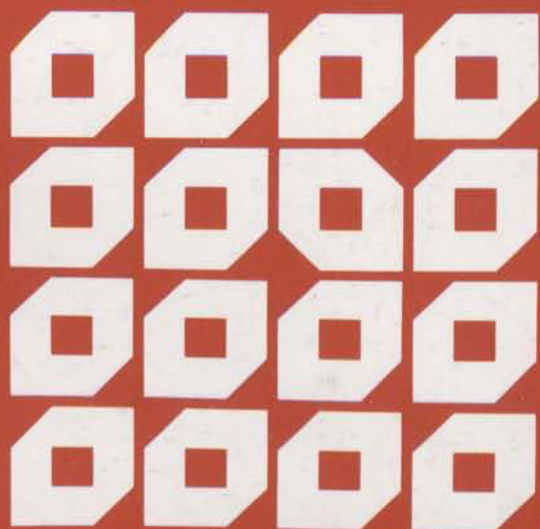


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# Consumer Product Warranty Reform: Regulation in Search of Rationality

(Volume II)

E. P. Belobaba



Consumer and  
Corporate Affairs  
Canada

Consommation  
et Corporations  
Canada

En français : Réforme du droit en matière de garantie des produits de  
consommation : réglementation en quête de rationalité

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CONSUMER PRODUCT WARRANTY REFORM:

REGULATION IN SEARCH OF RATIONALITY

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Consumer and Corporate Affairs Canada

Volume II

The analysis and conclusions of this study do not  
necessarily reflect the views of the Department.

Product Liability Studies  
Policy Research, Analysis and Liaison Directorate  
Policy Coordination Bureau

Product Liability: Reflections on Legal Aspects of the Policy Issues by Saul Schwartz, Jacob S. Ziegel and Louis Romero (ed. Jonathan J. Guss), 1979.

Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law by Robert J. Sharpe, 1981.

Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law in Quebec Private International Law by David Appel, 1982.

Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization by E.P. Belobaba, 1983 (vol. I).

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## FOREWORD

The problems raised for consumers by defective products, and the appropriate means of addressing these problems, have been the subject of a lively debate in recent years. The federal and provincial Ministers of Consumer Affairs, as long ago as 1977 at their conference in Montebello, identified the area of consumer product warranties and product liability as one in need of attention and ordered an inquiry into the matter.

To aid in this inquiry, Professor Belobaba of Osgoode Hall Law School has examined the issues raised in the debate surrounding defective products. His work has resulted in two studies.

In his first study\* (completed in 1981), he considered the problem of product-related personal injury in the context of injury compensation generally and advanced various reform proposals for integration and rationalization.

In this study (also completed in 1981), he concerns himself with financial losses caused by defective products, concentrating on the problems associated with modern-day consumer product warranties. The 1970s saw the enactment of several provincial consumer product warranty initiatives, as well as legislative developments in the United States. However, questions have been raised as to the appropriateness and effectiveness of this legislation. Professor Belobaba analyzes the legislation and attempts to provide answers to these questions. He explores the issues that policymakers will face in dealing with the problems surrounding consumer product warranties and draws up a suggested agenda for future action, with the aim of assisting policymakers in developing an improved approach to warranty reform.



Dr. T. Russell Robinson  
Assistant Deputy Minister  
Bureau of Policy Coordination

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\*Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization, vol. I (Consumer and Corporate Affairs Canada, 1983).

## SUMMARY

This study examines the state of the art in consumer product warranty regulation and suggests that a fundamental reappraisal of current federal-provincial approaches to consumer warranty reform is necessary. The study is interdisciplinary in nature and draws on recent legal, economic and sociological research. It is divided into the following five chapters.

