] to Kuhn,[389] from Polanyi[390] to Feyerabend,[391] the modern critiques of "scientific method" by the very scientists involved in scientific research expose even more persuasively the historical and analytical vulnerabilities of "method," "scientific objectivity," and "human knowledge."[392] As with the psychological studies, these works on the philosophy of science will be essential reading for those scholars and policy makers who persist in clinging to human reason as some kind of an analytical lifeboat.

We do not suggest for a moment that we abandon our unique capacity as humans to reason our way through problems to "rational" solutions. We suggest only a need to review the extent to which our reliance on, indeed reification of, the power of human reason dominates in modern policy scholarship and influences unduly the design of both research agendas and regulatory vocabularies. If our continuing commitment to "rationality" is nothing more than a rhetorical reaction against the abuses of arbitrary decision making, then it is understandable and benign. However, if this belief in human reason is more substantively connected to notions of scientific method, objectivity and "final solutions," then the situation is more sinister, indeed quite serious. If the latter, the tendency toward single-answer theorizing will continue to grow. Exclusionary analytical vocabularies will be employed, experts will dominate the policy-making process and we will remain where we have been for the past 117 years — in the rut of wrong assumptions and wrong directions. It is hoped that the literature referred to above will allow the more serious-minded policy maker to pursue more progressive, more experimental directions. What these directions might be are considered below the part subtitled "An Agenda for Action."

Empirical

The fourth constraint that plagues modern consumer policy making is the empirical one. It relates to the nature and vulnerabilities of modern empirical research methods. It also relates to the rationality constraint discussed above, to the single-vocabulary, single-answer, quantitatively biased drive for "hard data" in the belief that sufficient quantities of

empirical data will provide clear answers for policy making. Here again the mature policy maker confronts a paradox. On the one hand there is a need for more information, more empirical research to inform problem identification or legislative design. On the other hand there is the recognition that ultimately the information collected will not be determinative and cannot be relied on because of the many inherent limitations and deficiencies in social methodology.

The empirical constraint explained more directly is this. Much of what we do in Canadian consumer protection regulation is based more on intuition, hunch, or "guesstimation" than it is on hard empirical observation. We are beginning to do more empirical or street-level research particularly in such areas as product safety, information and labelling, trade practices and consumer warranties.[393] Some of these studies have already been described above . On balance, however, we still have no real empirical understanding of the most important threshold questions in any of the five main areas that we have considered in this paper — questions relating to problem identification, legislative design, choice of appropriate regulatory instrument, selection and design of enforcement techniques and remedial provisions, education and publicity initiatives, governmental enforcement practices or marketplace impact assessment.

Most policy makers would agree that empirical research in each of these areas would be valuable and ought to be undertaken. Indeed, it was empirical study that opened our eyes to the limitations of tort litigation as a deterrence vehicle, the non-importance in the personal injury, no-fault insurance context of the so-called "moral hazard problem," and the dubious value of penalty rating techniques — all of this in the product safety and the product liability area.[394] In the area of trade practices, empirical research revealed the disturbing conclusions about governmental commitment and enforcement;[395] in the information and advertising regulation area, it uncovered the ambiguous or even counterproductive results of certain disclosure or labelling regulations;[396] in consumer warranties, hard data countered long-standing assumptions about the role of the warranty and the actual cost to consumers of "better warranty" coverage.[397] Currently, empirical data is urging a reconsideration of the view that favours a more informal consumer justice system.[398] Obviously, in each of these areas, the data collected were useful and illuminating; more information is better than less.

The concern, though, is the extent to which policy makers or academic commentators tend to idealize empirical research as a non-controversial determinant of consumer policy formulation. For example, in the Priest-Whitford exchange about the appropriate theory for explaining the modern consumer product warranty, Priest concluded that the debate could only be resolved in one way: "better data."[399] Better data would certainly inform the debate and should be collected, but would

not by any means resolve it. The complexity of modern policy making and especially the complexity and the vulnerabilities of social science methodology carry with them built-in controversies even in this seemingly quantitative and objectively verifiable area of data collection.

The vulnerabilities stem from a double-barrelled problem in research method: first, the controversy of appropriate methodology and second, the controversy of evaluation or data interpretation. The first relates to the design of the research — the articulation of the hypotheses that need to be tested and the methodology that should be employed. Two questions arise: in a human behavioural context, where, as Poincaré has noted, "there are an infinite number of testable hypotheses," which particular hypothesis should be tested?[400] But then, what can really be tested? And if the appropriate hypothesis and relevant variables can be identified, what can be done about the "theory of second best"?

The "theory of second best" and the problem of mutually contingent conditions have been described by many writers, including Markovits[401] and Duggan.[402] The clearest and most colourful explanation of the theory is still Leff's:

> If a state of affairs is a product of N variables and you have knowledge of or control over less than N variables, if you think you know what's going to happen when you vary "your" variables, you're a booby. That is, in complex processes (which social processes are) a move in the right direction is not necessarily the right move. To pick a simple illustration, if I am on a desert island subsisting solely on coconuts and oysters and beginning to hate it a lot, and across the bay from me there is another island lush and fertile, I do not improve my position in life by swimming half way across.[403]

Leff goes on to say this:

> the most critical need is to identify as clearly as possible, to oneself at least, the following factors in any social decision: (1) *what* am I assuming will stay constant if I meddle; (2) *what* do I know is connected to what I am meddling with; (3) how much do I know about how those connected things will behave when I jiggle the things I have got my hand on; and (4) *when* I talk about the effects of my intervention, when do I mean?[404]

And this, to say the least, is difficult to do, if not impossible. Particularly in a complex and modern society where "what a thing does is only one of the things that it means, but everything that it means is something else that it does."[405]

But even if a truly workable research methodology could be designed and hard, truly determinative data could be obtained, the second barrel of the double-barrelled empirical dilemma would have to be confronted: the criteria for evaluation. What standards should be used to measure or evaluate the data collected? A cost-benefit analysis? A socio-economic impact assessment? But what are the definitional elements or constituent components of these various words and phrases? To what extent is "cost" or "benefit" merely a malleable or infinitely manipulative politi-

cal, rather than analytical, criterion? Baldwin and Veljanovski, in their study of President Reagan's Executive Order No. 12291 (which established the cost-benefit standard for regulatory evaluation) found that an intelligent use of cost-benefit data could be one important factor in regulatory decision making but should not be the routine method employed in deciding complex policy issues, particularly in matters of regulation where market imperfections abound and where there are real dangers of exaggerating the significance of the most easily measurable, or "hard," data that are collected. Cost-benefit analysis, although useful in a very limited context, they concluded, is inherently value laden and political.[406] Professor Touohy is even more critical of the currently popular cost-benefit technique. For her, cost-benefit analysis can be attacked as:

1. Erroneous, because of its sensitivity to a variety of more or less arbitrary assumptions (e.g., the definition of factors to be considered as cost and benefits, discount rates, methods of valuing life, the specification of predictive models, mathematical modelling techniques);
2. Biased, because it favours consideration of quantifiable as opposed to non-quantifiable factors, and because its rather esoteric methodology establishes terms of debate which tend to restrict participation in that debate to those who can avail themselves of the necessary expertise;
3. Politically irrelevant, because it requires political decision-makers to act in ways which are inconsistent with their political interests (which may focus on *who* bears the cost and *who* derives the benefits, rather than on choosing a policy that generates the highest social benefits net of costs);
4. Politically strategic, in that it may enable opponents of regulation to paralyse the process; and
5. Ethically repugnant, because it subjects special values, such as that inherent in human life, to a utilitarian calculus.[407]

The selection and design of appropriate evaluation techniques or "criteria for choice" once the data are collected is further compromised by what psychologists have discovered about the nature of human reasoning: the heuristics employed, the faulty decision rules, the cognitive incapacity of the human brain, etc. These psychological limitations were discussed earlier. The only further point to make here is this: recent psychological research is suggesting not only formidable analytical and problem-solving limitations of the conscious mind but also even more formidable constraints in the unconscious mind. Studies at the Laboratory for Cognitive Psychophysiology at the University of Illinois have found that "an enormous portion of cognitive activity is non-conscious. . . . Figuratively speaking it could be 99 percent," and that "we probably will never know precisely how much is outside awareness."[408] The implications of this research will, by definition, never be fully understood or appreciated. This psychological research should, however, provide a much-needed caution as the modern policy maker begins to give "hard data" more attention than they deserve.

We do not for a moment suggest that the need for more empirical research or impact analysis in the various areas of consumer protection that we have addressed in this paper should be ignored. If anything, much more should be attempted. But as the research is designed and the data are collected, an intuitive skepticism about the ultimate determinability of these data is healthy and mature. How the policy maker comes to grips with the dilemma of empirical data will remain a continuing challenge — a challenge to recognize and appreciate the limits of what Lindblom and Cohen call "usable knowledge."[409] But even given this dilemma, certain long-term and short-term empirical research objectives can be pursued. These will be discussed in more detail in the part on future directions below.

Structural

We come finally to the last constraint on modern policy making, the structural or political one, which remains the most formidable of all. Even if all of the other constraints discussed above were resolved, this last and most fundamental one would continue to flaw consumer protection regulation in Canada. The structural or political constraint is nothing less than the current operation of our political process and thus relates to the very organization of Canadian life. Its elimination would require the most sustained and long-term policy planning initiatives imaginable. In all likelihood, the constraint will never be removed; but the attempt must be made.

Consumer protection, after all, is not just about the "fundamentals of our economic system"[410] but also about the fundamentals of our political process. If all of the consumer protection scholarship over the past two and a half decades could be distilled to its essence, a common, irreducible theme would emerge: the average consumer is a relatively powerless individual. And standing in the way of effective consumer protection is a largely impenetrable marketplace and an inaccessible political process, a process that is more polyarchy than democracy, a process that is dominated by the powerful and the influential — more often than not by big business and big-business lobbies — a process that requires substantial overhaul and reform.

One of the most penetrating studies of the interrelationship between politics and markets in North American society was completed in 1977 by Charles Lindblom.[411] His argument is that business continues to occupy a very privileged position in modern government and policy making. This view was further explored in the context of consumer regulation by Michael Pertschuk, who concluded that: "Lindblom's analysis fits the consumer protection picture exactly."[412] Pertschuk found that business does indeed dominate consumer policy making and, at least in the United States, has developed sophisticated lobbying techniques and "political action committees" to ensure a continuing,

well organized, articulate and disproportionately influential business voice in the formulation and implementation of consumer policy.

Does the Lindblom and Pertschuk thesis apply in Canada? The evidence is less clear, but there is probably little reason to doubt its application here as well. Nothing in the nature of the Canadian political process suggests anything less than a privileged position for business in the formulation of modern consumer protection policy. Indeed, as was noted earlier, "almost every important piece of postwar consumer legislation has been opposed by some segment of the business community."[413] Major consumer protection initiatives at both the federal and provincial levels have been diluted, delayed or totally derailed by the vociferous and articulate opposition of business.

How we as a society can respond to these fundamental and long-standing problems in order to begin finally to move from polyarchy to democracy is not a matter that can be discussed properly in this paper. The one important point that can be made here is this: we must begin to recognize the importance of political-process and political-structure reforms even for the more discrete consumer protection agenda. Regulatory and political reform must proceed in tandem.

> Failure to at least acknowledge emphatically the essential identity of issues of regulatory and political reform runs a serious risk of having (current) and extensive work on regulation contribute unwittingly to a public conclusion (perhaps politically expedient) that a great deal in the way of significant regulatory reform can be accomplished without major reforms of our political institutions and processes.[414]

The exact reverse of course is true. We must begin with the reform of our political process so that the values of individual autonomy, democratic participation and institutional accountability will have meaning in the consumer context as well, so that the average consumer can finally begin to "have a say" about the big and little injustices in the modern marketplace. The average consumer's concern about "little injustices" and the need for major reform of our political institutions and processes are inextricably connected. We recall Laura Nader's insight:

> Little injustices are the greater part of everyday living in a consumption society, and, of course, people's attitudes towards the law are formed by their encounters with the law or by the absence of encounters when the need arises. If there is no access for those things that matter, then the law becomes irrelevant to its citizens and something else, alternatives to the law, become all they have.[415]

The "things that matter" to Canadian consumers include not only knowledge of existing rights, or better access to dispute resolution, but also the knowledge that consumer policy is shaped by a relatively democratic process that is accessible and representative. The consequences of continuing disregard by federal or provincial governments

of this single most important item on the modern law reform agenda are far reaching. As Professor Corry noted:

> Unless government is conspicuously seen by a preponderance of citizens to be "by the people and for the people," the spontaneous loyalties on which democracy utterly depends will fall away. If instead, what government does continually divides the citizens into a hundred different factions on a hundred different issues, democracy will crumble from within. No amount of exhortation will save it. That is why efforts at a turnaround should take precedence over all other domestic objectives such as those of economic growth. . . .[416]

Of course, the kind of "turnaround" that Corry urges will require nothing less than a major restructuring of our political institutions and our long dormant electoral ideals. The particular parameters of this process of democratization and the most immediate barriers to minimal action — problems in federal-provincial relations,[417] modern political pluralism,[418] or "electoral self-interest"[419] — are attracting a growing scholarly literature.[420] For our purposes here, in the context of consumer protection regulation, the steps that can be taken in the foreseeable future are more discrete and more manageable. They also will be described below.

Future Directions: An Agenda for Action

In this final part of the paper we attempt to identify, albeit tentatively, some future directions for federal and provincial policy makers in both the long and short term. The long-term objectives relate directly to the constraints discussed above in the previous section and the implications that flow from recognizing the scope of these constraints. These goals or objectives will clearly require a long-term strategy. It may be decades before any change can be discerned and any change may require major political restructuring. More immediate, short-term initiatives, however, can and should be attempted to redress some of the difficulties noted above. These can be instituted immediately with real and measurable results.

Long-Term Objectives

We turn first to the constitutional constraints discussed above in the previous section. Here there is a clear need for a more confident policy making by both federal and provincial ministries with respect to both real and perceived constitutional or jurisdictional impediments. There is a need as well on the part of federal and provincial policy makers to begin to appreciate the necessarily teleological and ad hoc quality of modern constitutional adjudication. Both levels of government have to begin to assert their respective constitutional positions and claims on jurisdic-

tional territory more aggressively, by developing a modern and nationally responsive federal trade and commerce capability and a more flexible and less judicially dominated provincial tribunal experimentation option. For the federal government especially, where civil or administrative regulatory techniques are thought warranted and thus a full-scale litigious assault is required on the existing trade and commerce jurisprudence, policy makers should concentrate their litigious energies on more intuitively sympathetic initiatives — not for "lite beer" regulation but for matters of public health and safety. An aggressive, constitutional stance in a factually appropriate regulatory area would do much to begin the restoration of a general federal power to regulate Canadian trade and commerce. A more mature understanding of the nature of constitutional adjudication, combined with a more aggressive litigational strategy, is the only way ahead in this area. It is an approach that should be tried. If it fails, of course, the recently entrenched domestic amending formula may have to be resorted to in order to provide clear and workable directions for both federal trade and commerce regulation and provincial experimentation with non-curial dispute resolution mechanisms.

The theoretical and philosophical constraints described in the previous section can also be addressed in the long term. The primary need here is to abandon the single-vocabulary or single-answer perspective in consumer policy theorizing. In short, the need is for a more pluralistic perspective that will allow policy makers to live with and accommodate the unavoidable confusion and contradiction that will necessarily frustrate "principled" policy making in an increasingly multi-partied and multi-planned policy world. The rejection of single-answer thinking does not mean the acceptance of nihilism. Gilmore is undeniably right: "Man's fate will forever elude the attempts of his intellect to understand it."[421] As is Leff: "Law is not something we know but something we do."[422] These insights are powerful but they need not paralyze the modern policy maker. What is required here is a coming of age: a confident embrace of Miguel de Unamuno's insight that contradiction can be the basis for an ethic: "Uncertainty, doubt, perpetual wrestling with the mystery of our final destiny, mental despair and the lack of any solid and stable dogmatic foundation, may be the basis of an ethic."[423] The rejection of single-answer theorizing does not mean the rejection of theory. All it suggests is "the need to keep our theories open"[424] and the need to "preserve some skeptical relativism in a society hell-bent for absolutes."[425]

In a recent conference on societal risk assessment, Professor Raiffa argued for "a more experimental, societal approach, a more adaptive approach" and for "the need to remain loose, flexible and resilient."[426] New theoretical approaches to consumer protection should by all means be pursued, but the tendency of many commentators to search for

unitary, all-encompassing and comprehensive theoretical "answers" must be resisted. One example of such a search is Reich's attempt to articulate a principled, non-paternalistic approach to consumer protection that would take account of market structure and market incentives. He would allow governmental intervention only if this "test" was passed:

> When market conditions do not facilitate sellers' stake in goodwill, and a substantial likelihood of consumer misestimation exists, government intervention may be appropriate. . . . This [would call] for a strategy combining in various proportions according to market characteristics, elements of disclosure, property rights and trustworthiness, and competition.[427]

The problem, of course, with this attempt for comprehensiveness is that the theoretical "test" is so general, so abstract, so malleable and manipulative that, although well intentioned, it loses all theoretical or analytical utility. Once the quest for a unified theory of policy making is abandoned, a more flexible and more liberated approach can be pursued, an approach that in some circumstances would still urge synoptic or comprehensive planning, while in other circumstances it would be content with, and indeed prefer, incrementalism. In the previous section, it was Diver who reminded us that "incrementalism is not a flawed form of analysis, but a sensible response to technical uncertainty and political ferment."[428] He also reminded us that, conversely, comprehensive rationality is not a panacea. In his view, the analytic prowess of the synoptic planning approach "should be trained upon problems not beset by doubt or strife, those in which a single misstep can mean disaster or those in which the interests of a disenfranchised consistuency cry out for attention."[429] The mature policy maker should recognize and be comfortable with situations where ad hockery is called for and equally so where synoptic planning is both desirable and possible. The appropriate realm for incrementalism and for comprehensive rationality is described by Diver in the following way:

> *The synoptic paradigm* should be preferred in relatively stable environments like labour standards or licensure qualification or transport safety standards and even in unstable environments where (1) small errors in policy can cause irreversible or catastrophic harm, for example nuclear power plant safety or the regulation of carcinogens, or (2) misallocations of political power among the most intimately affected persons, for example immigration policy, housing and nutrition for the poor, discrimination etc., i.e. where the policy involves or affects unrepresented or poorly represented minority groups and synoptic planning that requires the decision-maker to consider all the interests is a must. . . . *The incrementalist paradigm* should be used for all other areas — where there is acute technical or high value conflict, but without the risk of irreversible catastrophe or irremediable inequalities, for example deceptive trade practices, broadcasting regulation, collective bargaining and product safety regulation.[430]

In sum, the long-term objective here is the one we noted earlier: fewer hedgehogs, more foxes.

The third constraint — the conceptual or attitudinal constraint — can be minimized if policy makers conscientiously adopt a much more open-minded and self-critical use of the "rationality" precept in consumer policy making. As Lowrance has noted, not only cognitive limitations, but biased media coverage and misleading experience cause uncertainties that are improperly denied, risks that are misjudged and judgments that are believed with unwarranted confidence: "The biggest liability today is in our over-reaching."[431]

But if one can no longer rely on precise standards or quantitative decision-making factors, what are the consequences for long-term consumer protection? One implication may well be a shift in the long-term agenda from a focus on substantive results to a concern about the process employed. Given the emerging and diverging views of risk and rationality, modern consumer policy making may have to consider seriously the democratization of problem identification and legislative design — what Kasper describes as a "process change . . . that would assure the early and real involvement of all affected parties in decision-making."[432]A similar point has been made in the Canadian context by Shaul and Trebilcock. In their study of federal-level hazardous products regulation,[433] they propose experimentation with a more "consultative model" that would allow consumer participation in determining what are "essentially political questions," such as risk assessment and product safety.[434] If, as they believe, precise, objectively discernible criteria such as costs and benefits cannot be counted on as a primary analytical tool in determining appropriate regulatory responses to potential health or safety hazards, then:

> The focus of attention in institutional design must move from *what* the substantive characteristics of a good decision should look like to *who* should make the decision. This shift of focus directs our attention to issues of process. . . . What we have to ensure is that the processes by which these decisions are arrived at are as politically legitimate as possible, with all the inputs and influences fully identified and the trade-offs frankly revealed.[435]

The move from a formal adjudicative model, or more accurately a managerial model (that is presently in place administering the federal *Hazardous Products Act*) to a "consultative model," however, carries other concerns. Can this "democratization" of consumer product regulation in this important and, granted, "political" area, although conceptually attractive, work in fact? To what extent would the involvement of lay people in complicated questions of product regulation result in a de facto delegation of decision-making authority to the government representatives or the experts -- and result essentially in the managerial model that prevails today? Although politically more principled (at least

in terms of representative theory), will the process actually work in practice?

Or should we be heading in the opposite direction to bolster the substantive aspects of policy making with a more normative theory of value called "retrospective rationality"? The latter is being argued by Professor Goodin.[436] In his view the crisis in rationality points to incrementalism, and incrementalism for him is an unwise and cynical strategy. The adoption of a principle of "retrospective rationality" to guide policy choices would allow a more aggressive and politically more defensible policy-making posture. As he explains:

> Instead of worrying whether a policy has consistently strong support throughout its life, this standard [of retrospective rationality] advises us to proceed with the policy so long as there are good grounds for believing that at the end of the day it will be agreed to have been a good thing.[437]

Innovative consumer protection and social welfare programs, then, could be instituted over public protest provided that these actual programs were warranted by people's future preferences.[438]

However attractive Goodin's theory may be to the consumer advocate or frustrated policy maker who dreams of a carte blanche prerogative, the notion of "retrospective rationality" would clash fundamentally and dramatically with widely shared notions of participatory democracy and present-time individual autonomy.[439] The way out of the rationality trap is not retrospectively but prospectively, beyond substance to process. But because of the legitimate doubts that arise with respect to the feasibility of the process-oriented reforms suggested above, policy making in this area will have to proceed by way of experimentation.

We turn next to the empirical constraints discussed above and consider their implications for long-term strategies. As we explained above, the problem here is a double-barrelled one, relating to both research design and research evaluation.[440] Here again there is ample play in the critical literature to allow the easily tempted policy maker to draw nihilistic conclusions about the future of social science research. Both Gunnar Myrdal and Grant Gilmore have done their share to nurture this nihilistic problematic. Myrdal:

> It is fruitless to expect that the social sciences will ever formulate the type of universal and unchangeable relationships between facts that are accessible to researchers in the simpler natural sciences. We are dealing with the behaviour of human beings each of whom has a soul and is influenced by his living conditions in the widest sense of the word. These vary widely and change all the time, as does also their relationship to behaviour.[441]

Gilmore:

> Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future

> from our view. The quest for laws which will explain the riddle of human behaviour leads us not toward truth but toward the illusion of certainty which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics — or law.[442]

Are they fundamentally wrong? Of course not. Can we persist in a relatively principled policy making despite these bleak assessments? Can we come to grips with the possibilities of policy making in "a universe filled with too many things about which we understand too little and then evaluate them against standards we don't even have?"[443] Of course we can. And more importantly, we must. Whether it is in the "myth of Sisyphus"[444] or in a more pragmatic commitment to "muddling through,"[445] we do not choose to live our lives constantly on the brink of despair. Nor should we.

Fortunately, the intellectual challenge of nihilism need not concern us for some time to come. Our commitment to, or reliance on, empirical research and data collection in modern policy making has not yet even reached the stage where the double-barrelled dilemma of empirical research has to be addressed. In Canadian consumer protection, the commitment to empirical research is modest. Much of the reform literature is still written in an intellectual vacuum. Consider any mainstream law reform commission study or law journal piece and you will discover what Schuchman discovered: problems of empirical research or "knowledge" in legal scholarship are "mostly avoided or finessed."[446] Put bluntly, we have a long way to go in our use of empirical data before the inherent abuses discussed earlier even come to the fore.

We can, then, quite comfortably urge a continuing commitment to empirical research, to legislative impact analysis, to data collection generally. Empirical research has assisted in each of the five main areas of consumer protection that have been discussed in this paper and will continue to do so in the foreseeable future. What must be acknowledged, however, is the existence of the double-barrelled dilemma described earlier and its implications in the long term for research design. We can persevere with existing research methodologies provided their inherent limitations are recognized and conceded. For example, the all-encompassing recommendation of Scheffman and Applebaum in a recently published study of the Ontario Economic Council that "social regulation by the province be catalogued and studied in its entirety"[447] is neither definable nor do-able. A more humble, self-conscious and self-critical approach that recognizes the limits of empirical research would be more mature and constructive. No general guidelines can be fashioned. Here again experimentation is called for.

Finally, we come to the last and most pervasive constraint, the political or structural constraint. This constraint, as we noted above, dominates all the others. Even if the preceding four could be eliminated or

minimized, failure to address the obstacles and problems inherent in our modern but badly functioning political system would prevent any lasting reforms or improvements. The long-term objective is nothing less than the democratization of our political process. The transformation of our modern regulatory state from polyarchy to democracy will require both time and commitment, and it may well be that one or the other will run out before any significant advances are made. But, as we stated earlier, the attempt must be made.

Too many of the obstacles that confront the average Canadian consumer in the discovery and redress of both big and little injustices, from product injury to misinformation, from product quality to dispute resolution, are traceable to the phenomenon of powerlessness, a phenomenon that relates directly to the failures of our legislative and political process. These obstacles will not be removed overnight — the agenda for action is too long and too complicated. Fortunately, a concern is growing in the scholarly literature that regulatory reform is inextricably connected to political process reform. Our contribution here is to emphasize that the problems of consumer protection are fundamentally problems of political process. Reform of the former will require reform of the latter; and reform of the latter is the single most important long-term objective for Canadians, both as consumers and as citizens.

Short-Term Initiatives

The consequences of the constraints discussed above for long-term policy making are to say the least problematic. The force of the various constitutional, theoretical, conceptual, empirical and structural constraints suggests an enormous complexity in future policy-making directions. Complexity, however, does not have to mean complacency. Even as we begin to inform ourselves of the nature and content of these various deep-structure impediments identified above, we can still proceed in the short term with a more specific and more manageable agenda for action. Bardach and Kagan put the matter this way:

> At present there is no general theory of regulatory design with sufficient power to furnish good guidance on particular questions. . . . Fortunately, this need not impede policy planning and action.[448]

The strategy in the short term calls for a "more experimental, a more ad hoc, a more case-by-case approach" to consumer protection and consumer policy making.[449] Where sufficient foundations have been laid, both theoretically and empirically, aggressive initiatives can be pursued. Where, however, the foundations are more vulnerable or non-existent, a more cautious and experimental strategy is required.

We can now suggest at a very general level a brief itemization of the kinds of short-term initiatives that might be pursued by federal and

provincial policy makers over the next several years. These would, in our view, include the following:

1. Enforce the federal and provincial legislation that is currently in the books. Provide the necessary staffing and funding to permit the reasonable enforcement of the laws we already have.
2. Begin a more extensive educational and informational campaign to inform Canadian consumers of their legal rights. Because of recent empirical studies questioning the efficacy of such publicity campaigns, proceed by way of localized and controlled experiments.
3. Redraft existing federal and provincial consumer protection legislation in plain English and French.
4. Consolidate all existing federal and provincial consumer protection laws in each jurisdiction under one "Consumer Code" for easy access at public libraries, etc.
5. Commit more public resources to high-school education in legal rights, including basic consumer rights.
6. Learn from the regulatory experience in other jurisdictions, particularly the United States, where recent experiments with "performance" rather than "design" standards suggest immediate applications in the Canadian context as well.[450]
7. Plan to begin experimentation in the foreseeable future of certain proposals in the consumer literature that merit testing, from a more informal and consultative decision-making process in the product safety area to a less informal consumer redress mechanism in the dispute resolution area.[451]
8. Begin immediately to improve both the quality and quantity of consumer participation in regulatory decision making by way of cost subsidization or tax credit schemes.[452]

Turning now more specifically to the five main areas of consumer protection regulation that we have considered in this paper, the following short-term initiatives can be identified.

Product Safety and Consumer Injury In this area we offer the recommendations that we made in a federal study of products liability and personal injury compensation in Canada:

1. Federal and provincial health authorities should give immediate priority to the establishment of a national electronic injury surveillance system such as the National Electronic Injury Surveillance System (NEISS) currently in operation in the United States.
2. Provincial legislators should not waste precious legislative time debating strict liability tort reforms.
3. Instead, policy makers should seize the opportunity for rational and responsible law reform and begin the task of developing an integrated and comprehensive first-party no-fault accident compensation scheme.

4. Policy makers should view the adoption of universal accident compensation as a first step to the eventual enactment of universal disability insurance.[453]

Information and Advertising Regulation Here federal policy makers should continue their research of appropriate consumer information delivery systems. New initiatives in labelling and disclosure regulation (e.g., life cycle/cost labelling) should be pursued but on an experimental basis only. Federal policy makers should consider seriously the need for civil and administrative enforcement techniques for more effective national advertising regulation and should begin to lay the litigational foundations for a broadly based assault on the attenuation of the trade and commerce jurisdiction.[454]

Transactional Fairness The jurisdiction here is primarily provincial. Provincial governments must demonstrate a greater commitment to the enforcement of trade practices legislation; clarify the many instances of archaic statutory language that is found therein; and consider seriously the amendment of this legislation to include additional administrative remedies such as substituted action and immediate cease and desist. Further research into standard-form contract regulation and the modernization and improvement of consumer credit law should be encouraged.[455]

Product Quality and Consumer Warranties This also is a matter that falls primarily within provincial jurisdiction. In a recent study of consumer product warranty reform, we recommended the following short-term initiatives:

1. Enact consumer product warranty legislation, but do so with more care and sophistication.
2. Deal with manufacturers' written or expressed warranties via a carefully designed information disclosure requirement.
3. Provide consumers with stronger and more meaningful remedies.
4. Develop innovative and more responsive dispute resolution mechanisms, but do so on an experimental, problem-specific basis.
5. Encourage consumer product industry groups to standardize voluntarily their consumer product warranty forms.
6. Consider government standard form of warranty regulation, but only where demonstrably necessary.
7. Examine and assess the structure and operation of modern consumer product warranty systems.
8. Consider seriously the proposal for "unbundling" consumer product warranties.
9. Make a greater commitment to long-term consumer education via plain language legislation and high-school level law teaching.
10. Work toward interprovincial uniformity in consumer product warranty regulation.[456]

Dispute Resolution and Consumer Access to Justice This final problem area in modern consumer protection is also a matter for provincial action. Consumer access to justice at the individual level calls for renewed initiatives to improve and make more accessible the small claims court system. Given recent empirical studies about the institutional and psychological implications of third-party arbitration and mediation procedures, the intuitive urge to make consumer justice more informal should be resisted until further research is completed. Consumer access to justice at the group level calls for the immediate enactment of consumer class action procedures.[457]

Conclusion and Postscript

Consumer protection policy making in Canada is in transition. Less sanguine commentators would go further: Consumer policy making is in crisis. The accumulation of common sense, contradiction and confusion that has riddled almost a century of federal and provincial lawmaking is coming to a head. In product safety, information and advertising, trade practices, consumer warranties and access to justice, the cosy concepts of yesterday are beginning to confront the constitutional, theoretical, conceptual, empirical and structural constraints of tomorrow.

The conclusion? There is none, or at least not one. There are many. We have attempted to identify them to provide both long-term objectives and short-term initiatives. There are no single answers. No simple solutions. Consumer policy making is becoming an increasingly complicated phenomenon. If we are to meet its challenge, we have to begin to learn to live with contradiction, confusion, doubt, passion, uncertainty. And we must do this without letting the nihilist problematic paralyze even incremental advances. We have to encourage a major shift in both the direction and the design of the modern policy-making paradigm. Indeed, we may have to articulate and endorse a new paradigm in the Kuhnian sense,[458] a paradigm that is truer to the realities and complexities of modern policy making and modern politics.

In this paper, we have suggested some of the steps that could be taken toward this end. Much of what we have said, we are sure, will not be unfamiliar to the reader. Much of it we have known for years, if not decades. But that is not surprising. The Chinese poet and philosopher Lao Tzu talked about "The lessons that we know but never learn."[459] If we can only learn what we already know, that in itself would be a major achievement in modern regulation.

Notes

This study was completed in July 1984.
The author gratefully acknowledges the research assistance of Shane Kelford, Osgoode Hall Law School, LL.B. 1984, and the secretarial support of Lynn Spinney and Diane Darroch.

1. Nader, "Alternatives to the American Judicial System," in Nader (ed.), *No Access to Law* (1980), at p. 4.
2. Trebilcock, "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" (1975), 13 *Osgoode Hall L.J.* 619 at p. 647.
3. Leff, "Economic Analysis of Law: Some Realism About Nominalism" (1974), 60 *Virginia L.R.* 451 at p. 477.
4. Ziegel, "The Future of Canadian Consumerism" (1973), 51 *Can. Bar Rev.* 191 at p. 191.
5. See, for example, Leviticus 25:14 and 25:29. Discussed in Estey, "The Fluctuating Role of Contract Law in the Community" (1983), 8 *Can. Bus. L.J.* 272 at p. 273
6. Code of Hammurabi ss. 225 to 230. As cited in Estey, *supra*, note 5. Also see Economic Council of Canada, *Responsible Regulation: An Interim Report* (1979), at p. 9.
7. See generally Hahlo, "Unfair Contract Terms in Civil Law Systems" in Ziegel (ed.), *Papers and Comments Delivered at the Ninth Annual Workshop on Commercial and Consumer Law* (1981), at p. 101 *et seq.* Also see Muirhead, *Law of Rome* (1886), at p. 286.
8. See, for example, the royal edicts of King Louis XI of France as described in Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 *Osgoode Hall L.J.* 327 at p. 328.
9. See, generally, Harvey, *The Law of Consumer Protection and Fair Trading* (2nd ed. 1982), at pp. 1–6.
10. *Ibid.* Also see Greenfield, *Consumer Transactions* (1981); Spanogle and Rohner, Consumer Law (1979); and Cranston, *Consumers and the Law* (2nd ed. 1984).
11. A concise history of consumer protection initiatives from biblical times onward is provided in Geis and Edelhertz, "Criminal Law and Consumer Fraud: A Sociological View" (1972–73), 11 *Am. Crim. L.R.* 989 at pp. 989–96.
12. "Government regulation of economic behaviour is as old as government itself." See Economic Council of Canada, *supra*, note 6, at p. 9.
13. S.C. 1871, c. 24.
14. S.C. 1874, c. 8.
15. S.C. 1889, c. 41. See generally MacCrimmon, "Controlling Anti-Competitive Behaviour in Canada: A Contrast to the United States" (1983), 21 *Osgoode Hall L.J.* 569.
16. *Supra*, note 14.
17. The American legislative history in food and drug regulation is described in Feldman, *Consumer Protection: Problems and Prospects* (2nd ed. 1980), at pp. 4–7.
18. The pre-Confederation *Division Courts Act*, C.S.U.C. 1859, c. 19 was the foundation for later provincial small claims court enactments. And see *Creditor's Relief Act* 1880, 43 Vict., c. 10.
19. Section 91(2) of the *Constitution Act, 1867*, originally enacted as the *British North America Act, 1867*, 30–31 Vict., c. 3 (U.K.), and renamed by 1982, c. 11 (U.K.) [hereinafter the *Constitution Act, 1867*].
20. Section 91(27) of the *Constitution Act, 1867*.
21. S.C. 1908, c. 50.
22. S.C. 1910, c. 9.
23. S.C. 1914, c. 24, adding s. 406A to the *Criminal Code*.
24. S.C. 1920, c. 27. See, generally, "Note on the History of Food and Drug Legislation in Canada," in Ziegel and Geva, *Commercial and Consumer Transactions* (1981), at pp. 308–18.

25. S.C. 1923, c. 9.
26. S.C. 1939, c. 23.
27. E.g., the Ontario *Money-Lenders Act*, 2 Geo. V, c. 30.
28. E.g., Ontario *Sale of Goods Act*, S.O. 1920, c. 40.
29. E.g., in Manitoba and Quebec. See Houlden and Morawetz, *Bankruptcy Law of Canada* (1984), at pp. 1–9.
30. E.g., Ontario *Real Estate Brokers Registration Act*, S.O. 1930, c. 40.
31. E.g., Ontario *Collection Agencies Act*, S.O. 1932, c. 51.
32. S.C. 1967, c. 16.
33. In 1966, Parliament enacted Part X of the *Bankruptcy Act*, now R.S.C. 1970, c. B-3, establishing a procedure for the "orderly payments of debts."
34. Today seven provinces have "opted in" and their consumers may use the Part X procedures. But Ontario and Quebec, the two largest provinces, have not opted for the procedures.
35. *Hazardous Products Act*, R.S.O. 1970, c. H-3.
36. *Motor Vehicle Safety Act*, R.S.C. 1970 (1st supp.), c. 26 as amended.
37. *Textile Labelling Act*, R.S.C. 1970 (1st supp.), c. 46.
38. *Consumer Packaging and Labelling Act*, S.C. 1970–71–72, c. 41 as amended by S.C. 1976–77, c. 55, s. 3.
39. *Weights and Measures Act*, S.C. 1970–71–72, c. 36, introducing metrification.
40. *Bills of Exchange Act*, R.S.C. 1970 (1st supp.), c. 4, s. 1, Part V.
41. Bill C-256.
42. See McQueen, "Revising Competition Law: Overview by a Participant," in Prichard, Stanbury, and Wilson (ed.), *Canadian Competition Policy: Essays in Law and Economics* (1979), at pp. 13–14. Also see Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971–1975* (1977).
43. E.g., Ontario *Consumer Protection Act*, S.O. 1966, c. 23, now R.S.O. 1980, c. 87; and the *Ontario Consumer Protection Bureau Act*, R.S.O. 1970, c. 83 as amended.
44. E.g., Ontario *Consumer Protection Act*, *supra*, note 43. See, generally, Ziegel, "Recent Developments in Canadian Consumer Credit Law" (1973), 36 *Mod. L.R.* 479.
45. *Ibid.*, and see, generally, "Cost of Credit Disclosure," in C.C.H., *Canadian Commercial Law Guide* (1984), at p. 15-080 *et seq.*
46. C.C.H., *Canadian Commercial Law Guide* (1984), at p. 15-360 *et seq.*
47. E.g., Manitoba *Mortgage Brokers Act*, S.M. 1964, (2nd), c. 6.
48. E.g., Ontario *Motor Vehicle Dealers Act*, S.O. 1964, c. 121, now R.S.O. 1970, c. 475 as amended.
49. E.g., Alberta *Collection Agencies Act*, S.A. 1965, c. 13, now R.S.A. 1980, c. C-30. For a comprehensive discussion of all applicable provincial legislation in this area, see "Registration and Licensing," in C.C.H., *Canadian Commercial Law Guide* (1984), at p. 15-040 *et seq.*
50. Discussed later in the section on the state of the law today.
51. See, generally, Ziegel, *supra*, note 4; Buchwald, "Consumer Protection in the Community: The Canadian Experience" (1977), 2 *Can. Bus. L.J.* 182; and Neilson, "The Future of Canadian Consumerism: A Retrospective and Prospective View," in Ziegel (ed.), *Proceedings of the Tenth Annual Workshop on Commercial and Consumer Law* (1980), at pp. 179–98.
52. Ontario Select Committee on Consumer Credit, *Final Report* (1975); Special Joint Committee of the Senate and House of Commons, *Report on Consumer Credit and Cost of Living* (1967).
53. Economic Council of Canada, *Interim Report on Consumer Affairs* (1967).
54. On March 15, 1962, President John F. Kennedy first articulated a "Consumer Bill of Rights" which included (1) the right to safety; (2) the right to choose; (3) the right to be heard; and (4) the right to be informed.

55. Nader, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (1965).
56. The enormous influence of senators Kefauver and Magnusson in the development and design of modern American consumer protection policy is described in Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement* (1982), at pp. 5–45. Michael Pertschuk is a former chairman of the Federal Trade Commission and has been directly involved in consumer protection regulation at the federal level in the United States for over 20 years. The publication of this book marks a major contribution to the consumer protection literature. We will be referring to the points made in Pertschuk throughout this paper.
57. Wilson, *The Politics of Regulation* (1980); and see Professor Schuck's review of this book in (1981), 90 *Yale L.J.* 725. This notion of "entrepreneurial politics" is explained and discussed by Pertschuk, *supra*, note 56, at pp. 9–23.
58. S.C. 1974–75–76, c. 76. See, generally, Kaiser, "The Stage I Amendments: An Overview," in Prichard, Stanbury, and Wilson (ed.), *Canadian Competition Policy: Essays in Law and Economics* (1979), at pp. 25–54.
59. In addition to misleading advertising, the regulation of warranties and guarantees, testimonials, bait-and-switch selling, double-ticketing, promotional contests and sale above advertised price. Discussed in Kaiser, *supra*, note 58, at pp. 44–48.
60. *Motor Vehicle Tire Safety Act*, S.C. 1976, c. 96.
61. *Tax Rebate Discounting Act*, S.C. 1977–78, c. 25.
62. Bills C-16 and C-42. See Evans, "The Proposed Federal Borrowers and Depositors Protection Act" (1977–78), 2 *Can. Bus. L.J.* 382, and Burns, "The Borrowers and Depositors Protection Act: A Case History in Legislative Failure" (M.B.A. thesis, U.B.C., 1981). Also see Stanbury, "The Stage II Amendments: An Overview" in Prichard, Stanbury, and Wilson (ed.), *Canadian Competition Policy: Essays in Law and Economics* (1979), at pp. 55–77; McQueen, *supra*, note 42, at pp. 16–20; and MacCrimmon, *supra*, note 15.
63. Ontario, British Columbia, Alberta, Manitoba, Prince Edward Island and Newfoundland. See generally, Belobaba, *supra*, note 8, at p. 327.
64. Saskatchewan *Consumer Products Warranties Act*, S.S. 1976–77, c. 15; New Brunswick *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. 18-1; and the Quebec amendments to the *Consumer Protection Act*, S.Q. 1978, c. 9. The Saskatchewan legislation is discussed in Romero, "The Consumer Products Warranties Act" (1979), 43 *Sask. L.R.* 81. For background to the New Brunswick legislation see Department of Justice of New Brunswick, *First Report of the Consumer Protection Project* (1974), at pp. 8–232. The Quebec amendments are discussed in Belobaba, *Consumer Product Warranty Reform: Regulation in Search of Rationality* (1983), at pp. 24–25.
65. E.g., Ontario *Consumer Reporting Act*, S.O. 1973, c. 97.
66. E.g., British Columbia *Debtor Assistance Act*, S.B.C. 1974, c. 26.
67. E.g., Alberta *Collection Practices Act*, S.A. 1978, c. 47.
68. E.g., Ontario *Travel Industry Act*, S.O. 1974, c. 115.
69. Ontario *New Home Warranties Plan Act*, S.O. 1976, c. 52.
70. Book Nine of the Quebec *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 999–1051, as enacted by S.Q. 1978, c. 8, s. 3.
71. Pertschuk, *supra*, note 56, at pp. 47–68.
72. Reich, "Towards a New Consumer Protection" (1979), 128 *U. Penn. L.R.* 1 at p. 1.
73. Pertschuk, *supra*, note 56, at pp. 47–68.
74. Editorial, "The FTC as National Nanny," *Washington Post* (March 1, 1978). Discussed in Pertschuk, *supra*, note 56, at pp. 69–76.
75. "Stoning the National Nanny: Congress and the FTC in the Late 1970's," in Pertschuk, *supra*, note 56, at pp. 69–117 .
76. *Ibid.*
77. "The New PAC's Americana: Revitalization of Business Political Action," in

Pertschuk, *supra*, note 56, at pp. 47–68.

78. See, for example, Birnbaum, "Legislative Reform or Retreat? A Response to the Product Liability Crisis" (1978), 14 *Forum* 251.
79. Pertschuk, *supra*, note 56. The book's sub-title is "The Rise and Pause of the Consumer Movement."
80. Discussed later in the section on consumer policy making in transition.
81. See Economic Council of Canada, *Reforming Regulation* (1981).
82. Ontario Law Reform Commission, *Report on Sale of Goods* (1979).
83. Ontario Law Reform Commission, *Report on Products Liability* (1979).
84. The OLRC's Contract Law Amendment Project is still in progress. A report is expected sometime in 1985.
85. Ontario Law Reform Commission, *Report on Class Actions* (1982). Discussed later in the section on consumer legislation in overview.
86. S.C. 1980–81, c. 43.
87. *Criminal Code*, s. 305.1. See Ziegel, "Bill C-44: Repeal of the Small Loans Act and the Enactment of a New Usury Law" (1981), 59 *Can. Bar Rev.* 188.
88. E.g., in Ontario see S.O. 1983, c. 22.
89. Ziegel and Geva, *supra*, note 24, at p. 21. For a similar assessment of the U.K. scene see Borrie, "Legal and Administrative Measures of Consumer Protection in the United Kingdom," in Eastham and Krivy (ed.), *The Cambridge Lectures 1981* (1982), at pp. 71–72. For the U.S., see Pertschuk, *supra*, note 56, and Feldman, *supra*, note 17, at pp. 19 and 240.
90. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (1983).
91. *Ibid.*, at p. 4.
92. *Ibid.*
93. Discussed above in the section on the development of consumer protection legislation, 1945–84.
94. See, generally, Breyer, *Regulation and Its Reform* (1982), and Lave, *The Strategy of Social Regulation* (1981). The extensive economic literature in this area will be introduced and discussed later in the section on consumer policy making in transition.
95. See Kerr, "The Scope of the Federal Power in Relation to Consumer Protection" (1980), 12 *Ottawa L.R.* 119. Also see Belobaba, *Products Liability and Consumer Warranty Reform: The Constitutional Implications* (1981).
96. See Hirschhorn, "The Administration of the Hazardous Products Act," in Dewees (ed.), *The Regulation of Quality* (1983); and Shaul and Trebilcock, "The Administration of the Federal Hazardous Products Act" (1982), 7 *Can. Bus. L.J.* 2.
97. E.g., Ontario *Upholstered and Stuffed Articles Act*, R.S.O. 1970, c. 474.
98. See, generally, Trebilcock, Tuohy, and Wolfson, *Professional Regulation* (1979).
99. Section 92(13) of the *Constitution Act, 1867*.
100. Discussed in Belobaba, *supra*, note 90, at pp. 36–37.
101. Explored in Shaul and Trebilcock, *supra*, note 96.
102. See, for example, Meiners, "What to Do About Hazardous Products," in Poole (ed.), *Instead of Regulation* (1982).
103. Belobaba, *supra*, note 95.
104. Shaul and Trebilcock, *supra*, note 96.
105. *Ibid.*, discussed later in the section on future directives.
106. Described in detail in Belobaba, *supra*, note 90.
107. *Ibid.*
108. All of these initiatives are discussed in detail in Belobaba, *supra*, note 90, at pp. 14–19.
109. Belobaba, *supra*, note 90, at pp.143–43.
110. See, generally, Schwartz and Wilde, "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis" (1979), 127 *U. Penn. L.R.* 630.