Chapter I provides a comprehensive survey of both the uses and the abuses of modern consumer product warranties. Various real or perceived functions of the product warranty are canvassed (is it primarily a competitive marketing tool, a limitation of liability document, a consumer informational vehicle, or an insurance contract?), the "abuses" are itemized and the demand for law reform is described. The recent legislative initiatives in Saskatchewan, New Brunswick and Quebec are then critically evaluated and contrasted with the developments in the United States both at the federal and state level. The continuing trend toward more comprehensive and more omnibus consumer product warranty legislation is noted but is then placed in the context of the growing controversy and confusion that exists not only on the part of manufacturers and retailers, but increasingly and for surprisingly similar reasons on the part of consumer advocates as well. The shared concern that much of the legislation in this area is at best well-intentioned but intuitive, and at worst ill-considered and fundamentally unprincipled, is documented in recent empirical studies of consumer decision-making and purchasing behaviour and legislative impact generally. The chapter concludes with an analysis of wide-ranging difficulties that confront any serious-minded policymaker in this area.

Chapter II argues for a more systematic and generally more principled approach to consumer product warranty regulation in Canada. A five-step policymaking approach is suggested: (1) problem identification; (2) determination of the rationale for governmental intervention; (3) determination of the appropriate degree and design of desirable intervention; (4) implementation of the regulation; (5) ongoing evaluation of impact and effectiveness. Each of these criteria for principled decision-making is described and discussed in some detail.

The need for greater theoretical sophistication in consumer product warranty regulation is complemented by an equal need for more empirically informed decision-making about problem identification, consumer decision-making and purchasing behaviour, and legislative impact generally.

Chapter III surveys the relevant literature and summarizes the findings of several important recent empirical studies in both Canada and the United States. The ten most important findings documented in this empirical research are these:

1. Consumers generally do not see product warranties as a high priority consumer protection problem.
2. There are, however, several serious problems that can be specifically identified and redressed (these are considered in detail).
3. Many of these specific problems relate to the general structure and strains of modern consumer warranty systems (i.e., warranty service capability problems, warranty service willingness problems, consumer knowledge and beliefs regarding repair costs and services generally, and problems regarding shared data collection and federal combines legislation).
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 impact.
6. There is some evidence of "better warranty" coverage.
7. There is very little evidence, however, that disclosure regulation has improved warranty readability or understandability.
8. The average Canadian consumer has little if any awareness of his or her legal rights in this area.
9. Current advertising and information dissemination techniques have not worked.
10. Longer or "better" consumer product warranties may cost consumers more than they are worth.

Each of these findings is, of course, described and documented in more detail in Chapter III.

Chapter IV assesses the implications of these recent empirical studies for Canadian consumer warranty policymaking and suggests both short-term and long-term agendas for action. In the short term, provincial policymakers are encouraged to do the following:

1. Enact omnibus 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, 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 reforms.
6. Consider government standard 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 inter-provincial uniformity in consumer product warranty regulation.

In addition to this immediate agenda for action, certain specific future directions for research-minded policymakers are also proposed: research involving designated problem areas noted in recent empirical studies, research relating to the entire question of life cycle costing, further exploration of the "extended service contracts" phenomenon and, finally, research into the possibility of extending consumer product warranty legislation to include not only consumer goods but also consumer services.

The final chapter summarizes the findings and recommendations of this study. Both specific and general conclusions are presented and reviewed.

## TABLE OF CONTENTS

	<u>Page</u>
Chapter I - CONSUMER PRODUCT WARRANTIES:	
WHERE WE ARE AND HOW WE GOT HERE.....	1
A. The Nature of the Problem.....	1
1. The Modern Consumer Product Warranty:	
Uses and Abuses.....	1
2. The Demand for Law Reform.....	13
B. Legislative Action in the 1970s.....	15
1. Canadian Developments.....	15
(i) Ontario.....	15
(ii) The Saskatchewan Consumer	
Products Warranties Act, 1977.....	22
(iii) The New Brunswick Consumer	
Product Warranty and Liability Act, 1978....	22
(iv) The Quebec Consumer	
Protection Act Amendments.....	24
2. American Developments.....	25
(i) Federal Legislation:	
The Magnuson-Moss Warranty Act.....	25
(ii) State Legislation: Recent Initiatives.....	30
C. Where Are We Today?.....	31
1. The Trend toward Omnibus CPW Legislation.....	31
2. Growing Controversy and Confusion.....	34
(i) Concerns of the Business Community.....	34
(ii) Criticism from Consumer Advocates.....	43
(iii) Loss of Confidence in Government	
Generally.....	44
(iv) The Empirical Realities.....	45
Chapter II - THE NEED FOR A MORE PRINCIPLED APPROACH	
TO CPW REGULATION.....	57
A. Towards a More Principled Policymaking.....	57
1. Problem Identification.....	57
2. The Rationale for Intervention.....	58
3. The Degree and Design of Desirable Intervention....	60
4. The Specific Design and Implementation of the	
Regulatory Instrument Selected.....	61
5. Ongoing Evaluation of Impact and Effectiveness.....	65

	<u>Page</u>
Chapter III - THE NEED FOR A MORE INFORMED APPROACH TO CPW REGULATION.....	67
A. The Nature and Extent of Recent Empirical Research.....	67
B. The Ten Most Important Findings of the Empirical Research.....	69
Empirical Findings regarding the Nature and Extent of the Consumer Product Warranty Problem.....	69
1. Consumers Generally Do Not See Consumer Product Warranties as a High Priority Consumer Protection Problem.....	69
2. There Are, However, Several Serious Problems That Can Be Specifically Itemized.....	79
3. Many of These Specific Problems Relate to the General Structure and Strains of Modern Consumer Warranty Systems.....	87
Empirical Findings regarding Consumer Purchase Behaviour and Information Disclosure Regulation.....	93
4. Consumers Neither Read Nor Care about the Consumer Product Warranty Before Making a Purchase.....	93
5. Information Disclosure Requirements and Truth in Warranty Regulation to Date Haven't Had Much Impact.....	98
6. There Is Some Evidence of "Better Warranty" Coverage.....	98
7. But There Is Very Little Evidence That Disclosure Regulation Has Improved Warranty Readability or Understandability.....	100
Empirical Findings regarding Consumer Awareness of Consumer Protection Laws.....	101
8. The Average Canadian Consumer Has No Awareness of His or Her Legal Rights in This Area.....	101
9. Current Advertising and Information Techniques Haven't Worked.....	106
Empirical Findings regarding Dollar Value of Longer or "Better" Warranties.....	109
10. Longer or "Better" Consumer Product Warranties May Cost Consumers More Than They Are Worth.....	109
Chapter IV - WHERE DO WE GO FROM HERE? AN AGENDA FOR ACTION.....	115
A. Immediate Action for Provincial Policymakers.....	115
1. Enact Omnibus CPW Legislation but Do So with More Care and Sophistication.....	115
2. Deal with Manufacturers' Written or Express Warranties via a Carefully Designed Information Disclosure Requirement.....	117

	<u>Page</u>
3. Provide Consumers with Stronger and More Meaningful Remedies.....	120
4. Develop Innovative and More Responsive Dispute Resolution Mechanisms but Do So on an Experimental Problem-Specific Basis.....	121
5. Encourage Consumer Product Industry Groups to Standardize Voluntarily Their Consumer Product Warranty Forms.....	124
6. Consider Government Standard Form of Warranty Regulation but Only Where Demonstrably Necessary.....	124
7. Examine and Assess the Structure and Operation of Modern Consumer Product Warranty Systems.....	125
8. Consider Seriously the Proposal for "Unbundling" Consumer Product Warranties.....	127
9. Make a Greater Commitment to Long-Term Consumer Education via Plain Language Legislation and High School Level Law Teaching.....	129
10. Work toward Inter-provincial Uniformity in Consumer Product Warranty Regulation.....	131
B. Future Directions.....	132
1. Related Research Suggested by Kennedy, Pearce and Quelch.....	132
2. Research regarding Life Cycle Costing.....	132
3. Extended Service Contracts.....	136
4. The Regulation of Consumer "Services" Generally...	139
Chapter V - CONCLUSIONS.....	145
A. Specific.....	145
B. General.....	147
C. A Final Observation.....	148
BIBLIOGRAPHY.....	151

Note: For purposes of both clarity and brevity, a short-form citation style has been adopted. Works are listed by author and date at the end of each chapter; the complete references can be found in the BIBLIOGRAPHY at the end of this volume.