111. Cranston, "Consumer Protection and Economic Theory," in Duggan and Darvall (ed.), *Consumer Protection Law and Theory* (1980), at p. 251. Also see Beales, Crasswell, and Salop, "The Efficient Regulation of Consumer Information" (1981), 24 *J. Law and Econ.* 491.
112. Pitofsky, "Beyond Nader: Consumer Protection and the Regulation of Advertising" (1977), 90 *Harv. L.R.* 661.
113. *Ibid.*, at p. 498.
114. See, generally, Federal Trade Commission Information Task Force Policy Review Group, *Consumer Information Remedies* (1979); and the literature cited in Davis, "Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit Contracts" (1977), 63 *Virginia L.R.* 841.
115. Sections 91(2) and 91(27) of the *Constitution Act, 1867.*
116. Section 92(13) of the *Constitution Act, 1867.* See, generally, Romero, *Federal-Provincial Relations in the Field of Consumer Protection* (1975). Also see Kerr, *supra*, note 95, and Belobaba, *supra*, note 95.
117. See the section on the development of consumer protection legislation.
118. See, generally, "Product Safety" and "Packaging and Labelling," in C.C.H., *Canadian Product Safety Guide (1984), at p. 1000 et seq.*, and p. 6000 *et seq.*
119. S.C. 1974–75–76, c. 76. See Kaiser, *supra*, note 58.
120. Trebilcock et al., *A Study on Consumer Misleading and Unfair Trade Practices* (1976).
121. For example, a study of energy consumption–appliance labelling requirements by Hirschhorn: see Dewees, "The Quality of Consumer Durables: Energy Use," in Dewees (ed.), *The Regulation of Quality* (1983).
122. Shaul and Trebilcock, *supra*, note 96, and Hirschhorn, *supra*, note 96.
123. Trebilcock et al., *supra*, note 120; and Fitzgerald, "Misleading Advertising: Prevent or Punish?" (1973), 1 *Dal. L.J.* 246.
124. See below in the section "Deeper Problems and Dilemmas."
125. *Supra*, note 44 and accompanying text.
126. *Supra*, note 63 and accompanying text.
127. Trebilcock et al., *supra*, note 120. And see, generally, Pitofsky, *supra*, note 112; and Feldman, *supra*, note 17, at pp. 48–57.
128. *Ibid.*
129. See Miniter, "Misleading Advertising: The Standard of Deceptiveness" (1976), 26 *Can. Pat. Rep.* (2nd) 1; and the recent FTC policy change to protect only the "reasonable" consumer: *Globe and Mail*, October 26, 1983, at p. 11.
130. Reed and Coalson, "Eighteenth-Century Legal Doctrine Meets Twentieth Century Marketing Techniques: FTC Regulation of Emotionally Conditioning Advertising" (1977), 11 *Georgia L.R.* 733.
131. Boyd, "The Truth-in-Lending Simplification and Reform Act — A Much-Needed Revision Whose Time Has Finally Come" (1981), 23 *Ariz. L.R.* 1 (Part I) and 449 (Part II).
132. This point is developed in the section on deeper problems and dilemmas.
133. See Davis, and Federal Trade Commission Study, *supra*, note 114. Also see "Mandatory Disclosure" in Bardach and Kagan, *infra*, note 134.
134. Bardach and Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982), at p. 254.
135. Cranston, *supra*, note 10, at p. 306.
136. See Trebilcock et al., *supra*, note 120.
137. *Supra*, note 63.
138. The impact of the *Uniform Consumer Sales Practices Act* and the "Little FTC Acts" is described in Belobaba, *supra*, note 8, at pp. 331–34.
139. See Belobaba, *supra*, note 8, at pp. 334–65.

140. E.g., Ontario *Business Practices Act*, R.S.O. 1980, c. 55, s. 7(1). Discussed in Belobaba, *supra*, note 8, at pp. 367–69.
141. See "The Regulation of Trade Practices" in Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention," in Reiter and Swan (ed.), *Studies in Contract Law* (1980), at pp. 426–27.
142. Belobaba, "Some Features of a Model Consumer Trade Practices Act," in Ziegel (ed.), *Proceedings of the Seventh Annual Workshop on Commercial and Consumer Law* (1978), at pp. 1–9.
143. Samuels, "Administrative Action Under the Ontario Business Practices Act" (1982), 20 *U.W.O.L.R.* 215.
144. *Ibid.*, at p. 245.
145. Neilson, "Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation" (1981), 19 *Osgoode Hall L.J.* 153 at p. 188.
146. Slawson, "Standard Form Contracts and Democratic Control of Law Making Power" (1971), 84 *Harv. L.R.* 529 at p. 529. The literature on standard form contracts is voluminous. Two useful surveys of this literature can be found in Rotkin, "Standard Forms: Legal Documents in Search of an Appropriate Body of Law," [1977] *Ariz. State L.J.* 599; and Dugan, "Standard Form Contracts — An Introduction" (1978), 24 *Wayne Law Rev.* 1307.
147. Leff, "Contract as Thing" (1970), 19 *American U.L.R.* 131 at p. 143.
148. Posner, *Economic Analysis of Law* (2d ed. 1977), at p. 87.
149. Waddams, *The Law of Contracts* (1977), at pp. 191 and 197–98. And see generally Deutch, *Unfair Contracts: The Doctrine of Unconscionability*(1977). Also see *Tilden Rent-A-Car v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.).
150. E.g., Cranston, *supra*, note 111, at pp. 246–48, and Dugan, "The Application of Substantive Unconscionability to Standardized Contracts — A Systematic Approach" (1982), 18 *New England L.R.*77.
151. Leff, *supra*, note 147.
152. Such as U.C.C. 2–302.
153. *Unfair Contract Terms Act*, 1977, c. 50 (U.K.).
154. Saskatchewan *Consumer Products Warranties Act*, *supra*, note 64, ss. 17 and 37(b).
155. Discussed in Belobaba, *supra*, note 64, at pp. 24–25.
156. Deutch, "Controlling Standard Contracts — The Israeli Version" (1985), 30 *McGill L.J.*
157. Saskatchewan and Quebec, *supra*, notes 64 and 154.
158. Ontario Law Reform Commission, *supra*, note 82, at pp. 160–63.
159. Leff, "Unconscionability and the Crown — Consumers and the Common Law Tradition" (1970), 31 *U. Pitt. L.R.* 349 at p. 356.
160. Posner, *supra*, note 148, at p. 87.
161. The decision in *Schroeder v. Macaulay*, [1974] 3 All E.R. 616, is criticized by Trebilcock, "The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords" (1976), 26 *U.T.L.J.* 359.
162. [1977] 3 All E.R. 488 (Eng. C.A.). The court chose to ignore first-party property insurance realities and consumer cross-subsidization implications in this "consumer protection" decision: see Comment by Males in (1978), 37 *Camb. L.J.* 24. Also see Baer, "The Importance of Insurance in Interpreting Exclusion Clauses" (1981–82), 6 *Can. Bus. L.J.* 97.
163. *Supra*, note 149; and see Hasson, "The Unconscionability Business — A Comment on *Tilden Rent-A-Car Co. v. Clendenning*"(1979), 3 *Can. Bus. L.J.* 193.
164. Trebilcock, *supra*, note 161, at p. 385.
165. A New York statute, for example, requires that each consumer contract be "written in a clear and coherent manner using words with common and everyday meanings." *McKinney's N.Y. Gen. Ob. Law*, s. 5-702(a). Other examples are discussed in Greenfield, *supra*, note 10, at pp. 159–60.

166. E.g., the *Unfair Contract Terms Act*, *supra*, note 153.
167. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983), 96 *Harv. L.R.* 1174.
168. Discussed further in Belobaba, *supra*, note 141, at pp. 454–59.
169. Axworthy, "Developments in Consumer Law in Canada" (1980), 29 *Int. Comp. L.Q.* 346 at p. 372 *et seq.*
170. E.g., the Ontario *Consumer Protection Act*, R.S.O. 1980, c. 87, s. 34(2) [non-excludability of implied sales law conditions] at s. 31(1) [preservation of defences against assignees]. But cf. s. 31(2) "balance owing" with s. 4(4) of the Ontario *Business Practices Act*, R.S.O. 1980, c. 55: "amount paid."
171. *Globe and Mail*, June 14, 1976.
172. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970), 84 *Q.J. of Econ.* 488.
173. *Ibid.*
174. E.g., Ontario *Sale of Goods Act*, R.S.O. 1980, c. 462, ss. 15(1) and (2). See further Ontario Law Reform Commission, *supra*, note 82, at pp. 206–21.
175. Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).
176. *Ibid.*, at p. 166.
177. Bill 110 died after first reading. See Mont, "Comment on Ontario's Bill 110: An Act to Provide for Warranties in the Sale of Consumer Products" (1977), 4 *Dal. L.J.* 201.
178. *Supra*, note 64.
179. *Ibid.*
180. Belobaba, *supra*, note 64, at pp. 22–24.
181. See the analysis in Belobaba, *ibid.* Also see the discussion in Belobaba, *supra*, note 141, at pp. 427–29.
182. *Supra*, note 64. These provisions are discussed in Belobaba, *supra*, note 64, at pp. 24–25.
183. Priest, "A Theory of the Consumer Product Warranty" (1981), 90 *Yale L.J.* 1297.
184. *Ibid.*, at p. 1298.
185. Whitford, "Comment on a Theory of the Consumer Product Warranty" (1982), 91 *Yale L.J.* 1371.
186. Whitford, "Law and the Consumer Transaction: A Case Study of the Automobile Warranty," [1973] *Wisc. L.R.* 400.
187. The relevant empirical studies completed by the FTC and its consultants are discussed in Belobaba, *supra*, note 64, at pp. 98–101. Also see Wisdom, "An Empirical Study of the Magnusson-Moss Warranty Act" (1979), 31 *Stan. L.R.* 1117.
188. MIT Center for Policy Alternatives, *Consumer Durables: Warranties, Service Contracts and Alternatives* (1978).
189. *Supra*, note 187. Discussed in Belobaba, *supra*, note 64, at pp. 98–101.
190. *Supra*, note 188. Discussed in Belobaba, *supra*, note 64, at pp. 127–29.
191. Kennedy, Pearce, and Quelch, "Consumer Product Warranties: Perspectives and Issues," in Thomson (ed.), *Macro-Marketing: A Canadian Perspective*(1980).
192. Romero, "Jurisprudence on the Saskatchewan Consumer Products Warranties Act" (1983), 8 *Can. Bus. L.J.* 288.
193. Belobaba, *supra*, note 64.
194. *Ibid.*, "Summary," at pp. ii–iii.
195. MIT Center for Policy Alternatives, *Reliability and Durability in Major Appliances* (1981).
196. Belobaba, *supra*, note 64, at p. 139. See Singal, "Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services" (1977), 12 *New England L.R.* 859.
197. Belobaba, *supra*, note 64, at pp. 136–39, and literature cited therein.

198. Currently being considered in Ontario: See *Ontario Lawyers Weekly*, February 24, 1984.
199. "Ontario Studying 'Lemon' Car Law," *Globe and Mail*, February 2, 1984, at p. 4. And see generally Herring, "Sweetening the Fate of the Lemon Owner: California and Connecticut Pass Legislation Dealing with Defective New Cars" (1983), 14 *U. Toledo L.R.* 341.
200. Nader, *supra*, note 1.
201. Sigurdson, *Small Claims Courts and Consumer Access to Justice* (1976). A more recent empirical study is Ramsay, "Small Claims Courts in Canada: A Socio-Legal Appraisal" (forthcoming 1985).
202. See Belobaba, *supra*, note 90, at pp. 92–94 and literature cited therein. Also see Belobaba, *supra*, note 141, at p. 442 *et seq.*: "Why the Common Law Fails: The Institutional Limitations."
203. *Ibid.* Also see, in the consumer products warranty context, Belobaba, *supra*, note 64, at pp. 101–6 and literature discussed therein; Ramsay, *supra*, note 201; and Best and Andreason, "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress" (1977), 11 *Law and Society Rev.* 701.
204. Ontario Law Reform Commission, *supra*, note 175, at pp. 110–23.
205. Discussed in Romero, *supra*, note 192.
206. *Ibid.*, at p. 308.
207. See, for example, Eovaldi and Gestrin, "Justice for Consumers: The Mechanics of Redress" (1971), 66 *N.W.U.L.R.* 281, and more recent literature in Belobaba, *supra*, note 64, at pp. 121–24.
208. Nader, *supra*, note 1, at p. 30.
209. Ramsay, "Consumer Redress Mechanisms for Poor Quality and Defective Products" (1981), 31 *U.T.L.J.* 117.
210. *Ibid.*, at p. 146.
211. *Ibid.*, at p. 148.
212. Whitford, "Structuring Consumer Protection Legislation to Maximize Effectiveness," [1981] *Wisc. L.R.* 1018 at p. 1026.
213. *Ibid.*, at pp. 1036–41.
214. Ramsay, *supra*, note 209, at p. 146.
215. *Ibid.*, at p. 149.
216. *Supra*, note 70. Described in Ontario Law Reform Commission, *supra*, note 85, at pp. 70–76.
217. *Supra*, note 85, at pp. 212 and 250–67.
218. *Ibid.*, at pp. 304–308.
219. These issues and the discussion of the controversy in the literature occupy volumes II and III of the OLRC Report, *supra*, note 85.
220. As discussed, *supra*, in notes 200–211 and accompanying text.
221. Ramsay, *supra*, note 209, at p. 150. The last phrase comes from Trebilcock, "The Pathology of Consumer Credit Breakdown" (1975), 22 *McGill L.J.* 415 at p. 467.
222. Ziegel, *supra*, note 4, at p. 193.
223. Cranston, *supra*, note 111, at pp. 253–55.
224. Reiter, "The Control of Contract Power" (1981), 1 *Oxford J. Leg. Stud.* 347 at p. 348.
225. Belobaba, *supra*, note 141, at p. 460: "The essential question in the 1980's will not be whether but how. Legislative technique — the selection, design and continuing evaluation of regulation — will deserve our attention and our energies."
226. See *infra*, notes 230 and 232 and accompanying text.
227. Economist Intelligence Unit, *Pilot Study of the Additional Costs to the British Consumer of Compliance by Industry with Consumer Legislation* (1979), cited in Cranston, *supra*, note 10, at p. xxxvii. And see Moore, "Measuring the Economic Impact of Consumer Legislation," in Cranston and Schick (ed.), *Law and Economics* (1982), at p. 145 *et seq.*

228. For example, federal legislation protecting the dairy industry, or regulating meat and canned foods, or banning margarine: see Hirschhorn, "Regulation of Quality in Product Markets," in Dewees (ed.), *The Regulation of Quality* (1983), at pp. 62–63.
229. The proposed deregulation of the airlines industry, taxi-cabs, telecommunications, trucking and marketing-boards deserves serious consideration: see Economic Council of Canada, *supra*, note 81.
230. Hirschhorn, *Product Safety Regulation and the Hazardous Products Act* (Technical Study No. 10, Economic Council of Canada, 1981).
231. *Ibid.*, at p. 54.
232. Economic Council of Canada, *supra*, note 81, at p. 131.
233. Belobaba, *supra*, note 8, at pp. 331–34.
234. *Citizens Insurance Co. v. Parsons* (1881), 7 A.C. 96 at 113: "The general regulation of trade affecting the whole Dominion." Discussed in Belobaba, *supra*, note 95, at pp. 12–13.
235. *A.-G. Canada v. Canadian National Transportation Ltd. et al.* (1983), 3 D.L.R. (4th) 16 (S.C.C.).
236. *R. v. Wetmore and Kripps and Pharmacy et al.* (1983), 2 D.L.R. (4th) 577 (S.C.C.).
237. Discussed in Fairley, "Developments in Constitutional Law: The 1983–84 Term" (1985), 7 *Supreme Court L.R.* (forthcoming 1985).
238. Explained in Whyte, "Developments in Constitutional Law: The 1982–83 Term" (1984), 6 *Supreme Court L.R.* 49 at pp. 69–81, and see the literature cited therein.
239. Belobaba, *supra*, note 95, at pp. 23–25 and literature cited therein, and, generally, Hogg, *Constitutional Law of Canada* (1977), at pp. 129–39.
240. See, generally, Trebilcock, Hartle, Prichard, and Dewees, *The Choice of Governing Instrument* (1982); Trebilcock, Waverman, and Prichard, "Markets for Regulation," in Ontario Economic Council, *Government Regulation: Issues and Alternatives* (1978); and Dewees (ed.), *The Regulation of Quality* (1983).
241. A very helpful analysis is Dewees, Mathewson, and Trebilcock, "Policy Alternatives in Quality Regulation," in Dewees (ed.), *The Regulation of Quality* (1983).
242. *Ibid.* Also see federal and provincial legislation as described above in the sections on the development of consumer protection legislation and the state of the law today, and, generally, Hirschhorn, *supra*, note 228.
243. The tendency of modern policy makers and courts to continue to view contractual relations as discrete "non-relational" phenomena is criticized most vigorously by Macneil, *The New Social Contract* (1980). And see literature cited therein.
244. See Shaul and Trebilcock, *supra*, note 96, at pp. 32–33; and Hirschhorn, *supra*, note 230, at p. 104. Also see Cohen, "The Public and Private Law Dimensions of the UFFI Problem" (1983), 8 *Can. Bus. L.J.* 309 and (1984), 8 *Can. Bus. L.J.* 410.
245. Described in Belobaba, "Regulating the Income Tax Discounter: A Study in Arbitrary Government" (1978), 1 *Canadian Taxation* 21.
246. O'Connell, *Ending Insult to Injury* (1975), at p. 63.
247. E.g., Ramsay, "Book Review: Report on Sale of Goods" (1980), 58 *Can. Bar Rev.* 780.
248. *Supra*, note 62 and accompanying text.
249. See Belobaba, *supra*, note 8. Also see Neilson, *supra*, note 51, for a survey of these terms including "pure pastiche" and "legislative spur of the moment responses."
250. Discussed in Belobaba, *supra*, note 90, and note 64. Also see as a positive step forward the OLRC's study on class actions: *supra*, note 85.
251. *Supra*, note 85.
252. Pound, "The Scope and Purpose of Sociological Jurisprudence" (1911), 9 *Harv. L.R.* 516 at p. 516.
253. Whitford, *supra*, note 212, at pp. 1041–42.
254. See Shaul and Trebilcock, *supra*, note 96, and Hirschhorn, *supra*, note 96.
255. Fitzgerald, *supra*, note 123.
256. Samuels, *supra*, note 143.

257. Belobaba, *supra*, note 64.
258. Ramsay, *supra*, note 201, and note 209.
259. Moyer, *A Survey of Consumer Issues Among People of Ontario* (1978), at p. 27. Discussed in Belobaba, *supra*, note 64, at p. 106. And see other Canadian surveys cited therein at p. 106.
260. Best, *When Consumers Complain* (1981).
261. U.K. National Consumer Council, *Consumer Concerns Survey* (1981).
262. Shaw, *Summary of Results of a Survey of Saskatchewan Households and Business People Regarding the Consumer Products Warranty Act* (1978). Discussed in Belobaba, *supra*, note 64, at pp. 106–107.
263. In Ontario the efforts of CLEO (Community Legal Education Ontario) working independently and with the provincial Ministry of Education have been particularly worthwhile.
264. Discussed later in the section on deeper problems and dilemmas. See notes 378–87 and accompanying text.
265. Beales, Crasswell, and Salop, *supra*, note 111; also see FTC Study, *supra*, note 114.
266. E.g., Ontario *Business Practices Act*, *supra*, note 170, s. 4(1). And see discussion in Belobaba, *supra*, note 8, at pp. 359–62 and 375.
267. Nader, *supra*, note 1, at p. 32.
268. *Ibid.*, at p. 41.
269. Stigler, "Can Regulatory Agencies Protect the Consumer?" in Stigler, *The Citizen and the State* (1975), at p. 187.
270. We would include our own work as well: see for example, Belobaba, *supra*, note 8, an article written in 1976–77.
271. Even some of the very best commentators in the early to mid-1970s were sloppy and polemical: see, for example, Leff, *supra*, note 147.
272. See, for example, the work of the Ontario Economic Council and the Economic Council of Canada and the research of scholars such as Cranston, Ramsay, and Trebilcock to name but three.
273. The leading literature is surveyed in Veljanovski, *The New Law and Economics: A Research Review* (1982).
274. *Ibid.*, at pp. 7–16. The leading text was Posner, *supra*, note 148.
275. The critical literature has grown to enormous proportions. See, for example, "Symposium on Efficiency as a Legal Concern" (1980), 8 *Hofstra L.R.* 485; and Duggan, *The Economics of Consumer Protection: A Critique of the Chicago School Case Against Intervention* (1982). Also see the literature cited in Belobaba, *supra*, note 90, at pp. 86–88.
276. Leff's devastating critique published in 1974 is still the best: *supra* note 3.
277. See, as an American example, "Consumer Protection Regulation Symposium" (1981), 24 *J. Law. Econ.* 365. And in Canada see the authors and works cited, *supra*, notes 161, 232, and 240, for example.
278. Economic Council of Canada, *supra*, note 81.
279. See, for example, Scheffman and Applebaum, *Social Regulation in Markets for Consumer Goods and Services* (1982), a study published by the Ontario Economic Council.
280. *Ibid.*, at p. 151. And see Lave, *supra*, note 94, at p. 32 and the works cited *supra*, note 240.
281. The Time-Yankelovich survey (May 1981). Discussed in Pertschuk, *supra* note 56, at pp. 47–48.
282. *Ibid.*, at p. 48.
283. Pertschuk, *supra*, note 56, at p. 61.
284. *Ibid.*, at p. 140.
285. *Ibid.*, at p. 132.
286. Discussed later. See note 318 and accompanying text.

287. Economic Council of Canada, *supra*, note 6, at p. 5. Also see the surveys discussed in Belobaba, *supra*, note 64, at pp. 44–45.
288. Economic Council of Canada, *supra*, note 6, at pp. 5–7: "Demands for more regulation."
289. Discussed in Hirschhorn, *supra*, note 228, at p. 74.
290. Discussed above in notes 131–34 and accompanying text.
291. Friedman, "Who Protects the Consumer?" in *Free to Choose* (1980), at p. 222.
292. Cranston, *supra*, note 10, at p. xxxix.
293. Peltzman, "The Effects of Automobile Safety Legislation" (1975), 83 *J. Pol. Econ.* 677.
294. Cranston, *supra*, note 111, at pp. 244–45 and literature cited therein.
295. Meiners, *supra*, note 102.
296. Cranston, *supra*, note 111, at p. 245 and literature cited therein.
297. See the "Studies" discussed in McChesney, "Book Review" (1984), 70 *Virginia L.R.* 339 at pp. 347–50.
298. *Ibid.*, at pp. 348–49.
299. *Ibid.*, at p. 350.
300. See Pertschuk, *supra*, note 56, at pp. 139 and 141, and Reich, *supra*, note 72, and *infra*, note 427 and accompanying text.
301. Greenfield, *supra*, note 10, at p. xix.
302. Goudsblom, *Nihilism and Culture* (1980), at p. x.
303. As discussed above in the section on the development of consumer protection legislation.
304. As discussed in the sections on consumer legislation in overview and consumer policy making in transition.
305. *Ibid.*
306. Belobaba, *supra*, note 90, at pp. 23–24 and 35–46.
307. The various provincial no-fault "add-on" laws are discussed in Belobaba, *supra*, note 90, at pp. 37–41. Two provincial studies have recently recommended the adoption of a total no-fault automobile accident insurance system: see Ontario Select Committee on Company Law, *Fifth Report on Accident and Sickness Insurance* (1981), at pp. 327–28; and British Columbia Automobile Accident Compensation Committee, *Report on Automobile Accident Compensation* (1983), at pp. 175–76.
308. See, generally, Belobaba, *supra*, note 90, and the critical literature discussed therein.
309. This argument is documented in Belobaba, *supra*, note 90.
310. Discussed above in the section on consumer legislation in overview and later in that on consumer policy making in transition.
311. Discussed in more detail later in the section on deeper problems and dilemmas.
312. Leff, "Thomist Unconscionability" (1980), 4 *Can. Bus. L.J.* 424 at p. 428.
313. See the section on consumer policy making in transition.
314. *Ibid.*
315. See literature, *supra*, note 240.
316. *Supra*, notes 189 and 190 and accompanying text.
317. *Supra*, notes 208–11 and accompanying text.
318. See the important discussion of this public versus private schizophrenia in Sagoff, "At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic" (1981), 23 *Arizona L.R.* 1283, and Sagoff, "On Markets for Risk" (1982), 41 *Maryland L.R.* 755. A similar theme is explored in Schulze, "Ethics, Economics and the Value of Safety," in Schwing and Albers (ed.), *Societal Risk Assessment: How Safe Is Safe Enough?* (1980), at p. 218.
319. Hirschman, *Shifting Involvements: Private Interest and Public Action* (1982).
320. See especially the section on future directions.
321. See above in the section on consumer legislation in overview.

322. See especially the section on future directions.
323. Above in our discussion of the five areas of consumer protection regulation. See the section on consumer legislation in overview.
324. The implications of sections 6, 7–14, and 15 of the *Charter of Rights and Freedoms* (the mobility, legal and equality provisions) are explored by several writers in Belobaba and Gertner (ed.), *The New Constitution and the Charter of Rights: Fundamental Issues and Strategies* (1982). Also cited as (1982), 4 *Supreme Court L.R.*
325. The implications of *R. v. Hauser* (1979), 26 N.R. 541 and the options available to the Supreme Court of Canada when the matter was next presented more directly for decision are discussed in detail in MacPherson, "Developments in Constitutional Law: The 1978–79 Term" (1980), 1 *Supreme Court L.R.* 77 at pp. 92–103.
326. *Supra*, note 235.
327. *Supra*, note 236. For an analysis of these decisions see Fairley, *supra*, note 237.
328. *Supra*, note 234.
329. As described above in the section on consumer legislation in overview. And see Belobaba, *supra*, note 95.
330. (1976), 66 D.L.R. (3d) (S.C.C.) 1.
331. *Supra*, note 235, at pp. 63–71.
332. *Labatt Breweries of Canada Ltd. v. A.-G. Canada* (1979), 110 D.L.R. (3d) 594 (S.C.C.). See MacPherson, "Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglios," in Ziegel (ed.), *Papers and Comments Delivered at the Tenth Annual Workshop on Commercial and Consumer Law* (1982), at pp. 63–103.
333. *Supra*, note 236, at pp. 585 and 587.
334. Section 96 of the *Constitution Act*, 1967 provides as follows: "The Governor General shall appoint the Judges of the Superior District and Country courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."
335. One can trace the judicial developments over the last five years by reviewing the "Developments in Constitutional Law" articles in the *Supreme Court Law Review*: See MacPherson (1980), 1 *Supreme Court L.R.* 77 at pp. 103–11; MacPherson (1981), 2 *Supreme Court L.R.* 49 at pp. 100–107; Lysyk (1982), 3 *Supreme Court L.R.* 65 at pp. 87–93; Whyte (1983), 5 *Supreme Court L.R.* 77 at p. 81; and Whyte (1984), 6 *Supreme Court L.R.* 49 at pp. 69–81.
336. *Crevier v. A.-G. Quebec* (1982), 127 D.L.R. (3d)1.
337. *McEvoy v. A.-G. New Brunswick* (1983), 148 D.L.R. (3d) 25.
338. See Whyte, *supra*, note 238, at pp. 69–81.
339. The proposal is to add a section 96B that would provide as follows:
    (1) Notwithstanding Section 96, the legislature of each province may confer on any Tribunal, Board, Commission or Authority, other than a Court, established pursuant to the laws of the province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the province.
    (2) Any decision of a Tribunal, Board, Commission or Authority on which any jurisdiction of a superior court is conferred under subsection (1) is subject to review by a superior court of the province for want or excess of jurisdiction.
340. The literature here is voluminous. A useful and recent Canadian work is Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984), 34 *U.T.L.J.* 47. Also see Weiler, *In the Last Resort* (1974); and Miller, *Social Change and Fundamental Law: America's Evolving Constitution* (1979).
341. An important contribution to this literature is Simeon, "Criteria for Choice in Federal Systems" (1983), 8 *Queen's L.J.* 131.
342. *Supra*, note 340. Also see Miller, *Toward Increased Judicial Activism: The Political Role of the Supreme Court* (1982).
343. *Labatt Breweries of Canada Ltd. v. A.-G. Canada* (1979), 110 D.L.R. (3d) 594 (S.C.C.).
344. See "Federal Officials Withdraw 59 Charges," *Globe and Mail*, January 22, 1980.

345. Examples abound in almost every area of constitutional adjudication. In peace, order and good government; trade and commerce; administration of justice; standing to sue; section 96; civil liberties, etc.; see, generally, Hogg, *Constitutional Law of Canada* (2d ed. 1985). Also see Weiler, *supra*, note 340, at p. 173:

> . . . current judicial review in the Supreme Court of Canada means that the Court is holding legislation valid or invalid on the basis of standards which it is making up as it goes along . . . We have seen many examples of the Supreme Court "flip-flopping" back and forth on an issue.

346. The most recent illustration of a mid-flight "switch" is Ritchie J.'s change of opinion regarding provincial administration of criminal justice: compare the transformation of his views from *Di Iorio* to *Hauser* to *CN Transportation* and *Kripps Pharmacy* — resulting in Laskin C.J.'s dissenting opinion of *Di Iorio* becoming the majority six years later in *CN* and *Kripps*. See discussion in Fairley, *supra*, note 237.

347. Frank, *Law and the Modern Mind* (1930), at chap. 12; Shklar, *Legalism* (1964), at pp. 9–28; Spaeth, *Supreme Court Policy-Making: Explanation and Prediction* (1979), at pp. 8 and 52–64 ("Legal Reasoning: The Veneer of Objectivity"). The point was made directly but poignantly by Leff, "Unspeakable Ethics, Unnatural Law," [1979] *Duke L.J.* 1229 at p. 1229:

> Much that is mysterious about much that is written about law today is understandable only in the context of this tension between the ideas of found law and made law; a tension particularly evident in the growing, though desperately resisted, awareness that there may be, in fact, nothing to be found — that whenever we set to find "the law", we are able to locate nothing more attractive, or more final, than ourselves.

348. See, generally, Weiler, *supra*, note 340, at pp. 164–85.

349. Discussed above in the section on the state of the law today: consumer legislation in overview.

350. As Goudsblom describes it: *supra*, note 302, at pp.ix–xv.

351. See, for example, the works cited, *supra*, note 240; and the bibliographic appendices in Belobaba, *supra*, notes 64 and 90.

352. E.g., Prichard, "A Market for Babies?" (1984), 34 *U.T.L.J.* 341. Although Prichard makes it clear that he is not advocating the use of market capitalism for the allocation of new-born babies (at p. 341), he later states (and we assume he means this seriously) that "*it is not at all clear* what value is being reserved or promoted by means of denying this fundamental happiness to the large number of couples left childless under the existing [non-market] scheme" (at p. 354).

353. Okun, *Equality and Efficiency: The Big Trade-Off* (1975), at p. 120.

354. Breyer, *supra*, note 94.

355. Stokey and Zeckhauser, *A Primer for Policy Analysis* (1978).

356. Breyer, *supra*, note 94.

357. Bardach and Kagan, *supra*, note 134.

358. Graymer and Thompson (ed.), *Reforming Social Regulation: Alternative Public Policy Strategies* (1982).

359. House, *The Art of Public Policy Analysis* (1982).

360. Lave, *supra*, note 94.

361. The leading workers describing each of these techniques are collected in Diver, "Policy-making Paradigms in Administrative Law" (1981), 95 *Harv. L.R.* 393 at p. 397, notes 17–24.

362. Lindblom, "The Science of 'Muddling Through' " (1959), 19 *Pub. Admin. Rev.* 79. And see Braybrooke and Lindblom, *A Strategy of Decision* (1963).

363. Diver, *supra*, note 361, at p. 396.

364. *Ibid.*, at p. 429.

365. Berlin, *Four Essays on Liberty* (1982), at p. 106: "One of the deepest human desires is to find a unitary pattern in which the whole of experience, past, present and future, actual, possible and unfulfilled, is symmetrically ordered."

366. McKean, "Products Liability: Trends and Implications" (1970), 38 *U. Chicago L.R.* 3 at p. 5: cited in Belobaba, *supra*, note 90, at p. 88.

367. Berlin, *Russian Thinkers* (1980), at p. iv.

368. *Ibid.*

369. Leff, *supra*, note 3, at p. 482.

370. Recall Arthurs, "Dissent" in Economic Council of Canada, *supra*, note 81, at p. 142: "At the root of my discontent, perhaps, is my own preference for a vocabulary of analysis and a system of social priorities that differ from those of the Report."

371. See Berlin, *The Hedgehog and the Fox* (1953).

372. Indeed our own work can be cited as an example: see Belobaba, *supra* notes 64 and 90 and the focus on rationality. "Rational" is a ubiquitous adjective in the titles of many leading articles and texts in this area: see, for example, Carley, *Rational Techniques in Policy Analysis* (1980).

373. *Toronto Star*, June 15, 1982, at p. A-17.

374. Ehrenfeld, *The Arrogance of Humanism* (1981).

375. *Ibid.*, at pp. 3–22.

376. *Ibid.*, at pp. 9–10.

377. House, *supra*, note 359, at p. 286, concludes his book as follows:

> We have come to a point after hundreds of pages of analysis, description and reporting which suggests strongly that common sense may be one of the best tools in the policy analyst's kit bag . . . heavy doses of common sense laced with the smorgasbord of techniques available today would be proper.

378. Simon, *Reason in Human Affairs* (1983). Also see the leading articles collected in Barry and Hardin (ed.), *Rational Man and Irrational Society: An Introduction and Sourcebook* (1982). A third work that deserves careful study is Schelling, *Micromotives and Macrobehaviour* (1978).

379. Simon, *ibid.*, at p. 7.

380. *Ibid.*, at pp. 79–87 and literature cited therein.

381. The leading work is Kahneman, Slovic, and Tversky (ed.), *Judgment Under Uncertainty: Heuristics and Biases* (1982).

382. Goodin, *Political Theory and Public Choice* (1982), at pp. 139–45.

383. Slovic, Fischoff, and Lichtenstein, "Cognitive Processes and Societal Risk-Taking," in Carrol and Payne (ed.), *Cognition and Social Behaviour* (1976), at p. 169.

384. Kahneman, Slovic, and Tversky, *supra*, note 381 and articles collected therein; Slovic, Fischoff, and Lichtenstein, "Facts versus Fears: Understanding Perceived Risk," in *ibid.* at p. 463 *et seq.*; Saks and Kidd, "Human Information Processing and Adjudication: Trial by Heuristics" (1980–81), 15 *Law and Society Rev.* 123; and Hammond, "Human Judgment and Social Policy," in *Progress in Research on Human Judgement and Social Interaction* (1974).

385. Hammond, *ibid.*, but cited in Saks and Kidd, *ibid.*, at p. 131.

386. Saks and Kidd, *supra*, note 384. Also the broader psychological critique of microeconomic "rational man" theorizing in Alhadeff, *Microeconomics and Human Behaviour* (1982), and Scitovsky, *The Joyless Economy: An Inquiry into Human Satisfaction and Consumer Dissatisfaction* (1976). For more on individual and collective rationality see Elster, *Sour Grapes: Studies in the Subversion of Rationality* (1983).

387. Macneil, "Value in Contract: Internal and External" (1983), 78 *N.W.U.L.R.* 340 at p. 348.

388. Poincaré, *Science and Hypothesis* (1952).

389. Kuhn, *The Structure of Scientific Revolutions* (2nd ed. 1970).

390. Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (1974).

391. Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (1975); Feyerabend, *Science in a Free Society* (1982).

392. See, generally, the leading works in Lakatos and Musgrave (ed.), *Criticism and the Growth of Knowledge* (1970). More specifically see Hutchison, *Knowledge and Ignorance in Economics* (1977), and Lindblom and Cohen, *Usable Knowledge: Social Science and Social Problem-Solving* (1979).

393. Discussed above in the section on consumer legislation in overview.
394. The empirical literature is discussed in Belobaba, *supra*, note 90. One example is Blankenburg, "Legal Insurance, Litigant Decisions and the Rising Caseloads of Courts: A West German Study" (1981–82), 16 *Law and Society Rev.* 601, showing that the availability of prepaid legal insurance has *not* resulted in the over-use of the courts. This "moral hazard" question is explored further in Belobaba, *supra*, note 90, at p. 107 *et seq.*
395. Discussed above in the section on consumer legislation in overview.
396. Discussed in the sections on consumer legislation in overview and consumer policy making in transition.
397. Discussed in the sections on consumer legislation in overview and consumer policy making in transition.
398. Discussed in the section on consumer legislation in overview.
399. Priest, "The Best Evidence on the Effect of Products Liability Law on the Accident Rate: Reply" (1982), 91 *Yale L.J.* 1386 at p. 1401.
400. Poincaré, *supra*, note 388, as quoted in Pirsig, *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values* (1974), at p. 237: "If phenomenon admits of a complete mechanical explanation, it will admit of an infinity of others which will account equally well for all the peculiarities disclosed by the experiment."
401. Markovits, "A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics," [1975] *Wisc. L.R.* 950.
402. Duggan, "The Theory of Second Best," in *The Economics of Consumer Protection* (1982), at p. 103 *et seq.*
403. Leff, *supra*, note 3, at p. 476.
404. *Ibid.*, at p. 476.
405. Leff, "Law And" (1978), 87 *Yale L.J.* 989 at p. 989.
406. Baldwin and Veljanovski, "Deregulation by Cost-Benefit Analysis — U.S.Experience and U.K. Potential" (forthcoming 1985).
407. Tuohy, *Policy Options in the Regulation of Asbestos-Related Health Hazards* (1982), as quoted in Shaul and Trebilcock, *supra*, note 96, at pp. 35–36.
408. "Decisions Made Unconsciously: Person Unaware Mind Is Working," *Globe and Mail*, February 11, 1984, at p. S-12.
409. Lindblom and Cohen, *supra*, note 392.
410. Trebilcock, *supra*, note 2, at p. 647.
411. Lindblom, *Politics and Markets: The World's Political-Economic Systems* (1977).
412. Pertschuk, *supra*, note 56, at pp. 12, 114–15, 155 and 137:

> Lindblom is essentially right: over time, significant government decision-making affecting the interests of producers and consumers will normally respond to the needs and demands of business . . . Even in the most representative of administrations, there has been a failure of equity in government decision-making affecting business and consumers. Politicians and bureaucrats chronically hesitate to challenge business demands, especially when such demands are backed by implicit or explicit threats that business's role in maintaining prosperity will be otherwise impaired . . . Business has thus succeeded in neutralizing the unique political weapon that had made the entrepreneurial politics celebrated by James. Q. Wilson possible: an unambiguous citizen outrage focussed upon a consensual legislative remedy . . . In its place there now exists a cacophony of conflicting claims on public outrage that succeeded in storing Lindblom's stated condition for business's predominant influence in public decision-making: citizen confusion and ambivalence . . . the consumer movement was laid low primarily by the reaction and revolt of business — business was able to exploit diffuse public disaffection with government and regulation to legitimize the dismantling of consumer and other regulations that have retained undiminished popular support.

413. Ziegel, *supra*, note 4.
414. Trebilcock, Hartle, Prichard, and Dewees, *supra*, note 240, at p. 102, quoted in McQueen, "One Piece of a Larger Problem: The Economic Council on Regulation" (1982), 7 *Can. Bus. L.J.* 73 at p. 97.
415. Nader, *supra*, note 1.

416. Corry, *My Life and Work* (1981), at p. 236, as quoted in McQueen *supra* note 414, at p. 96.
417. See, generally, Romero, *supra*, note 116, and Neilson, *supra*, note 51.
418. The critical literature of political pluralism includes important work by Kariel, Lindblom, Lowi, Thurow and Wolff. See a discussion in Miller, "Pluralism as Anarchy," *supra*, note 342, at p. 149 *et seq*.
419. The "electoral self-interest" postulate is nicely described and discussed in Hartle and Trebilcock, "Regulatory Reform and the Political Process" (1982), 20 *Osgoode Hall L.J.* 643. See the literature referred to therein and also see the literature, *supra*, note 240.
420. Hartle and Trebilcock, *supra*, note 419.
421. Gilmore, *The Ages of American Law* (1977), at pp. 99–100.
422. Leff, *supra*, note 405, at p. 1011.
423. Unamuno, *Tragic Sense of Life* (1954), at p. 261.
424. Gilmore, *supra*, note 421, at p. 110.
425. *Ibid.*, at p. 110.
426. Raiffa, "Concluding Remarks," in Schwing and Albers (ed.), *Societal Risk Assessment: How Safe Is Safe Enough?* (1980), at p. 341.
427. Reich, *supra*, note 72, at p. 39.
428. Diver, *supra*, note 361, at p. 434.
429. *Ibid.*
430. *Ibid.*, at pp. 431–32.
431. Lowrance, "The Nature of Risk," in Schwing and Albers (ed.), *Societal Risk Assessment: How Safe Is Safe Enough?* (1980), at p. 12.
432. Kasper, "Perceptions of Risk and Their Effects on Decision-Making," in Schwing and Albers (ed.), *Societal Risk Assessment: How Safe Is Safe Enough?* (1980).
433. Shaul and Trebilcock, *supra*, note 96.
434. Shaul and Trebilcock, *supra*, note 96 at pp. 38–39.
435. *Ibid.*
436. Goodin, *supra*, note 382.
437. *Ibid.*, at p. 40.
438. *Ibid.*, at p. 48.
439. See the energetic defence of "non-expert" individual judgment in Feyerabend, *Science in a Free Society*, *supra*, note 391.
440. Discussed above in the section "Deeper Problems and Dilemmas."
441. Myrdal, "How Scientific Are the Social Sciences?" in *Critical Essays on Economics* (1973), at p. 157.
442. Gilmore, *supra*, note 421, at pp. 99–100.
443. Leff, *supra*, note 3, at p. 482.
444. Recall the last two lines in Camus' *The Myth of Sisyphus* (1955): "The struggle toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."
445. Lindblom, *supra*, note 362. Also see Berlin, *supra*, note 367: "We seek to adjust the unadjustable, we do the best we can."
446. Schuchman, *Problems of Knowledge in Legal Scholarship* (1979), at p. 4.
447. Scheffman and Applebaum, *supra*, note 279, at p. 154.
448. Bardach and Kagan, *supra*, note 134, at pp. 302–303.
449. See Breyer, *supra*, note 94, at pp. 8 and 341; Bardach and Kagan *supra*, note 134, at p. 267; Pertschuk, *supra*, note 56, at p. 139; and Raiffa, *supra*, note 426, at p. 341.
450. The shift of emphasis from regulating design to prescribing performance standards is one American development that deserves serious Canadian review. The advantages of the "performance" approach (over "design") are discussed in the context of both misleading advertising and unfair trade practices in Pertschuk, *supra*, note 56, at pp. 143 and 150. Also see Scheffman and Applebaum, *supra*, note 279, at p. 150.

451. Discussed above, *supra*, notes 434 and 215 and accompanying text.
452. Hartle and Trebilcock, *supra*, note 419, at pp. 658–63, make a convincing case for the funding of public interest groups by the use of tax-credit scheme. Also see Economic Council of Canada, *supra*, note 81, at pp. 134–36.
453. Belobaba, *supra*, note 90, at pp. 142–43.
454. As discussed above in the sections on deeper problems and dilemmas and future directions. Also see Neilson and Belobaba, "Proposals for Administrative and Civil Enforcement Powers in a Federal Trade Practices Act" (unpublished 1981).
455. With respect to standard form contracts, the threshold concern is still problem-identification: as discussed above in the section on consumer legislation in overview. In the consumer credit area a recently published text will provide useful directions for further research: see Geva, *Financing Consumer Sales and Product Defences in Canada and the United States* (1984).
456. Belobaba, *supra*, note 64: "Summary," at pp. ii–iii.
457. As discussed above in the section on consumer legislation in overview.
458. Kuhn, *supra*, note 389.
459. Bynner, *The Way of Life According to Laotzu* (1944), at p. 74. And see Camus, *The Fall* (1956), at p. 147: "Are we not all alike, constantly talking and to no one, forever up against the same questions although we know the answers in advance?"

2

Environmental Law and Policy
A Retrospective Examination of the Canadian Experience

D.P. EMOND

This paper is intended as a practical rather than a philosophical statement about environmental degradation, law and public policy. But no matter how pragmatic or practical my focus, it is imperative that I begin with a discussion of definitions and values. Not to do so is to fall into the web of fuzzy thinking in which assumptions are made without careful examination, and proposals are advanced without full evaluation of the alternatives.

Society speaks generally and often glibly about an "environmental problem." By describing environmental degradation as a problem we presuppose the need for a "solution," and a search for solutions by lawyers invariably stimulates a discussion of alternative legislative and judicial actions appropriate to respond to the problem.[1] Much of this paper will examine and evaluate legislative and judicial responses to this problem. but rather than rushing toward the nuts and bolts of the lawyers' trade and a full examination of a legal resolution to the problem, I propose to tackle two rather complicated tasks. The first is to seek an answer to the question, "What is the problem?"; the second, to examine the causes of the problem. With these tasks completed, I believe that the detailed discussion of law and policy as applied to a very specific example of environmental degradation, namely, the Spanish River in Ontario, will be a good deal more relevant, and my proposals for action more persuasive.

The Problem Defined

What is the problem? I believe that Canadian society is confronted with two problems today — one related to "residuals" or wastes, the other to

"resource-use planning." Both problems are primarily physical and "effect oriented" with the first seen in terms of the contamination or degradation of the natural environment, and the other as a problem of inappropriate siting, timing, process, or the social desirability of an activity.[2] The problem of residuals is perhaps the most obvious and thus has received the most public attention, but that of planning is easily the more important. It is almost always better to anticipate and avoid problems than to react to them.

Residuals are the by-product of societal processes, usually industrial processes, that ultimately find their way into the natural environment. As air emissions they adversely affect the quality of the air, as liquid affluent they degrade the quality of water, and as solids they despoil the land. The three are not mutually exclusive. Air emissions will ultimately affect water and soil quality; solid wastes will leach into water bodies; and some liquid effluent will adversely affect the land. The interrelationship among the three is more complex than an examination of ultimate effects suggests. Trade-offs can be made among residuals or "waste streams" before they are discharged into the environment. For example, sulphur may be emitted into the air as sulphur dioxide or extracted from the gases prior to emissions and disposed of (or utilized) as a solid waste (or product). Similarly, suspended and dissolved solids can be removed from liquid wastes and disposed of in ways that may affect air quality (incineration) or soil quality (solid waste disposal). And incinerators may be fitted with scrubbers to remove many residuals from the gases before they are emitted into the air. Through the application of appropriate technology and energy, virtually all wastes are reducible to solids. This not only has important implications for the question of effects, but also casts doubt on the value of the traditional classification of pollution into air, water and land problems as categories for planning and control policy. The question is not what problem to tackle, but how and when to deal with the problem. That inevitably prompts a discussion of priorities among alternative planning and control policies.

The resource-use planning component may be less obvious, but it is the key to solving many environmental problems. If all activities affect the natural environment — most of them adversely — it is clear that the siting, the timing, the process employed, and ultimately the social desirability of the activity will also have important implications for the natural environment. Thus, the relevant issues are as follows: whether to proceed or not to proceed with a proposed activity; whether to locate the activity in an already developed area or in a relatively undeveloped area; whether to proceed before important information about its effects is available or to delay development until more is known about its impact and environmental management; and whether to employ a known and proven process, to experiment with a process from another field, or to seek the development of a new process.

Because many important planning issues have already been determined for existing activity, there is less scope to plan, and hence less room to regulate and manage what already exists. Nevertheless, all planning processes must take into account the existing environment, including the built environment, and thus plans may limit or reduce future problems by prohibiting or restricting any further incremental development, or attempt to change the existing environment by encouraging relocation. The planning process may also have something to say about environmental quality standards and the implementation of such standards (controlling residuals) and thus may have important implications for government activity in controlling residuals.

Finally, to complete the circle, the interrelationship between residuals and resource-use planning deserves brief mention. At the most simplistic level, planning the site for a particular process or planning what process to employ will affect the local environment, and perhaps even the regional or world environment. As planning becomes more sophisticated, it will contribute to a fuller understanding of the relationship between processes and effects, and thus will help shape and constrain decisions affecting the environment. In this way, planning can provide the pre-development feedback necessary to improve the sensitivity of development decisions to environmental consequences. Or, to put the point in a more realistic context, the failure to plan or to plan properly obscures and clouds consequences, and thus encourages environmentally unsound development.

To describe the environmental problem as I have done obscures the fundamental question of why. Why are residuals a problem? Is it because they exceed the assimilative or carrying capacity of the particular environment, or the ultimate capacity of the larger environment, into which they are discharged? Or is it because society believes that it is morally and ethically wrong to engage in activity that changes or may change the environment adversely in some way? If the latter is true, what is meant by adverse? Most, if not all, human activities will have some effect on the environment. Some activities, such as disease control, are regarded as environmentally desirable; many others, however, are regarded by at least a vocal minority as environmentally undesirable. In other words, how are the problems of residuals and resource-use planning best addressed pragmatically in terms of the likely effects of the activity on health and/or property, objectively in terms of the propensity of the activity to change or degrade the environment, or subjectively in terms of what is publicly acceptable? There are, of course, important links among the three. Measured effects will obviously influence what is publicly acceptable, and public norms, through the political process, ultimately will determine the acceptability of the "no degradation" option. Nevertheless, the starting or definitional point will have important ramifications on the solutions adopted.

However the alternatives are characterized, it is important to recognize the ethnocentricity of any approach. In spite of the environmentalists' best efforts to escape the propensity of characterizing the problem and solutions in terms of society's perceptions and needs, the urge to do so seems irresistible. Environmental degradation is a problem because of its adverse effects on human society. If humans were oblivious to the consequences or unaffected by the results, there would be little, if any, public concern and the problem, as normally defined, would no longer exist. Environmental protection is not pursued for its own sake, but rather for society's sake. Thus, an understanding of the problem demands first an understanding of societal perceptions, values and institutions as they relate to the environment.

But there is another perspective, although it is almost impossible to grasp. A definition of environmental pollution based exclusively on human need condemns society to a process in which humans are not viewed as an interdependent part of the environment, but masters over it, seeking new ways to exploit and dominate it. On the other hand, a perspective that sees society as an integral part of the environment, as a cooperative part of nature, offers more than the concept of environmental domination, and the consequent loss of freedom that it implies. It offers respect for and a sense of obligation toward the natural environment. But it may offer society more than merely the role of "sacred observer," suggesting as that phrase does, that no change is desirable or possible. It offers society the opportunity for change — socially desirable change — that recognizes and respects society's role in nature, reinforces society's contribution to the environment, and emphasizes society's role as a cooperator with nature. Society can be both "grand manipulator" and "sacred observer," embracing a new environmental ethic of respect and co-operation.[3]

This brings me to an inquiry into the causes of the pollution problem. I have noted above the problem of residuals or wastes and their impact on the natural environment. I have also recognized a planning component, particularly as it relates to the timing, siting and design of new activities. Together, they account for the physical dimension. The environmental problem may also include an important ethical or moral dimension.

This is a world of limited resources — limited in terms of what and how much may be extracted from the planet,[4] but limited also in terms of the planet's capacity to assimilate the waste by-product, or residuals of development. Once the demand for more resources exceeds the planet's capacity to supply them, or the production of residuals exceeds the planet's carrying capacity, then an environmental problem (or crisis) is created.[5] The environmental problem is not only a question of the land that is despoiled; it is also a question of society's relationship to that land. Are we the environment's masters, free to utilize and exploit it for our own selfish ends? Are we its steward, under a self-imposed obliga-

tion to practise wise management and good husbandry? Or are we an integral part of the environment and thus committed to principles of respect, mutual aid and cooperation?

The questions asked and the definitions of the environmental problem offered will inevitably shape society's response. Thus, if environmental degradation is seen as physical, the solution will be conceived in terms of reducing demand and internalizing environmental benefits. If, however, the problem is viewed as an ethical or moral one, a different set of responses will be deemed appropriate. The law, however, cannot solve all problems. Indeed, the indiscriminate use of legal techniques for resolving disputes may accentuate a problem or create new ones. The law does have a role to play in solving the environmental crisis, but I believe that it is more modest than either legislators or the public care to admit.

Why do persons persist in activities and make decisions that have such a negative impact on the environment? The answer to this question is certainly complex, but I believe that it is deeply rooted in societal values and hence in society's economic, political and legal institutions. I will begin, therefore, with a discussion of values and then turn to an examination of institutions, specifically legal institutions.

The Causes of Pollution

Values, Ethics and Morals

The starting point for any serious inquiry into the causes of pollution must be an examination of values, ethics and morals. Although a necessarily brief inquiry into such fundamental issues will tend to trivialize their importance, some comment and observation is necessary.

If the environmental problem is an attitudinal one which can be solved by changing attitudes, values and beliefs about the environment, we must first understand what motivates environmentally unacceptable behaviour. Why do some people regard the environment with such apparent disdain? What are the causes of their beliefs, values and mores that give rise to norms that apparently ignore the consequences of acts? These questions presuppose that norms are predetermined and external. Another view of norms, however, is that they are not predetermined, but shaped by processes, including the political, economic and legal systems.

Although no one article can do justice to the role that cultural values play in encouraging anti-environmental actions, White has captured the essence of the problem in his important piece, "The Historical Roots of our Ecological Crises."[6] He begins by asking rhetorically whether a demoralized world can survive its own implications without rethinking its axioms. Present axioms, according to White, see man created by God in God's image. White argues:

> Man named the animals, thus establishing his dominance over them. . . . No item in the physical creation had any purpose save to serve man's purpose. . . . [Man] could exploit nature in a mood of indifference. . . . Despite Darwin, we are not . . . part of the natural process. We are superior to nature, contemptuous of it, willing to use it for our own slightest whim.[7]

Contributing to man's propensity to dominate and control was the concept of time as "nonrepetitive and linear." Society's decisions and actions, however calamitous for the environment, can only move it forward. Under this ethic, growth is progress. Drawing the analogy to nature, proponents of this view argue that not to grow is to stagnate and decay. Society's eternal quest for progress and fear of stagnation provide considerable fuel for the engines of development. Although White offers only a limited view of the values that underlie the environmental crisis, it is a popular one.

Other perspectives generate similar results. It could be argued that living under the shadow of the Bomb, societies have become generally more disaster conscious and disaster immune. Fear for tomorrow heightens the sense of the present and causes societies to discount the future, particularly the environmental future. Suspicious of the moral sensibilities of science, doubtful about the infinite capacity to progress, society's increasing pessimism encourages individuals to take what they can while they can, irrespective of the consequences.

Nor are these dysfunctional values confined to Western thought. Yi-Fu Tuan in a stimulating article entitled "Our Treatment of the Environment in Ideal and Actuality" traces a pattern of environmental exploitation and despoilation in Eastern societies that closely parallels Western practice.[8] The essence of Yi-Fu Tuan's thesis is captured in the following passage:

> In a complex society benign institutions can introduce effects that were not part of their original purpose. The indirect results of any major action or event are largely unpredictable, and we tend to see the irony only in retrospect. For example, Buddhism in China is at least partly responsible for the preservation of trees around temple compounds, islands of green in an otherwise denuded landscape. On the other hand, Buddhism introduced into China the idea of cremation of the dead — and from the tenth to the fourteenth centuries cremation was common enough in the southeastern coastal provinces to create a timber shortage there.[9]

The author concludes that the conflicts between an ideal (no one wants more pollution) and the practice (but most do want better houses and cars) "expose our intellectual failure to make the connection, and perhaps also our hypocrisy. . . . Contradictions of a certain kind may be inherent in the human condition. . . . Ideals and necessities are frequently opposed as, for example, on the most fundamental level, keeping one's cake and eating it are incompatible."[10] Or, to put the point in

equally crass economic terms, "the taxpayers, consumers and voting public are not prepared to [pay for] the pollution control that is implicit in [their] environmental quality goals."[11]

Economic Values and Institutions

Our economic values and institutions account for much of the environmental problem, particularly as it affects common resources such as air and water.[12] Assume, for a moment, two seemingly unassailable propositions, both well steeped in the human values and the morality of our time: first, that all people decide what is in their own best self-interest; secondly, that no person or persons has an exclusive right to the common resources of air, water, quiet, or, conversely, that common resources are available to all, seemingly free of charge. With these two propositions, Hardin, in his article "The Tragedy of the Commons," demonstrates that "tragedy and ruin" is the destiny toward which all who use common resources rush.[13] Hardin's thesis is worth developing through the words of the author.

> The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . .
>
> As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously he asks, "What is the utility to me of adding one more animal to my herd?" This utility has one negative and one positive component.
>
> (1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
>
> (2) The negative component is a function of the additional overgrazing created by adding one more animal. Since, however, the effects of overgrazing are shared by all herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1.
>
> . . . the rational herdsman concludes that the only sensible course of action for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit — in a world that is limited. . . .
>
> Natural selection favours the forces of psychological denial. The individual benefits as an individual from his ability to deny the truth even though society as a whole, of which he is a part, suffers. Education can counteract the natural tendency to do the wrong thing, but the inexorable progression of generations requires that the basis for this knowledge be refreshed.[14]

Pollution is the tragedy of the commons in reverse, with the actors adding something to the commons (air, water, sound, view) rather than taking something out. Again, Hardin describes the thought process of the rational decision maker.

> The rational man finds that his share of the costs of the wastes that he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of "fouling our own nest," so long as we behave only as rational, independent, free enterprisers.[15]

This theme has provoked a good deal of thinking and writing on pollution, all of which can be characterized as the search for "cost internalization." How can the costs that polluters impose on the commons and all who use it (the victims) be shifted (internalized) to the polluter? Or, to ask the reverse question, how can the benefits of abatement be enjoyed by those who reduce the pollution? Unless those who spend money on reducing pollution enjoy marginally more than their proportionate share, there will be little incentive to spend. This is the search for "benefit internalization." Both problems result from a combination of instrumentally rational behaviour and the common non-ownership features of our natural resources, and both evoke a search for ways of "privatizing the resource" and pricing its use, or for rules that approximate private behaviour where the resource is private, so that costs and benefits are borne or enjoyed by those responsible.

Hardin's description of the common is equally appropriate for the degradation of what is often described as a collective good, i.e., a good that is almost free to the consumer,[16] and thus of little value to the producer. The non-excludability that distinguishes collective goods from private goods often results in their being ignored in the market exchange system. Clean water is a classic example of a collective good that, without government intervention, will be overconsumed and underproduced by rational individuals. It is available to all, virtually free of charge. This apparent lack of cost encourages water consumers to substitute relatively inexpensive water for other more expensive resources whenever possible. Thus, given a choice between an expensive system to recycle waste water, or the almost costless process of discharging the contaminated water and drawing clean replacement water, the decision for the rational profit-maximizing individual is obvious. The costlessness of the resource that encourages overconsumption also discourages water treatment. Think now of the industry as a potential producer of clean water — that is, a company that provides, through proper waste treatment and water purification, the collective good of clean water. The inability to exclude Other resource consumers from enjoying the collective good (after all it is "free" to all) precludes the possibility of exacting a payment to cover the costs of production. There is, therefore, little market incentive to provide the collective good in question. Similarly, from the perspective of the resource consumer, there is little incentive for an individual consumer to pay for upstream treatment on the supposition that other consumers will pay for it and, given the non-excludability characteristic of water, the first consumer

could then enjoy, free of charge, a good paid for by others.[17] But this reasoning applies to all consumers, with the result that no one pays anything and the good is not supplied. Consumers may be better off if they could agree among themselves to pay something for treatment. Where the number of consumers is large, however, the cost of communicating with each other is expensive and the danger of a bargaining stalemate is high. Agreement is effectively precluded.

Now let us return to the seemingly "unassailable" propositions that lie behind Hardin's thesis: utilitarian self-interest and the non-exclusivity of common resources such as air and water. The latter concept is not open to dispute. But the notion of utilitarian self-interest betrays a particular view of society and individual behaviour that is well steeped in the work of Charles Darwin, specifically his finding that competition and struggle for survival marked the dominant feature of natural and social relationships.[18] There is, however, another view that current economic theory has chosen to ignore. This is one in which rational behaviour is not predicated on the ruthless desire to appease immediate self-interests, but is rather one in which cooperation and mutual aid are the distinguishing features of rationality. Darwin argued for as much in his work, although many modern Darwinists have chosen to ignore it. Others, such as the Russian thinker, Peter Kropotkin, demonstrated the cooperation-in-nature thesis through his empirical research into the behaviour of birds.[19] Indeed, few relationships within society are characterized by struggle, competition and the desire to dominate. The family, for example, seldom condones such behaviour. Many institutions, such as universities, are organized collegially, rather than hierarchically. Indeed, we need go no further than the common about which Hardin writes to see that Hardin's thesis is open to question. The English common was not subject to the overutilization that Hardin alleged. In fact, it flourished. And the reasons why it flourished have much to do with the ability of the common's users to delimit, through informal and cooperative mechanisms, the rights of each user to ensure a place for all.

Although this view of the common offers an important alternative to Hardin's thesis and conventional economic analysis, it does not offer a persuasive explanation of the environmental problem. Why have the mediating principles of cooperation and mutual aid not prevailed over individual self-interest and domination? This is not an easy question to answer. It demands an examination of political theory and the state that would go beyond the scope of this paper. Suffice it to say that the so-called dominant or utilitarian economic theory, as described by Hardin, was permitted to flourish in the 18th, 19th and 20th centuries for political reasons, and has subsequently received reinforcement by prevailing economic and legal theory. Hardin's thesis does indeed offer an important perspective on the causes of the problem, but it is a limited perspective that is open to challenge. Perhaps the more helpful perspective

comes from an understanding of the political forces that lie behind this particular economic theory.

Political Values and Institutions

The political process does not serve environmental values well, even though the public has consistently put environmental concerns at, or near, the top of most lists of current concerns. The reasons for this are not hard to find. They lie in the public's aspirations to have its cake and eat it too. Many features of the political process are designed to elicit such public aspirations, while others contribute to an obfuscation of the full implications of letting the environment look after itself. This paper cannot do justice to such a complicated subject. What follows, therefore, is a compendium of some of the more "pathological" features of the political process — at least as they relate to environmental degradation.

The most persuasive feature of the political process is its preoccupation with growth. This preoccupation manifests itself in two ways. First, it stands alone, as Ophuls argues, as the guiding principle of American politics and to a lesser extent Canadian politics:

> Growth is still central to American politics. . . . Growth is the secular religion of American society, providing a social goal, a basis for political solidarity, and a source of individual motivation. . . .
>
> We have justified large differences in income and wealth on the grounds that they promote growth and that all would receive future advantage from current inequality as the benefits of development trickled down to the poor.[20]

Secondly, it manifests itself in the recent push toward increased efficiency through deregulation, showing an unquestioned faith in the free market.[21] Political, or government, intervention to secure such social goals as income redistribution and environmental protection is under attack everywhere. The credo of the day is "let the market decide," since the market, it is alleged, rewards efficiency and growth but discourages laziness and waste. But the market to which politicians and many special interest groups subscribe is not the free market originally described by Adam Smith in the *The Wealth of Nations* in which equal choice prevailed. Today's market is heavily biased in favour of change (growth) for those persons and groups who have the resources (money) to exert their will. Those without the buying power to compete for goods and services in the marketplace are effectively disenfranchised. In other words, the rewards go to the winners. As the discussion in the previous section noted, however, a preoccupation with unbridled competition in the marketplace without any mediating or countervailing principles may indeed facilitate growth, but it will do so at enormous cost to the environment and ultimately to the social fabric.

Nevertheless, American and Canadian political thinking continues to be dominated by the libertarian doctrines of John Locke. Behind each doctrine lies the right or freedom of individuals to pursue their own needs and wants, almost without regard for the environment. That right is founded on the indispensable and, until recently, virtually unchallenged premise of ecological abundance.[22] Furthermore, ordinary citizens do not know, indeed cannot know, the full implications of their own acts or the acts of others on the environment. Lack of knowledge about ecological consequences is a function of the uncertainty that accompanies a complex, rapidly changing society.[23] More importantly, it is a consequence of a growth ethic that commits far more resources to change than to understanding the effects of change. The result is a growing lag in the public's ability to comprehend the full implications of that growth and thus a growing inability to participate, through political processes, in decisions that would limit development and environmental degradation.

Without knowing and understanding the consequences of growth, there is little incentive to rethink the philosophical foundations of the growth ethic. The benefits of growth are promoted and widely understood. The costs are not. The perceptions are now being challenged, but, although satellite photographs of earth have done much to change public thinking, the lag effect is enormous. We are indeed on "the spaceship earth" with only existing resources to sustain us.

The structure of the political and governmental processes also contributes to environmental degradation. The three- or four-year tenure of politicians and governments focusses attention on the short term. For politicians, the important run is the short run. They discount the future of the environment, relegating it to a manageable and comprehensible present consisting of one or two years. The consequences of such a short-term focus are twofold. First, it discourages medium- or long-term planning. The assumption is that tomorrow will look after itself.[24] Few politicians are prepared to act today for environmental posterity if the benefits outlast their own tenure, and almost none are ready to act if the benefits will only be enjoyed by future generations. The second consequence is that political decisions are heavily influenced by crises. Although living with the threat of the Bomb may have made society more crisis-immune, politicians are nevertheless plagued by one environmental crisis after another. First DDT, then mercury, then lead, and now toxic rain depositions are some of the more popular crises. In each case, adverse effects were popularized, the public was shocked and politicians reacted, often to the detriment of other more pervasive and serious environmental problems.

Acid rain provides an excellent case in point. The problem has existed in North America for some time and in Europe much longer. Its causes have been well known for at least 25 years. The most adverse con-

sequences have been understood by the scientific community for almost as long. And yet every month some new revelation about its consequences sends shock waves through the media and public. Canadian politicians have seized on this latest crisis and devoted a disproportionate share of their public outrage to railing against "the culprits" to the south. Such strong reaction and political opportunism, however, do little to address the problem. Indeed, it may only serve to deflect attention from the fact that as "least cost consumers" we are all polluters, and that there are other, potentially more serious environmental crises lurking just around the corner.[25]

Why are issues, particularly environmental issues, perceived as crises? The answer is found, in part, in the decision-making process, but also in the way in which society learns about consequences. There is some truth in the old adage, "What you don't know won't hurt you." Equally important today is another adage, "What you do know will frighten you." Society is not anxious to devote resources to finding out what it does not want to know. Furthermore, understanding, learning and knowledge do not "progress" smoothly, but rather incrementally and in spurts as insights and revelations are gleaned.[26] Society's best efforts to ignore the truth must ultimately give way to the reality of environmental degradation. With each new revelation a crisis is born and out of crisis comes "mass outrage" with the corresponding public demand for a quick, painless course of action. The scientific community's contribution to learning also promotes a crisis mentality. Anxious to generate public and private funding for research, scientists are prone to describe problems of particular interest to them in crisis terms. Like any other organization, the scientific community is intent upon survival and thus promotes its research in such a way as to enhance its own position within society. There is no objectivity here, only an organizational desire to survive and, if possible, grow.[27]

Whether a democracy will ever devote sufficient resources to learn about environmental consequences is highly problematic. Not only is the cost of such research enormous, but the environment must compete with other demands on society's limited resources to resolve such other immediate crises as unemployment, international competitiveness, housing and welfare.[28] Where the long-term risks of environmental degradation are uncertain and turn on narrow technical questions, it is unlikely that present generations will ever undertake the collective sacrifices needed to protect future generations.

Another major structural problem of government and political decision making is characteristic of most organizations and all large bureaucracies. In his provocative book, *Essence of Decision*, Graham Allison described how bureaucratic and political decision making exhibited certain "pathological features" that make rational decision making virtually impossible. Although a full examination of organiza-

tional theory goes well beyond the scope of this paper, a brief summary will serve to illustrate the essence of the problem.[29]

Organizations approach tasks and problems — be they environmental or other — in predictable ways. First, complex problems such as pollution are factored into more manageable sub-problems. Thus, pollution tends to be reduced to exceeding specific water-quality guidelines or maximum permissible air-quality standards.[30] While the urge to reduce water pollution to specific guidelines is predictable and understandable, much is lost in the reduction. Most would agree, for example, that there is something disingenuous about defining the pervasive and insidious effects of water pollution as any amount "in excess of x parts per million (ppm)." Once problems are defined in such terms, the organizational ability to react to new problems or develop new insights into old problems is limited. Organizational change, if and when it comes, is slow and incremental. This limited flexibility means that all pollution problems receive more or less the same treatment. Future behaviour becomes predictable. Organizations do today what they did yesterday and will do tomorrow what they did today.

The reasons for such behaviour are not hard to find. Bureaucracies and other organizations are loathe to act until confronted with a problem and when so confronted, they are loathe to look any further than the first acceptable solution. This propensity to "satisfice" (as Allison terms it) leads to results that reinforce the close, almost symbiotic relationship between regulator and regulated, while providing the symbolic reassurance needed to appease an apprehensive public. Political and bureaucratic organizations will avoid uncertainty whenever possible. For this reason, they are reluctant to seek out new environmental problems, preferring instead to work on simple, comprehensible pollution problems rather than tackle the unknown. Institutional hiring and promotion practices reinforce parochial priorities and perceptions. Organizations develop workable agendas and then adhere rigidly to them. Only the threat of a crisis and dramatic budget changes will provoke radically different responses from bureaucracies.

Under such circumstances the ability of responsible ministers and regulatory departments to deal effectively with pollution is limited. We can expect departments to seek new ways of avoiding the problem, while at the same time enhancing their own regulatory or management role. The enthusiasm with which departments have embraced multiple and optimum-use management principles provides a vivid illustration of this phenomenom.

The last problem of government decision making that I propose to discuss relates to the way in which public preferences affect public decision making and vice versa. If the essence of the political process is bargain and compromise among relevant actors, who in turn respond to the preferences of significant publics, a number of questions arise. First,

how long can we continue to compromise environmental values, particularly if successive compromises lead to a continued deterioration in environmental quality? Second, who are the significant actors and significant publics? In short, who are the winners and losers in environmental decision making? What preferences should count? As Stewart writes in "The Reformation of American Administrative Law," "it is hardly self-evident that only existing preferences should count," nor is it obvious that "governmental policies should in principle be addressed solely to consumers' existing preferences."[31] And finally, what is the relationship between government decisions and public preferences? Again, to quote Stewart:

> Preference-shaping effects . . . may be significant to governmental decisions because of the large absolute amount of resources which may be effected, their pervasive long-term character, and the fact that the process of choice is collective rather than individual. These characteristics, together with the efforts of affected agency and client interests to maintain and expand programs once initiated, often invest governmental programs with a self-generating, self-fulfilling dynamic.[32]

The question of the compromises that environmentalists "must" make and the implications of such compromises offers a chilling prospect for all of us. Frabricant offers the following prognosis:

> Tastes are bound to deteriorate further in the long years ahead. For the values of future generations will be molded by the world into which they are born, and this could well be very different than ours because of the continued process of economic growth . . . our descendants will set environmental standards that we would view as intolerable.
>
> . . . If pollution is permitted to worsen over the centuries and the eons, we can nevertheless suppose that life will adapt itself. "Living systems are systems that reproduce," yes; but as the biologists define them, they are also systems "that mutate, and that reproduce their mutations." That is why living things "are endowed with a seemingly infinite capacity to adopt themselves to the exigencies of existence" — even in a cesspool.
>
> But we cannot be certain that it is human life that would adapt and survive.[33]

Nor is it clear whether the quickening deterioration toward a "cesspool earth" can be stopped. How can future generations prefer a world that they have never known? Does the problem not plunge society in the hopeless circularity of preferring whatever it chooses? Again, the short-term perspective of the present political process would seem to accentuate rather than address these preference-shaping problems.

The question of who is a significant public raises additional concerns about which individuals and groups within society are primarily responsible for shaping preferences. Small groups within society wield enormous influence on public policy. Individual and corporate donors who

sponsor politicians and parties demand and get from the winners preferential treatment and policies. If, however, preference shaping should not fall within the purview of the political process, how should it be done? The market is not an attractive alternative to political decision making. Individual knowledge and experience are far preferable, but, without structural changes within society and a radical redistribution of wealth, they are elitist. To expect that the poor, who lack the resources to escape the despair of an inner city ghetto, will acquire a taste for an unspoiled northern wilderness, or even healthy lakes, is to hope for miracles. It will not happen.

Ultimately the problem of pollution may not be amenable to resolution through the governmental process. It is too complex, too polycentric to be solved in a systematic, rational and comprehensive fashion.

Common Law and Legislative Responses to Environmental Problems

Like economics and politics, law covers a vast spectrum of values and structures. If this part of the paper is to serve as a general overview of the problems, it is necessary that it receive the same broad treatment as the previous sections.

The Common Law

THE PROCESS

The structure of law, specifically the adversarial process offers a useful starting point. Here, generalization is easy for the predominant mode of judicial or quasi-judicial decision making is adjudication, with a few recent exceptions. Like all institutions, adjudication brings a certain bias to problem solving. Adjudication is adversarial. Whether in the courtroom or the board or commission room, it pits two or more parties against one another, before an "impartial" third-party decision maker. Success is determined by a party's ability to persuade the decision maker, and persuasion is related to a party's ability to construct the stronger case by addressing proofs, evidence and argument to predetermined rules and criteria.[34] Success is also a function of a party's ability to expose the weaknesses of an opponent through cross-examination, and then exploit those weaknesses in final argument. The process is thus a contest. The rules are well set out in advance, and, within the rules, the contestants are encouraged to employ their best strategy to achieve a favourable result.

Like the market and the political process, adjudication is based on a number of premises and therefore brings a number of biases to dispute resolution. First, it assumes conflict within society and the need to settle

such conflict, primarily through a pronouncement of "rights" as applied to the particular factual setting that gave rise to the conflict. Secondly, the process is designed to focus on the particular claims of the individual contestants. Adjudication heightens the sense of the particular. But in doing so, it trivializes broader, community-wide concerns that are of no more than general interest to the two parties. Thirdly, it is based on a win-lose premise. There is little within the process that encourages a negotiated resolution of differences, other than the prospect of defeat. Nor is there anything within the process that facilitates compromise. Indeed, the limited range of remedies available to the decision maker reinforces the win-lose mentality of the participants.

The foregoing can be related to environmental law and policy in Canada in this manner. First, by impressing issues with the stamp of conflict, pollution becomes the interference with the rights of innocent victims on the part of polluters and vice versa. So in the end, the issue becomes a contest of rights: the right to use one's property as one sees fit, against the right to be free from unreasonable interference. As a regulatory tool, the law is impressed with the same stamp of conflict. It assumes that the activities of society are anti-environment and therefore demands public regulation and management.

These general tendencies are accentuated by other specific process problems. Perhaps the most difficult problem faced by the plaintiffs is the burden of proof.

The Burden of Proof

The seemingly neutral principle that "one who asserts must prove" creates an inherently biased process imposing an almost intolerable burden on those who seek environmental protection. The assumption underpinning this principle is captured in the statement that "one may do as one wishes, providing those who may be adversely affected are unable to prove any adverse effects to them." Thus, action may be taken if no legally recognized individual rights will be adversely affected;[35] and a person who asserts or fears an adverse effect is unable to prove the assertion.

The problem stems from the uncertainty and information lag that has become so characteristic of modern society. Economic growth and the sophisticated technology associated with it means that the gap between what we know (or think we know) and what may actually happen is growing. If there is no answer to the question, "what will happen, or what is likely to happen," then those who propose potentially harmful activities are free to proceed[36] until the harmful effects are proven, "beyond a balance of probabilities."[37] Establishing the causal connection between the activity and the harm will be costly and sometimes impossible in the short run, especially if the harm results from second- and third-order synergistic effects.[38]

Proof is made even more difficult by the adversarial structure of the courts and the "anti-scientific" biases of the judiciary. A process that pits one group against another, that is blind to the relative resources of each party, and that employs an independent and more or less passive observer to glean the truth from above the fray is not an efficient way of finding facts.[39] Inefficiencies in the process thus disadvantage the party that has the fewest resources and the burden of having to prove either potential or real environmental harm. The process is made more difficult by an anti-scientific/anti-technology bias exhibited by the courts.[40] Consider the following statement by Chief Justice McRuer; citing with approval, *Gollomid v. Turnbridge Wells Improvement Commissioners* (1886) L.R. 1, he said: "Speaking with all possible respect to the scientific gentlemen who have given their evidence . . . I think that in cases of this nature [nuisance] much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. . . ."[41]

Although Chief Justice McRuer adopted this approach to dismiss the scientific findings of the defendant's witnesses and accept the oral "proof" of the plaintiff, judicial caution poses a far greater problem for the party with the burden of proof, the plaintiff. Indeed, the now infamous *Nova Scotia Forest Industries* case is by far the more typical result.[42] There, in dismissing the plaintiffs' application for an injunction to prohibit toxic and potentially harmful herbicide spraying adjacent to their property, Mr. Justice Nunn was most reluctant to accept the scientific evidence of the plaintiffs. Indeed, although a growing body of evidence, including a very comprehensive and current report from the United States confirmed many of the plaintiffs' assertions, Nunn "cautiously" found that there was not sufficient evidence to justify the relief sought. As pollutants become more complex and effects more difficult to quantify, the burden of proof will limit successful actions to a small number of cases in which the harm is either obvious or provided by the dramatic findings of the epidemiologist.[43]

Standing and Class Actions

Even if the environmental plaintiff can overcome the burden of proof problem, two other procedural or process obstacles stand in the way. The problem of standing[44] and class actions[45] are best discussed together, for both pose an almost insurmountable obstacle to the environmental plaintiff. The problem is best illustrated in the context of public nuisance. Public nuisance describes any legally recognized problem, including environmental problems faced by society in general. In other words, public-nuisance problems such as environmental degradation are not unique to a particular plaintiff. But the lack of uniqueness raises the question of who is competent to sue — any affected member of the public, or only the public's legal representative, the attorney

general. The celebrated case of *Hickey v. Electric Reduction Co.* unequivocally answered the question in favour of the latter.[46]

Hickey, a commercial fisherman, made his livelihood in Placentia Bay, Newfoundland. The fishing, however, was seriously impaired by a highly toxic effluent from the Electric Reduction Company's plant on the bay. With the fishing gone, Hickey and other commercial fishermen in the area faced a bleak economic future. They sued for damages, alleging that their fishing rights had been interfered with. Mr. Justice Furlong agreed that there had been interference, but that the interference was to the public right to fish, and not to a private right of the commercial fishermen. To maintain his action, Hickey would have to prove that he was adversely affected in some special or unique way — different from other members of the public in kind (whatever that means) rather than merely degree.[47] Hickey's loss was his livelihood as a commercial fisherman and, although the court concluded that the loss was far greater in financial terms than the loss of others (such as recreational fishermen), it was still no different in kind. In the result, Hickey lacked the standing to even argue the case on the merits. In other words, he was not sufficiently affected to permit him access to the courts, let alone win on the merits.

The court's reasons for the decision are baffling. Mr. Justice Furlong expressed concern that standing to Hickey would open the floodgates to a torrent of litigation from all others whose rights had been affected, in other words, potentially from all members of the public. He argued that the financial loss, however large, was not sufficient to distinguish Hickey from recreational fishermen. And finally he noted that the attorney general, as the public's representative, was the appropriate plaintiff in such an action. None of these reasons is persuasive, however. The floodgate is a figment of the judiciaries' imagination. It exists only in theory, not in practice. Furthermore, financial loss can and often does distinguish a potential plaintiff from the general public. Indeed, to describe "a loss of livelihood" as merely a "difference in degree" from that of the recreational fishing public is misleading.[48] At some point the size of the loss describes a difference in the type of loss, rather than merely the amount of the loss.[49] Furthermore, the attorney general is often not a suitable plaintiff.

He did not sue in the *Hickey* case, and is not likely to sue in other environmental actions. The reasons for such inaction are not hard to find. A member of the cabinet, for example, may have sought and facilitated the defendant's activities. The attorney general, as a member of cabinet could decide that such an action would be an embarrassment to the department and the government. Indeed, the only potential plaintiff unconstrained by any potential conflict of interest is the person who has suffered grievously at the hands of the defendant, namely *Hickey*. And yet he is the one person denied standing by the court's reasoning.

Were one to accept the reasons of Mr. Justice Furlong, an obvious solution to the "problem" of potential multiple actions is the class action. By joining all persons adversely affected by the defendant's actions, the class action promises not only to produce one action, but also to give plaintiffs the economies of scale that come through group or representative action. But instead of accepting the logic of the class action, the courts have used it to place another procedural bar in the way of the plaintiffs. The reasoning of the court is captured in the following passage of Mr. Justice Orde in *Preston v. Hilton*:

> In my judgment, an action either for damages for a nuisance or for an injunction to restrain a nuisance cannot be brought in a representative capacity. Though there may be many others who may sustain or fear damages from the nuisance it is clear that the injury or threatened injury must be peculiar to each person alone or to his property. A class or representative action is permissible, broadly speaking, only in cases where all those whom the plaintiff claims to represent are in the same interest (by which is meant not merely a like or similar interest) as the plaintiff, such as, for example, an action to set aside a conveyance in fraud of creditors, where all the creditors share rateably in the successful result of the action, or an action on behalf of all the shareholders of a company, or of all the policy-holders in an insurance company, or of all the debenture-holders secured by the same mortgage trust deed, or of all the part-owners of a ship.[50]

Because each plaintiff in the case had a separate and distinct cause of action, the case lacked the requisite "community of interest" needed to sustain a representative action.[51]

At this point the environmental plaintiff's dilemma is complete. According to Mr. Justice Orde in *Preston v. Hilton*, a private nuisance action may not be brought in a representative capacity. To avoid the class action problem, the plaintiffs may de-emphasize the "special injury to each individual" aspect of the case and sue in public nuisance. But by denying the private nature of the nuisance, the plaintiff becomes embroiled in a standing problem that may only be overcome by proving "special injury" — something that does not suit a class action. The result is that little environmental protection litigation is individually initiated, thereby further reducing environmental protection.

The Substantive Law

Many of the themes and problems already encountered in the previous section emerge from an examination of the substantive law, namely, a persistent preoccupation with the individual's right to exploit the environment. An examination of the common law property rules, for example, illustrates the same blind acceptance of the right of individuals to pursue their own self-interests, subject only to certain minimal restrictions when that right clashes with a similar right in others.

Three assumptions underly such a theme. First, land (real property) is seen as little more than another factor of production, a marketable commodity that deserves no special recognition or status in society. Secondly, the theme embraces the pre-eminence of individual rights over public or community rights. In fact, the law today seems to regard community rights at most as the sum of the rights of the individual members of the community, and not as something that may be greater than or in some way transcend individual rights. Thirdly, such a use-oriented doctrine means that only legally recognized persons can have rights. Or, to put the point somewhat differently, the inanimate environment can hold no rights except to the extent that the right is held on behalf of some legal entity, such as a natural person or corporation. Thus, environmental protection for its own sake is not a legitimate goal of the legal system. The environment, as seen through the eyes of the law, exists to serve utilitarian interests. The only interests that count are human interests.

Land as a Marketable Commodity

Today's perception of land as a marketable commodity is a relatively recent phenomenon that owes its genesis more to the political and economic exigencies of the modern state, than to any inherent characteristic of land or land law. Feudal and pre-industrial England used land to determine status. A person's relationship to land helped define the person (from lord to serf) and determined, to a large extent, the person's place within society. Prior to 1290 and the *Statute of Quia Emptores*, each new land transfer created a new relationship between transferor and transferee, with the present occupant owing certain well-defined rights and duties to the previous occupant. No one "owned" land as we now understand that word. Ownership rested in the Crown. The most that one could acquire was a possessory interest, with the extent of possession determined by the relationship between the present possessor (tenant) and prior possessor (lord). Indeed, up until the 18th century the verbs "to own" and "to owe" were used interchangeably. Both described the obligations owed to the land and the Crown by the present occupant. Absolute ownership was a contradiction in terms, unless applied to the Crown. Ownership described the owner's relationship and obligations to the land, not an unrestricted right to exploit it.

The *Statute of Quia Emptores* brought an end to the creation of new feudal relationships and represented the first step toward the free alienability and marketability of land. Future transfers no longer created a lasting relationship between transferor and transferee. Instead, the new "owner" simply stood in the place of the old. The *Statute of Wills* (1540) marked another important step toward the marketability of land, by permitting the present occupant to transfer an interest in land upon the occupant's death. In fact, by the Industrial Revolution almost all restric-

tion on land transfer and land use had disappeared. The incidents (obligations) of tenure had been abolished. Estates or interests in land had been reduced to a single estate, the fee simple. Not only did the present owner have few obligations toward the land, but also the owner's rights to divide, develop and sell the land were virtually unrestricted.[52] Indeed, attempts by some owners to limit use and restrict alienability outside the family were seen by the common law courts as "an affront to the fee" and struck down. The doctrine of waste continued to have relevance, but only to protect vested future interests, and only then to provide minimal protection to the land. With the uniqueness of any particular piece of land in doubt, with all land reducible to a dollar value, land truly became another "factor of production."[53] Land deserved no special protection. As a result, injunctive relief and specific performance lost their attraction as remedies for breach of contract or unreasonable interference with the land. Damages became the preferred remedy for seeking redress, further emphasizing the extent to which land had lost its special status in society.

The legal developments in Canada further accentuated the trends started in pre-industrial England. As a plentiful resource, land enjoyed no special status in Canada. "Free" land was the reward for loyalty and long service and "free" land provided an important incentive to spur settlement and development.[54] During the 19th century, legislative and administrative regulation on land use and alienation was rare. Although the common law would enforce contractual restrictions (restrictive covenants), and the legal doctrines of waste and nuisance, by 1851 Chancellor Blake could describe land's role in Ontario in the following terms: "[Land] is regarded as an article of merchandise. It is treated for many purposes as a chattel."[55]

Land was indeed little more than an article of commerce and as such received no special consideration or protection. The results of treating land as an article of merchandise are more ominous for the environment than the mere indifference that Chancellor Blake's statement suggests. Two specific examples further illustrate and emphasize the anti-environmental bias of the proposition. Both examples again require an understanding of the concepts that underlie property law. The first traces the legal definition of ownership and the consequences that flow from such a definition; the second focusses on one of the incidents of land "ownership," namely, the doctrine of waste and the extent to which this potentially pro-environment doctrine has failed to limit environmentally damaging activity.

The Concept of Ownership The common law concept of "ownership" is closely aligned to the economic concept of ownership. They both fail to generate a very high degree of environmental protection for three reasons. First, ownership represents to the lawyer a bundle of judicially

defined user rights to a thing. To the economist, "ownership" describes a bundle of potential utility-yielding services that can be used in alternate ways. Thus "ownership," no matter what the discourse, refers to user rights, not to the thing itself. The law describes who (capacity) may own what (real and personal property) and the terms and conditions of ownership (alienability, use, etc.). The thing, if we are referring to some part of the environment, exists irrespective of the law. In other words, property-based "environmental protection laws" are, at best, indirect, for they are designed to limit or facilitate the use of the thing and are not concerned with preserving or protecting the thing itself.

If ownership determined and limited use, things that were "not owned" could by implication be used without limit. Thus, as Hardin has argued, the law's failure to recognize ownership rights in the common,[56] may have led to the tragedy of overutilization.[57] In effect, "everybody's property is nobody's property." Anything that is treated by the law as a "free" or "common" good[58] is likely to become a valueless good, a situation that is fast approaching with certain environmental amenities such as air and water. But it is not clear that private ownership of such resources, assuming that the physical problems posed by the non-exclusivity of air and water could be overcome, would necessarily solve the problem.

Secondly, where the law has recognized and enforced ownership rights, it has contributed to environmental degradation because of the way in which those ownership rights are defined and enforced. Thus, the right to exclude another party from one's property, and the resulting ability to charge another for the use of the property or the right to earn rent encourages a high level of land utilization. Because property, like all resources, is limited in size and perhaps productivity, population increases will lead to an increased demand for its use, and this in turn enables the owner to charge more rent for its use. Increases in the rent and hence the value of the property encourage greater or more intensive use of the resource, which creates an incentive to improve the resource. When this logic is applied to land, for example, it explains why farmers invest heavily in chemicals (pesticides, herbicides and fertilizers) and technologies (replacing two-wheel drive with four-wheel drive tractors, because they permit earlier cultivation of the field). In this way the technological dimensions of the pollution problem are a "logical" and "natural" result of the legal concept of ownership, in a state in which demand for the use of limited resources is growing.

Finally, the principle that owners may use land as they wish, subject only to respecting the corresponding right of all other landowners, offers a strong incentive to use, develop and exploit the environment. The very formulation of the rule, "development is permitted unless it interferes with the rights of others," assigns the development right to those who wish to act. This means that the right assignment is also a wealth

assignment, in the sense that rights are valuable and a right assignment will confer a benefit on the assignee of the right.[59] By adding to the wealth of those who choose to develop, at the expense of those who do not, the legal system, working in tandem with the market, provides an obvious bias in favour of development. Secondly, although the right is limited by a corresponding right in other persons, this limitation is of little use. Let us assume that the neighbours choose not to exercise their development rights or that their development is relatively passive. Their concern then is to limit or stop the proposed development on the adjacent land on the grounds that it may interfere with their enjoyment of their property. Because of the particular formulation of the right, the burden of proving that the development activity (the exercise of the pro-development right) will adversely affect the right to be free from unreasonable interference thus falls on the non-developer. Were information about the environmental impacts of the proposed development readily and inexpensively available, the burden would not be onerous. But in a world in which such information is either expensive to obtain or simply unavailable in the short term, the burden can seldom be discharged; hence, inappropriate and environmentally harmful development proceeds virtually unchecked by any legal requirement that it respect the "rights" of others.

The Doctrine of Waste The law of waste is designed to protect future interests in land. As such, it offers the promise of an environmental protection mechanism to restrain present activity that may adversely affect the future integrity of land. The reality, however, falls far short of the promise. First, the doctrine is limited to those few situations in which present and future interests are held by different persons. The vast majority of landowners, however, are unaffected by the doctrine of waste. Legal rights to land, like the land itself, exist in perpetuity. Thus, ownership in "fee simple absolute," which is characteristic of most landownership, describes a bundle of legal rights to the use and enjoyment of a parcel of land that is infinite in time. The owner in fee simple absolute is regarded in law as the absolute owner, subject only to certain paramount rights held by the Crown. This is not to say that others will not acquire a future interest in the land, only that whatever rights others may subsequently acquire are held, at present, by the fee simple owner. Seen in these terms, there is no logical reason to impose restrictions on the present owner's use of the resource. The present owner owns the future uses that may be adversely affected by present uses. Who is better than the present owner to determine the appropriate degree of protection required, if any, for such future rights? Because "absolute ownership" is held by the present owner, there are no legally recognized future interests that require protection.

The doctrine of waste, therefore, was confined to those legal arrangements in which vested future interests were held by someone other than the present occupant.[60] Under the doctrine, the present possessor was forbidden to engage in any activity on the land that would diminish the market value of the future interest. Thus, everything from cutting timber and extracting precious metals to failing to maintain the property in a good state of repair were actionable by the future interest holder. Although the pre-19th-century version of the doctrine exhibited a strong bias in favour of land protection, particularly for the future benefit of vested interest holders, the economic demands of the 1850s loosened property from the grip of such a restrictive doctrine and spelled the demise of waste as a pro-environment tool. With the exception of equitable waste (malicious damage), waste had virtually disappeared as a potential cause of action by the beginning of the 20th century. The principle that the present occupants were free to use the land as they wished prevailed. Waste was either excluded by agreement (as in the case of a term of a will or inter vivos transfer) or narrowly interpreted by the courts.[61]

Whether the doctrine of waste ever did provide or could now provide the degree of protection required to meet today's environmental problems is, of course, problematic. What it did offer was a different perspective on land use, one that was forward looking rather than preoccupied with maximizing present uses. Waste offered a classic illustration of the extent to which future generations and future needs could impose duties on present occupants. But as a doctrine, it was limited to those circumstances in which future use was severed from present ownership. Most land was held in fee simple and, in such circumstances, the law collapsed future uses into the present owner's bundle of rights. Since the failure of society and the court to protect the long-term needs of our environment can place no legal obligation on its present users, the common law has little to offer our grandchildren and their children.

Individual Rights and Community Rights

The common law's preoccupation with individual rights is rationalized under the guise of "maximizing community welfare." Although this may, at first examination, appear to be a contradiction of my earlier point on the law's focus on individual user rights, a close examination of common law rules suggests the contrary.

The conflict between development and environmental protection may be addressed in one of two ways. A clash of rights may be resolved solely on the basis of the claims of the parties; alternatively, the problem may be examined and resolved in a way that serves the broader community interests.[62] Legal rules appropriate for resolving the first set of problems tend to be non-instrumental in the sense that they do not serve goals or ends external to the legal rules themselves. In other words, the legal

rules may express an assumed principle of justice that is accepted without explicit reference to the achievement of an external goal. Examples of such rules might include a right to a minimal level of environmental quality,[63] the right to injunctive relief from any interference with one's property (environment) irrespective of costs, or a rule of reciprocity. Legal rules appropriate to the second mode of resolving disputes serve some broader community goal such as economic efficiency, community welfare maximization or income redistribution.[64]

The doctrines of nuisance and riparian rights clearly fall within the second category in the sense that they both purport to maximize community welfare and economic efficiency through the application of the rough cost/benefit measure of reasonableness and utility. Nuisance is an unreasonable interference with the use and enjoyment of another's property.[65] And, while the definition of riparian rights is generally regarded as strict — any alteration in the quantity or quality of the flow of water is actionable[66] — judicial preoccupation with lower-stream uses and their reasonableness and discretion to award a successful plaintiff damages in lieu of an injunction provide a large dose of reasonableness with regard to both liability and the remedy.[67] Reasonableness, as the concept has been judicially applied in both nuisance and riparian rights actions, means "those activities (risks) that yield a net social utility (benefit)."