# LIST OF EXHIBITS

<u>Exhibit</u>	<u>Page</u>
1. Mr. Coffee "Limited Warranty".....	2
2. General Electric "Full Warranty".....	3
2A. CGE Pro-Turbo Pistol Hair Dryer Warranty.....	4
3. Sony Tape Recorder Limited Warranty.....	5
4. Harman/kardon Stereo Products Warranty.....	6
5. 1980 General Motors New Vehicle Limited Warranty.....	7
6. Basic Warranty Coverage by Appliance.....	10
7. Warranty Coverage on Certain Components.....	11
8. Excerpt from OLRC Report on Warranties.....	16
9. Summary of Recent Consumer Legislation in Three Provinces.....	23
10. Taxonomy of Warranty Statutes.....	27
11. Excerpts from the Combines Investigation Act.....	33
12. An Example of a "Customer-Language" Warranty.....	35
13. Whirlpool Home Appliances Advertisement.....	36
14. Beliefs about Business and Government.....	38
15. Interest of Business and Government in Consumer Needs....	38
16. Incidence of Complaints.....	39
17. Whom Complaints Are Taken To.....	39
18. Other Consumer Problems.....	40
19. Outcomes of Complaints.....	41
20. Degrees of Satisfaction with Outcomes of Complaints.....	41
21. Evaluation of the Present and Future concerning Various Aspects of Consumerism.....	42
22. Beliefs about Remedies.....	46

<u>Exhibit</u>		<u>Page</u>
23.	Sources of Information on Consumer Rights.....	47
24.	Sources of Information and Assistance on a Major Purchase Decision.....	48
25.	Evaluation of Certain Consumer Organizations' Effectiveness by the Organizations Themselves.....	49
26.	Priority Public Issues.....	71
27.	Priority Consumer Issues.....	72
28.	Index of Seriousness of Consumer Problems.....	73
29.	National Consumer Satisfaction/Dissatisfaction Study: Appliances and Personal Care Equipment.....	74
30.	National Consumer Satisfaction/Dissatisfaction Study: Cars and Other Transportation.....	75
31.	National Consumer Satisfaction/Dissatisfaction Study: Repairs and General Services.....	77
32.	Tabulations of Consumers' Overall Satisfaction with Problem Handling.....	80
33.	Reasons for Dissatisfaction Reported by Purchasers.....	81
34.	Distribution of the "One Most Important Reason" for Dissatisfaction.....	84
35.	Dominant Factors Affecting Functional Reliability of White Goods Appliances and Automobiles.....	88
36.	Dominant Factors Affecting Length of Economic Life of White Goods Appliances and Automobiles.....	89
37.	Reasons for Dissatisfaction.....	90
38.	Distribution of the "One Most Important Reason" for Dissatisfaction.....	91
39.	Key Consumer Characteristics in the Purchase and Use of Major Durable Products.....	94
40.	Respondent Purchasers' Reading of Their Warranties before and after Purchase.....	95

<u>Exhibit</u>		<u>Page</u>
41.	Warranty Input into the Consumer Purchase Decision: Respondent Purchaser Acquisition of Warranty Details.....	96
42.	Warranty Input into the Consumer Purchase Decision: Respondent Purchaser Knowledge of Warranty Gained by Reading Warranty.....	97
43.	"Full" and "Limited" Designations, First Year of Warranty before and after Warranty Act.....	99
44.	Changes in Warranty Coverage: 1977-78 over 1974.....	100
45.	Average Reading Ease Scores for 4 Product Categories.....	102
46.	Warranty Readability.....	103
47.	Direction of Annual Change in Readability of Warranties.....	104
48.	Warranty Input into the Consumer Purchase Decision.....	105
49.	Knowledge of Consumer Protection Laws.....	107
50.	Respondents' Knowledge of Consumer Law.....	108
51.	Effectiveness of Consumer Remedies.....	130
52.	Economic Life Costs of Two Products.....	133
53.	Economic Life Costs of a Standard Sized Automobile.....	134
54.	Rate Card for Eaton's Extended Warranty Plan.....	137
55.	Suggested Retail Prices for Automobile Manufacturer Service Contracts.....	138