Although the "reasonableness principle" offers the seemingly irresistible promise of efficiency and wealth maximization, the approach is fundamentally flawed, providing little more than an intuitively persuasive rationale to pursue highly risky and environmentally dangerous activities. First, although it purports to assess net community benefits and costs, the assessment is slanted heavily in favour of the defendant. If the plaintiff complains of "personal sensible discomfort" — the typical environmental complaint — the court weighs the "surrounding circumstances" in determining whether the relief sought is appropriate.[68] In this way, for example, a defendant's early arrival in an industrial neighbourhood argues strongly in favour of the reasonableness and hence acceptability of a very dirty and environmentally damaging activity. Also relevant for purposes of determining an appropriate remedy are such factors as the severity of the harm to the plaintiff,[69] the defendant's capacity to create jobs, the relative economic position of the defendant in the community, and the relative position of this defendant's activity vis-à-vis other similarly situated defendants.[70]

Conspicuously absent from this judicial cost-benefit analysis, although it is not analytically necessary, is a corresponding investigation into the community-wide and environmental impact of the degradation. Thus, courts are quick to overlook the fact that the whole community may be suffering from the health hazards posed by the defendant, and that large parts of the environment, unrepresented by any plaintiff, may

be suffering at the hands of the defendant.[71] In other words, the wealth maximization calculus performed by the courts is limited by the present political and social value system to a particular set of concerns that bias the calculations in favour of the defendant's interest in growth and development. In fact, judicial endorsement of the reasonableness principle obscures the fact that other, potentially more appropriate principles regarding the environment could be used to establish standards of appropriate behaviour. Let me suggest two such principles that deserve serious consideration.

The first principle postulates that the environment[72] has a right to a minimal level of environmental quality, with the level partly determined by referring to an objective public health standard,[73] and partly by some measure of environmental integrity.[74] With such a rule, any interference, whether reasonable or not,[75] with the person's health or the environment's long-term integrity would be actionable and remedied by an injunction to enjoin the offending activity. In addition to responding to a perceived need for more environmental protection, such a principle might also be supported as a modest attempt to redistribute income in favour of those supportive of environmental protection, even though some parts of this group may have more wealth than the average Canadian.[76]

The second principle, developed by Fletcher in his article "Fairness and Utility in Tort Theory," looks to reciprocity as the basis for resolving individual disputes. Fletcher explains the principle in the following terms:

> Whether the victim is entitled [to recover] depends exclusively on the nature of the victim's activity when he was injured and the risk created by the defendant. The social costs and utility of the risk are irrelevant, as is the impact of the judgment on socially desireable forms of behaviour. . . .
>
> The general principle . . . is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from non-reciprocal risks. Cases of liability are those in which the defendant generates a disproportionate, excessive risk of harm, relative to the victim's risk creating activity. . . . Conversely, cases of non-liability are those of reciprocal risks, namely, those which the victim and the defendant subject each other to roughly the same degree of risk.[77]

Like the right to a minimal degree of environmental protection, the reciprocity principle expresses a strong bias in favour of environmental protection, for it is generally the defendant who initiates environmentally damaging activities and thus most often creates the non-reciprocal risk and liability. Unlike the previous principle, reciprocity does not look beyond the parties for the relevant liability rules. Liability is determined by the non-reciprocal nature of the defendant's actions, not by its potential impact on the environment.

Although both approaches are attractive from the standpoint of environmental protection, they raise a number of difficult questions. What is the content of the right? How far does it extend? Is it really any different than the principle that "unreasonable" interferences are actionable? How risky must an activity be before it is prohibited? In the end, these questions seem to invite the very cost-benefit calculus the principle was designed to avoid. Similarly, why is it fair or just to enjoin or compensate non-reciprocal risks and not reciprocal ones? Are not non-reciprocal risks simply unreasonable risks — risks in which the actions of the defendant pose an unreasonable threat to the interests of the plaintiff? There does not seem to be any obvious logic or rationale behind Fletcher's principle, other than the logic that comes from a limited cost-benefit analysis.[78]

Giving content to the right to a certain level of environmental quality is particularly difficult. There is little disagreement that exposing persons to a deadly poison offends such a right, however the right is defined and no matter how much the cost of enforcing the right. But there will be less agreement over when the action in question "merely" poses some slight risk that increases only after long and persistent exposure to the potentially harmful activity. Again, like an examination of reciprocal risks, the analysis of the environmental right principle begins to creep uncomfortably close to the cost-benefit analysis and the "reasonableness" principle that it was meant to avoid.

Only Legally Recognized "Persons" Have Rights

It is trite to note that only persons have legal rights, be they natural persons, corporations or municipalities. Indeed, society is so steeped in the view that law serves and facilitates human domination of nature that proposals to confer legal rights on inanimate objects are regarded as silly. Yet Christopher Stone's article, "Towards Legal Rights for Natural Objects: Should Trees Have Standing?" has sparked much discussion on the issue of extending rights to the natural environment, although it has generated few concrete actions.[79] Stone's plea to protect the environment per se emphasizes the extent to which environmental protection laws are at best utilitarian and instrumentally rational, and at worst environmentally exploitive.

> But the time is already upon us when we may have to consider subordinating some human claims to those of the environment per se. Consider, for example, the disputes over protecting wilderness areas from development that would make them accessible to greater numbers of people. I myself feel disingenuous rationalizing the environmental protectionist's position in terms of a utilitarian calculus, even one that takes future generations into account, and plays fast and loose with its definition of "good." Those who favour development have the stronger argument — they at least hold the protectionist to a standstill — from the point of advancing the greatest good

> of the greatest number of people. And the same is true regarding arguments to preserve useless species of animals. . . . One *can* say that we never know what is going to prove useful at some future time. In order to protect ourselves, therefore, we ought to be conservative now in our treatment of nature. I agree. But when conservationists argue this way to the exclusion of other arguments, or find themselves speaking in terms of "recreational interests" so continuously as to play up to, and reinforce, homocentrist perspectives, there is something sad about the spectacle. One feels that the arguments lack even their proponent's convictions. I expect they want to say something less egotistic and more emphatic but the prevailing and sanctioned modes of explanation in our society are not quite ready for it.[80]

In spite of an interesting dissent by Mr. Justice Douglas of the United States Supreme Court,[81] the judiciary is not yet ready to cast off the "yoke" of such an instrumentally rational discourse.[82] The most recent case to examine whether courts might intervene on behalf of the environment in the absence of identifiable human interests comes from Colorado. In response to an action that sought damages on behalf of mosquitoes killed by a city-spraying program, Judge J.E. DeVilbiss ruled that the plaintiff lacked standing and that his arguments on behalf of the "flora and fauna . . . and all things great and small" were "essentially cosmic."[83]

Perhaps we can expect little more from the courts than a utilitarian, homocentric, want-oriented perspective. The courts are not likely to intervene on behalf of the environment or environmental protection values, unless they serve a well-recognized and hence legally acceptable interest. Some day the integrity of the environment may qualify as such, but that day will not dawn until existing attitudes and values change.

Common Law Defences and Remedies

Until now, I have focussed on the substantive law and certain problems of process in pursuing it. Two other points deserve brief mention before concluding this section. Environmental litigation is only successful if: first, defences raised by the defendant are unsuccessful; and, second, the remedy sought by the plaintiff is granted. In both areas, however, the courts are increasingly unsympathetic to the needs of the plaintiff. Defences seem to be growing in effectiveness, if not in number. Remedies, on the other hand, are confined more and more to a grant of monetary damages.

Two defences are of particular concern to the modern environmentalist: statutory authorization and due diligence. Although each has a unique history and its own operative principle, the two have much in common. Both owe their modern existence to environmental protection statutes, and both seem to be little more than modern variations of the reasonableness test, thus carrying with them all the anti-environmental biases described previously.

The defence of statutory authorization flows "naturally" from the principle of parliamentary supremacy. It posits that those whose activities are closely circumscribed by statute should not be liable civilly for the inevitable consequences of those activities, provided the operator was not negligent.[84] This, of course, describes a good deal of pollution today. The problem is regulated by the appropriate provincial or federal authorities pursuant to statute, with the regulation normally leading to a series of mandated actions, each of which is specifically set out in an approval, permit or order.[85] Even strict compliance with the regulatory order will create a certain degree of pollution.[86] The pollution is therefore "inevitable" and according to the theory and the defence, the polluter is not responsible for the damage caused.[87]

Due diligence is supported by a similar rationale, although the defence is somewhat more problematic. The due diligence defence is now well recognized and accepted in criminal law. It applies to so-called public welfare offences, such as pollution, that are defined by administrative or regulatory statutes. Thus, under most provincial statutes, it is an offence to pollute,[88] and under all statutes it is an offence to discharge pollutants into the environment in contravention of a regulation or an order. A charge under such a statute or regulation may be successfully met by the defence of due diligence, that is, proving that the act occurred as a consequence of a reasonable mistake or as an inevitable result of diligent and reasonable behaviour.[89] But the statutes do more than simply determine quasi-criminal guilt. The Supreme Court of Canada has recently held that a failure to comply with the statutory scheme for regulating water use in Ontario is per se unreasonable and hence actionable — civilly.[90] Applying the Supreme Court's logic to the normal civil nuisance or riparian rights action, it would seem that a defendant's compliance with the regulatory statute would be *prima facie* evidence of its diligence and reasonableness and thus a defence to the action. While the court has been reluctant to endorse the logic of this approach,[91] it is only a matter of time before the legislature will have further entrenched the concept of reasonableness in common law actions — this time by creating the defences outlined above.

A judicial finding that a common law right has been infringed will lead to either equitable relief (specific performance and/or an injunction), damages, or some combination and/or variation of the two.[92] Canadian judges, however, are most reluctant to grant injunctive relief. With rare exception, it is regarded as too blunt, too draconian or simply inappropriate in a growth-oriented society. Judges are unable to effect the "delicate balance" of interests with injunctive relief. Damages, on the other hand, respect the defendant's right to act in its own best economic interest, while financially compensating the plaintiff for the loss suffered. It offers to a politically sensitive judiciary the best of both worlds: the promise of restoring the plaintiff to preinterference status and the

prospect that the defendant will pay the real costs of its activity.

But again the advantages are more superficial than real. The loss imposed on the plaintiff(s) is likely only a small fraction of total environmental loss occasioned by the activity. The loss to the community and the loss to the environment go uncompensated and unredressed. Indeed, judicial preoccupation with the economic consequences to the defendant and those dependent on it have blinded the courts to the many environmental interests for whom the plaintiff speaks — if only indirectly. The result is that plaintiff's rights are "expropriated with compensation."[93] Those who ask for more are accused of "standing on their extreme rights."[94] For the polluter, the damage award is simply regarded as a relatively small "cost of doing business." In the end, the environment and those who value it lose. Because environmental rights are not easily reducible to a monetary measure, they may be safely ignored.[95]

Not only does the common law lack a set of operative principles that might begin to redress environmental degradation, but the process is fundamentally flawed. It is primarily reactive. It is normally invoked after the injury has been sustained, thereby institutionalizing inefficiency. In theory and in practice it costs no more to ascertain the environmental appropriateness of an activity beforehand. The judicial process, however, generally demands an aggrieved party before it will intervene, not a concerned party. Furthermore, the judicial focus is on the human perception of environmental injury.[96] It offers no principles or mechanisms to address environmental degradation which is unrelated to interference with proprietary interests that are legally recognized and individually held. Thus, northern rivers may be despoiled; but without a litigious downstream riparian owner, well able to finance an extravagant and potentially costly lawsuit, the common law and the courts are powerless to intervene. Legally recognized interests are narrowly circumscribed to those uses presently enjoyed by a particular owner/occupant. Class actions are highly problematic.[97] Clearly then, actions on behalf of future generations and/or inanimate objects are beyond judicial contemplation.[98] The common law and judicial process thus testify to the extent to which the law and the courts embrace development to the detriment of the environment.

The Legislation

While the preceding section demonstrates the ways in which the judicial process and the common law are ill suited to serve environmental concerns, an examination of environmental protection statutes provides a different, but equally illuminating perspective. In many ways the legislative initiatives in the field are the point at which economic, political and legal processes meet. It is through the environmental protection statutes that the judicial and administrative processes are called upon to

assist in formulating policy and, once it is fully developed, enforce it. The scope, complexity, and diversity of environmental protection legislation precludes detailed analysis. Nevertheless, it is again possible to capture the essence of the approach through a rather broad overview of the topic.

Environmental protection legislation in Canada may be categorized and described (see Table 2-1). In general terms, this matrix also describes the sequence in which provincial legislatures and Parliament responded to pollution problems. The first legislative attempts to tackle environmental degradation began as acts to deal with very specific problems, such as water pollution or air contaminants.[99] As the interrelationship between residuals was better understood,[100] legislatures began to enact comprehensive environmental protection statutes.[101] Some of these acts attempted to set out appropriate performance standards for polluting activities. Most, however, left regulations and guidelines to be developed incrementally, on an industry-by-industry or case-by-case basis, as information and experience were acquired by the regulators. As mega-projects grew in number and the potential for large-scale environmental impact increased, interest developed in a comprehensive, anticipatory approach to problem solving. This ultimately led to assessing the environmental impact through a legislative or departmental process designed to anticipate, examine and solve environmental problems before they arose. Monitoring was subsequently added to the assessment process to provide the feedback needed to evaluate actual performance and adjust regulation.

As these processes were evolving, environmental planning was gaining support and respectability. Assessing individual projects to determine environmental impact was difficult, but evaluating them in a policy vacuum without any criteria for determining whether a project was good or bad was almost impossible.[102] Planning, therefore, was a logical and necessary addition to the assessment, although not all jurisdictions have adopted comprehensive resource-planning processes. Environmental impact assessment, which could either stand alone or be integrated into other processes such as land-use planning, offered the prospect of a pre-evaluation of all factors that may adversely affect the environment, including, for example, site, process, and abandonment of the activity. Indeed, when combined with a detailed assessment of impact and residual control, environmental planning provides a degree of public input in the decision-making process that not only can address a very broad range of public concerns, but also challenges the accepted basis upon which government and private developers make decisions.

It is not possible to detail these developments through a discussion of all environmental legislation in Canada.[103] Nevertheless, the general description of the trends offered here, when combined with the K.V.P. story, which will be discussed shortly, provide a good insight into the nature of pollution control and environmental planning in Canada.

TABLE 2-1 Examples of Provincial and Federal Environmental Protection, Planning and Assessment Statutes

	Pollutant or Problem Specific	Provincial (Ontario)[a]	Federal
Residual Control Legislation Reactive, regulatory and on a residual-by-residual basis	Water	*Ontario Water Resources Act*, R.S.O. 1980, c. 361; *Lakes and Rivers Improvement Act*, R.S.O. 1980, c. 229	*Fisheries Act*, R.S.C. 1970, c.F. 14 as amended; *Ocean Dumping Control Act* S.C. 1974-75-76, c. 55
	Air	*Air Pollution Control Act*, R.S.O. 1970, c. 16 (repealed)	*Clean Air Act*, S.C. 1970–71–72, c. 47
	Land	*Waste Management Act*, R.S.O. 1970, c. 491 (repealed)	No federal legislation directly on this point
	Pesticides	*Pesticides Act*, R.S.O. 1980, c. 376	*Pest Control Products Act*, R.S.C. 1970, c. P-10
Comprehensive Residuals Control Legislation As above, although on a comprehensive basis; legislation attemps to anticipate problems before they arise		*Environmental Protection Act*, R.S.O. 1980, c. 141	*Environmental Contaminants Act*, S.C. 1974–75 c. 72. *Canada Water Act*, 1970 (1st Supp.) c. C-5
Planning and Assessment Anticipatory and pro-active, designed to anticipate future problems and take the appropriate preventive actions		*Niagara Escarpment Protection Act* R.S.O. 1980, c. 297; Planning Act S.O. 1983, c. 1[a]; *Environmental Assessment Act*, R.S.O. 1980, c. 141	E.A.R.P. Environmental Assessment and Review Process (established by Cabinet directive 1973, modified 1977 and 1984); S.E.P.A., Social Economic Impact Analysis Process (1977)

a. Ontario is used as the legislative model. All provinces follow more or less the same approach.

Residual Control Legislation

Specific residual control legislation in Canada is well illustrated by virtually any of the statutes noted in the preceding table. Rather than describe a representative statute in detail, this section will outline and evaluate the general approach adopted.[104] First, the legislation recognizes that harmful residuals may be produced by either existing or future activity. Existing pollution problems, however, are less easily regulated than potential ones, regardless of the history of the problems.[105] Existing pollution is normally supported by a major capital investment in the polluting process, one that is not easily written off should a solution require a radically different approach.[106] Other expectation interests associated with the activity will have to be considered by regulators, although none may be as strong as those that lie behind the financial investments in the process.[107] Regulating proposed plants is not constrained by such direct reliance interests, and is therefore easier and potentially more effective.[108] Thus, legislation normally requires approval by the regulatory department before a person undertakes a potentially polluting activity, whether it is an expansion of an existing activity or an entirely new activity. This process normally entails: (a) advising the regulatory department of the proposed activity; (b) submitting detailed plans of the proposal; and (c) providing detailed specifications for any pollution control and abatement equipment. After a departmental review of the proposal, which is normally facilitated by information provided by the proponent, the plans and specifications are either approved as submitted or approved subject to agreed-upon modification. The department generally lacks the power to disapprove a proposal, although it can delay one until it meets, or will likely meet, departmental pollution-control objectives or standards. The legislation envisages compliance through periodic departmental supervision of the installations and operation of the abatement equipment, supplemented by the "threat" or actuality of a prosecution for failure to meet the terms of the abatement.

Existing problems are regulated in much the same way, subject to the important caveat that there is a strong presumption in favour of respecting the status quo. The presumption is quickly overcome if pollution from the activity poses an immediate danger to health or property.[109] Where the problem is not life or property threatening, control normally comes incrementally, with each new control preceded by protracted negotiations (bargaining) between the department and polluter. Thus, by way of summarizing the regulatory process for existing problems, the approach is as follows: (a) identification of the problem — either voluntarily by the polluter, or involuntarily through research and investigation by the regulatory department; (b) a proposed course of action for correcting or mitigating the problem;[110] (c) departmental/industry "agree-

ment" on the appropriate course of action; (d) translation of the agreed-upon action into an enforceable order or licence; and (e) compliance with the order.

Although this describes the majority of residual control legislation, some especially troublesome and potentially persistent problems demand even greater departmental supervision. Pesticides legislation requires, for example, detailed approval prior to their importation, manufacture and use, as well as a complex array of requirements for record-keeping, storage, selling, display and transportation.[111] In other words, there is an obvious correlation between the danger of a product or residual and the degree of regulation and control provided by the legislation, with most of the control provisions designed to avoid potential problems rather than rectifying existing ones.

Specific water or air pollution legislation offers the attraction of a relatively simplistic view of pollution, but it ignores the interrelationship among residuals. Air emission standards may be met by capturing contaminants before they move into the air, but such abatement strategies may do little more than raise the problem under a new label —solid waste disposal or water pollution. It makes little sense to manage one problem by converting it into another, unless of course the public is more sensitive to the first than the second. Nor does it make sense to duplicate regulatory and management structures under separate titles for pollution. Although a comprehensive and integrated approach to pollution control may breed bureaucratic inefficiency, the problem is more than offset by other efficiencies and the promise of better recognizing the trade-offs that pollution control demands.

Comprehensive residual control legislation in Canada offers a regulatory approach that is very similar to specific residual control. The same distinction is made between existing and potential powers problems. The same "negotiated agreement" is used either to avoid new problems or to abate old ones. And the same supervisory and prosecutorial powers are used to ensure compliance. The distinguishing feature here is that controls will invariably reflect trade-offs between problems and residuals. In attempting to regulate pollution from an existing plant, the controls may address air pollution, water pollution, noise pollution and solid waste disposal. Not all problems can or even should be rectified immediately. Evaluating the relative dangers of each pollutant and assigning a priority to the controls, therefore, are integral parts of the regulatory process.

As the foregoing suggests, the potential for effective control and environmental management is great. The regulators have the option of requiring that polluters and potential polluters adopt state-of-the-art[112] abatement technology, state-of-the-industry technology[113] or focus on the pollution-generating process. Process changes promise better control, although such changes may be very expensive and thus difficult to

implement, especially for established firms.[114] A regulatory approach that concentrates on the polluter ignores the extent to which abatement may be realized by changing consumer preferences.[115] Encouraging lifestyle changes may have a dramatic effect on industrial activity and hence on pollution.

An examination of pollution control practice shows the extent to which the potential and the reality part company. The deficiencies of the present legislative approach in Canada have been well documented by others, and require little more than brief comment here.[116] Although the comment is brief, the problems are legion. First, the legislation lacks a clear view of the problem and hence of the solution. Much of the specific residuals legislation was passed in response to a mentality provoked by the pollution crisis.[117] Under this approach some aspects of pollution were recognized as a problem and either regulatory legislation was enacted in response or, more likely, controls were imposed under existing legislation.[118] Other legislation was enacted to control pollution and facilitate growth.[119] This legislation normally includes heavy subsidies to enable existing and potential polluters to cope with their problem. These were paid either as direct grants[120] to a company or municipality, or by means of indirect subsidies through preferential tax treatment.[121] Although legislative ambivalence may offer much needed flexibility in determining the most appropriate approach, it has enabled polluters to expose the lack of clear intent and play one scheme off against the other. Thus, controls are resisted until subsidies are forthcoming. Effluent fees are opposed by environmentalists as a "licence to pollute" and by industry as "too expensive." In the end, heavy departmental reliance is placed on regulation, but regulation whose effectiveness depends in large part on the public paying for compliance through grants and tax advantages.

Strict regulation means developing close contacts between regulators and regulated. When the legislative requirement for close consultation between the department and industry is combined with broad departmental discretion to define the problem and determine an appropriate solution, the result is negotiated pollution control. Although negotiated controls are not necessarily wrong or ineffective,[122] present practices leave much to be desired. Concerned members of the public are systematically excluded from the process.[123] Without support from a concerned and determined pro-environment group, the department is at a distinct disadvantage. It can never really know as much about the problem as industry and thus is heavily dependent upon the regulated for an acceptable result.[124] And finally, when the issue of jobs and environmental protection clash in the public forum,[125] the dispute is usually resolved politically in favour of jobs. Lacking both public and political support, the department is put at a distinct disadvantage in the negotiat-

ing process. The result is delays, extensions, subsidies or just plain inaction.[126]

The residual control legislation is, of necessity, primarily reactive. It seeks to remedy a problem rather than prevent it. Its focus is on abatement instead of prevention (although abatement often includes process changes), with the result that the initiative lies with the potential polluter. The latter determines the site, the process, the abatement technology, and the operation. Thus, the department has a good deal of input on appropriate abatement and process technology, but virtually none with regard to siting. And if the proponent can establish that its proposal will meet regulatory objectives and standards, the department is powerless to do anything, even though significant additional reductions in pollution may be achieved with minimal extra expenditure. In those areas in which the department lacks clear objectives or enforceable standards, its regulatory powers are further circumscribed. It can negotiate for a satisfactory level of pollution but, as noted above, it negotiates from a serious disadvantage.

Finally, residual control legislation focusses on only one facet of the problem — physical pollution from residuals. Other equally significant problems are not addressed. The legislation takes no cognizance of the social and economic impact of proposals, although their effect on the environment may be dramatic and devastating, particularly when major developments are concerned. In other words, the legislation defines environment and environmental impact narrowly, thereby limiting regulation to a narrow range of problems. Broader concerns over lifestyle and quality of life are thus systematically excluded from the regulatory process.

Planning and Assessment Legislation

With the growing realization that environmental problems were both more extensive and complex than the "mere" physical impact of residuals, governments have moved to address environmental degradation through environmental assessment and resource development planning. Again, this in not the place for a detailed description of legislative and policy initiatives in these fields.[127] What is needed, however, is a description of the general approach and an evaluation of the efforts to date.

Whether environmental assessment is pursuant to statute or administrative policy, it follows a predictable pattern in Canada. First, a mechanism is included to predetermine what proposed activities are to be assessed. Criteria may be set out in the legislation;[128] they may be established by guideline[129] or regulation;[130] or they may include both, with the guidelines and regulations providing the detail that general statutory criteria lack. In addition to such criteria, the process normally

includes an exempting process that enables governments to exempt proposals that would normally qualify for assessment.[131] Proposals scheduled for assessment normally undergo some type of prescreening to determine whether a full assessment is appropriate.[132] Sometimes the prescreening is conducted by the proponent, sometimes it is conducted by the responsible government department, but normally it is done by a combination of the two.[133]

All schemes require that the proponent prepare the environmental assessment (EA) or environmental impact assessment (EIA), with the assessment covering a remarkably broad range of issues.[134] The Ontario *Environmental Assessment Act* requires, for example, that:

> 5. — (3) An environmental assessment submitted to the Minister pursuant to subsection 1 shall consist of,
> (a) a description of the purpose of the undertaking;
> (b) a description of and a statement of the rationale for,
> (i) the undertaking,
> (ii) the alternative methods of carrying out the undertaking, and
> (iii) the alternatives to the undertaking;
> (c) a description of,
> (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
> (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
> (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment, by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and
> (d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking.

When the requirements of the environment assessment are read in conjunction with the definition of environment,[135] the assessment is remarkably broad. As a minimum, it includes the potential impact on the physical environment (natural and built), the economic environment (jobs), and the social environment (culture and lifestyle).

Following the submission of an assessment, the government conducts a review[136] for purposes of determining the acceptability of the document. Problems with the assessment are flagged through formal statements outlining deficiencies or informal discussion with the proponent. Once the assessment is complete, an evaluation of potential environmental impact is made by government. If the potential for adverse impact is high, the proposal will usually receive a full public review. If not, it will normally be permitted to proceed, subject to certain mitigating terms and conditions. Few proposals[137] ever reach the public hearing

stage, but those that do are scrupulously examined under the rigours of the adversarial or quasi-adversarial process.[138] Finally, the process concludes when the hearing body sends a recommendation (or decision) to a responsible official[139] on whether the proposal should proceed and, if so, on what terms and conditions. Such recommendations are generally accepted and implemented through the normal government regulatory process.

Although the process offers the promise of a systematic, comprehensive public review of all the factors making up a decision that may have adverse environmental consequences, there are some severe problems with it. At the most specific level, the criticism has been well documented. There is ambivalence about the scope of the process. Some processes apply to private sector activities, others do not.[140] Similarly, within the public sector, some departmental activities are subject to assessment, others are not. The prescreening of potential projects thus lacks both rigour and consistency. Major projects that clearly demand assessment are often exempted even though the exemptions appear not to fall within statutory guidelines.[141]

Once it is determined that the process applies, it is often racked by delay, duplication and overlap.[142] There is seldom a clear sense of the way in which environmental assessment fits with other regulatory processes. Without coordination the assessment simply becomes another regulatory hurdle for proponents to overcome. Furthermore, the public hearings are often poorly designed. In spite of recent efforts to encourage public participation, particularly from directly affected communities, "public" participation is sporadic and often ineffectual.[143] Confrontation at the hearing and the adversarial nature of the process continue to shape the overall process into a "win or lose game." Again, modifications designed to reduce conflict and emphasize the advantages of cooperation and agreement have met with limited success.[144] And finally, once recommendations or decisions are made, there is no follow-up or systematic monitoring. The lessons of one project are seldom used to improve assessment of subsequent projects. But these problems are dwarfed by more fundamental concerns that lie behind the process.

In spite of the political enthusiasm for environmental assessment, politicians are not really committed to it. Fearful that a strong process will change, if not undermine, established modes of private and public decision making, many aspects of the process are designed to ensure relative ineffectiveness.[145] First, the process imposes few firm obligations on anyone. At every turn, discretion ensures that the politicians (through the exempting procedures), the bureaucrats (through the prescreening mechanisms) and the proponents (through self-assessment) may effectively circumvent the objectives of environmental assessment. But heavy doses of discretion may simply be symptomatic of a far larger problem: the process simply cannot work as designed at present. First, it

is probably trying to do too much. Assessing the impact on the physical environment is one thing, but to combine it with the social and economic impact is to confer enormous powers on what was originally intended as a regulatory process.[146] It is not surprising, then, that much of the history of the process has been to ensure that it has never reached its full potential. If environmental assessment were to function according to the intentions of some advocates, it would effectively change the whole basis upon which public and private sector decision making is carried out. Furthermore, the process lacks the necessary tools to make the decisions expected of it. Most major projects will have an adverse environmental impact. But how adverse is too adverse? By what criteria is a proposed site to be evaluated? What trade-offs are to be made between the development and security of oil supply, on the one hand, and the northern environment and native lifestyle on the other? By forcing the environmental assessment process to address and decide these questions, it requires the process to undertake a planning function that it is not well designed to carry out. The problem is that such assessment is being conducted in either a planning vacuum or a milieu of inconsistent plans. It is bound to flounder.

The realization that assessment cannot function in a policy or planning vacuum, together with a general desire to try to avoid environmental problems before they arise, has recently prompted a variety of proposals for planning resource use. For example, the federal government, through the Department of Indian Affairs and Northern Development has recently negotiated an agreement with the Government of the Northwest Territories that would see the establishment of a joint federal-territorial planning process.[147] Although the centralizing features of the proposal have been criticized, the very existence of the process stands as a recognition that economic development proposals cannot be examined in the abstract. They must be evaluated in the broader context of northern objectives, and those objectives must be formulated before the pressures for more development foreclose present options. Similarly, Ontario has recently formulated strategic Land Use Plans for both northeastern and northwestern Ontario.[148] Once approved, these plans will provide a policy context within which development decisions may be made. And again, although this process has been criticized for its lack of public participation, it tries to address in a systematic and rational way the relationship between the people of Northern Ontario and their natural environment, and their social and economic aspirations for the region.

Attempts to integrate planning and assessment have also taught decision makers that rational decision making may be an illusive goal. A rational process would plan and then assess proposed projects, and finally regulate development according to the terms and conditions imposed by the assessment or review process. But planning is not easily

conducted in the abstract. Often the stimulus for planning comes from a proposed project, thus requiring that plans be formulated in the context of an assessment. Or, to make the same point but from a more practical perspective: a planning process that lacks a specific context would seldom attract much public attention or participation. Thus, plans formulated in this way are virtually meaningless until publicized by a specific proposal that either challenges or confirms the plan. Suddenly those directly affected by the proposal become concerned about the plan (policy), find it not to their liking, and demand a reopening of the policy questions "settled" by the plan. Ultimately, rationality loses out to practicality. Plans that are formulated too soon lack public input and hence legitimacy: those formulated later in the process, i.e., in the context of specific proposals, are strongly criticized for being too narrow and reactive.

The problems of resource development planning and environmental assessment are not easily overcome. Nevertheless, a number of options are available to government. First, rather than assuming that a discreet "plan" can be developed, or "an assessment" conducted, government must begin thinking of an ongoing process. The solution to resource development problems is not an approved plan. Such plans are normally obsolete the day they are published. Nor will a one-time assessment solve the potential pollution problems from a proposed undertaking. Pollution, that is, a socially acceptable level of residuals, is an ongoing problem that demands continuous public and governmental input. Thus, rather than trying to produce a result — a plan or recommendation — or a decision, we should be trying to develop an ongoing process that facilitates continuous public input into planning, assessment and development. This in turn might lead to new ways in which the public might become partners in decision making, rather than recipients or adversaries.

Two ideas to facilitate public involvement in all facets of the process deserve government study. The first is to expand the role of environmental mediation as a way of recognizing the public interest in — rather than its support for or opposition to — resource development and pollution control.[149] Mediation does not cast participants into adversarial roles. Instead, it is designed to exploit the community of interest we all share in resource development and pollution control. The second idea is more radical. If public and private corporations are responsible for most activities affecting the environment, then one solution to ongoing public involvement in the decision-making process is to invite the public to participate in such decisions of the board of directors. Not only would such an approach facilitate public input, but it would help break down the us–them polarization that exists between developers and environmentalists.[150]

Whatever the solution, government has a special role to play. Not only is it responsible for the legislative and policy initiatives needed to give effect to these experiments, but it must provide many of the resources to make the idea work. It must, for example, fund public participation as well as the generation and analysis of information. In addition, government must take responsibility to integrate fully the planning, assessment and regulatory processes.[151] Overlap, duplication, confusion and delay have been the hallmark of many new governmental initiatives in this area. Nevertheless, with the appropriate government support, much can be done to overcome many of the problems of the present process.

The Law in Context: The K.V.P. Story

Nowhere is the relationship among pollution, the common law, and the environmental protection statutes better illustrated than in the K.V.P. case. Nor is there a better environmental example to demonstrate the almost complete ineffectiveness of the law, or illustrate the need for dramatic reform. The story comes from Ontario and primarily concerns water pollution. It offers, however, far more than a view of pollution control and the resource management of the pulp and paper industry in Northern Ontario. It provides a dramatic illustration of the typical Canadian governmental approach to industry and the environment over the last 25 years.

Early History, the Civil Action and Legislative Response

The story begins in 1905. That year the Abitibi Pulp and Paper Company established a pulp and paper mill at Espanola, Ontario, on the Spanish River. By 1930 the mill was closed. The river had been badly polluted by the mill, but the closure, followed by a series of floods during the 1930s and early 1940s that flushed much of the decaying wood fibre out of the river, permitted the river to recover. Fish returned and the area again became a haven for tourists, particularly recreational fishermen. Outfitters on the river below Espanola thrived and expanded, and the local economy began to rely on the dollars brought north by southern tourists.

In 1946 things changed again. That year the mill reopened with the assistance from the Ontario government, under the name Kalamazoo Vegetable Parchment Ltd. (or K.V.P.).[152] Notwithstanding the company's undertaking to government not to place or deposit in the river "refuse, sawdust, chemicals or matter of any other kind . . . which shall be or may be injurious to game and fish life . . . beyond that reasonably necessary for the operation of the Company," effluent from the plant was discharged into the Spanish River.[153] The water quality in the river quickly began to deteriorate. The fish stocks dwindled, the tourists stopped coming, and the outfitters saw their revenue fall dramat-

ically. In 1948 five outfitters, including Earl McKie, sued the K.V.P. Company. The outfitters alleged that the effluent and air emissions from the mill were a nuisance, and that the impaired water was an interference with their rights as riparian owners. In a strong decision, Chief Justice McRuer agreed with the plaintiffs and enjoined the defendant from further polluting the air and river, subject to a six-month delay to permit the defendant to modify its plant to comply with the court's order.

Although the facts of the case are not noteworthy, McRuer's analysis of the common law and its potential contribution to reducing environmental degradation illuminates both the strengths and weaknesses of the common law. For McRuer, there was no doubt that the plaintiff's common law rights had been interfered with and that an injunction was the appropriate remedy.

> The course of action that [the defendant] followed shows an indifference toward the rights of others which a Court should not hesitate to control by measures appropriate in the circumstances.
>
> An injunction will go restraining the defendant from depositing foreign substances or matter in the Spanish River which alters the the character or quality of water.[154]

McRuer also had strong words for those who argued that the court order would wreak economic havoc on the financial viability of a one-industry town, for those who questioned the ability of judges to make difficult decisions about the trade-off between environmental quality and economic development, and for those who may have questioned the effectiveness of such litigation. With regard to the injunction, McRuer argued:

> a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's right, by assessing damages in that behalf, leaving his neighbour with the nuisance. . . . [155]

For McRuer environmental/economic trade-offs had little relevance to such a case:

> some evidence was given . . . to show the importance of [the defendants] business in the community and that it was carried on in a proper manner. Neither of these elements is to be taken into consideration of this character, nor are the economic necessities of the defendant relevant to be considered.[156]

As to the effectiveness, an injunction, although suspended for six months, offered the plaintiffs dramatic and effective relief.

But McRuer's decision highlights some serious drawbacks of the judicial process, even when it is applied so forcefully on behalf of environmental protection. First, it is not clear what alternatives were available to the company. Although McRuer suggested one — disposing

of the effluent on a sandflat adjacent to the mill[157] — there was little evidence that such a practice would have done anything more than shift the problem from the river to the land and perhaps from there to the ground water.[158] The problem was with the process, and until that was solved, the pollution would simply move from one environment to another. Whether the K.V.P. Company could solve its process problems was also highly problematic. First, the technology in place dated from 1905, and could not be altered easily without heavy financial commitment.[159] Nor was it clear what alterations should have been made. In 1948 all pulp and paper mills in North America were a pollution problem. Process improvements would likely depend upon industry-wide research and innovation, not the actions of a particular mill or company.

The universality of the problem raised another troubling feature of the case. This case came to court as a result of the frustration and anger of McKie and his fellow outfitters. They were motivated by a sense of environmental outrage, but even more by their financial loss. Polluted rivers without a downstream owner like McKie, however, escaped judicial scrutiny and public attention. Thus, mills located in more remote areas were unconstrained by the environmental consequences of their pollution. In other words, whether environmental problems received judicial attention depended upon a number of factors: a downstream riparian owner, sufficient financial loss to justify the time and expense of an action, a clear causal link between the pollution and the defendant, and perhaps even a proprietary interest by the plaintiff in the fish.[160] If one or more of these elements were missing, the facts would simply not sustain a successful action. The result was that some mills faced legal action, while others escaped it completely, a rather unfair situation.

Perhaps the most serious drawback of the judicial process is its focus on the rights and obligations of the parties before the court. In this particular example, there is no question that the interests of both plaintiff and defendant came under close judicial scrutiny. But this came at a high cost, namely, the cost of not examining the implications of this case on other interests. As the company argued, its employees had a strong interest in the outcome of the case. So, too, did the town. Because Espanola is a one-company town, the plant's closure might have had a very adverse effect on local businesses.[161] However, the pollution of the Spanish river had consequences that went far beyond the interest of the plaintiffs. Most of the downstream riparian shore was publicly owned, and thus lacked an individual proprietor to come forward with evidence of injury.[162] Similarly, no one spoke for the fish. The right to fish is a public right and hence any interference with it is actionable only by the attorney general, unless an individual suffers some unique and special loss.[163] Nor can any individual plaintiff speak for the quality of the air, unless it has been fouled to the point of directly impairing public health, specifically the health of the plaintiff.

As this case illustrates, then, the courts' view of the issues is extraordinarily narrow. Both the rules of procedure and the substantive law limit the courts' consideration to certain specific interests of direct concern to the two parties before the court. Other interests such as the quality of life in the area, the health of the public, and the relative advantages and disadvantages of a tourist-based and/or a forestry-based economy are systematically excluded. Indeed as a systematic and comprehensive mechanism for pollution control, judicial action seems particularly inappropriate. It is reactive, potentially discriminatory, and examines a relatively narrow set of issues.[164]

Subsequent events brought these problems into sharp focus and persuaded the Ontario government that the courts could not properly address pollution problems. The first response was to legislate a broader judicial review of the issues. Recall that McRuer refused to take into account the impact of an injunction on the town because the public had an interest in and benefited by the carrying on of all trades, but to use McRuer's words, that is no "answer . . . to an action by persons [whose rights are] affected."[165] In 1949 the Ontario legislature tried to remedy this situation by amending the *Lakes and Rivers Improvement Act*. The newly enacted section 30 provided that the Court is empowered to:

> refuse to grant an injunction if it is found that having regard to all the circumstances and taking into consideration the importance of the operation of the mill to the locality in which it operates and the benefit and advantage, direct and consequential, which the operation of the mill confers on the locality and on the inhabitants of the locality, and weighing the same against the private injury, damage or interference complained of, it is on the whole proper or expedient not to grant the injunction. . . . [166]

Both the Ontario Court of Appeal and the Supreme Court of Canada refused to use the new section to modify McRuer's injunction. Writing for the Supreme Court of Canada, Mr. Justice Kerwin emphasized the principle that statutes are to be applied prospectively and refused to apply the amended section retrospectively to the K.V.P. case.[167] McRuer's order was confirmed; the injunction was to take effect after a six-month period to give the company time to eliminate the pollution.

Faced with the prospect of a loss of jobs at the Espanola mill, and encouraged by strong representation from the company and other economic interests in town, the Ontario legislature now acted quickly. In March 1950, Premier Leslie Frost introduced a bill to the legislature that would have the effect of dissolving the injunction, limiting the plaintiffs' remedy to damages, and permitting the K.V.P. Company to pollute the Spanish River with virtual impunity.[168] The only obligation imposed on the company under the *K.V.P. Co. Ltd. Act* was to compensate for nuisance, in effect legalizing the "expropriation" of common law rights.[169] The government justified this extraordinary legislation with

the observation that water pollution could not be solved with injunctions that "could be very injurious to the public interest," and the promise that research into water pollution throughout the province would be a government priority. As for the plaintiff's rights, they were to be respected "within the limit and bounds of reason."[170] The act received royal assent on March 30, 1950. Subsequent events added some impetus to the government's determination to study the problem. In 1954 and 1955, the Ontario High Court enjoined the municipalities of Richmond Hill and Woodstock from polluting the water and land of downstream riparian owners.[171] In both cases, the pollution was a result of municipal efforts to treat municipal sewage in lagoons, lagoons that subsequently turned out to be defective or inadequate because they permitted the escape of effluent onto nearby property. And, like *McKie v. K.V.P.* the litigation provoked legislative intervention to "remedy" the "problem."[172]

Realizing that water was an important ingredient in the economic development of Ontario, the Conservative government enacted in 1954 the *Ontario Water Resources Commission Act (OWRC Act).*[173] Although the act underwent many subsequent changes, which need not be documented here, it provided a rationale and an approach to pollution that continues to be reflected in the Ontario *Environmental Protection Act* (1971) and most comprehensive provincial environmental protection statutes. Milner correctly described the *OWRC Act* in 1960 when he wrote:

> The Ontario Water Resources Commission Act, 1956, a short act with twenty section, is similar to The Power Commission Act which when first passes in 1907, had 25 sections: In half a century the later has grown to 120 sections and the state-operated supply of hydro-electric power has acquired an excellent reputation. It is too soon to say whether the Water Resources Commission will expand on the same scale, but the potential of development is present, and the Commission could engage on a large project, such as the piping of water from Lake Huron throughout the whole of south-central and western Ontario. Not only may the Commission thus play a major part in developing municipalities, but, unless some system of planning co-ordination is worked out, the Water Commission may become, along with the Power commission and the Department of Highways of Ontario, one of the major planning bodies in the province. Industry, then people, will go where water is made available and the decision to make water available may not always be made by the municipality. From one point of view, the new commission's powers represent a major step toward effective regional planning. From another point of view the powers represent a serious inroad on local government.[174]

Pollution in Ontario and indeed throughout Canada is only viewed as a problem, it seems, if it stands in the way of economic development. In the same way that Ontario Hydro was designed to fire the engines of

economic development, the OWRC was established as another utility to provide the water and water treatment needed to accommodate the need of a growing industrial and municipal sector. The purpose of the act and the commission was not to prohibit pollution, merely to bring it to within tolerable or acceptable levels so that it would not stand in the way of industrial development. As a provincial utility the OWRC would standardize[175] and subsidize[176] water treatment and sewage control to facilitate growth.

Seen in the context, it is not surprising that pollution control statutes neglected to address pollution. They were not intended to. They were designed to bring pollution to within tolerable limits to facilitate development. But increased development only accelerated pollution, bringing with it new problems of quantity, toxicity and persistency. In spite of these problems, legislative change was slow.

Pollution Control Legislation

In 1967, the Ontario legislature passed the *Air Pollution Control Act*[177] and three years later, it passed the *Waste Management Act*.[178] In 1971 both were consolidated in a comprehensive *Environmental Protection Act* (EPA).[179] Water, because of its unique history, continued to be regulated under its own statute, the *Ontario Water Resources Act* (OWRA).[180] The EPA and OWRA provided all the features of a comprehensive yet highly individualized control scheme: a department of the environment subsequently renamed the Ministry of Environment (MOE) with research, investigation and control branches; an Environmental Hearing Board, subsequently renamed the Environmental Assessment Board,[181] with the authority to conduct hearings on waste disposal matters and report to the director of the Environmental Approvals Branch; an appeal board (the Environmental Appeals Board); and a sophisticated array of regulatory devices ranging from control order and certificates of approval to stop orders. In 1972, the Ontario Water Resources Commission was disbanded and its functions were assumed by the Minister of Environment. Hearings formerly conducted by the OWRC were now conducted by the Environmental Assessment Board.

Pollution control in Ontario under the *Environmental Protection Act* was typical of provincially inspired pollution control in Canada — it offered much potential but few concrete results. The potential lay in the particular regulatory approach adopted, that is, highly individualized regulation of all existing and potential polluters. Existing polluters were required to report the level and type of pollution. Once the ministry was apprised of the problem, it would either approve a polluter-initiated program of abatement (a program approval), or issue a control order. In either case, a specific abatement program would be set out, and the polluter would be required to comply with the program pursuant to a

detailed timetable. Control of potential polluters was equally sophisticated. A proponent of a new activity was required to submit detailed plans of the proposed activity. Following MOE review, an abatement strategy would be formalized in a certificate of approval. Under such an individualized regulatory scheme, the level of potential control was enormous.

But as the K.V.P. case illustrated regarding the common law, what is possible in theory and what actually happens are very different. Again, the K.V.P. case provides a classic illustration. During the legislative debates on the *K.V.P. Act*, the attorney general, Dana Porter, promised that the K.V.P. problem would be carefully analyzed and that the government would leave no stone unturned in its search for a solution. The K.V.P. problem was studied and each study confirmed most of what McKie knew, namely, that the river was badly polluted and that the kraft mill at Espanola was responsible.[182] But solutions were not forthcoming.

Governments at both levels seemed powerless to act. The federal government, armed with the *Canada Water Act*,[183] the *Fisheries Act*,[184] and the *Pulp and Paper Effluent Regulations*,[185] was especially ineffective. On the one hand, the *Canada Water Act* stands only as a testament to what the government might do. To date, the government has done virtually nothing with it. On the other hand, the *Fisheries Act* and *Effluent Regulations* represent the government's primary control mechanisms. But the regulations were drafted behind closed doors by federal officials in consultation with the Canadian Pulp and Paper Association. Not only did citizens like McKie have no input, but national environmental protection organizations such as the Canadian Environmental Law Association (CELA) were excluded from the regulation-making process. The result was predictable: relatively weak regulations that were applicable only to new mills. For example, the K.V.P. mill at Espanola was exempt from the mandatory compliance with the new regulatory standard because it was already in operation. Existing mills, like K.V.P., were to be brought into compliance with the standards through negotiated compliance schedules. Neither approach has achieved a particularly high degree of pollution control. In many cases, the standard is simply too low. To quote a federal government report:

> It is recognized that there may be situations at some mill locations where the requirements of these Regulations will not furnish sufficient protection for the aquatic environment. . . . In such cases, attempts will be made . . . to negotiate an appropriate abatement program.[186]

As for the negotiated compliance schedules, they have been slow in coming and have been especially sensitive to the companies' financial needs. Generally they have been honoured more in the breach than the observance. In 1975 a federal office commented: "In certain cases we

have to recognize that those compliance schedules do have some slippage."[187] National Status reports in 1974 and 1976 confirmed that while limited progress was being made on an industry-wide basis, problems at individual mills persisted.[188] The Espanola mill not only failed to meet toxicity standards, but its woodstream effluents proved to be one of the most toxic of any examined in the province.[189]

Provincial initiatives under the *Ontario Water Resources Commission Act* (*OWRC Act*) were almost as ineffective.[190] While the act may have been designed to facilitate development, existing and future development was intended to meet certain minimum guidelines for environmental protection. Thus the act provided both a general prohibition on water pollution, as well as a mechanism for regulating existing and potential polluters.[191] Failure to comply with one technique or the other exposes the offending party to prosection under the act. A conviction carried a maximum $5,000 fine for a first offence, and a maximum $10,000 fine for subsequent offences. Prosecution might be initiated by either the government (Ministry of Environment's legal staff or the attorney general's staff) or by private individuals.[192]

In spite of the fact that the K.V.P. problem provided much of the early impetus for water quality legislation in Ontario, the Espanola plant largely escaped regulation under the act. Nothing of substance was done in the late 1950s. Again, during the early 1960s no action was taken, notwithstanding the fact that the mill was clearly in breach of the general pollution control provisions of the act. This was "rectified" in the mid-1960s when cabinet intervened again to legalize pollution from the company. By Order-in-Council the mill was exempted from 1965 wastewater quality objectives for pulp and paper mills and was permitted to operate without much needed pollution-abatement equipment.[193]

In 1968, a local citizen group took action. Frustrated by the apparent ineffectiveness of the legislation, angered by the legislature's and cabinet's intervention on behalf of the company, Paul Falkowski of the Sudbury and District Pollution Control Committee launched two private prosecutions under section 27 of the OWRC Act against the company.[194] Both resulted in convictions but brought little improvement to the local environment. The following year the OWRC brought four more charges against the company, again resulting in four more convictions, but with little real improvement to the local environment.

Prosecutions under the act and requests to comply with Ontario's water quality objectives proved ineffectual.[195] Successful private prosecutions generated little more than nominal revenue for the government and annoying publicity for the company; requests to meet non-enforceable objectives produced little more than excuses, with each response made against a background of concern for jobs and thus the economic and social viability of Espanola and similar northern towns.[196]

Finally, in 1977, the MOE determined that it was time to act. Following a section 83 (now 126) report,[197] and extensive discussions with the company, the MOE issued a control order[198] pursuant to section 6 of the *Environmental Protection Act* (EPA) against the successor to K.V.P. Co. Ltd., the Eddy Forests Products Co.[199] The order set out a specific approach to pollution at the Espanola mill including, for example, the following:

> 7a. On or before December 31, 1979, submit to the Director an application for a certificate of approval pursuant to section 8 of The Environmental Protection Act, 1971, for control equipment and facilities to treat gaseous components from your non-condensible gaseous exhausts, including:
> (a) digester relief and blow gases;
> (b) multiple effect evaporator gases;
> such that emissions from these sources are in compliance with Regulation 15, R.R.P. 1970, made pursuant to The Environmental Protection Act, 1971.
> 7b. On or before June 30, 1981, provide evidence to the Director that a contractor has been hired to complete the work mentioned in 7a. above.
> 8. On or before December 31, 1982, complete the installation, construction or arrangement and have in operation facilities referred to in 7a. and 7b. above.[200]

A detailed examination of the control order against E.B. Eddy would of course go beyond the scope of this paper. Nevertheless, four features deserve special comment. First , the date is important. The order was issued in 1978 — 30 years after McKie and four other outfitters began their litigation, 24 years after the *OWRC Act* was enacted, and 6 years after the passage of the *Environmental Protection Act*. In those intervening years, under the supervision of first the OWRC and then the MOE, water quality in some areas of the province continued to deteriorate; in others it did not improve substantially. And yet, other than to document the deterioration, the government and agencies responsible for the situation did little. The extensive regulatory powers of the MOE mostly generated research on the problem. The federal government's initiatives in the field were equally ineffectual. Secondly, although the order is cast in great detail (it includes 18 specific provisions), the MOE relies heavily on the company to fill in the details of the order. Thus, the first requirement of the order has the company submitting a report to the local district office of the MOE,

> concerning the ways, *if any*, in which suspended solids loss can be reduced by:
> (a) improving the efficiency of your existing clarifier;
> (b) converting your emergency hydro treater facility to a clarifier to be put into continuous, normal operation;
> (c) treating the flow in sewer No.7 [emphasis added].[201]

Thus, the solution, if any, will come from the company. If the company does not provide one and if the MOE is persuaded that its failure to invent one is reasonable because of the circumstances, the order immunizes the company from future prosecution.[202] Thirdly, nothing in the control order guarantees that water and air pollution will be brought to within acceptable limits. In other words, if all facets of the company plan are approved, implemented and subsequently found not to work, the government has no recourse against the company.[203] At that point it is required to begin again the lengthy process of documenting the pollution problem, issuing a notice of intention to issue a control order and finally the order. Lastly, the order evidences the difficult trade-offs that must be made between air and water pollution. The MOE never assumed that the company could solve all of its problems at once. Thus, the order set air pollution as a first priority (at least from the standpoint of scheduling) and water pollution as a second priority. The river had to wait again, this time until the mid-1980s when the company's effluent problems were once again addressed.

Some additional points can be made about the general process of control orders, again using the control order against E.B. Eddy as an example. First, this order was very much a private affair, with only the MOE and the company as participants. Those affected by the pollution — the McKies of the Spanish River — were not part of the process leading up to the order. Essentially, the control order was a negotiated settlement, the result of lengthy negotiations between the company and the government officials. In this case, as in others, the public is generally only permitted to participate after the terms of the order have been finalized.[204] If the government had been able to represent downstream and downwind interests in these negotiations, the lack of public participaion would not be serious.[205] But the government was unable to do so because of its past financial assistance to the company. An independent, pro-environment stand was thus difficult to obtain. Furthermore the government's policy of promoting economic activity in the area biased regulation in favour of development. This case shows, then, that a strong pro-environment perspective can be lost by the very procedure of excluding those adversely affected by pollution from participating in the negotiating process.

Similarly, the courts have been insensitive to the public's interest in participating in negotiating control orders. Those who have argued that control orders may adversely affect rights,[206] and that the fairness doctrine[207] demands that affected parties be given an opportunity to participate in the process have generally fallen on deaf ears.[208] But the bias against public participation is not simply limited to the negotiation process. Section 122(1) of the EPA provides the company with the right to appeal the order to the Environmental Appeal Board. The control order also confirms this right. However, it is available only to the company and

to the other negotiating party, the MOE. Again, those members of the public potentially affected by the order[209] have no comparable rights of appeal.[210] Theoretically their rights are protected by the MOE. But as the last section argued, the MOE labours under a number of potential disadvantages that spring from low budgets limited expertise and the close relationship between the department and industry. Excluding the public from the process thus results in both a lower level of pollution abatement than would otherwise be the case, and general public dissatisfaction with the priorities and policies expressed in the control order.[211] In another case, for example, dissatisfaction with the policies of the order led to a private prosecution under the Fisheries Act, even though the company was in full compliance with the EPA control order.[212]

A second disturbing feature of the E.B. Eddy control order is that, like so many other regulatory initiatives, it was paid for by government. The order was projected to cost $22 million. That, however, was offset by a $25 million government grant to facilitate an expansion and modernization program.[213] E.B. Eddy is owned by George Weston Limited, a company that enjoyed an 84 percent increase in profits in the year preceding the grant.

Control orders are only effective if they address the problem and are made to stick. Only time will tell whether the E.B. Eddy control order properly addresses the problem at Espanola. How long we will have to wait to find that out is not clear. The original 1978 order envisaged a timetable that would have all abatement equipment in place by the early 1980s. But by 1980, the company had proposed an amendment to the original order that would extend the completion date, in return for further commitments from the company for additional abatement equipment. Amendments, extensions, delays and non-compliance are hence characteristics of many control orders. These problems may, as the politicians argue, result from "unrealistic" orders[214] and the financial weakness of the industry.[215] A more plausible explanation is found in the regulator/regulated relationship that exists between the MOE and E.B. Eddy. Other than prosecutions, which have not proved successful, the MOE has few tools to ensure the effective abatement of pollution. It lacks the staff and resources to understand the problem as well as the company does; it lacks the surveillance capacity to provide ongoing monitoring; and, most importantly, it lacks the political and formalized public support to get tough.

Finally, the history of the order and a recent decision of the Ontario Court of Appeal emphasize some of the weaknesses of the control-order approach. What is striking about the negotiating process described above is the government's reluctance to get tough. Once the ministry began negotiating pollution abatement through a control order, it refused to prosecute under the EPA, even though the company was reluctant to accept the terms of the order and has subsequently been in apparent

breach of it.[216] The reason for the ministry's reluctance to prosecute stems in part from a decision of the Ontario Court of Appeal.[217] In *Re Abitibi Paper Company*, the Court of Appeal held that where the ministry and the corporation were negotiating an abatement order and that, as a result of those negotiations, the corporation could reasonably expect that if it performed certain remedial work it would not be prosecuted, then charges laid for pollution are properly stayed as an abuse of process. Thus, negotiations and the normal commitments made as a part of the negotiating process may seriously limit the ability of government to use its prosecutorial powers. And, by limiting one of the few enforcement tools available to government, the court has further restricted the ministry's ability to negotiate a particularly favourable result. Thus, although the control order has the potential to achieve tight, effective and highly individualized regulation of pollution problems, the experience tends to be otherwise.

Resource Development, Planning and Environmental Assessment Legislation

There is another side to the K.V.P. story that is more difficult to tell because it lacks the drama of a Supreme Court of Canada decision and special acts of the Ontario legislature. This story relates to government involvement in the exploitation of the forests, especially forest utilization and managment policy. Again, this particular story is worth telling because, although it relates to a specific resource, namely forests, it is not atypical of government and industry policy with regard to other natural resources. Furthermore, it emphasizes the futility of focussing exclusively on pollution control. The problem is not simply one of abating emission and effluent; it is linked to the far more complex question of how Canadians relate economically and socially to their resource-rich natural environment.

Like all natural resources policies, forestry policy in Canada has fluctuated from the extreme of facilitating cutting, irrespective of the long-term costs to the environment, to conservation-minded forest management. The Espanola mill opened in 1905. For the 60 years prior to the mill's opening, government ownership of the forests and its regulation of cutting were designed to promote the maximum exploitation of the forest resources. Production quotas were set high, and penalties were imposed on licensees whose cutting and output levels fell below target. Dues charged on the timber cut were kept low to encourage high production. The government subsidized transportation by constructing timber slides. In spite of strong government support for the industry, industry spokespeople blamed the 1846 collapse of the timber industry in part on too much government regulation and control. A legislative committee was set up to examine the causes of the collapse, and it concluded that

the principle of Crown ownership of the unharvested resources should be confirmed, the principles of public regulation should be affirmed, but that ground rents should be set low and not be payable until the cut timber was sold. The committee recommendations were embodied in the *Crown Timber Act* of 1849 and remained in effect for the next 50 years.[218]

The act served public policy well. Lands were clear cut at a rapid rate. Lumbermen and, to a lesser extent, the government treasury prospered. Homesteaders benefited because once the land was clear cut it was available, often free of charge, for agricultural purposes, but there were costs to the policy. Clear-cut forests were not replaced. Natural regeneration was slow and sometimes unsuccessful. Providing the funding and cutting new supplies meant building new, longer roads and thus escalating transportation costs.[219] Although the environmental costs of the policy were not high on the public's list of concerns, they became more visible and thus more significant as settlement moved north. By the turn of the century a small, but well-directed conservation movement was challenging the extractive mentality of the previous century. Within a short period of time the perception of the forests as an inexhaustible resource changed. There were limits to what types of trees could be harvested. And there were costs to an extractive policy that failed to plan the management of the resource for the long-term benefit of many different interests. The K.V.P. mill opened in 1905 in the midst of this period of changing attitudes. For the next 80 years the company found itself working in an environment in which resource development policy was buffetted by a series of competing and sometimes contradictory forces.

Throughout this 80-year period, many different government and industry policies have initially received strong public support, only to be replaced by new policies as the economic and environmental implications of the old policy were better appreciated. Thus, on the issue of forest renewal, early policies put responsibility in the hands of the company. But with a ready supply of wood just around the proverbial corner and no secure, long-term tenure in the land, the companies were loathe to invest in silvaculture and reforestation. Companies argued that clear-cut areas would regenerate "naturally" and thus no expenditure on reforestation was warranted. But today, there are no more corners to turn and no new economic stands of wood.[220] Facing a serious shortage of wood, the industry has sought a large public financial commitment to help augment its own spending in the field. Federal and provincial governments have responded with new policies to increase the supply and also comprehensive 20-year management strategies to make the industry's future less uncertain.[221]

The forest industry has achieved its early objective of supporting and facilitating economic growth, particularly on northern non-agricultural lands. The record and the statistics are very impressive.[222] But it is

growth that has come at a high price, without any real appreciation of the way in which the price might have been lowered and the benefits maintained or even enhanced. Northern rivers have been lost to industry.[223] Tourist outfitting is being lost to the public access that the industry brings.[224] Many northern communities are economically dependent on a single resource, so that they are vulnerable to its vagaries.[225] Private initiative and facilitative government policies have benefited certain economic interests well, but whether they have served the broader public interest is another question. This question, however, must be asked and answered in the context of a planning process that can look beyond the narrow interest of a particular group. The first K.V.P. Company mill in Espanola was not planned, nor was it assessed for purposes of adverse environmental impact. Unfortunately, the consequences of not thinking through the full implications of such a decision have jeopardized many values.

Conclusion

The K.V.P. story is really one of resource development and pollution in Canada. The same story could be told with regard to almost any resource, or any resource development activity. It is the story of poorly planned development, after-the-fact regulation, and little opportunity for public input in the process. The government has generally done all it can to facilitate economic development; then, as the environmental costs of the policy and the project have become painfully evident, it has turned to regulation — but regulation that seems designed to legitimize the status quo or a minor variation of it. The result is that an apprehensive public gets the symbolic reassurance that it seeks, while the industry gets the facilitative regulation that it needs. The solution to this dilemma will not be easy.

Solutions

Introduction

Before beginning a review of the preceding analysis and a search for solutions, I would like to comment on two important points. First, some alleged problems, such as environmentally destructive technologies, are not actually problems but rather the result of problems; second, the combination of limited resources (scarcity) with rising populations and expectations must inevitably push society toward an environmental crisis and demand that it take immediate and effective action.[226]

Many respected ecologists have suggested that environmental degradation is a consequence of technology. In his classic book, *The Closing Circle*, Barry Commoner outlined the essence of this thesis in 1971 when he wrote:

> The last fifty years have seen a sweeping revolution in science, which has generated powerful changes in technology and in its application to industry, agriculture, transportation and communication. . . .
>
> . . . production for most basic needs — food, clothing, housing — has just about kept up with the 40 to 50 percent or so increase in population . . . [but] the *kinds* of goods produced to meet these needs have changed drastically. New production technologies have replaced old ones. Soap powder has been displaced by synthetic detergents; natural fibres have been displaced by synthetic ones; steel and lumber have been replaced by aluminum, plastic and concrete; . . . fertilizer has displaced land. Older methods of insect control have been displaced by synthetic insecticides. . . .[227]

The harm that arises from new technologies is sometimes known. Usually, however, there is a gap between the technology or science and their known effects on the environment. Thus, the rush for new technologies is a rush into the unknown in which their ultimate impact may be much more serious than anyone expected. The experience to date suggests that this is the case. While Commoner's examples provide much substance to his concern about technologies, they misstate the true nature of the problem. The problem is not technology; it is the values and institutional arrangements that displace old "technologies" with new, potentially more harmful technologies; that prefer environmentally harmful technologies such as the automobile to environmentally sound technologies such as public transit. Indeed, to describe the problem in technological terms, invites technological solutions. The real solution is not likely to be a new round of technological development, with all the uncertainties and potential problems associated with them, to counteract the effect of the first, but rather to re-examine the incentives that lie behind such potentially dangerous technological developments.

The problem stems from the values encouraging environmentally harmful activities and withdrawing resources from environmentally helpful activities. Such a perspective ultimately pushes us closer toward the proverbial precipice of environmental disaster. Stated most simplistically, the culprit is a growth ethic in a world of limited resources. But our capacity and appetite for growth are not likely to alter. Nor do I think that they should change completely. To stop growth and change is to fossilize the existing social and economic structure with all its inequities and failings. And I believe that most Canadians would strongly oppose a policy that drastically changed the existing social and economic structure.

If society were not bounded by the natural limits and constraints of the planet, it might be possible to satisfy all wants and needs, however extravagant they might be. But the reality is otherwise. We have come to know only too well the limits of this planet and the need to allocate the scarce resources that such limits create. Recently this point was made most dramatically by the work of the Club of Rome. The following,

written by one of the principal investigators for the Club of Rome, captures the essence of the problem:

> Population, capital investment, pollution and food consumption have been growing exponentially . . . throughout history. Growth has come to be regarded as the natural condition of human behaviour, as the undeniable sign of progress, but exponential growth rates cannot continue forever. Given the fixed space of the world, growth must, in time, encounter the limits set by nature and give way to some form of equilibrium.[228]

The author goes on to argue that unless present growth rates are curtailed, we can expect the global depletion of our natural resources and more pollution crises. The article concludes:

> The great challenge of the present is to choose the best available transition from the past dynamics of growth to a future condition of equilibrium. In making this decision, we must recognize that there are not utopias in our social systems, no sustainable modes of behaviour that are free of pressures and stresses. . . .
>
> New human purposes must be defined to replace the quest for economic advancement; the goals of nations and societies must be reformulated to become compatible with the philosophy of equilibrium.[229]

The limits-to-growth thesis has been strongly criticized, particularly its assumptions that there are not inherent constraints on economic growth and no timely self-correcting mechanisms that will prevent growth from accelerating and producing violent crises.[230] Yet, there is much truth to the message. Unless we take steps to move toward a state of equilibrium, environmental degradation will continue — perhaps to the point of human life-threatening crisis; certainly to the detriment of the quality of life on earth.

If the real problem is an unconstrained growth ethic in a limited world, combined with a blind faith in technology's ability to solve all problems, then much of the blame must lie with those values and institutions that reinforce such an ethic and faith.

Proposed Solutions

One of the paradoxes of the environmental protection movement is that it seeks solutions to problems from the very institutions that have contributed so much to their creation. Thus, we are compelled to look to economics to provide the incentive to develop a better, more efficient "technological fix." We look to our politicians for better, more effective choices and laws, knowing full well that the short-term, reactive perspective of the political process impairs their view of the problem, thereby precluding a radical solution. And those who would put their faith in the courts and the judiciary must accept the fact that the courts and legal doctrines have both founded and facilitated many of the pro-

development stimuli that have created so many of the present environmental problems.

Nevertheless, we must work with what we know and understand. Solutions will only come incrementally. We are not capable of more, and thus it would be naive and unrealistic to expect more. Even by working incrementally through existing institutions, much can be done to respond to the environmental problem. We must, however, be cognizant of the inherent limitations of each institution and the potential distortions that "solutions" from economics and law will bring to the issues.

VALUES AND POLITICS

Any solution to our environmental problems must begin with a re-examination of values, and that requires a rethinking of the political process. It would be presumptuous of me to suggest that this paper could offer both a new set of values for society as well as a more satisfactory theory of the state. It cannot. Even without a grand design, much can be said to stimulate discussion and thinking that may ultimately lead to a new environmental ethic, a new set of overarching principles to link economic development and environmental protection.

As outlined in the section on the causes of pollution, the dominant values of Canadian society may be described in terms recently set out by Environment Canada:

> *acquisitive materialism*: Overcoming sacrifices and enhancing market choice . . . leads to an image of man as primarily an economic being, a factor of production and consumer of goods.
> *science/technology*: Reliance on science and technology to solve all problems is unquestioned.
> *manipulative rationality*: Nature . . . [is] to be controlled and dominated in pursuit of material goals.
> *pragmatic values:* . . . individual rights and freedoms are stressed. . . . Society is viewed as the sum of its parts.[231]

Not only are these values widely shared among Canadians but they are continually reaffirmed by our economic and legal institutions. Much good has come from the determined and enthusiastic pursuit of these values. We live in a land of great wealth. We have made remarkable gains in our material well-being. Individual Canadians enjoy a level of freedom and individual expression that is virtually unmatched elsewhere in the world. But, as Environment Canada warns, the very values that have created so much, the very successes of the existing institution of arrangements, "have led to a situation where continuation along the present path may well result in unacceptable consequences."[232] Many of these consequences have been well documented in the K.V.P. story. Others are to be found in the pages of the daily newspaper and in our everyday experience.

How can Canadians both preserve and build on the successes of the past and also lay the foundations for a new relationship with their natural environment? While the two objectives are not necessarily incompatible, some important changes in the way in which Canadians relate to their environment, themselves and each other are needed. Indeed, a new set of values is needed. While societal values normally grow from within, this paper has a modest role to play in suggesting some objectives toward which Canadians might begin to move. Let me suggest the following:

- The quality of life might be better measured in terms of the quality of relationships both among people and between people and the natural environment, rather than in terms of growth and acquisitive materialism.
- Co-operation rather than competition with nature and its domination should be the aim, as should co-operation among people, organizations and governments.[233]
- Diversity and experimentation with new relationships should be sought, rather than a single-minded commitment to economic progress.[234]
- A greater awareness of and sensitivity to our place within the environment should be developed instead of our alienation from it.
- Economic concerns should be balanced with social and environmental issues.

What contribution can our politicians and political institutions make to bring about a solution? One is tempted to answer glibly, claiming they can only contribute what they wish to, which has been precious little to date. But I believe that those politicians who hold liberal, humanistic and ecological ideals want to offer far more and can and will if shown the way. The focus on the political process is not misplaced for it is at this level that important social choices are made. The way in which such choices are made, or not made, gives considerable cause for concern. Thus, a political solution presupposes some reform of the political process, a matter that is well beyond the scope of this paper.

The political process has two contributions to make. The first is to promote the values espoused above. The second is to design and implement new institutions, new economic arrangements and new ways of reinforcing and promoting these values, without unduly upsetting the old. The task will not be easy because change is never easy. Nor will it be accomplished quickly, although time is now of the essence.

How may the political process be transformed from one in which "expansionist values" prevail, to one in which the new "transformation values" are afforded respect and encouraged?[235] First, if the real costs of growth and acquisition were better understood and, once understood, imposed directly on those who benefit from growth,[236] the ethic of growth and domination would begin to give way to the ethic of care and

harmony or, in economic terms, production and pollution would be reduced to more socially optimal levels. But knowledge and understanding will not come easily or cheaply. Individuals lack the resources and the incentives to learn about the real implications of development. The government, therefore, has a responsibility to commit more public resources to finding out about the real consequences of a new process or widespread use of an old process. It has a duty to inform the public and include them in the decision-making and regulatory process.

Developing policies that encourage sensitivity to and cooperation with nature may be more difficult. How can the public prefer such policies if they have little, if any, experience with which to evaluate such radically alternative policies? If we are destined to prefer what we choose, we bear the heavy responsibility, as does the government in particular, to explore a wide range of values and choices.[237] The initiative for change must come, and indeed is coming, from a small group of conservation-minded people. Now growing numbers of Canadians not only respect the environment as a home, but also promote strategies that see humans as an integral and cooperative part of the environment. And yet the government can do much to facilitate this process. It can introduce more people to nature;[238] it can adopt processes that give equal or greater weight to the "transformation" perspective; and it can generate the information the public needs to make more informed choices about the quality of life. At a more specific level, the government must begin to reverse the public's isolation from the environment by subsidizing public access to it. This does not necessarily mean subsidizing reduced airfares to the high Arctic. Most people's environment does not consist of a remote wilderness; it is a sunny afternoon in a local park, a walk in a forest, or fishing in a nearby lake. Increased exposure to and appreciation of our environment are the first steps to understanding our relationship to the environment. And through a growing understanding of that relationship, the public may choose economic and political policies that are constrained by respect. In other words, policies will be shaped and determined by a well-informed public rather than being imposed on them. Processes must be altered to let attitudes change toward the environment.

The most immediate contribution from the political process will come in the form of new (or amended) legislation, new institutional arrangements, and new ways of carrying out or facilitating the activities of society. In other words, the political process must be prepared to rethink the legislative and administrative framework within which the work of society is conducted. In this area, the political process has both a symbolic and practical contribution to make. Symbolically, our legislatures and Parliament must seriously consider expressing legislatively a "right to a clean environment" or the new "transformation ethic."[239] This need not mean entrenching such a right or ethic in the Charter of

Rights and Freedoms. Indeed, to do so might have the unfortunate effect of giving the courts primary responsibility for interpreting the concept, thus taking policy questions out of the political arena. On the contrary, new principles are well expressed as preambles to new legislation or statements of statutory purpose. If all federal legislation were to look at the way in which a particular statutory scheme addresses environmental issues and encourages an increased awareness of the environment, we would come far closer to laying the groundwork for a new environmental ethic.

At a more practical level, legislative reform must address the following:

- facilitating greater co-operation among members of society, organization and governments;
- encouraging mediation and other non-adversarial forms of decision making;
- facilitating greater public involvement in the decision-making process;
- improving political and corporate accountability for decisions affecting the environment;
- providing a better information base for which environmental decisions may be made;
- encouraging diversity and experimentation among governments and other institutions with regard to enforcement and compliance mechanisms; and
- adopting a "polluter pay" policy that requires that all victims of environmental degradation be fully compensated.

Economics and Law

The Economic perspective

Economics and law offer a way by which this new environmental ethic might be implemented. No discipline, no new approach will solve all our environmental problems. Despite the limitations implicit in any solution that relies on existing modes of thought and institutions, economics promises at least a more efficient and effective way of achieving our environmental goals. Law offers even more. As a primary mechanism within society by which values are shaped and reinforced, new environmental legislation and amendments to existing statutes in those areas in which environmental policy is set, implemented and enforced, might, over time, fundamentally change the way in which Canadians think about and relate to their environment.

The appeal of economics as a problem-solving device is seductive. Who could argue with the proposition that environmental protection should proceed to the point at which the marginal cost of abating

pollution equals the marginal benefit of enhancing environmental amenities? Anything less than this point, as well as the "law" of diminishing returns, tells us that costs will be less than benefits, an undesirable and inefficient situation; anything more suggests that we will be spending more on pollution abatement than the utility received from the improved environmental quality. Providing we can reduce or overcome the problems of valuing costs and benefits, and providing we can create the necessary market mechanism needed to facilitate negotiation among potential resource users (and overcome the problems of transaction costs), individual self-interest and the competitive market will automatically generate a so-called optimum level of environmental protection.

However seductive the analysis may seem, it will not solve all environmental problems. First, the analysis has certain inherent limitations that seriously restrict its ultimate utility. Secondly, it may have an unintended and undesirable impact on other societal goals. After a discussion of each problem, I will explore the potential contribution of economics to creating a better environment.

Some Inherent Limitations The limitations of the economic analysis are substantial. The process by which environmental amenities (benefits) and damages (costs) are valued and quantified economically in smoothly exchangeable units (dollars) according to individual expressions of self-interest provides a limited, short-term focus on the issues and problems. Benefits and costs are measured in dollars according to one's expressed willingness to pay. Thus, the amount society is prepared to pay for environmental protection (the aggregation of all individual payments) is the measure of this value to society. But the willingness-to-pay principle is of limited assistance in valuing environmental amenities for which there is no market analogue. When respondents are asked how much they would be willing to pay to preserve an environmental amenity, they will state relatively low amounts. When asked what they would accept from another for the right to impair the amenity, they will state much higher amounts.

Such discrepancies cast serious doubt on the utility of a willingness-to-pay principle for determining the value of environmental protection. They also demonstrate how the distribution of wealth influences the answer. The formulation of the first question assumes that another has the right to pollute the environment and the respondents are asked how much they would be prepared to pay to purchase the right. The low amount offered reflects, in part, the disparity in wealth created in favour of the one who has the right against the one who seeks to purchase it. The formulation of the second question assumes that the respondent has the right to a pollution-free environment. The new assignment of the right has increased the wealth of the respondent by the value of the right;

owing to the increased wealth, the respondent can now afford to put a higher value on the right. Not only is the willingness-to-pay principle heavily influenced by the relative wealth of those asked to pay and thus by the original assignment of right, but it also assumes that all values can be expressed in dollar terms. Nor does economics have anything to contribute to the appropriate assignment of the right.

Furthermore, a respondent will also lack the necessary information to answer properly the willingness-to-pay question. Information available is always imperfect, and there is a special problem created regarding alternatives. If respondents are asked what they would be willing to pay to preserve a wilderness area or how much they would charge another to despoil the area, the answer would have to make assumptions about alternatives, and whether they would be available to them.[240] But the availability of alternatives will be partly determined by the use made of the particular resource. If it is despoiled, the pressure to use alternative areas for amenity purposes (recreation, etc.) will increase, yet the area's relative worth to the respondent will decrease. Conversely, if the wilderness is not developed, the pressures to use other areas will decrease, but these alternatives may increase in value. The interrelationship between the response and the factors influencing the response thus makes any answer to the question about willingness to pay highly problematic.

Some amenities do not even admit to approximate valuation, no matter how the willingness-to-pay question is framed. What price would one pay for the sense of well-being felt by the knowledge that one lives in or has access to a safe, clean environment? Feelings and emotional reactions cannot be quantified in dollar terms the same way that automobiles and appliances can. There is no real market for feeling and emotions, and thus the market is unable to value this aspect of the benefit. The quantification process is arbitrary and tends to "dwarf soft variables" such as feelings and aesthetic values. Thus the process is biased in favour of people who value those things that are easily quantified and against people who do not. This is natural. Economists would prefer to ignore (i.e., put value at zero) those things whose value they cannot objectively determine. The result is to undervalue the environmental costs of pollution and overvalue the benefits of production. This point would seem to argue in favour of more sophisticated economic analysis that takes proper account of variables. Why, then, cannot feelings toward a clean environment be priced? They probably can be, but only at the expenses of eroding the analytic power and predictive utility of economics. If economic analysis is unable to accurately value the sense of personal well-being that comes from a higher level of environmental quality, it has only a very modest contribution to make to the process by which society makes decisions about resource development and environmental protection.

But the problem of pricing environmental amenities is more difficult than the above discussion would suggest. The value of an environmental amenity is measured, in economic terms, by one's willingness to pay for the good. This willingness is partly a reflection of wealth, as well as exposure to and preference for the amenity in question. Rich people have more disposable income to purchase such amenities and are also more likely to have been educated to value them highly. Thus in an egalitarian society, one would expect a strong general preference for a basic level of environmental protection, whereas in a society that tolerates sharp discrepancies in levels of wealth, the wealthy may prefer more wildness areas, whereas the poor would seek improved air quality in the inner city.

The problem becomes acute when one pursues this theme to its logical end. The more affluent ecologists are likely to value highly environmental protection programs that address potentially irreversible, long-run environmental harms such as wilderness preservation or decreased use of pesticides. But neither protection policy would provide any benefits that the poor would likely acknowledge. Instead, such policies are likely to impose heavy burdens on them in the forms of foregone economic development and higher food prices. On the other hand, actions that afford greater benefits to the poor, such as air pollution control in the inner city are directed at largely reversible harms that enjoy a relatively low ecological priority, particularly among the more affluent. Support for environmental policies is thus a function of one's preference for an ability to enjoy the policy, and each policy partly depends on one's relative wealth vis-à-vis other members of society. Furthermore, by linking the substance of "benefit" to ability to pay, economic efficiency attaches a higher value to environmental protection measures that appeal to and are enjoyed by the wealthy, thereby accentuating the inequality in the vertical distribution of wealth within society. It is more than just a coincidence that the environmental protection movement began first with a concern for the natural environment (the one enjoyed by the affluent) and has only recently become concerned with the environment of the industrial workplace (the one suffered by the less affluent).

All of the above is made more difficult by the general uncertainty that pervades environmental degradation. We do not know the effect of many activities in the short run, let alone the long run. Furthermore, the cumulative effect of activities is not well understood. Nor can we predict with certainty the likelihood of finding a technological "solution" to a particular environmental problem. No matter how conscientiously we attempt to value or price environmental amenities or predict the cost of activities on those amenities, it cannot be done — even assuming we have infinite resources to spend on finding answers, which we do not.[241]

Undesirable Consequences of Efficiency Let us step back from the economic magic of the marginal-cost-equals-marginal-benefit formula, and examine the ways in which this formula and the analysis behind it may introduce new distortions into the decision-making process. First, economics has as its objective the efficient allocation of environmental resource, where resources are defined to include the use of the environment both for waste disposal purposes and for amenity purposes. The pursuit of such an objective may be contrary to another equally important social policy, such as the redistribution of income in favour of the poor. Not only that, the preferred (i.e., the most economically efficient) method for implementing such policies may further accentuate the problems of the poor.

To simplify this analysis, assume that only two methods for abating pollution are open to the regulatory authority: charging polluters for the pollution created, a technique often described as damage-cost pricing; or publicly funding pollution abatement through public subsidies of one sort or another.[242] Conventional economic wisdom would favour the charging scheme. It is responsive to market factors; it avoids the prospect of extra profits for firms who can reduce pollution at per-unit cost that is less than the subsidy; and it provides an incentive to choose production methods that reduce the amount of waste generated. (The subsidy may have just the opposite effect.) Furthermore, the charge offers the symbolic (but not real) advantage of penalizing rather than rewarding those "responsible" for inappropriate behaviour.[243] For all these reasons, economic efficiency argues in favour of internalizing external costs by putting a price on pollution and charging a fee for each unit of pollution generated, with the fee set to reflect a more socially desirable level of pollution than the one presently experienced. But this may be directly contrary to widely accepted policies designed to redistribute income from the richer to poorer members of society. This potentially undesirable consequence of an efficient pollution-control scheme stems from the following. Subsidies and direct government regulation are largely financed by revenue collected through income taxes. Pollution fees or effluent charges, on the other hand, are user fees, levied against the producer but paid primarily by the consumers of the product against which the fee is charged. The income taxes used to finance subsidies and direct government regulation are generally, although not universally, regarded as progressive. User fees such as a pollution charge are, however, regarded as regressive because they tend to be passed on to the consumer, more harshly affecting those who spend a proportionately large share of their income on consumer goods. Thus, a heavy reliance on user fees would put a proportionately large share of the cost of pollution control on the poor.

This does not mean that economically efficient "solutions" should be abandoned. On the contrary, they offer an important perspective on the

problem and how best to deal with it. Nevertheless, the inherent limitations of the analysis and the distributional consequences of efficient solutions do mean that we should be cognizant of such limitations and take the appropriate steps to minimize these undesirable effects.[244]

A Modest Role for Economics in Improving Environmental Quality

Although economic analysis has little to contribute to the quality-of-life questions raised by environmental degradation and indeed its application brings with it many problems, economics has much to contribute to an efficient solution and certainly offers an important perspective. Assume that decisions have been made about resource allocation and development, optimal or acceptable levels of pollution, and so on. And assume also, that these decisions require some behaviour modification, i.e., encouraging greater regard for the environment among present resource users. What contribution can economics make to these decisions? I believe its contribution is substantial for, although a preferred economic solution may have unacceptable implications regarding income distribution, it will be efficient. That is a worthy goal. If the approach is efficient, the problems of income and wealth distribution created by efficiency might then be fully addressed in some other way, such as through a negative income tax.

The government can implement or enforce its decisions about environmental quality in different ways. It can regulate, that is, prescribe, in a permit, licence or standard an acceptable level of pollution either on an individual polluter-by-polluter basis or a general basis, and can demand compliance with the standard with criminal or quasi-criminal legal sanctions. Alternatively, it can seek reduction in pollution through subsidies, either directly through grants for appropriate behaviour or indirectly through income tax concessions for those who comply. Again, subsidies may be determined and issued on a case-by-case basis or applied to all, according to general criteria. Finally, pollution may be curtailed by charging polluters a fee to pollute. By putting a price on pollution, polluters intent on maximizing their own interests will tend to reduce their waste output to the point at which the cost of an additional unit of statement equals the savings realized by not having to pay an additional unit of charge. As with the previous two, the charge scheme may be designed to operate individually or across the board.

Related to all three schemes is the question of how to reduce the pollution. To the extent that pollution — at the point when controls are to be implemented — is a technological problem, then technology and science have much to contribute to a solution. But here again, options are limited. A polluter may employ abatement technology that is already available and in use with regard to reducing the pollution; adopt and adapt technology from another related field; or develop new technology. Alternatively, a polluter may change the process or processes employed, such as switching to a cleaner fuel, in an effort to reduce pollution.

How then should we proceed toward this preferred future? Most Canadian jurisdictions have adopted approaches to pollution control that would be rejected both intuitively and economically, namely, individual regulation.[245] Individual regulation involves staggering administrative costs and gross inefficiencies. In all likelihood, such regulation cannot distribute the cost of reducing pollution among polluters in an economically efficient way, for to do so, it would presuppose that "the administrative authority is able to solve and set thousands of simultaneous equations, when the information required to write the equations is not only not available, but also often not obtainable."[246]

Nor is regulation on a general level an efficient option, although it is widely used throughout Canada.[247] A political decision to reduce pollution by 10 percent would likely mean a 10 percent reduction for all discharges under a general regulatory scheme. But this may be the height of inefficiency. No two firms are identical. Some will be able to reduce their pollution easily and inexpensively, others will not. An efficient solution would require that firms reduce pollution to the point at which marginal cost equals marginal benefit, not to some arbitrary level that has no relationship to the particular characteristics of that firm.

If regulation can be rejected, we are left with the second two options, and between the two, the charge or fee is clearly preferable on efficiency grounds. Dales outlines the advantages of each in the first passage and then focusses on the disadvantages of subsidies in the second.[248]

> [B]oth would result in optimum distribution of costs among discharges; all dischargers would reduce their wastes up to the point where the marginal costs of doing so equalled the subsidy provided, or the charge levied. . . .
>
> . . . First, if a subsidy of so much per ton of waste reduced is set, extra profits will accrue to those firms that can reduce their wastes at a cost per ton that is less than the subsidy provided, and no change in relative prices of goods is necessary. . . . Second, the subsidization scheme provides no incentive to choose production methods that reduce the amount of waste generated (and may indeed have the opposite effect). . . .[249]

In addition to Dales' comments, there are two further reasons to prefer the charge. The first is economic, the second political. First, the scheme lends itself easily to the market. Effluent charges are identical to "pollution rights" — permission to pollute or discharge a certain amount of waste for a certain period of time according to the term of the right. Because fewer rights would be issued by the government than presently exist,[250] they would immediately command a positive price. Over time, the price would vary according to supply and demand. The advantage of this scheme is that no person or agency has to set a price. Instead, once decisions are made about the number of rights and the terms and conditions attached to them, the market would determine an appropriate price, or rather charge.

The second reason for preferring a charge is political. Subsidies and charges make different statements about the acceptability of polluting behaviour. A subsidy states: "Yes, you have a right to pollute but we are prepared to purchase that right from you to achieve a more socially acceptable level of environmental protection." The charge, on the other hand, conveys a different message. It states: "No, you do not have a right to pollute. We recognize, however, that it may be necessary for you to do so and thus we will permit you to pollute, providing you pay the public owner of the environment, the government, an appropriate fee." While many people would object to any statement that admitted pollution was a necessary part of society, those who had to choose would find the second choice far more palatable. The reason for this would, of course, have much to do with a new and growing pro-environment ethic. It would also have something to do with wealth distribution. Subsidies put wealth in the hands of the polluter with no promise that it will be passed on to the consumers; charges put wealth in the hands of the public represented by the government.[251]

Although the preceding argument leans strongly in favour of implementing an environmental protection policy through charges, the effluent charge in Canada continues to be conspicuous by its absence.[252] We can speculate about the reason, but this fact alone underscores the limited contribution of economics to a solution. The analysis offers an important perspective on the problem, and can offer a sensible scheme for efficiently implementing a pollution control policy, but it is only one perspective. As economists argue, final decisions may be motivated by self-interest. If that is true, a number of other self-interests must be recognized and addressed in the process. These interests are best addressed in the political forum.

The Legal Perspective

Like economics, the common law has a limited contribution to make to solving the problems of environmental degradation and inappropriate resource development. The limitations of the environmental laws in particular, as previously outlined, make the law's contribution to a solution modest, at best. It is futile to talk about the common law solving environmental problems when its doctrine and principles are so firmly embedded in the logic of cost-benefit analysis, especially an analysis that measures the environmental costs of a proposed activity only in terms of direct economic loss to the parties before the court, and assumes that the benefits reach almost every member of society. Not only are the principles wrong, but the process is fundamentally flawed. It limits access to those with an obvious economic interest in the outcome of the case; it puts the onus of proof on those who ask for nothing more than a sober second look; it demands a standard of proof that requires the plaintiff to exhibit a measurable and easily quantifiable deterioration

in physical health; it is primarily reactive to problems; and it seldom offers more than financial damages to the successful plaintiff — damages calculated according to an amount required to compensate only the plaintiff for direct and measurable economic loss.

The courts and judges have not distinguished themselves in the field of public law. They have not moved to facilitate public access to the process by which environmental decisions are made and implemented,[253] they have let opportunities to enhance political accountability for environmental actions slip by;[254] and they have expanded the range of defences available to those accused of committing environmental offences.[255] The law is firmly within the grip of the pro-development interests within society. Its focus on individual interests means that it systematically excludes broader community interest, such as environmental values. It is inconceivable that the law could protect interests and values that have "no owner."

If these criticisms of the environmental protection laws suggest that there can be no legal solution whatsoever to the problems of pollution and inappropriate resource development, they have clearly gone too far. One fact is evident: we must, for the time being at least, work within the existing structure. Reform must start with incremental change to the present laws. Not only that, but there is much to commend the judicial process. As Professor Sax has so ably argued in his landmark book, *Defending the Environment*, courts offer a forum through which individual concerns may be publicly aired and considered, a mechanism by which the decision maker is forced to focus on the rights and responsibilities of individual litigants, and an objectivity and independence resulting from the dispassionate look at a dispute on the part of a disinterested generalist.[256] The judges' heightened awareness of the particular, as well as their theoretical position of independence, give them the opportunity to begin to fashion a new doctrine of "environmental stewardship." What is now needed is a clear message from the public that such a doctrine has widespread support.

The best — indeed the only — way of communicating such a message is through legislation that clearly sets out society's expectations for the law, offering the judges, and ultimately the public, the necessary tools to fulfill those expectation. Two recent proposals deserve serious consideration by the Commission. The first attempts to overcome the most serious deficiencies of the common law and environmental protection statutes through an environmental bill of rights; the second examines alternative ways of formulating and implementing policy and resolving disputes between development interests and environmental protection interests, such as by environmental mediation.

The Environmental Bill of Rights

Those who advocate an environmental bill of rights assume that substantive and procedural reform will not come from the judges. Reform must

come from the legislature, and that reform might conveniently be packaged as an environmental bill of rights, although the label seems to stir up a strong, anti-reform reaction within the government. Two statutes are necessary: one dealing with the common law; the other with the policy-making, implementing, and enforcing functions of the administrative or regulatory process. Such legislation would respond to the deficiencies in the process of both the common law and the administrative law.

This concept has been proposed, in bill form, by a number of provincial legislatures,[257] and has recently received qualified federal support by a former minister of the environment.[258] Bringing together the best of the legislative proposals, the Environmental Bill of Rights would include the following:

1. A substantive right to a clean, healthy environment.
Such a right may vary from the broad right of:

> Every person (resident) is hereby declared to have a right to the protection of the environment from pollution and degradation, regardless of his proprietary or pecuniary interest in the environment.[259]

to the more qualified right of:

> Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this act and the regulations, orders, approvals and authorizations issued under any section of this act.[260]

2. A substantive right to benefit from the use of public resources.

> [Canada's] public lands, waters and natural resources are the common property of all the people including generations yet to come, and as trustees of these lands, waters and resources, the government of Canada shall conserve and maintain them for the benefit of present and future generations.[261]

Access and Standing Access, or the right of access, simply refers to the right of a person, irrespective of nationality or residency, to participate in judicial or administrative proceedings that may affect that person. The rationale for the rule is simple: if residents from one jurisdiction have suffered or are likely to suffer from the polluting activities of another jurisdiction, they should be entitled to redress. On the issue of compensation, access speaks to the principle that "the polluter should pay." With regard to environmental policy, access affirms the desirability of permitting those affected by policy to participate in the policy-setting exercise.

Some progress has been made with access statutes in the United States and Canada. Montana and New Jersey, for example, have

passed Uniform Reciprocal Access Acts, and Ontario has recently introduced a bill entitled the *Transboundary Pollution Reciprocal Access Act* that is also modelled after the uniform act.

The standing doctrine, however, denies many persons the right to proceed to the merits of their case. It is a rule based on the status of the participants, not the merits of lack of merits of their cases. It has been used to pre-empt a judicial hearing on many egregious environmental problems. Its use evokes a strong pro-development bias, for a denial of standing endorses the conduct of the potential defendant in that class of case.

An appropriate statutory provision that would redress the standing problem reads as follows:

> any person may commence an action without having to show any greater or different right, harm, or interest, than that of any other members of the public, or any pecuniary or property right or interest in the subject matter of the proceedings.[262]

Access to Information If pollution and environmental problems are characterized by a high degree of uncertainty, as suggested earlier, then surely we all have a responsibility to share information with each other. To use the words of Jean Rosland, "the obligation to endure gives us the right to know."[263] For the public to participate effectively and constructively in the decision-making and environmental protection process, it must have the available information. Subject to a provision to protect certain well-defined interest (for example, a person's contractual obligations or competitive position) information from government and industry should be available to the public. A suitable statutory provision would include a public right to:

> available information concerning the quantity, quality or concentration of contaminants emitted, issued, discharged, or deposited, by any source of contamination or degradation . . .
> any licence, permit approval . . . and any information in support of such document — any report on any tests, observation, inspection or analysis carried out by or under the Minister's authority. . . .[264]

Of course, access to information is a meaningless right unless needed information is indeed available. Thus, the government must make a commitment to conduct the research and analysis necessary for the public to make an informed contribution about questions relating to the environment and quality of life.