## Chapter I

### CONSUMER PRODUCT WARRANTIES: WHERE WE ARE AND HOW WE GOT HERE

#### A. The Nature of the Problem

##### 1. The Modern Consumer Product Warranty: Uses and Abuses

Product warranties are a modern-day commonplace. Virtually every new consumer durable sold in Canada today comes with some sort of product warranty from either the manufacturer, the brand owner or the retailer. The actual warranty document -- be it a label, a card or a brochure -- may vary in both style and content as one moves across products and product categories. But at root all modern consumer product warranties have an essential similarity.

Essentially a warranty is an assurance made by the seller at the time of the sale with respect to the quality of the goods sold. It is a part of the sales bargain, spelling out the legal obligations of the seller and at the same time inducing certain expectations on the part of the consumer.<sup>1</sup>

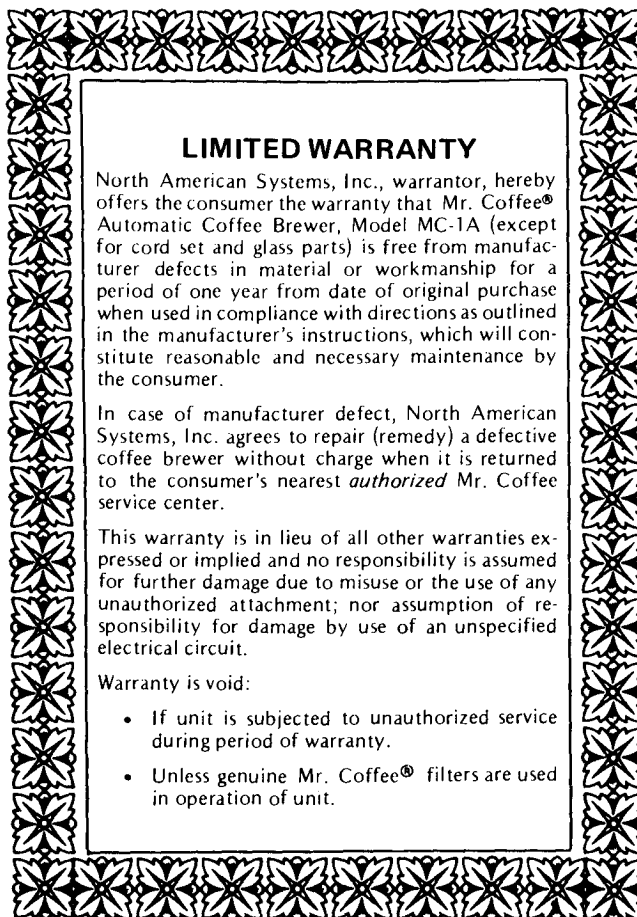
Modern consumer product warranties share certain common characteristics: carefully delineated product quality assurances, explicit and limited repair or replacement obligations, specified remedy or complaint procedures and general stipulations regarding the nature and extent of a supplier's liability in the event of defect or loss (see Exhibits 1 through 5). Most consumers believe that the "express warranty" card or brochure that is included with or attached to their recently purchased consumer product constitutes and delimits the supplier's entire obligation. Few, if any, consumers are aware that with or without this additional express supplier's warranty, every new consumer product sold in Canada today also comes with certain non-excludable, statutorily implied warranties of fitness and merchantability.<sup>2</sup> For the average Canadian consumer the actual warranty document, often incomprehensible to the non-lawyer, is the only basis for product quality or supplier performance evaluation. It is this focus -- the supplier's additional "express warranty" -- that will occupy much of our attention in this study.

Given the prevalence of the consumer warranty phenomenon today, most consumers would probably have little difficulty explaining what a consumer product warranty is...or at least what it looks like. But what is it used for? What explains the prevalence of this modern-day phenomenon? What accounts for the fact that the consumer's perception of the product warranty is quite different from that of the supplier?