Class Action Expanding the potential for class action is important for two reasons. First, the claims of the class representative and those represented are fully argued and settled at one time and within the context of one court proceeding.

Also, because the action permits the class to pool resources, it offers individuals with small claims access to the law in cases where individual suits would be uneconomic. But class actions presuppose, as Simon Chester argues, reforms in other areas:

> Reform to make it easier to finance public interest litigation such as contingency fees, the extension of legal aid funding, special public interest case cost rules, special class action cost rule . . . are necessary preconditions to an effective class action procedure. Without funding reform class action reform would be useless.[265]

Again, a useful model to consider comes from Ontario:

> In an action under this Act the Court may, by order, permit persons to act as representatives of a class of persons where, in the opinion of the Court,
> (a) the claims of the representative party are typical of the class;
> (b) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members;
> (c) a class action is superior to other available methods for the fair and efficient adjudication of the controversy;
> and
> (d) the representative party is acting in good faith and it is prima facie in the interests of the class that the action be maintained as a class action. The Court may provide in the judgement of a class action for subsequent determination of the amount and distribution of damages assessed against the defendant.[266]

Onus of Proof Given the uncertainty that surrounds most environmental problems, it is almost impossible for plaintiffs to meet even the civil burden of proof, i.e., "on a balance of probabilities." The uncertainty of environmental effects condemns those with the onus of proof to failure. Many people regard such results as unacceptable.

A more appropriate rule regarding onus of proof would distinguish between proposed activities and existing problems in the following way:

- The government would not approve new activities without the proponent showing "no harm" or "minimal risk of harm."
- With regard to existing environmental problems, the plaintiff would be required to prove a prima facie case and once that was established, the onus would shift to the defendant to refute the plaintiff's evidence.

Defences that are sometimes raised in environmental litigation would also have to be modified or abolished. Thus, it should not be a defence that:

- The defendant is not the sole cause of the alleged or potential contamination or degradation.
- It cannot be established that the contaminant which the plaintiff discharged or deposited . . . was the cause . . . of the con-

tamination . . . where the effect on the environment is of a nature consistent with that contaminant or source of cause.[267]

Remedies Although the courts have displayed considerable ingenuity in the way in which they have addressed the question of remedies,[268] a clear statement from the legislature with regard to the appropriate range of remedies is necessary. On this point, the legislation must explicitly authorize: interim injunctions, permanent injunctions, remedial orders, damages, orders imposing conditions on the defendant, and any other order which the courts believe is necessary to protect the environment.

One specific remedy would be to legislate an Environmental Bill of Rights designed to secure public participation in the planning assessment and environmental regulation process. Such a bill would have the following provisions:

1. A substantive right to a clean, healthy environment.
2. A substantive right to benefit form the use of public resources.
3. Access and standing.

These three provisions would duplicate those set out in the preceding Environmental Bill of Rights. The concepts are no different. The only difficult question is whether a substantive right to a clean environment is better secured through the judicial process or the administrative process. On this issue, I believe that such policy questions are better left to institutions that are more directly accountable to the public than the courts. Nevertheless, if environmental rights are best secured incrementally through a variety of different ways and means, there is no strong reason for excluding particpation from the courts in the policy-setting process, providing such participation is well integrated into that of the administration process.

4. Regulation making and standard setting.

Regulations and standards express the public's view of a desirable or appropriate level of environmental quality. This is perhaps the most important part of the regulatory process. If standards are too low, unacceptable pollution is authorized and sanctioned; if they are too high, useful development is lost. It is essential that the standard reflect the community's sense of the appropriate trade-off between environmental protection and economic development, and create the best possible quality of life. Thus, the following reforms are necessary:

- The public must have full access to the process.
- The process must be redesigned to facilitate public input. The notice and comment provisions of the federal *Clean Air Act* are a step in this direction. In certain cases, public participation may be better encour-

aged and accommodated with more novel mechanisms, such as interviews, referenda, public meetings and formal public hearings.
- The public must be given the resources to participate effectively, including much needed information and analysis, organizational assistance, and secure funding.
- Finally, the public must be given the power to initiate the process, be it in the context of a new standard or the review of an existing standard.

5. Resource development planning.

Too often development occurs without sufficient forethought to the adverse, long-term implications of the development. We cannot afford to wait until problems surface and then expect to fix them. By the time they appear, they may not be fixable (because of the irreversible feature of many resource development decisions) or may be too expensive to fix (the costs of remedying the problems of persistent, long-term and synergistic effects of some pollutants are astronomical). Thus, resource development planning, with appropriate provisions to ensure full public participation in the process, must become a routine aspect of all major resource development and environmentally threatening proposals.

6. Environmental Assessment.

If planning maps out the broad parameters of resource development, environmental assessment is needed to provide a long, hard look at each major proposal. The deficiencies of the present assessment process have already been noted in the section on legislative responses to environmental problems. Legislative reform is thus needed to:

- ensure that all potentially significant proposals are assessed through formal prescreening provisions;
- permit the public to participate in the process;
- encourage the use of scoping procedures and other mechanisms designed to reduce conflict and expedite the process;
- provide incentives to reduce overlap and duplication; and
- institute post-approval monitoring of the actual impact with a view to readjusting regulation and acquiring much needed experience for future assessments.

7. Accountability and judicial review.

In my opinion, judicial review of policy decisions, such as those raised by quality-of-live questions, would be limited. I am skeptical about the utility of the court's second-guessing the standard-setting, planning and assessment bodies. The court's role, however, is an important one. It must ensure that the procedures are complied with fairly, and that the decision is not arbitrary or capricious and does not completely ignore the evidence.

Accountability for such decisions must ultimately be to the public. Normally this process is made accountable to the legislature or cabinet.

Although recognizing the ultimate responsibility of our elected politicians, I believe that the burden of responsibility must lie with those who have heard form the public, read the submissions and seen the proposal. Granted, these persons bring their own special biases and prejudices to the process, but fair rules of procedure, as well as a responsibility to consider all the points of view, will do much to minimize the impact of personal bias.

Cooperative Decision Making and Dispute Resolution

The preceding discussion is premised on a decision-making process that is based largely on an adversarial view of society. It utilizes courts, adjudicative bodies and commissions to set policy and resolve disputes. Rather than simply remedying the obvious deficiencies of the present laws, environmental protection might be better achieved by exploring ways in which governments might institutionalize cooperation in the decision-making process. The present adversarial and hierarchical structure of adjudiction and decision making seems to impress environmental issues with a competitive stamp. Litigants do not come to court seeking cooperative solutions to environmental problems; they come seeking victory over their opponents. Government and industry sometimes cooperate on setting and enforcing standards, but it is often to the considerable detriment of many people who wish to participate in the process but are precluded from doing so.

Environmental Mediation

One approach that has received recent attention is environmental mediation. As its advocates warn, it "will not result in panaceas but rather should be added to existing effective means of dispute resolution . . . and should be tried because some of the other mechanisms are not working."[269] If the circumstances are right, mediation does promise to facilitate agreement through negotiation and compromise, rather than confrontation. The factors that help determine the potential usefulness of mediation are as follows:

- the affected parties regard a mutually satisfactory settlement to be in their self-interest;
- the parties consider a settlement an urgent priority;
- the parties are prepared to make reasonable sacrifices to reach a settlement; and
- the legal rights of the parties are not prejudiced by participation in the mediation process.[270]

Because environmental mediation is new and different from mediation in other fields, such as labour-management relations, the government

should provide generous support for different approaches to mediation and cooperation. Over time, the most successful approaches should receive legislative support. Specifically, environmental mediation laws will have to address the following:

- determining the participants in the process;
- finding ways and means of resolving problems created by the free rider and/or the holdout;
- financing public participation in the process;
- defining the relationship between mediation and other, more conventional, forms of decision making and dispute resolution;
- implementating and enforcing mediated agreements; and
- finding ways and means of expediting the process through, for example, professional mediators, a statutorily prescribed framework within which mediation could be conducted.

An Expanded Use of Civil Sanctions and Incentives in Environmental Protection Laws

Under the present regulatory laws, enforcement is secured through prosecution or threat of prosecution. Although we have traditionally turned to the criminal or quais-criminal law to achieve changes in socially unacceptable behaviour, undue reliance on criminal law in this field accentuates confrontation and makes cooperation highly problematic. Rather than attempt to label most polluters as criminals, we might achieve far more by saving the criminal law for truly criminal behaviour, and focussing on a broad range of administrative incentives and sanctions to modify behaviour.

This approach accepts pollution as a fact of life, as indeed it is. Search and try as we might, there are no pristine environments. Not only is pollution a fact of life, but we are all polluters and victims. When one realizes the interdependencies among all aspects of life and economic activity, it is clear that little is served by labelling the economic actors as criminals, unless of course their behaviour is criminal in the normal or true sense of that word.

If this is the case, prosecutions, excluding expcetional cases, are largely ineffective. Litigation offers a process by which the victim's loss becomes the polluter's responsibility, but the uncertainties and inefficiencies of the common law make this method-of-loss distribution both costly and problematic. A better approach, in my opinion, would recognize that economic activity is essential, that it imposes a whole variety of costs — some on individuals, some on society, others on the environment. Rather than putting the onus on the victim of pollution to initiate action (which will only lead to confrontation in an adversarial setting), it would make far more sense for the government to establish a suitable compensation fund for the victims of pollution, paid for by charges against those responsible for pollution, the producers and hence con-

sumers.[271] Administrators of the fund could then provide compensation to individuals and groups and restore damaged environmental amenities. The concept of a pollution-compensation fund raises many questions that must be answered. In spite of these problems, it is an idea with considerable merit. It treats pollution as the problem that it is — an inevitable consequence of our present level of economic activity. It compensates for and repairs environmental degradation in an efficient non-adversarial manner, and it provides some considerable incentives for society to reduce environmentally harmful consumption and respect environmental amenities.

Conclusion

If the proposals set out in the preceding sections suggest a different, more effective approach to reconcile our need for a satisfactory level of economic activity and a better relationship with our natural environment, then how do we begin? It would be trite but true to say we would require politicians who would ecologically minded and could see beyond the short-term perspective of committing substantial resources to an immediate, short-term need; judges who would be sensitive to the claims and needs of society and the environment; and economists who could temper their enthusiasm for efficiency with an appreciation that a better quality of life is more complicated than the single-minded pursuit of willingness-to-pay principles and cost-benefit ratios.

It is also true that a solution to our environmental problems will require both a stronger leadership role on the part of the federal government and a greater degree of federal/provincial cooperation. Federal leadership is necessary because environmental quality and resource development affects all Canadians. No province or group can act effectively on its own. Federal leadership is also necessary because pollution is not unique to Canada. If our knowledge of acid rain has taught us anything, it is that no country can escape the environmental effect of another country's development and disposal policies. We are a community of countries, sharing a common resource. In these circumstances, federal leadership is essential. A cooperative federal-provincial approach to the problem is also necessary. The Constitution and the courts' interpretation of it demands federal/provincial cooperation;[272] the interrelationship of pollution, resource development and quality of life across Canada make cooperative action essential; and our understanding of the limits — indeed, the futility of confrontation — make cooperative action the only rational alternative.

Much has already been done in both areas. The federal government is increasingly taking a leading role in environmental matters. Its determined and concerted action on acid rain and the water quality of the Great Lakes is impressive. But leadership is also required on the low-profile issues. Rather than waiting until something becomes a crisis,

demanding immediate and often expensive government response, much more should be done to anticipate, understand and thus avoid potential crises.

Although federal leadership is important, it must not prejudice other, equally valuable initiatives from the provinces and the private sector. Thus, leadership must mean both the responsibility to act on our problems, as well as the obligation to encourage experimentation and diversity at the local level. Cooperation at present finds expression in a variety of ways. The *Canada Water Act*, for example, envisages cooperative federal-provincial action, although little progress has been made in implementing the cooperative approach set out in the act. Councils and other formal bodies of federal and provincial ministers and officials have achieved much, particularly in the field of research and shared experiences. Similarly, important cooperative efforts have been initiated at the technical and scientific level. Cooperation, however, does not need to be instituted in another formal governmental structure. Other cooperative approaches include public financial support for public interest groups, academics, corporate officials, and others who initiate cooperative research and study of environmental and resource development issues; and financial incentives for those who experiment with new cooperative approaches to problem solving.

Perhaps the most that can be said about environmental law and policy is that a good deal remains to be done. We must not accept what we have. Although change is necessary, it is impossible to prescribe a specific course of action that will guarantee a desired result. We cannot know today the specific details of the preferred future toward which we should strive. Although this paper has argued for new ways of thinking about and understanding environmental issues and new cooperative approaches to problem solving, it is difficult to see where all of this will take us — probably not nirvana. But such approaches will expand our understanding of our relationships with the environment, and open up new possibilities and new ways of relating to our environment. The future toward which we must strive is barely more than a glimmer of light on the horizon. Its specific details will only become apparent as we begin to take the first steps to implement a transformation ethic. But until we replace domination, exploitation and competition with balance, harmony and cooperation, we are condemned to isolation and alienation in our own homes.

None of the solutions proposed here can be implemented unilaterally by the federal government. The environment is property; the quality of life, however, is really a civil matter. Thus a solution requires not only cooperation with the environment but cooperation among governments. Some tentative steps have been taken in this regard. We must now turn more attention to finding cooperative solutions to our environmental problems.

Notes

This paper was completed in December 1984.

1. Similarly, a search for a solution by engineers would stimulate a discussion of alternative technologies for solving the problem.
2. And in the most fundamental sense, the way in which Canadians relate to their natural environment.
3. The expressions are borrowed from Tribe, "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law" (1974), 84 *Yale L.J.* 1315.
4. Recycling expands society's store of resources so that all resources are, in a sense, renewable, or at least reusable.
5. Meadows et al., *The Limits to Growth* (1972) (a work sponsored by the Club of Rome). See also Mesarovic and Pestel, *Mankind at the Turning Point* (1974).
6. White, "The Historical Roots of Our Ecological Crises" (1967), 155 *Science* 1203.
7. *Ibid.*, at p. 1206.
8. Tuan, "Our Treatment of the Environment in Ideal and Actuality" (1970), 58 *American Scientist* 244.
9. *Ibid.*, at pp. 248–49.
10. *Ibid.*
11. Dewees, "Point Source Pollution: New Economic Mechanisms," in *International Joint Commission Workshop* (1973). This work has been expanded and updated. See, for example, Dewees, *Evaluation of Policies for Regulation of Environmental Pollution* (1981).
12. There is a common-resource component to all resources in the sense that even private resources such as privately owned property have a public component.
13. Hardin, "The Tragedy of the Commons" (1968), 162 *Science* 1244.
14. *Ibid.*, at pp. 1244–45.
15. *Ibid.*
16. Not quite free because all individuals must share a small fraction of the cost of using up the good, a cost shared with all other members of society.
17. The problem of the so-called "free rider."
18. Darwin, *On the Origin of Species* (1859).
19. Kropotkin, *Mutual Aid, a Factor of Evolution* (1902).
20. Ophuls, *Ecology and the Politics of Scarcity* (1974), in Stewart and Brier, *Environmental Law and Policy* (1978), at pp. 78–82.
21. However, most have recognized a continued need for government intervention with regard to social and environmental matters. See, for example, Economic Council of Canada, *Reforming Regulation* (1981).
22. A premise that persists in those parts of the country where people have not yet realized the implications of a finite world. It was less than 15 years ago that Canadian commentator Norman Depoe claimed that Canada's forests were inexhaustible.
23. Toffler, *Future Shock* (1969).
24. Support for such a view also comes from the Bible: Jesus: "Take therefore no thought for the morrow; for the morrow shall take thought for the things of itself. Sufficient unto the day is the evil thereof." Matthew 6:34.
25. One of these crises would be the effects of highly persistent toxic chemicals.
26. This is partly a function of the resources we devote to learning about potential problems. When we decide to find out (i.e., spend the necessary money to learn about a problem), we are usually successful. The money spent on a problem usually comes as a result of a dramatic increase in public pressure or concern, not long-term government planning.
27. On the other hand, it may be argued that too few crises emerge from scientific research. By asking the wrong questions, by working within a traditional mind set and by not "rocking the boat," scientists are prone to underrate the severity of a problem.

In addition, institutionalized peer-group evaluation ostracizes and isolates the outspoken "alarmists."

28. And indeed, a response to these crises may accentuate future environmental problems. The Ontario government's decision to proceed with the Darlington Nuclear Powered Generating Complex may alleviate unemployment in the nuclear industry, only to exacerbate long-term waste disposal problems.
29. Allison, *Essence of Decision* (1971).
30. The process is well explained by Castrelli and Lax, "Environmental Regulation-Making in Canada: Towards a More Open Process," in Swaigen (ed.), *Environmental Rights in Canada* (1981).
31. Stewart, "The Reformation of American Administrative Law" (1974–75), 88 *Harv. L. R.* 1667.
32. *Ibid.*, at pp. 1704–5.
33. Frabricant, "Economic Growth and the Problem of Environmental Pollution," in Boulding et al. (ed.), *Economics of Pollution* (1971), at p. 148.
34. Sometimes, however, the rules are made up during or after the hearing. This phenomenon occurs primarily when the issues before the body are novel.
35. Actions to protect public rights are at the discretion of the Attorney General (not a private plaintiff), unless the plaintiff can prove a special or unique injury. Proof of such injury has been extremely difficult for plaintiffs, unless they have some interest that has been adversely affected.
36. This statement, of course, ignores the effect of public regulation—a matter that will be examined in the next section.
37. The civil standard is slightly lower than that imposed on criminal prosecution, "beyond a reasonable doubt."
38. Relating loss to a particular defendant is further complicated by the plaintiff's own activities. Thus, an elderly, asthmatic person who smokes would be much more susceptible to pollution than a healthy adult.
39. Legal training and work experience tend to bias judges in favour of individual rights, rather than public rights. Some biases, however, may be particularly difficult for the environmental plaintiffs. For example, Mr. Justice Nunn's background as a labour lawyer (management side) seemed to lead to a strong pro-company/anti-environment bias in the N.S.F.I. case: *Palmer et al. v. Nova Scotia Forest Industries* (1983), 2 D.L.R. (4th) 397.
40. It is not only judges who are skeptical of science; the public too are somewhat suspicious of the scientific community. Scientists are sometimes seen as "hired guns," hired to represent a particular economic interest. Furthermore, scientists do not have all the answers, particularly when the issue is as complex and multifaceted as environmental degradation. And finally, people are distrustful of solving problems with the same technology or science that "created" the problem.
41. *McKie v. K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201.
42. (1983), 2 D.L.R. (4th) 397.
43. This has sometimes been called the syndrome of "dying in the streets." It describes a situation in which the onus of proof is so difficult to meet that success is only assured if persons are made seriously ill by the pollutant.
44. For an excellent discussion of the standing issue, see Roman, "Locus Standi: A Cure in Search of a Disease," in Swaigen (ed.), *Environmental Rights in Canada* (1981), at p. 11. Although the literature on class actions is not extensive, a number of recent articles and studies explain the principles and the problems. See British Columbia Law Reform Commission, *Report on Civil Litigation in the Public Interest* (1980); Australian Law Reform Commission, Discussion Papers Nos. 7 and 4: *Access to the Courts–Standing: Public Interest Suits* (1977 and 1978 respectively); Mullan, "Standing After McNeil" (1976), 8 *Ottawa L.R.* 32.
45. For a comprehensive review of the law on class actions, see Chester, "Class Actions to Defend the Environment: A Real Weapon or Another Lawyer's Word Game?" in Swaigen (ed.), *Environmental Rights in Canada* (1981), at p. 60. There has been a

plethora of articles on this subject, but those written from a law and economics perspective are perhaps the most interesting. See Prichard and Trebilcock, "Class Actions and Private Law Enforcement" (1978), 27 *U.N.B.L.J.* 5; Dewees, Prichard, and Trebilcock, "Class Actions as a Regulatory Instrument" (Ontario Economic Council, 1980).

46. *Hickey et al. v. Electric Reduction Co. of Canada Ltd.* (1970), 21 D.L.R. (3d) 368.
47. Difference in "kind" seems to refer to an interference with a private right of the plaintiff, such as the plaintiff's person or property.
48. Estey, "Standing to Sue in Public Nuisance Actions" (1972), 10 *Osgoode Hall L.J.* 563.
49. In other words, a pleasurable afternoon fishing is fundamentally different than fishing for a livelihood.
50. *Preston v. Hilton* (1920), 48 O.L.R. 172.
51. It must be noted that *Palmer et al. v. Nova Scotia Forest Industries*, *supra*, note 39, circumvented the *Preston v. Hilton* problem by holding that Preston was a public nuisance and that the plaintiffs were unable to establish the necessary "special damage" to maintain their action. No such problem arose in *Nova Scotia Forest* because:

    > the interest in result is obviously a common one. . . . The probability of harm may vary from one to another of the group, nevertheless it is the probability of harm which is common to all. The degree to each is unimportant, and especially so when the remedy sought is injunctive relief. . . . To my mind an allegation of serious health risk is always a matter of special damage, and, in this case, special damage to each and everyone of the plaintiffs [as per Mr. J. Nunn, p. 485].

52. The only significant limitations on the power of alienation were products of the general law of contract. See Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the 19th Century" (1977), 27 *U.T.L.J.* 201.
53. The other two factors were capital and labour.
54. Charges for surveys made the land slightly less than free.
55. *Hook v. McQueen*, [1851] 2 Ch. 490 at 499.
56. Although the common is "owned" by the public through governmental representation, political, bureaucratic and organizational obstacles make action to fully protect the public's interest difficult.
57. The tragedy of overutilization thesis is open to question, if for no other reason than that the English common flourished for many years under a "public" ownership regime. Thus, the present tragedy may have little to do with the lack of a private owner, and a great deal to do with the state's failure to exercise its responsibility as the public's representative of the common.
58. It is free because the law offers no mechanism by which those who value the resource may exclude other users from it, and hence provides an incentive to enhance the resource.
59. The "right assignment" is a wealth assignment because a right to use or exploit a resource is little different than a cash payment to the owner of the right. Assume, for example, that a neighbour does not wish the proposed development to occur. Other than to lobby for political intervention, the only way in which the neighbour can stop the development is to pay the developer to refrain from developing. In this sense, development rights are the equivalent of cash and certainly a reflection of a person's wealth.
60. The right to commit waste was an incident of ownership. See, for example, *A.-G. v. Malborough (Duke)* (1818), 56 E.R. 588.
61. See, for example, *Re Hanbury's Settled Estate*, [1913] 2 Ch. 357.
62. The two are not of course mutually exclusive. Conflict resolution will normally have at least some impact on the broader community norms and values.
63. The substance of such a right is explored in detail by Swaigen and Woods in "A Substantive Right to Environmental Quality," in Swaigen (ed.), *Environmental Rights in Canada* (1981), at p. 195.

64. The distinction drawn here is not altogether satisfactory. It is difficult to see, for example, how dispute resolution cannot affect (sometimes profoundly) broader community interests, and vice versa. Nevertheless, the dichotomy set out here is helpful for purposes of identifying tendencies and general differences.
65. Fleming, *The Law of Torts*, (4th ed. 1971), p. 591.
66. 39 *Halsbury*, (3rd ed. 1962), at pp. 516–21.
67. See, for example, *Lockwood v. Brentwood Park Investment Ltd.* (1970), 10 D.L.R. (3d) 43.
68. See, for example, *Walker v. McKinnon Industries*, [1949] 4 D.L.R. 739.
69. "Trivial" interferences may be an invasion of "rights" but they do not attract a remedy.
70. None of these factors will, by themselves, determine the issue.
71. The question of who should represent "the environment" is a difficult one. Courts often demand that plaintiffs have a substantial and often special interest in the outcome of a case before granting standing (see *Hickey et al. v. Electric Reduction Co. of Canada Ltd.* (1970), 21 D.L.R. (3d) 368; *Green v. A.-G. Ontario* (1973), 2 O.R. 396, 34 D.L.R. (3d) 20. The rationale behind this requirement is that the Attorney General is the appropriate plaintiff to represent the general public interest in environmental protection. But as part of a government that may be directly or indirectly implicated in the pollution problem, or caught in the bureaucratic web of a multipurpose environmental protection department, the Attorney General is not well qualified to bring an action. This in turn has led to calls for increased individual and group access to the courts by relaxing the present standing rules (see Roman, *supra*, note 44), or through the more radical approach of giving the environment standing and appointing friends of the environment to represent it in actions against those who would despoil it (see C. Stone, "Toward Legal Rights for Natural Objects: Should Trees Have Standing?" (1972), 45 *Southern California L.R.* 450).
72. It is the environment rather than community or person because the environment includes non-instrumental rights. Also if a person or group of persons hold the right then entitlement must be to the enjoyment of benefits and uses of the environment, not to a particular level of environmental quality.
73. While objectivity is never easy to achieve, one might argue that pollution that endangers or poses a substantial threat to public health is unacceptable, irrespective of the alleged benefits of such pollution.
74. Objectivity for this standard is even more difficult to achieve. No one argues seriously that environmental integrity means a pristine pure environment. All principles accept some level of environmental degradation. The question then becomes, how much or how little is appropriate? Try as society might, the answer to this question must be determined according to individual and community perceptions of what environmental integrity; really means, or what an optimal amount of environmental degradation means.
75. The interrelationship between this test and the reasonableness test becomes clear when one realizes that "reasonable" may be defined as any pollution that does not offend the environment's long-term integrity.
76. As noted earlier, rights may be equated with wealth. Thus by creating a "right" to a particular level of environmental quality, those who support such a proposal and who would thus benefit from it benefit by acquiring a new right or unit of wealth. Environmentally damaging development can then only proceed if the right is transferable and pro-development interests are prepared to purchase the right and thus exchange another unit of wealth for the pro-environment interest.
77. Fletcher, "Fairness and Utility in Tort Theory" (1972), 85 *Harv. L.R.* 537.
78. The frustration of trying to find a principled and *enforceable right* to a clean environment is expressed by Swaigen and Woods, *supra*, note 63.
79. Stone, *supra*, note 71. Emond, "Co-operation in Nature: A New Foundation for Environmental Law" (1984), 22 *Osgoode Hall L.J.* 523, and Elder, "Legal Rights for Nature — The Wrong Answer to the Right(s) Question" and Livingston, "Rightness or Rights" in the same number of the *Journal*.

80. Stone, *supra*, note 71, at p. 490.
81. See the dissent of Mr. Justice Douglas in *Sierra Club v. Morton* 405 U.S. 727 (1972): "standing would be simplified . . . if we . . . allowed environmental issues to be litigated . . . in the name of the inanimate object about to be destroyed. . . ."
82. See, Tribe, *supra*, note 3. For a contrary view, see Sagoff, "On Preserving the Natural Environment (1974), 84 *Yale L.J.* 205.
83. As reported in the *Toronto Star*, August 30, 1984.
84. The defence is set out in Emond, "Defences and Remedies to Common Law Causes of Actions in the Environmental Field," in *Environmental Law: Bringing and Defending Actions* (1984).
85. Sample statutes are set out in the next section, *infra*.
86. Indeed, the goal of the statute is not to prohibit pollution, but to regulate it.
87. While the "logic" of the defence is apparent, the courts have been reluctant to accept it. Thus, the Supreme Court of Canada went to some pains to dismiss it in *City of Portage La Prairie v. B.C. Pea Growers Ltd.*, [1966] S.C.R. 150. In England, the C.A. has limited its effectiveness by subjecting it to a rule of statutory interpretation that limits the defence to those circumstances in which the court clearly and unambiguously states that the damage suffered by the operation of the authorized activity is without redress. See *Allen v. Gulf Oil Refining Ltd.*, [1979] 3 All E.R. 1008.
88. See, for example, the Ontario *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 13.
89. The defence is set out in the Supreme Court of Canada's landmark decision of *R. v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161.
90. *Re National Capital Commission and Publiese* (1979), 97 D.L.R. (3d) 631.
91. *Saskatchewan Wheat Pool v. Government of Canada* (1983), 45 N.R. 425.
92. Damages may vary from permanent to continuing damage awards, while injunctive relief may vary according to timing, duration, scope and other terms and conditions of the order.
93. The expropriation, however, is not authorized by statute and thus may be likened to an unauthorized expropriation.
94. This phrase comes from *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642, p. 645. The full passage is as follows:

    > All the circumstances, including those of time and locality ought to be taken into consideration [in an action for nuisance]; and with respect to the latter [comfort and enjoyment of property] it was clear that in countries where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter or annoyance, for if so, the business of the whole country would be seriously interferred with.

95. Or, more accurately, left to fall where they land—on the environment and those who value it.
96. There are, of course, circumstances when the court will intervene to prevent a harm, but these are limited. Thus in *Stein v. The City of Winnipeg* (1974), 48 D.L.R. (3d) 223, the court refused to enjoin a potentially toxic city-spraying program because, on the balance of convenience, the convenience favoured the city. More specifically, the city's failure to comply with its own pre-assessment procedure was only one factor tending to favour Stein's application. The other factors alleged by Stein tended to favour the city. Stein had failed "to demonstrate the efficacy of an alternative to methoxchlor," and failed to establish that irreparable injury would likely result as a consequence of the spraying. The city had shown that cancellation of the program would cause great inconvenience to it. The "balance," in other words, favoured the city.
97. See *Markt v. Knight Steamship Co. Ltd.*, [1910] 1 K.B. 1039, and the cases that have followed and applied the dicta in *Markt*, particularly *Preston v. Hilton* (1920), 48 O.L.R. 172, although recently distinguished by *Palmer et al. v. Nova Scotia Forest Industries*, *supra*, note 39.
98. *Supra*, note 81.

99. To use Ontario as an example, water pollution control legislation was first passed in 1956 as the *Ontario Water Resources Commission Act*. Air pollution control legislation was passed 11 years later as the *Air Pollution Control Act*.

100. On the interrelationship of residuals, see Kneese, "Pollution and a Better Environment" (1968), 10 Arizona L.R. 10. At page 14 Kneese writes:

> By the application of appropriate equipment and energy, all undesireable substances can in principle be removed form water and air streams — but what is left must obviously be solid. Looking at the matter in this way clearly reveals a primary interdependence between the various waste streams which . . . casts into doubt the traditional classification of air, water and land pollution as individual categories for planning and control policy.

101. Again, to use Ontario as an example, the *Environmental Protection Act*, first enacted in 1971, consolidated provisions from the *Air Pollution Control Act, 1967*, and the *Waste Management Act, 1970*. Primarily for historical reasons, water was regulated under separate legislation, although the legislation was administered by the same department (Ministry of the Environment) that had regulatory and supervisory responsibilities under the *Environmental Protection Act*.

102. This point was made particularly forcefully by the Environmental Assessment Panel struck by the Federal Environmental Assessment Review Office (FEARO) under the federal Environmental Assessment Review Process (EARP) to examine the potential environmental impact of exploratory drilling in Lancaster Sound. See *Report of the Lancaster Sound Assessment Panel: Lancaster Sound Drilling* (February 12, 1979).

103. The nuts and bolts of the legislation are well described by Estrin and Swaigen in *Environment on Trial* (rev. ed.) (1978).

104. A detailed description of a number of Ontario statutes is provided in the section on the K.V.P. story.

105. It does not matter, for example, whether the problem has arisen as a result of increased public awareness, research, or changing standards of appropriate levels of pollution, the problem is the same: how to modify a process or approach in the face of a substantial financial commitment to a pollution-generating process.

106. Because of the high cost of altering existing processes, the present regulatory approach in Canada normally offers heavy financial incentives (subsidies) to help underwrite part or all of the cost of complying with regulations. Again, this point is developed in detail in the context of the K.V.P. story.

107. Other interests might include those of the consumers of the product produced or those of the suppliers of materials and labour for the production of the product.

108. Say potential because there are some constraints — new industry must compete with old industry, and, if the latter is not as closely regulated, it may enjoy a competitive advantage. Similarly, it must often compete with new unregulated industry in other parts of the world, again putting a closely regulated Canadian industry at a competitive disadvantage.

109. A particularly difficult test to meet and one that has inhibited government action except in the most extraordinary cases.

110. The proposal may come at the initiative of the polluter or the regulatory department. Public initiative is not encouraged. When it does arise, it is generally channelled through (or screened by) the regulatory department.

111. *Pesticides Act*, R.S.O. 1980, c. 376.

112. Sometimes described as "best available technology." Such technology is not necessarily being used in the industry controlled, but it is in existence somewhere.

113. This is usually described as "best practicable technology," and refers to the technology commonly used by the industry leaders.

114. Other changes, such as using a fuel with lower sulpher content, may not be particularly expensive and thus offer an attractive solution to some types of pollution.

115. To the extent that abatement puts up the price of a product and thus discourages consumer buying, abatement strategies and consumer preferences are interrelated.

116. The most recent critique of the present approach is by Schecter, *Political Economy of Environmental Hazards* (1984). See also, Rankin and Finkle, "The Enforcement of

Environmental Law: Taking the Environment Seriously," in Finkle and Lucas, *Environmental Law in the 80's: A new Beginning* (1982); Thompson, *Environmental Regulation in Canada* (1981).

117. Some of the crises that have prompted legislative or regulatory reaction include water contamination from pulp and paper mills, detergent, lead, mercury, and acid or toxic rain.
118. Controls range from environmental guidelines and objectives to legally enforceable standards. The two approaches are reflected in the way in which Ontario regulates air and water emissions. The former is done by legally enforceable standards; the latter by guidelines and water quality objectives. On the distinction, see Castrilli and Lax, *supra*, note 50, at p. 334.
119. As the K.V.P. story demonstrates, much of the impetus for that "environmental protection legislation" comes from the need to control pollution to facilitate development.
120. *The Ontario Water Resources Act*, for example, provides generous provincial grants to those municipalities who install sewage and water treatment facilities.
121. Few pollution control statutes attempt to control pollution by charging a fee and those that do have never imposed an effluent fee. See Allin, "The Tax Subsidy for Pollution Abatement Equipment" (1979), 2 *Canadian Tax Policy* 47. The federal *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5 and the Nova Scotia *Environmental Protection Act*, S.N.S. 1973, c. 6 permit the use of effluent fees; however, neither government has instituted such fees.
122. On this point see Barton, Franson, and Thompson, *A Contract Model for Pollution Control* (1984).
123. The lack of public input in the regulation-making process is well documented by Castrilli and Lax, *supra*, note 30. Public exclusion from the permit or licence-granting process is a feature of all environmental protection statutes in Canada. In Ontario, for example, the public does not even have a right to know that the permit-granting process is underway until the permit (control order) has been issued. Attempts to expand, through the judiciary, the right of affected members of the public to participate in the process have been unsuccessful. See Estrin, "Annual Survey of Environmental Law" 1975, 7 *Ottawa L. R.* 385, and the cases therein.
124. The departmental information "problems" have been accentuated in recent years by a lack of staff and continuous budget cuts.
125. Whether this characterization (polarization) of the problem is accurate is not relevant. As long as it is perceived by politicians and significant members of the public in these terms, the clash will usually be resolved in favour of the polluter's determination to preserve the status quo.
126. Again, this point is well documented in the section on the K.V.P. story.
127. Recent descriptions may be found in Emond and Cotton, "Environmental Impact Assessment," in Swaigen (ed.), *Environmental Rights in Canada* (1981); Emond, "Environmental Assessment Legislation in Canada," in Whitney and MacEachern (ed.), *Environmental Impact Assessment: The Canadian Experience* (1984), at p. 53.
128. See, for example, the Ontario *Environmental Assessment Act*, R.S.O. 1980, c. 141, s. 5(3).
129. The Federal Environmental Assessment Review Office (FEARO) and the Saskatchewan Department of Environment both publish guidelines for environmental assessment (EA).
130. See, for example, the Quebec *Environmental Quality Act*, R.S.Q. 1980, c. Q-2.
131. A mechanism that has been used frequently pursuant to the Ontario legislation, s. 29. See Samuels, "Environmental Assessment in Ontario: Myth or Reality" (1978), 56 *Can. Bar Rev.* 523.
132. The prescreening process ranges informally from that under the federal process (a preliminary Initial Environmental Evaluation — IEE) to the rather ad hoc procedure under the Nova Scotia *Environmental Protection Act*.
133. The federal process (EARP) requires the proponent to conduct an initial evaluation of impact (IEE) that is subsequently reviewed by the office (FEARO).

134. EA and EIA refer to the same thing, that is, the documents upon which the assessment is conducted.

135. Section 1(c) defines "environment" to include, *inter alia*, "(iii) the social, economic and cultural conditions that influence the life of man or a community."

136. Pursuant to s. 7(1) of the Ontario Act. Generally the review is co-ordinated by the Department of the Environment, but includes input (comment) from all affected departments and agencies. *Consolidated Hearings Act*, S.O. 1981, c. 20. The mechanism by which this integration takes place is described by Estrin, *Environmental Law* (1984), at p. 236 ff.

143. Initiatives have ranged from segregating hearings to general and community (FEARO) to funding (FEARO and Ontario Joint Board).

144. Modifications generally include prehearing devices to narrow or eliminate conflict such as conferences, interrogatories, and "canned" or prepared evidence. To the extent that these devices narrow the conflict they are described as "scoping." If they are successful in eliminating conflict, they are sometimes described as mediation.

145. Efforts to confine environmental assessment to a "merely information-gathering exercise" have largely been unsuccessful. Once underway, the process acquires a dynamic or momentum of its own, sometimes ensuring that the process produces a decision rather than simply information. On this point see Emond, "Fairness, Efficiency and FEARO," in Finkle and Lucas (ed.), *Fairness and Environmental Assessment* (1983).

146. To that extent that power has been conferred on the process, it has been done at the expense of other government departments and the private sector.

147. The Agreement signed in 1984 is the culmination of negotiations between the two governments that were begun following federal publication of its *Northern Land Use Planning Program* (1982).

148. See, for example, *Northeastern Ontario Strategic Land Use Plan*, (Ministry of Natural Resources, 1981).

149. Environmental mediation is gaining support in Canada as an alternative to the potentially adversarial hearing or meeting. Not only is it enthusiastically endorsed by organizations committed to its development, but the Ontario Environmental Assessment Board has recently used it to address concern regarding a proposed waste disposal site.

150. Although whether corporations could be oriented away from their emphasis on profits is highly problematic; on this point see Beck, *Corporate Power and Public Policy* (1984).

151. One interesting development in this area is Ontario's *Consolidated Hearings Act*, S.O. 1981, c. 20. Under this legislation, hearings previously held under the *Environmental Protection Act*, *Environmental Assessment Act*, *Planning Act*, and *Expropriation Act* are often consolidated into a single hearing and held before a joint board composed of members of the Ontario Municipal Board and Environmental Assessment Board.

152. According to discussions reproduced in the *Debates* it appears as if the Ontario government invested $20,000 in the reopening of the mill in 1946.

153. *McKie v. K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 at 218, where the judgment reproduces the relevant parts of the agreement.

154. *Ibid.*, at p. 219.

155. *Ibid.*, McRuer at p. 219, quoting with approval Lord Kingsdown in *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H.L.C. 600, 11 E.R. and cited with approval in *Shelfer v. London Electric Lighting Company*, [1885] 1. CH. 287 at 314–15.

156. *Ibid.*, at p. 213.

157. *Idid.*, at p. 219.

158. Although undoubtedly the company's objection that it was a question of "economics" merely served to persuade McRuer that this proposal was viable.

159. Whether such a commitment could be made without jeopardizing the financial viability of this operation would be difficult for a court to ascertain.

160. An interest that would only arise as a result of ownership of a water lot. Ownership of the bed carries with it ownership of the fish above the bed. One of the plaintiffs in the case, James B. Vance, was in fact the owner of a water lot and thus had a proprietary interest in the fish in the water on the lot.

161. But the company plant had been closed since 1930 and was only reopened in 1945.

162. The custodian of this land, the Ontario government, was not likely to launch a judicial action, particularly in light of its financial contribution to the mill opening.

163. *McKie v. K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 at 214, 215. In this case, as noted above at note 160, one of the plaintiffs, Vance, owned the bed of the river adjacent to his riparian property and as a consequence had a proprietary interest in the fish sufficient to maintain an action for dwindling fish stocks. Land purchased after 1911 does not include the bed of navigable waters unless specifically included in the grant. See the *Beds of Navigable Waters Act*, R.S.O. 1980, c. 40, s. 1.

164. The limits of the judicial process are well expressed by Mr. Justice Bergan in *Boomer v. Atlantic Cement Co.*, 26 N.Y. 2d 219, 257 N.F. 2d 870, 309 N.Y.S. 2d 312 [1970] :

> The amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and on the actual effect on public health. It is likely to require massive public expenditure. . . . A court should not try to do this on its own as a by product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution.

165. *McKie v. K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 at 214, quoting with approval from Stockport Waterworks Co. v. Potter (1861), 7 H.& N. 160, 158 E.R. 433.

166. S.O. 1949, c. 48, s. 6(2).

167. *K.V.P. v. McKie*, [1949] S.C.R. 698. Although the amended s. 30 was unable to "remedy" the K.V.P. problem, it has been effective. Subsequent to the K.V.P. case, no Ontario pulp and paper mill, to the knowledge of the writer, has been enjoined from polluting the environment.

168. Enacted by S.O. 1950, c. 33.

169. The Act also gave the Ontario Research Council a mandate to seek a solution to the problem and charge the company for the costs of the research. The author is unable to find any evidence that any specific research on the K.V.P. problem was conducted by the council, let alone that any research was charged to the company.

170. Ontario Legislative Assembly, *Debates*, Leslie Frost, March 29th, 1950.

171. *Stephens v. Richmond Hill*, [1954] 40 L.R. 572 (H.C.); [1956] O.R. (C.A.). *Burgess v. Woodstock*, [1955] 4 D.L.R. 615.

172. In 1956 the *Public Health Act* was amended to statutorily authorize all "approved" municipal sewage disposal facilities. (See S.O. 1956, c. 71, s. 6(1).) The effect of the provision was to provide the defence of statutory authorization to certain future actions.

173. S.O. 1956, c. 62; superceded by S.O. 1957, c. 88.

174. Milner, "The Ontario Water Resources Commission Act, 1956" (1961), *U.T.L.J.* 100 at pp. 101–2.

175. Formerly, "pollution control" was carried out at the municipal level under the *Public Health Act*. Under the OWRCA it would be controlled provincially.

176. The *Ontario Water Resources Commission Act* made provision for municipal/provincial cost sharing for the construction and operation of sewage and water treatment facilities.

177. R.S.O. 1970, c. 16.

178. R.S.O. 1970, c. 491.

179. S.O. 1971, c. 86, Waste Management became Part V of the new Act.

180. R.S.O. 1970, c. 332.

181. The renamed Environmental Assessment Board was reconstituted under the newly enacted *Environmental Assessment Act*, R.S.O. 1980, c. 140.

182. See, generally, *Environment Canada, Status Report on Abatement of Water Pollution from the Canadian Pulp and Paper Industry* (1978) and Ontario Ministry of Environment, *Report on the Ontario Pulp and Paper Industry*(undated) (on file with the author).

183. R.S.C. 1970 (1st Supp.), c. 5.

184. R.S.C. 1970, c. F-14 as amended.

185. S.O.R./71-578, s. 6.

186. *Environment Canada Regulations, Codes and Protocols Report* EPS 1-WP-72-2, at p. 14.

187. House of Commons, *Minutes of Proceeding and Evidence of the Standing Committee on Fisheries and Forestry* respecting Bill C-25, June 10, 1975 and cited in Castilli and Lax, *supra*, note 30.

188. Environment Canada, *Status Report on Abatement of Water Pollution from the Canadian Pulp and Paper Industry*, 1974, Report no. EPS 3-WP-75-6, 1975, and *Status Report on Abatement of Water Pollution from the Canadian Pulp and Paper Industry*, Report no. EPS 3-WP-77-9, 1977. The progress was indeed limited. Between 1967 and 1977 the U.S. pulp and paper industry had achieved an 84 percent reduction in biological oxygen demand (BOD) while the Canadian industry had only achieved a 36 percent reduction. In 1976 only 5 of 29 Ontario mills met Ontario provincial toxicity objectives, and only 11 of 29 met federal requirements. See Donnan and Victor, *Alternative Policies for Pollution Abatement: The Ontario Pulp and Paper Industry*, Volume III (Environmental Approvals Branch, Ontario Ministry of Environment, 1976).

189. MOE Report, *supra*, note 182, at pp. 12, 13.

190. Now the *Ontario Water Resources Act* (OWRA), R.S.O. 1980, c. 361.

191. *Ibid.*, s. 16(1) (formerly s. 32 (1)); s. 17(1) (formerly s. 33(1)); s. 24(1) (formerly s. 42(1)).

192. Berner, *Private Prosecutions and Environmental Control Legislation in Canada* (1972).

193. Interview by Pollution Probe with W. Salbach. Pollution Control Branch, MOE, October 25, 1977. (Notes of interview on file with the author.)

194. *Ibid.*

195. In 1965 the Ontario Water Resources Commission proposed waste-water quality objectives in a directive to all pulp and paper mills in Ontario. Ontario regultes water quality by way of objectives or guidelines rather than legal province-wide standards. Objectives are generally not enforceable by prosecution.

196. The first OWRC prosecution in 1969 against Brown Forest Industries (the successor to K.V.P.) netted a $100 fine. Letter from the Honourable George A. Kerr to Marion Brigden M.P.P. dated October 31, 1977. (On file with the author.) In general, the excuses range from lack of technology and/or financial resources to competitive market pressures from other jurisdictions. See, for example, the comments of Dr. R. Duncan in *Canadian Pulp and Paper Industry*, September 5, 1977 at p. 12ff.

197. The Report is required under the *EPA* before a control order may be issued. See *Environmental Protection Act*, R.S.O. 1980, c. 141 s. 126(1).

198. Previous efforts to act under legislation had largely been unsuccessful. In 1970 the OWRC issued a Requirement and Direction (R. & D.) against the company. In 1972 the Air Management Branch had issued a notice of intent to issue a control order to control SO_2 emissions. That same year the Branch became part of the Ministry of the Environment and the control order was, for some reason, not issued. Subsequent years saw the MOE and the company working together to solve air problems.

199. K.V.P. has gone through a number of corporate changes over the years. In 1966 K.V.P. Co. changed the name to Brown Forest Industries Ltd. In 1969 it changed its name again to Eddy Forest Products. In 1975, Eddy Forest and E.B. Eddy amalgamated and since then the company has been known as E.B. Eddy Forest Products Ltd. E.B. Eddy is owned by Eddy Paper Co., which in turn is owned by George Weston Ltd., the Canadian-owned multinational corporation.

200. The order is dated February 28, 1978 and signed by C.E. McIntyre, Director, Environmental Approvals Branch. (The order is on file with the author.)
201. *Ibid.*
202. Pursuant to s. 146(2) of the *EPA*.
202. This problem has been remedied in part by inserting, as a term of the order, a condition that the company, pending implementation of the Control Order, that you will take all steps necessary to minimize the emission into the natural environment of contaminants from the source regulated by this order. See *R. v. Johns-Manville Canada Inc.* (1980), 9 C.E.L.R. 137.
204. Unless a hearing is held pursuant to the *EPA* or *OWRA*, the public's only statutory right to participate in the process is to determine whether an order has been issued and to inspect the order (*EPA*, s. 18(4)). There is no such requirement in the *OWRA*.
205. Although there are many sound reasons for encouraging and permitting public participation that are not related to the quality of the final decision. See Emond, "Participation and the Environment: Democratizing Canada's Environmental Protection Act" (1975), 13 *Osgoode Hall L. J.* 453.
206. The "rights" argument runs as follows. Because a control order may prejudice future civil litigation by those adversely affected by the "approved" pollution, it is incumbent that courts permit participation by those who may be affected in the process. Thus, it is the fear that an order may either statutorily authorize the pollution or provide conclusive evidence of reasonable behaviour that lies behind the potential prejudice. Although the argument has not been fully developed before a court, there is some evidence from Ontario that it would not be successful. See *R. (ex rel. McCarthy) v. Adventure Charcoal* (1972), 9 C.C.C. (2d) 81.
207. *Nicholson v. Haldimand-Norfolk Regional Board of Commissionners of Police*, [1979] 1 S.C.R. 311.
208. The problem is well documented in Estrin, *supra*, note 123, at pp. 436–37. Courts in British Columbia adopted a very different approach toward public participation under the B.C. *Pollution Control Act* S.B.C. 1956, c. 36. See *Western Mines Ltd. v. Greater Campbell River Water District* (1967), 58 W.W.R. 305; *Re Hogan and Director of Pollution Control* (1972), 24 D.L.R. (3d) 368. The *Pollution Control Act* was repealed in 1981.
209. Affected in the sense that the order may preclude successful civil action by statutorily authorizing the pollution. See the discussion above at note 196.
210. Under the *EPA* only the person to whom the order is directed and the director may appeal an order to the Environmental Appeal Board.
211. Dissatisfaction with pollution abatement and the water quality of the Spanish River appears to simmer just below the surface. See, for example, Lachance, Letter to the Editor, *Mid-North Monitor* (November 1984).
212. *R.v Cyanamid Canada Inc.* (1981), 11 C.E.L.R. 31.
213. The *Toronto Star*, April 21, 1980, p. 2. The grant is made up of $16.7 million from Ontario under the Ontario Canada Pulp and Paper Facilities Improvement Program and $8.33 million from the federal government.
214. See the comments of Harry Parrott as reported in the *Toronto Star*, December 9, 1978.
215. Notwithstanding large government grants to the industry, it continues to complain that it cannot afford to clean up. See the comments by Duncan, *supra*, note 196.
216. In August 1983, a massive spill from the mill killed approximately 100,000 fish in the river. It is not clear, however, whether the spill resulted from a breach of the order.
217. *Re Abitibi Paper Co. Ltd.* (1979), 24 O.R. (2d) 742.
218. *Crown Timber Act* (1849). The role of the legislation is outlined by Nelles, *The Politics of Development* (1974), at p. 13.
219. One benefit of these transportation costs was that the new roads facilitated settlement in the region.
220. The last major stand of virgin timber in the province is in northeastern Ontario and is uneconomic to cut because of high transportation costs.

221. See Environment Canada, *Policy Statement: A Framework for Forest Renewal* (1982); Ontario Ministry of Natural Resources, *Forest Management Agreements* (1979).
222. See, for example, *Ontario Pulp and Paper Industry: Status and Outlook, 1978.* (Report on file with author.)
223. In the sense that BOD and toxicity levels in some rivers do not support outfitting or recreational fishing.
224. See, for example, *Submission of the Cochrane Outfitters Association to the Royal Commission on the Northern Environment* (1982).
225. This was precisely the problem facing Espanola in 1930 when the mill closed. Mill closings in northern communities have become almost an annual or semi-annual event.
226. The characterization of environmental pollution as a crisis is open to debate, as the subsequent material in the text suggests. Nevertheless I believe that it describes the problem fairly.
227. Commoner, *The Closing Circle* (1971), at pp. 127 and 144.
228. Forrester, "World Dynamics" (1972), 25 *Bulletin of the American Academy of Arts and Sciences*, reproduced in Stewart and Krier, *Environmental Law and Policy* (1978), at p. 49.
229. *Ibid*, at p. 56.
230. Kayson, "The Computer that Printed Out WOLF" (1972), 50 *Foreign Affairs* 660 at p. 666.
231. Environment Canada, "Sustainable Development," a submission to the Royal Commission on the Economic Union and Development Prospects for Canada (1984), at p. 13.
232. *Ibid*
233. See Emond, *supra*, note 79.
234. This value is especially appropriate for a federal state, such as Canada.
235. These are Environment Canada's words. See *supra*, note 231.
236. Such an approach accepts the "polluter-pay principle," a principle that has received strong endorsement from the Organization for Economic Co-operation and Development (OECD) and the United Nations Environment Program (UNEP).
237. Government bears an extra responsibility because of its ability to influence preferences because the impact of government programs and spending is so large. For a thoughtful discussion of this point see Stewart, *supra*, note 31, at pp. 1704–5.
238. By nature, I do not mean northern remote natures but rather the nature we share on a daily basis — the local parks, the woods, the fields, the streams.
239. Swaigen and Woods, "A Right to a Clean Environment," in *Environmental Rights in Canada* (1981).
240. While this example comes from the resource use field, the same analysis applies to pollution control.
241. The limitation is, of course, financial but it is also political in the sense that the political process is not well designed to know and appreciate the long-term cumulative environmental effects of industry. Without knowledge and appreciation of the problem, there will be little incentive to try to solve it.
242. Some of the subsidies are noted by Allin, *supra*, note 121.
243. The advantage is symbolic but not real because the polluter/pollution characterization of the issue is false. We are at one and the same time the cause and the victim of pollution — much like "the war of all against all." The attempt to characterize the source of pollution as the cause of the problem ignores at least two important characteristics of the issue. First, it assumes that the victims of pollution gain no advantage from the pollution, i.e., lower prices for goods produced by consumers, and that those responsible for pollution suffer no disadvantages from the effects of pollution, i.e., "their" environment is despoiled as well.

244. Thus, society might respond to the income-distribution effects created by efficiency by financing a portion of the abatement costs through progressive taxes, or opting for more radical income-distribution schemes such as a negative income tax.
245. The provincial schemes are well described by the K.V.P. story.
246. Dales, "Land, Water and Ownership," in Irving and Priddle (ed.), *Crisis* (1971) reproduced in Emond, *Cases and Materials on Resources Development Law* (1984), at p. 574.
247. This describes not only the Ontario *Environmental Protection Act*, but virtually all other provincial regulatory environmental legislation.
248. Both schemes have the disadvantage of requiring a certain amount of trial and error before the subsidy or charge is fixed at a level that reflects the policy choice made about pollution and environmental quality.
249. Dales, *supra*, note 246, at p. 574.
250. This assumes, of course, that existing levels of pollution are too high.
251. See the discussion *supra*, beginning at note 243.
252. A number of Canadian jurisdictions, including Winnipeg, London, Kitchener and Toronto impose sewer charges. Studies of the effects of sewer surcharge systems have almost universally shown what the economists predict; when you impose a sewer surcharge the quantity is reduced and the quality of the strength waste improves. See Dewees, "Economic Policies for Pollution Control" (1980). The *Canada Water Act* (R.S.C. 1970 (1st Supp.), c. 5, ss. 8, 11(1) and 13(1)) authorizes the imposition of effluent charges in particular situations, although none has been imposed.
253. See Estrin's survey of the court performance under the Ontario *EPA* in Estrin, *supra*, note 123, at p. 436.
254. Janisch, "Policy Making in Regulation: Toward a New Definition of the Status of Independent Regulatory Agencies in Canada" (1979), 17 *Osgoode Hall L.J.* 98; Emond, "Accountability and the Environmental Decision Making Process," in Swaigen (ed.), *Environmental Rights in Canada* (1981), at p. 406.
255. In *R.v. City of Sault Ste. Marie* (1978), 85 D.L.R. (3d) 161, the Supreme Court of Canada established the "new" defence of due diligence.
256. Sax, *Defending the Environment* (1971).
257. On this point see, Private Members' Bill 23, *An Act to Establish an Environmental Magna Carta for Saskatchewan* (1982); Private Members' Bill 96, *An Act Respecting Environmental Rights in Ontario* (1982); Private Members' Bill 91, *An Act to Establish an Environmental Magna Carta for Ontario* (1980); Private Members' Bill 185 *An Act Respecting Environmental Rights in Ontario* (1979); Private Members' Bill 222, *The Environmental Bill of Rights* (Alberta) (1979).
258. See, for example, the Private Members' Motion and Comments of Mr. Charles Caccia, *Debates*, July 9, 1984.
259. Bill 23, *An Act to Establish an Environmental Magna Carta for Saskatchewan*, *supra*, note 257.
260. *Quebec Environmental Quality Act*, R.S.Q. 1980, c. #Q-2, s. 19.1.
261. Bill 185, *An Act Respecting Environmental Rights in Ontario*, *supra* note 257.
262. *Ibid*
263. As quoted by Rankin in "Access to Information," in Swaigen (ed.), *Environmental Rights in Canada* (1981), at p. 245.
264. Bill 185, *An Act Respecting Environmental Rights in Ontario*, *supra* note 257.
265. Chester, *supra*, note 45.
266. Bill 96, *An Act Respecting Environmental Rights in Ontario*, *supra*, note 257.
267. Bill 185, *An Act Respecting Environmental Rights in Ontario*, *supra* note 257.
268. See, for example, *Spur Industries, Inc. v. Del E. Webb Development Co.* 494 P. 2d 700, where the court granted the plaintiff the injunction sought but ordered the plaintiff to pay the defendant's relocation costs.

269. Stein, "The Use of Mediation to Settle Canada–United States Disputes," in *American Bar Association Environmental Newsletter* (1982), reproduced in Emond, *Cases and Materials on Resources Development Law* (1983), at p. 808.

270. *Ibid.*

271. See Swaigen's excellent analysis of this concept in Swaigen, *Compensation of Pollution Victims in Canada* (1981).

272. See the Supreme Court of Canada's decisions in *Interprovincial Co-operatives Ltd. et al. v. The Queen in Right of Manitoba* (1975), 53 D.L.R. (3d) 321; *Dan Fowler v. The Queen*, [1980] 2 S.C.R. 213.

3

Corporate Power and Public Policy

STANLEY M. BECK

The purpose of this paper is to discuss corporate power and its impact on public policy in Canada. The breadth of the topic is better suited to book length treatment, ideally based on a number of research studies and a thorough survey of the relevant literature. Neither the time allotted nor the length requested allowed for such a study. Unfortunately, studies of the structure and governance of particular Canadian industries and their impact on public policy are almost non-existent.[1] The scene is somewhat brighter with respect to more general literature about corporate power and corporate structure in Canada, and some important work (Porter, Clement, Niosi, Naylor, Litvak and Maule)[2] has been considered here. The result is a paper that must necessarily generalize in attempting to bring together a number of disparate threads, for to write about corporate power and public policy in an essentially free enterprise market economy is to write about the socio-political structure of the society itself.

Although the focus of the paper is on the centrality of corporate power in Canada, a secondary theme is the failure of government to appreciate fully the nature of that power and to accommodate to it in a manner consistent with an open, pluralist society. The result too often has been the frustration or failure of public policy. Although the greater part of the paper is taken up with a description of the reality of corporate power, the conclusion suggests some areas for structural change in corporate governance and poses some questions for further inquiry. It also suggests possible avenues of greater government/corporate understanding and cooperation in economic policy setting.

The danger in such suggestions is corporatism, that is the cooperative setting of policy to suit the interest of the corporation in profits and

growth and of the government in a strong economy while according a secondary place to the interests of all other groups. Although corporatism is a real danger, it need not result if the government is fully aware of both the nature of corporate power and the necessity to communicate its plans and policy preferences to the citizenry as a whole. The government must also ensure that the voices of major interest groups are heard in formulating these plans. Similarly, an enlightened corporate leadership must be aware of and responsive to the social dimensions of corporate governance, the legitimacy of the claims of other interest groups and the demands that government must satisfy. Corporate leadership must also recognize that government is not an adversary or an interfering regulator but a necessary partner in economic regeneration. The choice is not between government involvement and a free market but between an unproductive antagonism and cooperative mechanisms that advance the interests of all.

Corporate Power in Canada

The power and influence of the public corporation is a subject that has excited controversy since confederation. It is well recognized that the largest corporations, such as Bell Canada, MacMillan Bloedel, CPR and CP Enterprises, Power Corporation and Imperial Oil, to name but a few, exercise power that extends far beyond their obvious function as efficient producers of goods and providers of services. In spite of the rise of manifold regulations and the alleged play of pluralist, countervailing forces, the large corporation wields power that commands, directs and influences large segments of society. Indeed, the international division of labour, the technological and communications revolutions, and the internationalization of capital aided by the electronic transfer of funds have given the corporation a freedom to move and a power to act that is greater today than it ever has been.

The matter has been cogently characterized by Lindblom.[3] In a private enterprise market system, such critical matters as the distribution of income, what is produced, the allocation of resources to different lines of production, the allocation of the labour force to different occupations and workplaces, plant locations, investment levels, the technologies used in production, the quality of goods and services, and the innovation of new products are all matters that are in large part decided by businessmen. Yet they are also all matters of great economic and social significance. They are, in a real sense, public policy decisions and, to the extent that they are made or shaped by business leaders, such leaders exercise a public policy function. Moreover, there is a significant degree of discretion involved in making such decisions and although the market may exercise a significant degree of control, it by no means dictates the outcome.

Many corporate executives would probably object to this description as simplistic and unrealistic. They would point to the enormous growth of regulations that check and counter business on all sides. They would refer particularly to tax policy, regional economic policy and direct government spending as being key determinants of business planning. They would also speak of the critical importance of monetary policy, of trade and tariff policy and of labour policy in influencing their decision making. Finally they would speak of the new wave of citizen awareness and activism that results in further constraining regulations concerning the environment, the workplace, product safety, consumer protection and urban planning. In short, they would argue that business has never before operated in as open an environment where the public's concerns and demands are translated into government legislation and agency regulation that shape and limit corporate decision making.

That there has been a great growth of government regulation since the end of World War II is beyond question. That it has accelerated in recent years as the public has become aware of the "externalities" of corporate production is also beyond question. Another important factor is the rise of governments — federal, provincial and municipal — as economic participants. Government is involved as a direct employer of the labour force, as owner of Crown corporations and as a direct purchaser of goods and services. In short, government itself is a direct force in the economy. However, the reasons for direct government involvement are not widely appreciated. Where government does get into business, it is usually in an area where private enterprise will not venture, or one it has abandoned, because of high risk, great scale or economic uncertainty. The East Coast fishery, the East Coast steel and coal industry, the aerospace industry, and energy-related mega-projects are recent Canadian examples. Moreover, subsidized, protected and risk-underwritten private enterprise is an alternative to public enterprise and is widely used, although this form of government investment does not bring the same degree of corporate complaint. The indirect and nearly total subsidization of high cost, high risk frontier lands and off-shore oil exploration through tax policy is a classic Canadian example. Recent tax policy with respect to investment in high technology industries is another. A recent study by Bird and Green[4] on government intervention in the Canadian economy shows that tax expenditures, that is, revenues foregone as a result of special provisions, primarily for corporations, has been one of the fastest growing areas of intervention. As a proportion of corporate taxes collected, corporate tax expenditures rose from 37 percent in 1964 to an estimated 85 percent in 1980. And this is before counting the extremely high cost (estimated at well over $1 billion) of the scientific research tax credit which flourished in 1984. Similarly, direct regulation can be used to bring about a desired economic result through means other than public enterprise.

Although the quantity of regulation and direct and indirect government involvement in the economy has increased, and business now has a real sense that it is overregulated and has lost a degree of freedom to act, to conclude that the corporate sector is effectively controlled by government is to misunderstand the nature of our private enterprise economy. If it is largely left to private enterprise to make the critical public policy decisions that were described at the beginning of this paper, then government policy must ensure the success of private enterprise.[5] If government policy fails to do so it risks detrimental effects on the economy and thus on the citizenry whose welfare it is the chief function of government to advance. If corporate decisions (the fact of discretion must again be emphasized) affect jobs, investment, prices, wages, community stability (e.g. in Sydney, Schefferville, Sudbury, St. Catharines, Thompson, Calgary, Port Alberni and Powell River), interest rates and trade balances, they are in fact "governmental" decisions. Thus, government must, to a significant degree, be acquiescent to the needs and demands of business for to do so is to do no more than to provide good government. Of course, to the extent that major public policy decisions are made by non-representative and thus non-accountable actors, they are removed from democratic control.

To appreciate the centrality of corporate decision making in the economy is to appreciate the special place that corporate executives have in government, a place that no other interest group can begin to approach. It is more than just power that opens the doors of deputy ministers and cabinet ministers to senior executives, that causes heed to be paid to the pronouncements of the Business Council on National Issues, the Conference Board of Canada and the Canadian Manufacturers' Association. It is the realization by members of the government that business must be accommodated if the government of the day is to succeed. One need only list the major issues of the federal election of September 4, 1984, to appreciate the role of business in influencing the agenda. Some of these issues were unemployment, increased exports, the national energy policy and investment in high technology. A recurrent theme, explicitly stated, was the government's need to gain the confidence of business, to keep business happy in order that the issues might be dealt with successfully. To alienate business was to risk national economic malaise and stagnation. As Lindblom has pointed out, "public affairs in market-oriented systems are in the hands of two groups of leaders, government and business, who must collaborate. . . . Collaboration and deference between the two are at the heart of politics in such systems."[6] A former senior executive at Dupont described the relationship in a somewhat different way: "the strength of the position of business and the weakness of the position of government is that government needs a strong economy just as much as business does, and the people need it and demand it even more."[7]

Public concern for a strong, relatively stable economy is an important support for business in its dealings with government. In effect, the demand is that government policy be conducive to the requirements and policy preferences of business. Unhappiness with government policy on the part of business is transmitted to the public through reports and rumours of negative investment decisions, or threats and warnings about the implications of such decisions, and is translated back as pressure on government to initiate or change policies in order to strengthen the economy, i.e., to accommodate business. With communications media in Canada so highly concentrated and an integral part of the dominant corporate culture, government has a difficult time getting its viewpoint across. The concerns of business, on the other hand, are an everyday stable of the news, often buttressed by editorial support.

A few recent examples in Canada illustrate this point. The business community has been antagonistic to the National Energy Program (NEP), the Foreign Investment Review Act (FIRA), the creation of Petro-Canada and its purchase of Petro-Fina and BP Canada, and the purchase by the Ontario government of an interest in Sun Oil Co. of Canada (Suncor). The media, to a very large extent, have been critical of all four ventures, reflecting unremitting business hostility. The NEP, FIRA and Petro-Canada were, in varying degrees, issues in the 1984 federal election, and both the Liberal and Conservative parties promised accommodating changes, which have now been made. Changes may well be warranted as a matter of effective policy implementation and some of the corporate criticism may be analytically sound. But it is beyond question that many of the changes that have been and will be made are in response to the adamant opposition of business as reflected in the media. Business may cite all four examples as proof of its ineffectiveness in the face of a government determined to follow a particular course and policy. Such a contention is both naïve and self-serving in failing to recognize the dynamic of the interaction between government and business when the interests of business are seen to be affected. The point is not that government cannot govern and determine national economic policy. It can, and there is obviously a critical place for government leadership in the policy process. But if economic policy is to be effectively carried out, the collaboration and support of business is essential. In that sense, business is an interest group in our society like no other; government has to heed its voice and attend to its concerns or risk frustration and failure of its policies.

Few Canadians would have even a vague understanding of the complexities of the NEP or FIRA or their economic effects. Yet there is a widely held perception, reflected in polls printed in the media over the past several years, that both have deterred investment and contributed to unemployment. The extremely high approval rate by FIRA, the continued high level of foreign investment, and a statement by such a leading

corporate figure as William Mulholland, chairman of the Bank of Montreal, that "no self-respecting industrial nation would not have a policy similar to FIRA" are ignored or not understood. The NEP is perceived to have slowed drilling activity dramatically and to have contributed to the cancellation of energy mega-projects that would have spurred the economy. Following the introduction of the NEP, the press regularly reported the movement of drilling rigs from Western Canada to the United States with predictions of dire consequences for the economy in the West. In fact, if one read such foreign publications as the *New York Times*, the *Wall Street Journal* and *The Economist* at approximately the same time, one would have realized that the drop in world oil prices and the glut of oil also signalled the end of every energy-related mega-project scheduled in the United States, Western Europe and the Middle East. Similarly, the decline in oil drilling in Western Canada was almost exactly paralleled by a similar decline in the United States and for the same reasons. Yet the belief persists in Western Canada, fuelled by the press, that the major responsibility for the oil industry's decline and the recession in the West is attributable to federal energy policy. This is not to deny that the NEP and FIRA may have deterred some investment. They may well have done so, but industry and media reactions have precluded an informed debate as to the economic reality and the possible trade-off between investment loss, national policy preferences and perceived gains.

The economic reality, with respect to foreign investment, is revealed through Statistics Canada figures on net U.S. direct investment in Canada. Conservative party leader Brian Mulroney cited these figures during the 1984 election to show U.S. capital fleeing Canada in 1976, the year after FIRA was established, and again in 1981–83, after the imposition of the NEP. However, investigation disclosed that the net figures are misleading because they are made up of two quite distinct components: U.S. direct investment (gross inflows) and Canadian buy back of U.S. subsidiaries and branches (gross outflows). When the components are segregated, they reveal not a halt to U.S. investment, but an unbroken expansion of U.S. direct investment to the end of 1981. Gross inflows varied between $1 billion and $1.4 billion in the 1970s and then exploded in 1980 and 1981, reaching a peak of $3.2 billion in 1981, the first full year of NEP. It was only in 1982, coincident with the world-wide recession and the sharp drop in world oil and other commodity prices, that U.S. investment began to decline. It levelled off at $2 billion in 1983 and stabilized at that figure in 1984, still well above the average for the 1970s.[8]

There are very few studies in Canada of the relationship between a proposed government policy, business reaction, media treatment and the consequent effects on that policy. Two such studies describe the attempt in the 1970s to put in place a new competition policy.[9] Two others, although not of the depth of the competition studies, relate to the

aftermath of the *Report of the Royal Commission on Taxation* (the Carter commission).[10] Before turning to these studies, it is necessary to have some understanding of the newspaper industry in Canada. After a brief review of this media, competition policy and tax reform will be considered in the context of the thesis set out above.

The Newspaper Industry in Canada

This paper is not concerned with the newspaper industry as such, but only as it tells something about corporate power and public policy. Fortunately, the industry has been the subject of a recent royal commission which supplies the essential data.[11] First, it is important to note that the newspaper market is either monopolistic or oligopolistic. That is, in most Canadian communities there is only one newspaper, and in a few major metropolitan areas there may be two or even three. Of the 117 daily newspapers, 88 (75 percent) belong to chains, 28 are independently owned, and one (the *Toronto Star*) is independent but part of a conglomerate public company. Another way to look at chain ownership is through circulation. The Canadian average weekly circulation is 32,445 million. Some 28.555 million or 88 percent is attributable to the chains. Two of the chains, Thomson and Southam, control 54 dailies and 58.8 percent of the total English language circulation.[12] Power Corporation controls 25 percent of the French language circulation in Quebec. Irving newspapers controls 90.6 percent of the daily circulation in New Brunswick.

Who are the chains? They are Thomson Newspapers Limited, Southam Inc., Sterling Newspapers, Gesca Ltée., the Irving interests, the Toronto Sun Corp., Quebecor Inc. and Armadale Co. Ltd. Thomson is part of a much larger multinational conglomerate involved in many businesses. Sterling is part of the Argus Corp. corporate group controlled by Conrad Black. Southam is a conglomerate confined to communications. Gesca Ltée. is part of the Power Corp. group controlled by Paul Desmarais. The Irving family has interests in pulp and paper, transportation, and mining and petroleum, apart from its newspapers, which are only a minor part of the conglomerate. The Toronto Sun group is now part of the Maclean Hunter Limited communications/information group. Armadale is owned by the Sifton family and is part of their extensive holdings in real estate, radio stations and airport operations. The *Toronto Star* is not part of a chain but is controlled by Torstar, a media conglomerate whose income from the *Star* accounts for under half (37 percent) of its gross revenues.

The above brief description reveals a highly concentrated newspaper industry largely owned by corporate groups whose other corporate holdings are far greater than their newspaper interests. In short, the newspaper business is part of, and is controlled by, the nation's business community. As such it is bound to reflect the interests and values of that

community. Thus one would expect that the perspective that is presented to the public on governmental/business issues such as NEP and FIRA, would be largely the perspective of business.[13] The place of businessmen as public policy decision makers and/or shapers as outlined above is accordingly immeasurably strengthened, and the fully informed debate that is said to be essential for the effective functioning of liberal democracy is greatly weakened. The response to the report of the Royal Commission on Newspapers and the fate of its recommendations is itself illustrative of this situation. The newspaper industry was not inclined to support recommendations that would have broken up the major chains.

It must be emphasized that the point being made here deals with the effects of ownership and concentration. Such ownership is sufficient to ensure an overall perspective and a broad accommodation that is conducive to the interests of the corporate community of which the newspapers are an integral part. It is not a case of overt censorship by owners or publishers or of reporters being told what to report or not to report, or to report in a particular way. There is likely little, if any, of that type of conduct, although the views of the publisher are predominant in setting editorial opinion.[14] It is more a question of structure and all that that means in terms of access, attitude and accepted parameters.[15]

Canadian Competition Policy

The continuing but frustrated attempt by the federal government to reform Canada's outmoded and ineffectual competition policy has been the subject of studies by Stanbury and Brecher.[16] Stanbury, surveying the serious reform efforts in the period 1971–75, noted that business was able to obtain not only widespread coverage of its views in the media but also widespread editorial and columnist support. He also remarked that given the concentrated nature of the media in Canada, they were hardly likely to cast the first stone. Nearly unanimous media support buttressed business in its submissions to government and in its meetings with cabinet ministers and senior civil servants. To quote Stanbury:

> It takes a strong civil servant or minister . . . to resist for long the combined onslaught of cleverly prepared briefs, passionate face-to-face arguments and hostile newspaper editorials and comment. Policy advisors and Cabinet members who supported a strong pro-competition policy did not have a large and vocal "clientele" providing an independent source of information and ideological support.
>
> Business as an interest group appeared to be highly successful in making the policy-makers' key external reality source (newspapers) closely reflect its position. . . .[17]

It is worth noting that editorial reaction was initially not hostile to Bill C-256 which was introduced on June 29, 1971. The legislation was supported by the *Financial Times* and received a positive response from

the *Victoria Times*, the *Montreal Star*, the *Peterborough Examiner* and *Le Droit*. In contrast, business reaction was almost immediately negative. Newspaper reaction quickly turned almost unanimously negative to reflect views similar to those expressed by business. Some two months after it praised the bill, the *Financial Times* referred to it as "a badly botched bill . . . a dangerous bill."[18] Within six months there was a new minister of consumer and corporate affairs who announced that Bill C-256 would be dropped and a new bill introduced.

Brecher surveyed Canadian competition policy from 1950 to 1980 and in many ways was as critical of government and the senior bureaucracy as he was of the business community. In terms of relating legislative results to professed aims and potential benefits, he characterized the attempt to reform competition policy as "among the saddest, most frustrating experiences in Canadian public policy."[19] In searching for reasons to explain the failure of policymaking in an area where "there is a valid public interest in the consumer and production benefits of workable competition," Brecher commented:

> I found, like others before me, that Canada's big-business community bitterly opposed competition reform because it perceived a change in the status quo to be in sharp conflict with its own private interest in freedom from governmental restraints on decision-making in the markets. I also found, like the others, that Canada's businessmen and their lawyer-associates used their own brand of economic and legal theorizing to attack the reform effort with both tenacity and consummate skill. *Such pressure goes a long way to explain the ultimate negative outcome.* [emphasis added][20]

With respect to Bill C-256, Brecher characterized business reaction as "swift, massive and overwhelmingly adverse."[21] He acknowledged that business had real grounds for concern with aspects of the bill and that there were serious drafting defects, but the concerns "were far from justifying any abandonment" of the bill. As he noted, coverage could have been trimmed, drafting errors corrected and appellate procedures expanded.[22] In short, as with any piece of major, complex legislation, it could have been referred to committee for detailed consideration and amendments could have been made. "Canada's hostile businessmen and their legal advisers were perfectly capable of recognizing these truths . . . however, they were bound up with a set of perceptions pointing to total rejection of this kind of statutory reform."[23]

Brecher then looked at what countervailing support there was for the bill and noted that a number of academics were supportive and tied to bridge the "knowledge gap" with respect to competition policy. In terms of public debate, the academics "provided a supportive, though weak, voice in the battle for legislative reform." He then commented on the almost totally one-sided nature of the debate as the media lined up behind business:

> Indeed, with conspicuously few exceptions like the Consumer's Association of Canada, it [the academic] was a private sector voice in the wilderness. And the countervailing noises that made it barely audible came not only from businessmen and their lawyers, but from virtually the entire newspaper and trade press as well. The latter projected their hostility in two principal ways: scathing editorials echoing the business attacks on C-256 and its sponsors; *and a combination of detailed reporting on the criticism and sketchy coverage for arguments or events favouring competition reform.* [emphasis added] [24]

Brecher concluded his study with the opinion that if Canada is to have a large and efficient private sector, there is a "*major* role for competition policy" and that "enforcing workable competition . . . is indispensable for producing the common market that this country does not now have." As to the wider public policy implications of his study, Brecher commented that the "competition story provides a crystal-clear case of extreme [interest group] pressures, inadequate response, and consequent harm to the public interest in economic efficiency." Most importantly, he noted that this was not the only such case, "on a variety of Canadian fronts — banking regulation, regional development, international trade — one could doubtless tell similar stories about strong private pressures, and about weak policy results flowing. . . .[25]

The Royal Commission on Taxation

The reaction to the 1967 *Report of the Royal Commission on Taxation* (the Carter commission) and subsequent government attempts to reform Canadian tax policy reveals much the same picture with respect to corporate power and media support as the case of competition policy. The Carter commission proposals, if implemented, would have totally restructured the tax system and thus, like Bill C-256, were bound to elicit a sharp response from the corporate community. Brecher's statement in the competition context is apposite: "Canada's big business community [was] bitterly opposed . . . because it perceived a change in the *status quo* to be in sharp conflict with its own private interest."[26] As Gardner stated in his study, "the corporate sector presented an intense and highly organized campaign of opposition to radical tax reform."[27] The *Report's* pursuit of equity and thus its recommendation of a comprehensive tax base would have raised the level of corporate taxation by approximately 25 percent. This would have resulted primarily from the withdrawal of a number of special concessions and the elimination of a lower rate on the first $35,000 of business income.

Gardner outlined what he called "the most massive campaign of corporate pressure upon the state in modern Canadian political history."[28] The pressure was exerted through speeches, briefs and conferences sponsored by trade and industry associations and through the

press. The dominant theme was that implementation would retard and disrupt economic developments. The *Report* argued that the rationalization of the tax system would facilitate long-term development. Major corporations such as Massey-Ferguson, Shell Canada, Imperial Oil and the Steel Company of Canada stated that they would either move major operations outside Canada or not proceed with major developments within the country if the *Report*'s proposals became law.[29] The debate — in public forums, in the press and in briefs to government — was almost totally dominated by business.

In the face of such opposition, the government began to back away from the *Report* in its November 1967 budget. As Gardner noted, the minister of finance repeated the major themes of business — the uncertain effect of such major changes, the regional impact of the changes and the nation's need to attract large amounts of foreign capital in the years ahead.[30] In the budget of October 1968, the comprehensive tax base was abandoned and thus the prerequisite for what the *Report* saw as a more equitable tax system. In 1969, the government published a white paper which indicated a further move away from the philosophy of the *Report*, but also indicated an intention to tax capital gains fully, to eliminate the dual rate of corporate tax and to reduce the level of incentives for the resource industries. Thus, although the government had not adopted the radical reform through a comprehensive tax base recommended by the *Report*, it did opt for progressive reform within the context of the existing system. Most of these proposed reforms were opposed by business, with the result that a vigorous assault was launched on the proposals of the white paper.

The focus of the business message was once again that capital formation would be affected with injurious consequences for the economy. Big business was joined in its opposition by small business, which was alarmed at the proposed elimination of the dual corporate tax rate. The resource sector applied much of its pressure through Western provincial governments, whose strong objections closely paralleled those of its resource constituents. Hearings on the white paper were held before the House of Commons standing committee on finance, trade and economic affairs. Two-thirds of the briefs were from business and business associations and the prevailing tone was one of opposition. Duff Roblin, former premier of Manitoba, appeared for Canadian Pacific and Ernest Manning, former premier of Alberta, appeared for the Investment Dealers Association of Canada. In August 1970, the minister of finance announced modifications to the white paper, particularly in the area of resource taxation, which removed two-thirds of the tax increase the proposals would have imposed. The report of the Commons committee argued for greater emphasis on economic growth and generally reflected the view of the business briefs.

Tax reform legislation was introduced in the December 1971 budget. Economic growth was the key consideration. Corporate tax rates were to be reduced, the dual tax rate for business was retained, only one-half of capital gains were to be taxed, strict limitations on the deductibility of business expenses were dropped and separate gift and estate taxes were eliminated. In its overall effect, there was little in this "reform" bill that was objectionable to business. Business had made it clear that favourable tax policies were necessary to ensure a stable and attractive level of profits and that without such policies there would be a reluctance to invest and to provide the resources required for economic growth. That was the private and public message and government heard it and heeded it as, to a degree, it had to.

The proposals for reform of resource taxation and the mining industry's response were the subject of a study by Bucovetsky.[31] He made many of the same points as Gardner, but was more specific in detailing media support for the industry's position. He pointed out that in no other area was public comment as one-sidedly hostile or as well organized. The *Globe and Mail*, Canada's only national newspaper and clearly the most influential, "published a sequence of news stories, reports of addresses and signed comments" whose message was that there would be a loss of hundreds of millions of dollars of investment if the recommendations became law. A three-inch banner headline on the front page in April 1967 announced that Noranda had shelved a $90 million project and blamed the *Report*. The media message was of a surmounting "capital strike."[32] By mid-May, the minister of finance publicly reassured the industry, particularly as to the possible date of implementation of the proposed reforms. The next day Noranda announced that it would proceed with its project. When the Commons committee heard testimony on the white paper proposals, which contained considerable revision of the existing mineral tax, 20 percent of the groups appearing before it advocated abandoning mining tax reform. The report of the committee was generally favourable to the industry, and the tax legislation passed in 1971 and 1972 was also generally accommodating. The mining constituency had achieved considerable success "in blunting and, indeed, reversing the thrust of tax reform in Canada."[33]

In contrast to competition policy reform, there was a long, thorough public debate with respect to tax reform. The Carter commission was a five-year effort, and its *Report* and background studies were internationally agreed to be an outstanding contribution to tax policy scholarship, although not all its admirers agreed with all its recommendations or its comprehensive tax base approach. There was a broad debate following the release of the *Report*, a white paper, further debate and hearings of a Commons committee and finally, five years after the *Report*, legislation. Yet the end result was minimal in the way of tax reform and this situation remains true today.

The story of tax reform, in spite of a massive background study and much broader public debate, is essentially the same as the story of competition policy reform. The debate was dominated by public corporations which saw their vital interests threatened. The media, as a part of the dominant corporate complex, cast its weight in favour of the corporate case and against legislative change. Most importantly, the media, by repetition of corporate concerns and threats, generated public concern over loss of investment and a consequent loss of jobs. In the face of such opposition, and in a context where the voice of competing interest groups was heard and reported only dimly, if at all, the government backed away from reform. It is not contended here that the Carter reforms or Bill C-256 ought to have been adopted. The Carter proposals, as a package, were probably too sweeping a tax reform for any industrialized country to have implemented and their adoption might possibly have entailed an economic risk that business was correct to question. However, the fact that there has been so little in the way of meaningful tax reform, or even ongoing debate about tax policy, in the 17 years since the Carter *Report* is remarkable. The inept attempt at tax reform in November 1981, including the Department of Finance's decision to announce its program with no prior discussions for fear that opposing interests would block it, gives further testimony to the difficulty of economic policy making in a free enterprise economy if the major economic participants are not accorded a significant role in the policy-making process. Those difficulties are compounded in the Canadian context by the strength of the regions and the concentration of particular industries such as forest products, mining, oil and gas, automobiles and textiles within particular regions. In the Carter debate this regional concentration resulted in opposition from the Western provinces with the concerns of the extractive industries being strongly expressed by the Western provincial premiers.

Concentration and Ownership

Concentration

Corporate power is increased both in the market and in relation to government if there is corporate concentration. In the Canadian context corporations are highly concentrated both in specific product areas and in the aggregate. As noted above, the regional nature of concentration in Canada also tends to increase corporate power. This paper is not a study of the degree of concentration or of the economic impact of concentration in the Canadian economy, but it is important to appreciate its extent. Concentration raises political and social concerns as well as economic concerns. The extent of family and foreign corporate control of Canadian companies raises similar concerns as well as calling into question

the theory of "managerialism" which is argued to advance corporate social responsibility.

The 1978 *Report of the Royal Commission on Corporate Concentration* provides the relevant data on these questions. The *Report* found "high domestic levels of industrial concentration" in the Canadian economy.[34] Aggregate concentration is higher than in the United States and industrial concentration is "substantially higher than in comparable industries in the United States." In fact the concentration is not just greater than in the United States: "aggregate concentration in Canada is roughly twice that of the U.S."[35] Canadian firms are large relative to both the size of the economy and to the size of individual industries.

In terms of specific concentration, three separate Canadian studies of manufacturing industries in 1954, 1965 and 1972 found significantly higher levels of concentration than in comparable U.S. industries. The Conference Board's study in 1972 showed that "roughly twice as many industries in Canada had four-firm concentration levels in excess of sixty percent."[36] A sample of nine Canadian industries was compared with industries in foreign industrialized countries. Concentration in Canada was higher than in the other countries studied, including the United States, West Germany, France, Japan and Sweden, and was higher than in the United States for all nine industries.[37] This comparative study also showed that concentration is higher in Canada than in countries with economies of roughly the same size.

Taking the period 1923–75, the *Report* stated that "the clear trend seems to be toward lower overall concentration in Canadian non-financial corporations."[38] A 1984 study indicates that that is not the case, although concentration does seem to have stabilized in the manufacturing sector.[39] The same study notes that, in Canada, only 40 to 50 percent of gross domestic product (GDP) is generated in effectively competitive sectors of the economy, compared with some 80 percent in the United States. Aggregate concentration in the non-financial sector in terms of the percentage of total assets held by the 25 largest firms was 23.8 percent in 1965, 29.6 percent in 1976, 30.7 percent in 1979 and 30.2 percent in 1980. In terms of industry concentration in the manufacturing sector, the average four-firm concentration ratio measured by shipments was 49.2 percent in 1965, 50.7 percent in 1972 and 49.8 percent in 1980. Aggregate concentration in manufacturing measured by shipments for the 50 largest firms was 33.3 percent in 1968, 38.5 percent in 1978 and 35.1 percent in 1980. A significant figure in revealing the degree of concentration is that, based on a study of 167 industries and 4080 products, 82 percent of all manufactured products, taking each product separately, are manufactured by four or fewer firms.[40] Although concentration may have stabilized, or even declined slightly in the manufacturing sector, the composite picture is one of a highly concentrated economy in the aggregate and in specific markets.

Concentration and Tax Reform

The use of corporate power and the effects of confused, if not perverse, national policy making are illustrated by the effect of tax reform on corporate concentration. The case is put in an excellent study by Bale.[41] Prior to 1972, a corporation could not deduct the interest on funds borrowed to acquire shares in other corporations. The Carter commission recommended that such interest be deductible as part of its aim of full integration of corporate and personal income tax. Integration was necessary to ensure that tax considerations would not dictate the form in which business was carried on. Moreover, Carter insisted on tax neutrality between transactions that had the same economic effect. Control can be obtained through the purchase of assets or the purchase of shares, but under the existing tax system only interest paid on money borrowed to purchase assets was deductible.

As noted above, most of the Carter recommendations, and certainly their underlying premises, were rejected. Integration, for the most part, was abandoned. Yet the tax reforms of 1971 did include deductibility of interest on funds borrowed to purchase shares. As for the need for neutrality, the market appeared not to require it as 90 percent of the corporate takeovers in the 1960s were share rather than asset acquisitions.[42] Why then the inclusion of interest deductibility in the 1971 reforms? The minister of finance stated that it was because lack of such deductibility put Canadian firms at a disadvantage vis-à-vis foreign firms that could deduct such interest. That was a legitimate concern and it was a sensible reform to remove this disadvantage and to provide for neutrality between asset purchases and share purchases. But the national economic context seems to have been ignored in implementing the reform. Tax policy that was coordinated with economic policy would have confined the deduction to Canadian controlled corporations. As Bale commented, in an economy which already has an extremely high degree of foreign ownership "it seems absurd for Canadian taxpayers to provide an almost fifty percent subsidy to a foreign controlled Canadian corporation to acquire shares in other Canadian corporations."[43]

A clear effect of the interest deductibility allowance was to encourage takeovers. Why, in an economy that is already highly concentrated, would government, through tax policy, encourage further concentration? The government was not unaware of the effects of the reform since Eric Kierans raised the issue squarely in the debate on the tax reform bill: "These sections of the bill can lead to further concentration in the Canadian economy, which no one wants [and] . . . to an increase in foreign ownership of Canadian industry, which no one wants."[44] In summary, corporate interests were able to deflect government from major tax reform and to persuade it to retain the recommended interest deductibility while abandoning the premises of equity and neutrality that

originally underlay this recommendation. The result was a corporate subsidy to foster increased concentration and foreign ownership. At almost the same time, the government introduced its radical, and ill-fated new competition policy and the Foreign Investment Review Act.

Ownership

In 1932, Berle and Means published their classic study *The Modern Corporation and Private Property*.[45] In it they described a change in property relations that was characterized as being as fundamental as the shift from feudalism to capitalism. The change they outlined was from ownership control to managerial control of the large, public corporation in the United States. In their famous phrase such control constituted "power without property" as investment and planning decisions were split from ownership/profit concerns. Indeed, the dilution of ownership control in the United States had been going on since the turn of the century, spurred by the growth of vast, multi-million shareholder constituencies, family divestment and dispersion, mergers, diversification of investment and the establishment of philanthropic foundations, i.e., Carnegie and Rockefeller.[46] The figures are striking. In 1929, of the 200 largest non-financial firms listed by Berle and Means, 10 were privately controlled, 9 were majority owned and 65 had minority ownership, that is 5 percent or more of the voting stock. In 1975, one was privately owned, 3 were majority owned and 29 were minority controlled.[47]

The situation in Canada was revealed by a 1984 Toronto Stock Exchange (TSE) study to be markedly different.[48] Some 283 public companies make up the TSE 300 composite index. Legal control (50 percent or more) was present in 137 companies (40 percent); effective control (20 percent to 49.9 percent) was present in 84 companies (30 percent) and 61 companies (21 percent) were widely held. Looked at another way, close to 80 percent of the listed companies are controlled by a single family and/or group. Conversely, the Standard & Poor's 500 index in the United States shows 426 (85.2 percent) of the companies to be widely held.[49] The *Financial Post*'s list of Canada's top 500 companies, ranked by sales, shows only 17 (3.4 percent) to be widely held, that is, with no one owning more than 10 percent. Another 21 are owned by cooperative members or employees. Some 75 of the top 200 companies (37.5 percent) are majority or wholly owned by foreign corporations. In short, the picture in Canada is one of very significant control of the economy by a small number of families and foreign corporations. Family control is increasing through the continuing expansion of the interests of such people as Paul Desmarais, Ken Thomson and the Bronfmans, unchecked by the presence of an effective competition law. Moreover, the listing of non-voting shares on the TSE and the move of many corporations to split their equity into voting and non-voting

shares, will ensure the position of the control groups even though the capital demands of growth may require new equity financing.

It is necessary to guard against jumping to the conclusion that family control of the Canadian company results in a very small group of individuals exercising enormous political and economic power. The analogy is not to such mythic figures as Morgan, Rockefeller and Carnegie who truly controlled and ran their corporate empires and openly used their power in political and social arenas. The more likely truth is that corporate management and corporate power is of the same order in Canada as it is in the United States. That is, the management of the Canadian company is for the most part professional management concerned with an efficient operation — with a viable mix of profit and growth. It is not suggested that the extreme concentration of the Canadian economy in a smaller number of hands — nine families control over half the value of the companies that make up the TSE 300 composite index[50] — does not constitute a power centre. It clearly does; their opinions and preferences must necessarily carry great weight in government councils, and the unchecked increase in their holdings is surely a matter for public concern. But given the nature of corporate power in our society, little is likely changed in terms of structural and power relations by the existence of such concentration.

The operation, management and power exercised by the Thomson companies, the Weston companies or the Bronfman/Brascan companies, to take three prominent examples, would not likely be of any different a nature if, in each case, the companies were widely held. The structure and sophistication of modern corporate organization, the discipline exerted by financial markets and the reality of regulation, all militate against owner control and power in the old fashioned sense. If there is control and power exercised in that sense, it is more likely through foreign parent control of Canadian subsidiaries. This situation more truly resembles a case of direction by a single owner and decisions possibly being taken in the best interests of the controller or its economic group. Indeed, U.S. studies on corporate control exclude cases where one corporation owns over 50 percent of another, "as the controlled firm is no longer considered a separate entity." To the extent that such subsidiaries are major factors in the economy, and they clearly are in Canada, the controller is in a position to exercise power in the sense of insisting on attendance to its needs and preferences and through its ability to move its capital or seek growth opportunities elsewhere. A Canadian corporation also has that ability, but not to the same degree as a large international group.

Family control is probably of greater concern as it manifests itself in economic concentration, as it appears to be doing. A high degree of market concentration and a high degree of concentrated ownership are the hallmarks of the Canadian economy. Together they constitute a centre of power that is rivalled only by government itself.

Supracorporate Centralization

Supracorporate centralization is the term used by Herman to refer to corporate power which comes through collective action, rather than through resource or market control.[51] The possible forms of collective action range from informal cooperation and coordination to formal linkages through interlocking directors, joint ventures, membership in trade and industry associations, public affairs groups, and government advisory bodies, and personal association through clubs and other social contacts. This paper is concerned with such ties only as they increase corporate power and impact on public policy making, rather than on market behaviour. Accordingly, the focus will be on interlocking directors, industry associations and public affairs groups.

Interlocking Directors

There is a direct interlock between two companies when an individual sits on the boards of directors of both companies. An extensive network of interlocking directorship serves to further concentration and power. Clement's study showed that there are very extensive interlocks in the Canadian corporate community.[52] The author surveyed the 113 dominant firms in finance, trade, manufacturing, resources, and transportation and utilities. He found a total of 1,848 interlocked positions and characterized them as "an interacting set of powerful people . . . who control and direct the future of these dominant companies and with that the Canadian economy."[53] An interesting aspect of interlocking directorships is that the Canadian controlled companies have the greatest number. Clement hypothesizes that this is because U.S. subsidiaries and Canadian controlled family firms, both of which tend to have low numbers of interlocks, are tightly controlled with little public shareholder participation. There is a particularly high number of interlocks between the five major Canadian banks and the other dominant firms. Clement found that the 231 bank directors held 306 other directorships in dominant firms, some 25.1 percent of all such directorships. The figures indicate that a relatively small number of individuals, about 300, who are central figures in the operation of the Canadian economy, come together on the boards of the institutions that provide access to finance capital — the 5 dominant banks and 11 dominant insurance companies.[54]

Trade and Industry Associations

There are approximately 300 trade and professional associations represented in Ottawa. The function of each is to further the interests of its members through contacts and influence with members of parliament, the civil service and cabinet ministers. The American phenomenon of senior civil servants, agency commissioners and even cabinet ministers

joining such associations when they leave public life is becoming more common in Canada. The traffic in talent also moves in other directions, from an association to the civil service and government. There is also increasing interchange between the major corporate law and accounting firms and the senior levels of government. In short, business and its representatives are part of a high level, interactive business–government–civil service network that is not duplicated in the same way for any other interest group in society. Certainly other interest groups, such as farm and labour, have access to both politicians and public servants, and the 300 associations are not all representative of business. But the corporate community has an ease of access, a quality of representation, a resource base, a sophisticated information and analysis network, and a policy-shaping function that is not remotely matched by any other group. Nor is the social interaction and role interchange that prevails in the upper reaches of business and government typical of any other interest group.

The 1978 *Report of the Royal Commission on Corporate Concentration* was both confused and naïve on the point. The *Report* noted the "greater access" to politicians and public servants enjoyed by the representatives of major corporations than is the case for "other individuals." Representation is stated to be made "most effectively [through] private conversations between corporate officers and those involved in the policy-making and legislative process."[55] Yet "this type of access" is also "achieved . . . by farm and labour groups and by many others with special interests."[56] Such access is indeed achieved by other interest groups, but the commission overlooked such critical questions as ease, regularity, level, intensity, deference and effectiveness.

The *Report* went on to note that contacts "between leaders of government and business can be very close and personal." Such contact is "not surprising . . . for there is a common concern with a wide variety of economic and social problems and legislative and regulatory measures." Then, in an astonishingly naïve passage, the commission explained that such contacts are "in the public interest" because "the success of government measures requires knowledge of how they may be expected to affect particular industries or companies, while the success of business projects will require a knowledge of the laws and public policies that will apply to them."[57] In short, business simply wants a full understanding of the laws and policies so that they may better comply. A somewhat more sophisticated appreciation of these "very close and personal contacts" might have raised questions about the mutual accommodation that is required in a free enterprise economy and the problem raised for liberal democratic theory by the necessarily special place of business that is entailed in that accommodation.

The *Report* did ask the question whether access resulted in "effective influence," and found it to be "difficult ground."[58] It concluded that

because important decisions are usually made in secret by ministers in cabinet, or cabinet committees, or in their offices with senior officials, "evidence is usually lacking on who really influenced a decision." The point is also made that a policy that coincides with the views of business may be the preferred one and may not be owing to business influence. That is an important and valid point. Many factors and interests undoubtedly shape and influence important government decisions. Such decisions may not always be those preferred by business; some may be contrary to its preferences. But that the voice of business is predominant and the most influential in the making of economic, and often social, decisions is beyond question. To repeat the point made above, government officials "grant them [business leaders] a privileged position . . . because jobs, prices, production, growth, the standard of living, and the economic security of everyone all rest in their hands."[59]

The Business Council on National Issues

In the case of industry associations, as elsewhere, some are more equal than others. A relatively new association, the Business Council on National Issues (BCNI), is the most powerful, the most prestigious and the quietest corporate group in Ottawa. Founded in 1976, the BCNI comprises some 150 chief executive officers of the major Canadian corporations, including the five dominant banks. The corporations they head employ more than two million Canadians and aggregate $450 billion in assets. The full-time president is Thomas d'Aquino who, prior to his appointment, was a special assistant in the prime minister's office. D'Aquino describes the BCNI as something other than a lobbying group. Because of the nature of its membership, he characterizes it as a "board of directors of last resort, exercising our responsibility to help determine the public interest."[60]

The BCNI is clearly modelled on the Business Roundtable, a similar group of the chief executive officers of the 192 largest U.S. companies, founded in 1973. Because of the power of its membership it has become "the preeminent lobbying institution in Washington." Its overall position has been broadly characterized as "anti-regulation, anti-federal spending, anti-anti-trust, pro-tax cuts."[61] The Business Roundtable operates through high quality research and briefs and, most importantly, through meetings between groups of the chief executives and the president, cabinet ministers and senior legislators. The BCNI operates in precisely the same fashion, through discreet meetings with the prime minister and cabinet ministers. As d'Aquino puts it, "chief executives like talking to their counterparts — the people who make decisions . . . and we have excellent relations with the senior economic ministers."[62] The meetings are backed up by task force reports on issues such as national finance, energy policy, labour relations, manpower and

competition policy. In its examination of competition policy, a draft bill accompanied its research and it had input into the bill introduced in the 1984 parliamentary session.

The power of the BCNI was captured in a five-line item on the inside pages of the *Toronto Star* on June 6, 1984. The item announced that thepremiers of Ontario and Alberta had attended a meeting arranged by the BCNI to discuss energy policy. Unremarkable perhaps, but it is hard to think of any other interest group in Canadian society that could secure the attendance of two powerful provincial premiers at a quiet meeting to discuss a national policy issue. Most importantly, such a meeting is not a singular event; similar meetings are typical of the BCNI's method of operation. It is not contended that such meetings, and the work of the BCNI, are somehow sinister. There may be much that is beneficial in regular, informal contacts between leading economic decision makers and senior government officials. The point simply is that the BCNI — what it represents — is a power group like no other in our society and is so recognized by government.

Events in the fall of 1984 reveal much about the nature of the BCNI, its agenda and its power. In September 1984, the Business Council called on the new government to slash federal spending by between $20 billion and $40 billion over the next four years. The identified targets were rail subsidies, home insulation programs, health and education, foreign aid, subsidized housing and the Canadian Broadcasting Corporation. In October, the council called for a $14 billion increase in defence spending over the next ten years. Mr. d'Aquino said that the call for increased defence spending was not inconsistent with the council's call for deficit reduction. "We are simply advocating a re-ordering of priorities," he said.

In November, Finance Minister Michael Wilson delivered his national economic statement to the House of Commons. An analysis of that statement by Thomas Walkom in the *Globe and Mail*, noted that its major points tracked almost exactly those set out in the September position paper submitted to the new government by the Business Council.[63]

The central political role played by a relatively small number of key corporate leaders is the thesis of Useem's 1984 book.[64] His study of the nature of political activity by large business firms in the United Kindgom and the United States led him to the conclusion that a politically active group of executives, "those few whose positions make them sensitive to the welfare of a wide range of firms," have come to speak for the entire business community. He characterizes this group, "which gives coherence and direction to the politics of business," as the "inner circle." This select cluster has been crucial to the expansion of corporate political activities of the past decade. Their views transcend the narrow concerns of individual companies since their activities are directed toward broader political goals that will yield benefits for all large

firms. Useem points out that such a single, powerful voice has given a new coherence and effectiveness to the political position of business. Moreover, "the rise to power of governments attentive to the voice of business, if not always responsive to its specific proposals, is, in part, a consequence of the mobilization of corporate politics during the past decade. . . . "[65] One can see an exact parallel in Canada of the phenomenon of the strategic and influential position of a transcorporate network of senior executive officers in recent political events in Canada and in the rise to influence of the BCNI.

The work of Useem, along with that of Lindblom, is also important in emphasizing the dominant voice of the large enterprise in articulating the concerns of business. The interests of the sectors of business are by no means identical. Certain segments of the business community may well benefit from tax reform and a more vigorous competition policy, to name just two areas where there would be opposing interests within business. But it is the largest enterprise, the firms that comprise the BCNI, whose executives form the powerful network that faces government as the spokesmen for the dominant actors in the economy and who thus set the policy agenda. It is to that voice that government responds in setting national economic policy.

Public Affairs Groups

Research groups, often referred to as think tanks, have risen rapidly to prominence in public affairs over the past decade. The Conference Board of Canada, the C.D. Howe Institute, the Niagara Institute and the Fraser Institute are among the best-known Canadian examples. Their forecasts, opinions and research results are given extensive coverage in the media and are used by government. Because they are thought to be both independent and expert, their statements are often considered authoritative and given a high degree of deference. In fact, these public affairs groups vary greatly in their independence. For the most part, they are funded by business interests and reflect a consistently conservative point of view. The Fraser Institute is neo-conservative and a vigorous advocate of unrestricted free enterprise. Its work is admitted to have heavily influenced the 1983 economic and social program of the government of British Columbia. Even those institutes that are most respected in terms of the quality of their work, such as the C.D. Howe Institute, have a conservative bias in that efficiency, in the economic sense, is the criterion, usually the sole criterion, by which policy is judged. There can be no objection to that in terms of the research the Howe Institute undertakes, but public debate is increasingly influenced by the work of such institutes and efficiency is just one among many criteria that should determine public policy outcomes. Gillies reports that "former ministers of finance all reported that the studies of the Conference Board and the

C.D. Howe Institute influenced their thinking. . . . Indeed, in the policy departments there is no question that such reports and studies are significant."[66] The board of directors of the Conference Board is similar to that of the BCNI. There are high-quality, independent institutions, such as the Institute for Research on Public Policy (IRPP), that sponsor a broad range of studies that move across the political spectrum, although an increasing share of the IRPP's budget is coming from corporate contributions. The Canadian Institute for Economic Policy (now defunct) was avowedly nationalist, interventionist and on the left of the spectrum. But for the most part, the public affairs institutes are the offspring of corporate sponsorship and reflect a conservative bias.

The Corporation

What is the proper role of the public corporation in society? Is it solely, as Milton Friedman would have it, "to use its resources and engage in activities to increase its profits"?[67] Or is there a broader social role to be played by the corporation, given its central position in the economy? Is there such a thing as "corporate social responsibility" and, if so, how is it defined and by whom; how is it implemented; how is performance monitored; and what are the enforcement mechanisms?

The controversy over the social role of the corporation goes back to the 1920s and a famous debate between Adolf Berle and E. Merrick Dodd.[68] Berle took the position that the corporation's powers were held in trust for its shareholders. Dodd asserted that the corporation's powers were affected with a public interest and in that sense held in trust for the entire community. Berle argued that the doctrine of primary responsibility to shareholders could not be abandoned until there was "a clear and reasonably enforceable scheme of responsibilities to someone else." Whatever the reality, the rhetoric since the 1960s has been about the social responsibility of corporations. Berle himself, in 1971, changed his position because of the "more responsible, more perceptive and . . . more honest" principles and practices of big business.

The social responsibility debate grew out of the changed public consciousness of the 1960s. Authority in all its guises was being questioned and challenged, and the corporation did not escape. Citizen activism was bound to focus on the corporation, given its central place in the economy. As individuals became concerned about clean air and water, product safety and utility, workplace health and safety, racial and sexual discrimination, urban congestion, political corruption and the human dislocation inherent in technological advance, they focussed on the corporation and demanded change,and on the government and demanded regulation. To a degree, they got both. There has been greatly increased regulation with respect to the environment, the workplace, consumer protection, urban development and the labour force. Corpo-

rate leaders have proclaimed a concern for the public interest and promised socially responsible conduct. The appropriate corporate constituency is said to be not only its shareholders but also its employees, customers, suppliers and the public at large. Given the debate over social responsibility, it is necessary to examine exactly what is meant by this term.

Corporate Social Responsibility

The past 20 years have seen corporate executives, lawyers, economists and political theorists engage in a debate about corporate social responsibility. The public statements of many thoughtful corporate leaders deal with the idea and usually proclaim a lively awareness of responsibility to constituencies other than shareholders. The great difficulty, however, is the elusiveness of the concept. The area of agreement when one talks of particulars and mechanisms, as opposed to "do-gooding" generalizations, is extremely narrow. Not the least of the problems is the failure to distinguish between doing good and not doing harm. It is the latter idea that most corporate spokesman have in mind when they speak of social responsibility. It is the idea of an organization that is concerned with the safety and quality of its products, the effects of its waste by-products, the health and safety of its workforce, the fairness of its advertising, the impact of its investment policies and the integrity of its operations. At its highest level, it is the concept of an organization that is committed to these ideas in the sense that they are the avowed and enforced concerns of senior executive management.

The broader idea of social responsibility, and one that finds far less support among executives, is that of an activist role for the corporation in ameliorating social problems. Thus it is argued that the corporation should play a role in such areas as job-retraining, minority hiring, urban renewal, environmental protection and even political reform, beyond what is called for by its economic mandate and considerations of profit, even in the long term. This broader concept sees the corporation as the major non-governmental force in society. It has the resources, the capacity, the personnel and the expertise to play a reforming and renewing role if it will. Some corporations have tried experiments in social activism, particularly in the United States, but these have been limited. For the most part, corporations are uncomfortable in such a role, it is outside their domain and there are concerns about its impact on their primary economic function. Political theorists have been equally uncomfortable about such a corporate role, raising as it does questions of mandate and legitimacy.

Corporate social responsibility, then, is primarily a concept of not doing harm. Stated positively, it is the taking into account of the impact of the corporation's actions, or its failure to act, on the constituencies

most immediately affected. These will almost always include consumers and the labour force and can be expanded to include residents near a plant, inhabitants along and users of a river into which a plant discharges toxic wastes, residents of a town in which the corporation is the dominant economic actor, and citizens generally who might be affected by a dangerous or defective product or the by-products of production. Even in the area of not doing harm, the parameters of the idea of social responsibility are extremely broad and there is not general agreement. Does a corporation have a duty not to discharge toxic waste when the current environmental regulation does not cover such wastes? Is there an obligation to take precautions in a plant beyond what current legislation requires when there is clearly a health or safety problem? Should the corporation use its political, social and legal resources to battle regulations, health, safety or environmental, which it thinks are too costly or too onerous? What is the appropriate attitude for the corporation to take on technological change and its effect on the work force? Should the corporation sell in one country what food and drug laws prohibit it from selling in its home country? Should a corporation invest in a country that practices apartheid as national policy? Should a corporation contribute to one political party? Equally to all? Should all such contributions be a matter of public disclosure?

To ask the above questions is to illuminate not only the fuzzy edges but also the uncertain core of the social responsibility controversy. It is obvious that corporations vary greatly in their attitudes and policies toward labour, environmental considerations, technological change, consumer welfare, workplace health and safety, and social welfare. Moreover, a corporation that may have progressive policies in one area may be backward in another, and for what it regards as sound reasons. Changes in their economic condition and outlook have a way of quickly changing the most progressive of companies into conservative institutions. Does corporate social responsibility then reduce to an endless and unresolvable debate with corporations operating in the future much as they have in the past? It is suggested that that ought not to be the case if only for the reason that there is a body of evidence that many corporations, among them the largest and most powerful, have operated in a socially irresponsible manner with harmful and costly injury to society. Regulation is not the only, or even the best answer, for the simple reasons that it does not always work, it is enormously costly and it may lead to inefficiencies in operation. It is suggested that the best solution, along with enlightened regulation, is in structural change that will mandate social responsibility while at the same time leaving the corporation free to be an efficient economic actor. Before turning to structural change, it is necessary to deal briefly with both the economic and legal situation and the reality of corporate organization.

The Economic Context

Milton Friedman's much quoted statement that the only social responsibility of business is to make a profit is often misunderstood as displaying a "public be damned" attitude. In fact, he was just expressing the idea that the corporation best serves society if, in a competitive market, it seeks to maximize its revenues. This objective will lead to a range of prices and an allocation of resources that will best contribute to the economic welfare of society as a whole. To ask corporate managers to depart from this basic goal of profit maximization is to endanger the corporation's capacity to function as an efficient economic actor. Moreover, profit maximization is an easily understood and tested criterion by which to monitor management. It is a concept to which management can respond fully and which the market can use to test performance and discipline inefficiency. No other criterion so well fills that important dual purpose.[69] Public policy and the welfare of those affected by the corporation is best left to public law making and regulation, private enforcement and the legal process.

There is much to be said for Friedman's position but his prescription cannot be taken in undiluted form. It is too simple and thus hides many difficult issues. Friedman himself said that the corporation's responsibility was to make as much money as possible "while conforming to the basic rules of society, both those embodied in the law and those embodied in ethical customs."[70] This is a formulation that surely raises questions of social responsibility. What about pollution, product safety and workplace health and safety? Is no testing and monitoring required by, say, a chemical or pharmaceutical company beyond the letter of legal requirement? Are economic considerations the only relevant ones in a decision by, say, Inco to close its smelter in Sudbury? Even if one is talking only about legal standards, the relationship between business and government that has been outlined in this paper is left out of Friedman's doctrine. The rules are not made by government independent of business, and regulation is not free of business influence. In a very real way, business is instrumental in shaping the rules that will apply to it and then in influencing the nature, form and effectiveness of their application. Surely there is a good case for considering questions of social responsibility in that entire process. Finally, Friedman's thesis depends upon the operation of competitive markets and that is a condition that is true in only varying degrees for many Canadian industries. Target pricing is a well-documented practice in major industries, most of which share an oligopolistic structure. The case for corporate structures that will recognize social responsibility is not inconsistent with the case for profit maximization as the basic corporate goal.

The Legal Context

It is the courts rather than corporate statutes that take profit maximization to be the sole, legitimate purpose of corporate activity. Canadian statutes do not refer to the goal of profit, but rather charge the directors to "act honestly and in good faith with a view to the best interests of the corporation."[71] That is a formula that is capable of a broad interpretation in terms of the directors' judging in good faith what "the best interests" are. The courts, however, have consistently held that "the corporation," in the context in which the issue here arises, means the shareholders as a body. Thus, policies are to be formulated and assets used to further the interests of the shareholders rather than any other interests, no matter how closely connected to the company. The leading case, now overruled by statute in the United Kingdom, is *Parke v. Daily News Ltd.*[72] Two newspapers were sold to another company and many employees were to be laid off. The directors of the selling company proposed that the proceeds of the sale be distributed among the employees. At the instigation of a single shareholder, the court prohibited the distribution on the ground that the shareholders were the sole group whose interest were involved. Although *Parke* may be unusual because the company was ceasing its major operation and its assets were being distributed, the broader interpretation as to the primacy of the shareholder interest is undoubtedly the law in Canada.

The decision in *Parke* does not prohibit charitable donations or political contributions, presumably on the grounds that the directors honestly consider them to be for the benefit of the company in terms of community reputation and relations with government and thus in the ultimate interest of the shareholders. Such corporate activities are rarely challenged and when they are the courts tend to give wide latitude to the directors in determining what is in the best interests of the company, but those interests must ultimately be connected with the profit-making function, no matter how tenuous the connection or long-term the view. The command of the corporate statutes, as interpreted by the courts, does not, of course, cover the total legal environment in which the corporation operates. That environment imposes restraints and responsibilities on the corporation with respect to all the persons or groups it affects — employees, consumers, creditors, debtors, the general public and government. However, in terms of its basic function, the legal requirement is that the corporation be operated in the interests of the shareholders and their increase in wealth.

The Structural Context

While Berle and Means outlined the change from ownership control to managerial control, they had little to say about the effects of such a

fundamental change. They did, however, hypothesize that the managerial elite, free of the constraints of ownership, would not be driven exclusively by the profit motive and would take a broader, more statesmanlike view of the role of the corporation. A review of the many studies carried out on owner-controlled and management-controlled firms since the 1930s has concluded that "the control groups of these organizations [management controlled] seem as devoted to profitable growth as are the leaders of entrepreneurial and owner dominated companies, past and present."[73] Competitive pressures, the internalization of the profit criterion in managers, the discipline of the capital markets and the demands of institutional ownership have all assured the primacy of consideration of profit, and profitable growth, in corporate operations. There is little evidence of a managerial ethic of social responsibility, although there is a good deal of public rhetoric proclaiming it. There is, in fact, a good deal of evidence that there is socially irresponsible behaviour in the largest, most sophisticated, most widely held corporate organizations. Such companies as Johns-Manville Co., General Motors, Ford, Reed Paper, Allied Chemical, Lockheed Aircraft, Firestone Rubber, Reserve Mining Co. and Richardson-Merrill Pharmaceuticals, to name but a few, have all been involved in well-documented cases.

A random selection of corporate irresponsibility, and in some cases crime, is not meant to characterize corporations as continuous lawbreakers and evaders, wreaking havoc on society. But such a selection is only the tip of an iceberg and it does raise perplexing questions about the nature of corporate organization and the actions of individuals in an organizational context. The drive for competitive success, both by the corporation as a profit-seeking entity and by individuals within the corporation, creates "a structural bias toward irresponsibility."[74] With respect to pollution, occupational health and consumer safety, the large corporations have a sorry record of non-compliance, recalcitrance, delay and cover-up. It will be noted that these are all relatively new areas of social regulation as opposed to the more traditional areas of economic regulation. They are areas where compliance is considered to involve interference with internal production processes and at a high cost. They are seen as laws and regulations that interfere with traditional management prerogatives, that are questionable in effect, and whose cost/benefit ratio may be considered to be badly skewed. Compliance may mean high immediate costs and thus translate quickly into lower profits. Accordingly, there is resistance and the public suffers the effects and pays the price of the "externalities" of corporate production.

In terms of the actions of individuals within the corporation, they are explicable in terms of internalizing the norms of the organization and conforming in order to move up. The single goal is profit and those who succeed are those who best contribute to that goal, whatever their place and function in the organization. Performance is measured by quantifia-

ble financial results — sales, earnings and return on investment. In such an environment it is not reasonable to expect managers to respond to social concerns. To do so is to incur costs, often of uncertain dimension, and so reduce financial results. Accordingly, social demands are blocked out, or, if mandated, complied with in the minimum fashion necessary, contested or evaded.

Weiss and Stone have written of the effect of corporate structure on corporate responsibility.[75] Large corporations have a divisional structure with a small central management that is concerned with finance, long-range planning and evaluating performance. Divisional managers are concerned with operations and operating results. Thus, control is exercised over vast enterprises by a small, top management group. For the divisional managers, and those who are working up through the divisions, the criterion is performance as measured by financial results. If there are problems that might influence performance, e.g., a defective product, delay for more testing, alteration to production processes, inadequate design or unsatisfactory waste disposal, the tendency is to minimize their significance and avoid a costly solution, if at all possible. There is also a tendency to ensure that news of problems does not reach up the hierarchy and particularly not to central management. Any complex bureaucracy is vulnerable to a problem of information flows and executive officers may well remain unaware of a serious problem, such as a design defect which tests at the plant level have revealed.

It is unrealistic to expect those who succeed in the climb to central management to suddenly develop a concern for social responsibility. Their whole working life has often been devoted to achieving profitable results and their success as senior executives is judged by the organization's financial success. Those who succeed to the top jobs may well be persons of breadth and great capacity, but they have been moulded by the ethos of the organizations of which they are a part and their fundamental concern must be for profit and profitable growth.

Some Tentative Solutions

Is there any mechanism which would overcome the structural bias toward irresponsibility in the modern corporation? Weiss reported on studies done at the Harvard Business School which indicated a process whereby the corporation can promote socially responsive behaviour.[76] The response process was evolutionary and had three distinct phases: a policy phase, a learning phase and a commitment phase. The policy phase involved the chief executive officer's decision to deal with the issue. The learning phase often involved adding expertise to the corporate group to educate and develop information. The commitment phase was critical and involved the chief executive in modifying management systems so that they led operating managers to assume responsibility for

producing results that met both economic and social objectives. The critical issue is whether the chief executive officer will make the commitment to socially responsive policies. There is little reason to conclude that, except in the rare case, such a commitment will be made. As noted, the dynamic of the organization, the criteria of personal success and the internalization of the corporate ethos that leads to the chief executive's chair all argue against it. There will be public expression of support for the idea and continuing heightened awareness of the social dimensions of corporate activity, but an actual commitment to modifying corporate structures and decision making to produce social objectives is extremely unlikely. Only externally mandated structural change will bring about that result.

An avenue that ought to be seriously explored by policy makers and corporate executives is a restructuring of boards of directors to represent the interests in society most affected by corporate conduct. These would include labour, consumers and representatives of other groups depending on the nature of the corporation and its impact in particular areas. In certain cases they might even include a government representative, i.e., a representative of an environmental agency on the board of a chemical or pulp and paper company, a public health official on the board of a pharmaceutical or chemical company, a safety engineer on the board of an automobile company. In a community dominated by a single industry there might also be representatives of the city government on the board. Such board members would be special interest representatives, and their primary responsibility would be to ensure that the concerns of that interest were being considered in a way outlined in the Harvard study. The overall responsibility of the board would remain the best interests of the corporation and its efficient operation as profit-making operation, but not the maximizing of profits at all costs. The majority of the board would likely remain persons of senior business experience.

It would be naïve to suggest that the placing of a special interest representative on the board of a major, multinational corporation will suddenly change the nature of its operations, its extra-corporate activities or the overriding cost concerns to which management accords priority. Nor are the social facts of co-option and collegiality unappreciated. However, legislated structural change in the board of directors, with its latent power to require response from senior corporate executives and through them to direct the corporate bureaucracy, is a critical requirement of corporate reform in the direction of social responsiveness and accountability. Such legislation would have to deal with issues such as constituencies, numbers, mandate, proportion, powers, publicity, support and sanctions. These all raise difficult questions but they are not beyond thoughtful solution. Reform that deals with the command and response structure of the corporation is the only reform

that can possibly lead to a socially responsive and accountable corporate sector.

The above proposal and variations of it, such as Ralph Nader's proposed nine-person board representing nine separate interests, have been severely criticized by American commentators such as Brudney, Winter, Herman and Clark.[77] They argue that such boards are no substitute for government regulation (Brudney), that they would cause the discretion of management to increase rather than diminish (Winter), that they would be "towers of Babel" operating by "logrolling" (Herman), and that they might impair overall allocational efficiency and would constitute an illegitimate form of government (Clark). All four authors stress the problem of conflicting loyalties and query the nature of the guidelines to decision making. Also raised are the problems of who will nominate and appoint special interest representatives, to whom the representatives will be accountable and by what standards they will be judged. Perhaps most telling, they refer to the studies on the operations of boards which show that boards of directors are essentially powerless.[78] Boards are in the control of the chief executive officer who chooses the members, decides what information they will get, sets the agenda and even chooses his own successor. These are real problems, but they are not insurmountable and they are often a lawyer's technical arguments raised to mask a preference for the business corporation in its present form and a hostility to interference with private enterprise.

The concerns of Brudney and Clark in particular require brief comment. As Brudney notes, most of the American commentators who favour the idea of the independent director, including the Business Roundtable, do so as a hoped-for substitute for greater regulation. Moreover, their idea of an independent director is usually one who is simply not a member of management. Brudney is rightly critical of such proposals, on the basis of the hard operational questions left unanswered and on the performance to date of boards with independent directors. In that context, he argues that the independent director is no substitute for substantive regulation. That is undoubtedly correct and it is important to note that the proposal for restructuring set out above is not of the same order as the proposals for independent directors that Brudney criticizes. The proposal here is for a more fundamental reform that will deal with the difficult questions — constituencies, powers, support systems, publicity, etc. — that would open the governance of these great power centres to broader interests and would lead to greater compliance with legislative and regulatory regimes. In time, such restructured boards might well lead to more enlightened corporate conduct that would require less regulation. There is no suggestion that substantive regulation and an improved regulatory process is not required or that restructured boards will do away with that need. The point of greater adherence to existing legal requirements is particularly

important. As Stone notes, a great deal of corporate irresponsibility is simply non-compliance with existing laws and regulations.[79] A restructured board could play an effective monitoring role and could also moderate corporate efforts to frustrate and alter proposed and existing regulation.

Clark is not opposed to the idea of broadened corporate decision making but he raises a number of cogent concerns. While there is some truth in his point that a reason for such restructuring is government failure, it is hardly "the main reason." To argue that it is, is to ignore the crucial relationship of corporate power to that failure. Nor is the proposal for reconstituted boards one in aid of "dispersing governmental power . . . thus reducing the likelihood of a wholesale abuse of that power and promoting participatory democracy."[80] Again, the issue is corporate power, properly seen, and its relationship to governmental power, not governmental power *per se*. Whatever the concern about abusive government and pervasive bureaucracy, there is always an electorate that can and will institute change at the local, provincial and national level. The need is to reduce the abuse of corporate power and to promote democracy within the corporate world.

Clark raises the question of decreased economic performance since management would not longer have the single, certain goal of profit maximization by which its performance would be judged. It is difficult to know why that should be the case. Adherence to existing laws and regulations, as well as some sense of the power and impact of a corporation's operations, is not inconsistent with an efficient, profit-maximizing enterprise. Vague social goals need not be substituted for profit maximization. The issue is one of responsible profit maximization rather than maximum profit at all costs. Nearly all the incidents of corporate irresponsibility, illegality, misconduct and insensitivity that have been documented by countless observers could be remedied within a regime of responsible profit maximization. To argue that they cannot be remedied is to argue that a successful corporation must necessarily be socially irresponsible. To so argue is surely to argue for pervasive regulation or for public enterprise. Finally, Clark is concerned that broadly representative corporations "would constitute an illegitimate form of government."[81] But, as he recognizes, that need not be the case if "great care is taken in the institutional design" to ensure that those who ought to be represented are represented. What is proposed here is not simply a case of, say, shareholders and workers directing the corporation in their best interests. The representation proposed would be broad enough to encompass all those major interest groups that, in the particular context, ought to be represented.

There is much that should be preserved in the efficient management of the North American corporation by skilled corporate executives. It has produced a bounty which has benefitted large segments of society. But

there are real problems of governance and legitimacy, of the failure of regulation, of the failure of the market, of abuse of power, of the cost of externalities and who pays (often with lives), and of the restructuring that technology and internationalization are forcing on our economy. It is suggested that it is not beyond the capacity of lawyers, senior civil servants and business leaders to design corporate structures and corporate laws that would aid in the solution of these problems. There would be formidable opposition from business leaders to such restructuring. But seen as an alternative to more pervasive and intrusive regulation, or to public enterprise, enlightened business leaders may be found to join in the rethinking of the nature of corporate governance. There may also be great appeal in the idea of a particularized mandate of social responsibility for all public corporations since no one corporation would have to be concerned about weakening its competitive position by responding to social concerns. Moreover, the concept would be moved from an amorphous, shifting idea, that may in fact increase managerial prerogatives, to sets of guidelines and criteria whose costs could be calculated. It is only at that point that management can be expected to respond and adjust its practices and prices accordingly.

Conclusion

The reform of the structure of the board that has been advocated above does not address the central problem of corporate power raised in this paper. An opening of the board to representative constituencies and greatly increased disclosure would be a step in the direction of legitimizing public power and might lead to an amelioration of the worst abuses of that power. However, the large, public corporation would remain as a major power centre in our society, matched only by government itself. That power is of a scale that raises a basic question for democratic theory. What is the origin of the mandate from the governed? We know the answer to that query, but it is not one that we wish to acknowledge. Moreover, as has been suggested, government must accommodate, as much as regulate, that power if it is to govern effectively.

There are some things that government might do to create a more open and effectively governed society, if it has the will. The issues of concentration, closely held control and foreign ownership should be addressed openly, and there should be an informed debate on the best solutions for the country in a world of international competition and capital markets. The extreme concentration in the media, including television and radio as well as newspapers, must similarly be addressed and solutions found. Is the revolution in information technology to be dominated by the same groups with all that that means in terms of the control of society? What mechanisms can be put in place that will open broader avenues of representation to other interest groups? If, as Presthus argues, elite

accommodation is the coordinating mechanism which ensures "some rough equilibrium among the contending interest groups in democratic societies," how do we ensure a more equal role for interests other than the corporate in reaching policy decisions? Or is that not possible in a mixed, free enterprise economy given the role that business must necessarily play? Are there alternative ways of financing politics, culture, research and, increasingly, higher education, other than through corporate support with the influence, if not control, that this brings? There are no easy answers to these questions, but they are real questions that ought to form the focus of public debate.

Government has either the power of appointment and great influence over the appointment to many public boards — crown corporations, regulatory agencies, research councils, granting bodies, universities, hospitals, and cultural community and charitable organizations. Why is it that such boards are, in the main, composed of corporate executives? Certainly their management and financial expertise, as well as their fund-raising capabilities, are important assets. The dominant place of the corporation in our culture provides another part of the answer, and the extent of the corporation's external activities is an important indirect influence in shaping the political climate. The opening of such boards to a much larger cross-section of society, rather than the token representation of various groups which is now often the case, would be an important and easily accomplished step toward a more democratic state. There is a large pool of capable individuals in our affluent, well-educated society who could make an important contribution to its governance if given the opportunity.

The role of ideas in the policy process is another vital area to which government should give greater attention. The increasingly important role played by independent but corporate sponsored think-tanks has been noted, as has the narrow focus of the media. Increasingly, the public is subjected to, and the government responds to, a narrow range of ideas. The current concern over the national deficit is focussed, in a time of persistent 11.5 percent unemployment, almost exclusively on the need for a reduction in the deficit. The primacy of reduction is stressed by corporate leaders and conservative institutes, and their positions are parroted by the press. Alternative economic strategies and their outcomes are almost non-existent as a matter of debate in public forums. A broader range of ideas that would form the background for better informed public debate is essential to policy formulation. Certainly, government itself generates ideas and policy positions within the bureaucracy, and the universities are an important source of idea formulation. But government does a poor job of publicizing its ideas, e.g., the closing of federal government bookstores was surely a retrograde step, and academic writings circulate primarily within academe. The creation of the IRPP (Institute for Research on Public Policy) was a step

in the right direction and its publications in recent years have been of high quality. Government needs to fund more such independent research centres with specific and general missions both within and outside the universities. And in this age of information technology, greater thought must be given to broader dissemination of the results of such research. There may always be a relatively narrow area of circulation of ideas in our society, but ways can be found to increase public awareness and public debate.

Another aspect of corporate power that takes a rather strange twist in Canada is that it seems to have been insufficiently recognized by government over the past 15 years. Too often government seems to have announced policies without sufficient, if any, consultation with the business community. The result has been confrontation, acrimony and failed public policies. The economy can ill afford a repetition of this sequence of events. It is not suggested that we move to a type of corporatism where government and business quietly decide what is best for the country. Government must still govern and set economic policy, but business must be more widely and more effectively consulted and it must feel that its concerns have been heard and taken into account — even if it does not approve of the policy outcome. At the least, business will understand the underlying rationale for the policy and that it was the outcome of an informed, considered debate. Such debate will involve government much more broadly in business and public education, a thing it does very badly at present.

Brecher's study of the thwarted reform of competition policy makes the point that the government itself was partly to blame for the failure.[82] Government failed through a lack of perceptiveness to realize the significance and the impact of the changes proposed and failed through a lack of initiative to take steps to inform and educate the most immediately affected consistuencies, the media or the public at large. In Brecher's words: "Ottawa *chose* to narrow its options far beyond the limits imposed by external forces."[83] The lesson is for government to appreciate the critical necessity to consult, inform and educate if it is to gather the necessary support for its policies. Government has powerful communication tools at hand to build consensus and confidence and it must use them in an enlightened and sophisticated way to gain support for public policy.

The role of government should be to set the framework within which the economy operates. Government intervention should be reserved for critical areas of support or breakdown. Too often intervention has been hasty, ill-considered, costly and ineffective, as in, for example, regional development, film industry support, research and technology write-offs, PIP grants, MURBS, etc. In developing framework policies and proposing specific intervention, policy papers should be widely circulated and debated and the immediately affected as well as the secondarily affected

interests need to be truly heard. There also need to be more effective mechanisms, both within and without parliament, for monitoring and accountability if there is to be public confidence in government. Corporatism is a real danger given the reality of corporate power, the rise of a transcorporate network of leading executives (the BCNI) and the consultative mechanisms proposed. But that need not be the result if policy preferences and outcomes are the subject of wider and more focussed debate and if consultation is truly broadened. A government operating in that context would have both greater understanding from business as well as a greater capacity to withstand business pressure.

Bird and Green, in their study of government expenditure, make the important point that a major role of government industrial policy should be to allow the market to function efficiently. An essential ingredient of industrial policy is a properly functioning public sector, and that may require more, not less, government expenditure. What is required, is a searching re-examination of the nature of that expenditure. The motivating force behind government's role in so many areas of Canadian life is often good; it is the execution of the role that has too often been lamentable. What is necessary, as Bird and Green note, is not to proclaim, as many do, the inevitability of "governmental failure" but "rather to take a more realistic, case-by-case, look at exactly what governments do, how they do it, and what improvements seem possible and desirable."

Government also needs to be more actively engaged in surveying and assessing the strategic sectors of the economy, given its concentrated nature and regional structure. A recent federal government report, still confidential at the time of this writing, assessed the B.C. forest products industry.[85] The report is critical of the industry and its investment decisions and states that it has become locked in to outdated processing technologies. The report compares Canadian practices and strategies unfavourably with the industry in Sweden and the United States. A federal official said that the report "was to provide background for long-term strategic analysis of B.C.'s most important industry."[86] In short, private industry may not always be doing the best job and making the right choices. Government can play an effective role in economic policy by conducting and commissioning such industry studies, representative of but not dominated by industry members, as an aid to effective private enterprise and its own policy making. What is needed is more high level, cooperative economic and industry sector analysis, and public debate about strategies, on an ongoing basis.

The problem of corporate power and public policy is a polycentric one. There are no solutions in our economic system, only a range of possibilities. One that is likely to prove most rewarding, for society as a whole, is a more sophisticated understanding of corporate power and what it entails, and greater recognition by government of the need to

come to terms with that power. Political theorists and believers in political pluralism may see dangers in that course, but it is probably the only way effective solutions can be found to the changing economic and social environment we face. A government sensitive to the dangers can construct mechanisms that will allow pluralism its full and essential play.

Notes

This paper was completed in December 1984.

1. A notable exception is Professor Schwindt's study for the Royal Commission on Corporate Concentration, *The Existence and Exercise of Corporate Power: A Case Study of MacMillan Bloedel Ltd.*, Research Study No.15 (1978).
2. Porter, *The Vertical Mosaic* (1965); Clement, *The Canadian Corporate Elite* (1975); Niosi, *Canadian Capitalism: A Study of Power in the Canadian Business Establishment* (1981); Naylor, *A History of Canadian Business* (1976); Litvak and Maule, *The Canadian Multinationals* (1981).
3. Lindblom, *Politics And Markets* (1977), at pp. 170–88.
4. Bird and Green, *Government Intervention in the Canadian Economy: A Review of the Evidence* (University of Toronto, Institute for Policy Analysis, 1985), at pp. 17–18.
5. Lindblom, *supra*, note 3.
6. *Ibid.*, at p. 175.
7. *Ibid.*
8. Walkom, "Softer FIRA and NEP Have Little Impact," *Globe and Mail*, December 20, 1984, p. P1.
9. Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971–75* (1977), and Brecher, *Canada's Competition Policy Revisited* (1982).
10. Gardner, "Tax Reform and Class Interests" (1981), 3 *Canadian Taxation* 245, and Bucovetsky, "The Mining Industry and the Great Tax Reform Debate," in Pross (ed.), *Pressure Group Behavior in Canadian Politics* (1975).
11. Canada, Royal Commission on Newspapers, *Report* (1981).
12. *Ibid.*, at p. 11. The information set out here is from chap. 1, "The Scope of Concentration."
13. Lindblom, *supra*, note 3, at pp. 206–13. Research for the Royal Commission on Newspapers indicated that "Major daily newspapers remain the primary source of public affairs information not only for the top decision-makers but also for the most politically attentive segment of the population at all levels," at p. 48.
14. Fletcher (with contributions from Bell and Gilsdorf), *The Newspaper and Public Affairs*, at p. 13, Research Study No. 7 for the Royal Commission on Newspapers (1982).
15. Clement, *supra*, note 2, at pp. 278–87, footnote 2.
16. Stanbury, *supra*, note 9, and Brecher, *supra*, note 9.
17. Stanbury, *ibid*, at p. 36.
18. *Ibid.*, at pp. 36–41.
19. Brecher, *supra*, note 9, at p. 52.
20. *Ibid.*, at p. 53.
21. *Ibid.*, at p. 17.
22. *Ibid.*, at p. 19.
23. *Ibid.*, at p. 21.
24. *Ibid.*, at p. 55.
25. *Ibid.*
26. *Ibid.*, chap. 10, "Summary."
27. Gardner, *supra*, note 10, at p. 246.

28. *Ibid.*, at p. 247.
29. *Ibid.*, at p. 248.
30. *Ibid.*, at p. 250.
31. Bucovetsky, *supra*, note 10, at pp. 87–114.
32. *Ibid.*, at pp. 94–95.
33. *Ibid.*, at p. 104.
34. Canada, Royal Commission on Corporate Concentration, *Report* (1978), at p. 12.
35. *Ibid.*, at p. 28.
36. *Ibid.*, at p. 39.
37. *Ibid.*, at p. 40.
38. *Ibid.*, at p. 19.
39. As reported to the author by Khemani from his study "The Extent and Evolution of Competition in the Canadian Economy," in *Canadian Industry in Transition*, volume 2 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (1985).
40. All of the figures quoted are from Khemani as reported to the author.
41. Bale, "The Interest Deduction to Acquire Shares in Other Corporations: An Unfortunate Corporate Welfare Tax Subsidy" (1981), 3 *Canadian Taxation* 189.
42. *Ibid.*, at p. 194
43. *Ibid.*, at p. 195.
44. *Ibid.*, quoting Canada, House of Commons, *Debates*, December 16, 1971, at pp. 10552, 10554.
45. Berle and Means, *The Modern Corporation and Private Property* (1932).
46. Herman, *Corporate Control, Corporate Power* (1981), at pp. 79–85. This paper has been heavily influenced by the works of Lindblom, *supra*, note 3, and Herman, and the occasional citation does not give full credit to that influence. Herman's book is an extremely important and well-documented study of corporate power in contemporary America and is a far superior work to the celebrated Berle and Means study.
47. *Ibid.*
48. "The Regulation of Take-Over Bids in Canada: Premium Private Agreement Transactions," in Report of the Securities Industry Committee on Take-Over Bids (1983), at p. 69, footnote 9. The reference in the text is: "The majority of large, publicly traded Canadian companies are legally or effectively controlled by an identifiable shareholder or group of shareholders," at p. 1.
49. *Ibid.*, at p. 75, footnote 89.
50. *Globe and Mail*, August 25, 1984, p. B1.
51. Herman, *supra*, note 46, at pp. 194–241.
52. Clement, *supra*, note 2, at pp. 155–69.
53. *Ibid.*, at p. 159.
54. *Ibid.*, at pp. 156–59.
55. Royal Commission on Corporate Concentration, *supra*, note 34, at p. 338.
56. *Ibid.*
57. *Ibid.*, at pp. 338–39.
58. *Ibid.*, at p. 339.
59. Lindblom, *supra*, note 3, at p. 172.
60. Gray, "Friendly Persuasion," *Saturday Night*, March 1983, p. 11.
61. Green and Buchsbaum, "The Corporate Lobbies," in *The Big Business Reader* (1983), at p. 207.
62. Gray, *supra*, note 60, at p. 14.
63. *Globe and Mail*, November 18, 1984, at p. 6.
64. Useem, *The Inner Circle* (1984).

65. *Ibid.*, at p. 4.
66. Gillies, *Where Business Fails* (1981), at p. 72.
67. Friedman, *Capitalism and Freedom* (1962), at p. 133.
68. Berle, "Corporate Powers as Powers in Trust" (1931), 44 *Har. L. R.* 1049; Dodd, "For Whom Are Corporate Managers Trustees?" (1932), 45 *Har. L. R.* 1145.
69. This point is well put in an interesting essay by Clark, "What Is the Proper Role of the Corporation?" in Brooks, Liebman, and Schelling (ed.), *Public-Private Partnership: New Opportunities for Meeting Social Needs* (1984), at pp. 195–98.
70. Friedman, *supra*, note 67, at p. 133.
71. *Canada Business Corporations Act*, S.C. 1974–75 as amended, 117(1)(a).
72. *Parke v. Daily News Ltd.*, [1962] 1 Ch 927.
73. Herman, *supra*, note 46, at pp. 112–13.
74. *Ibid.*, at p. 261.
75. Weiss, "Social Regulation of Business Activities: Reforming The Corporate Governance System to Resolve an Institutional Impasse" (1980-81), *UCLA L. R.* 343; Stone, *Where the Law Ends* (1975). Weiss' article has been relied upon in describing the organizational structure of the corporation and its effect on corporate responsibility.
76. Weiss, *ibid.*, at pp. 423–24.
77. Brudney, "The Independent Director — Heavenly City or Potemkin Village" (1982), 5 *Harv. L.R.* 597; Winter, Government and the Corporation (1978); Herman, *supra*, note 46; and Clark, *supra*, note 69.
78. Mace, *Directors: Myths and Realities* (1971); Eisenberg, *The Structure of the Corporation* (1976).
79. Stone, *supra*, note 75, at p. 229.
80. Brudney, *supra*, note 77, at p. 229.
81. Clark, *supra*, note 69, at p. 209.
82. Brecher, *supra*, note 9, at p.54.
83. *Ibid.*
84. Bird and Green, *supra*, note 4, at p. 10.
85. *Financial Post*, June 23, 1984, p. 1; see also *Globe and Mail*, "Report on Business," July 11, 1984, p. B2.

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Consumer Protection, Environmental Law and Corporate Power

IVAN BERNIER and ANDRÉE LAJOIE, Research Coordinators

This is the fifth of six volumes dealing with **Law, Society and the Economy** (see list in back of book), included in the Collected Research Studies of the Royal Commission on the Economic Union and Development Prospects for Canada.

The three studies in this volume, while dealing with different central issues, all focus on legal values, interest groups and political considerations. The first paper provides an overview of Canadian legislative developments in consumer protection and the social, economic and political factors that have given rise to them. The second paper offers a practical statement on environmental degradation, law and public policy. The third paper, linking elements of the other two, presents a strong plea for a more sophisticated understanding of a corporate power and what it entails.

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Royal Commission on the Economic Union and Development Prospects for Canada

University of Toronto Press

ISBN 0-8020-7296-8