EXHIBIT 1

Mr. Coffee "Limited Warranty"



North American Systems, Inc. • Bedford Heights, Ohio 44146  
Printed in U.S.A.

Form 1297

55M 5/76

EXHIBIT 2

General Electric "Full Warranty"

**IMPORTANT NOTICE TO CONSUMER**

**This warranty has been drafted to comply with the new Federal Law applicable to products manufactured after July 4, 1975.**

**FULL ONE YEAR WARRANTY**

General Electric Company warrants this product to be free of manufacturing defects for a **one year** period after the original date of consumer purchase or receipt as a gift. This warranty does not include damage to the product resulting from accident or misuse.

If the product should become defective within the warranty period, we will elect to repair or replace it free of charge, including free return transportation provided it is delivered prepaid to any General Electric authorized service facility. There is a nationwide network of authorized service facilities whose names and addresses are included with this product. Any questions regarding warranty service can be directed to Manager-Consumer Counseling, General Electric Company, Housewares & Audio Business Division, 1285 Boston Avenue, Bridgeport, Connecticut 06602.

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

CGE Pro-Turbo Pistol Hair Dryer Warranty

**WARRANTY**

To the original purchaser (or gift recipient) of this product for home use, the Canadian General Electric Company warrants that any part of the product which proves to be defective in material or workmanship within one year of the date of purchase or receipt will be repaired or replaced, free of charge.

Should your product not perform properly, return it to the nearest authorized Canadian General Electric service depot listed on the pink card packaged with the appliance, transportation charges prepaid.

If the nearest service depot is located outside of your city or metro area, or if you live in a rural area, Canadian General Electric will pay the return transportation charges.

This warranty will be honoured by any of our authorized service depots in Canada, wherever you may live, regardless of where the appliance was purchased.

Houseware Products  
**CANADIAN GENERAL ELECTRIC COMPANY LIMITED**  
Barrie — Ontario — Canada

**BEYOND WARRANTY SERVICE**

For beyond warranty repairs we recommend that you use our Servicenters and authorized service depots as these facilities carry replacement parts and have the proper servicing and test equipment for safe repairs.

Sony Tape Recorder Limited Warranty

**SONY®**

AUDIO TAPE RECORDER

**LIMITED WARRANTY**

SONY CORPORATION OF AMERICA ("SONY") warrants this product against defects in material or workmanship, as follows:

1. For a period of 90 days from the date of purchase, SONY will pay the labor charges of your authorized SONY service facility to repair the defective product. After this 90-day period, you must pay for all labor charges.
2. In addition, SONY will supply, at no charge, new or rebuilt replacements for defective parts for a period of 1 year from the date of purchase.

**Labor and Parts**

To obtain warranty service during the initial 90-day period, you must take the product, or deliver the product prepaid, to an authorized SONY service facility.

**Parts Only**

During the remainder of the warranty period, any defective part will be replaced if it is taken, or delivered prepaid, to a SONY factory service center. Labor for removal and installation is available from your authorized SONY service facility or SONY factory service center, at your expense.

This warranty does not cover any damage due to accident, misuse, abuse or negligence. This warranty is valid only in the United States and Puerto Rico.

We suggest that you retain the dealer's dated bill of sale as evidence of the date of purchase.

---

REPAIR OR REPLACEMENT AS PROVIDED UNDER THIS WARRANTY IS THE EXCLUSIVE REMEDY OF THE CONSUMER. SONY SHALL NOT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR BREACH OF ANY EXPRESS OR IMPLIED WARRANTY ON THIS PRODUCT. EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ON THIS PRODUCT IS LIMITED IN DURATION TO THE DURATION OF THIS WARRANTY.

---

Some states do not allow the exclusion or limitation of incidental or consequential damages, or allow limitations on how long an implied warranty lasts, so the above limitations or exclusion may not apply to you. This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

For the name of your nearest authorized SONY service facility or SONY factory service center, contact: TOLL FREE NUMBER: 800-243-6065  
For all Connecticut directories, TOLL FREE NUMBER is: 1-800-882-6500

**SONY CORPORATION OF AMERICA**

47-47 Van Dam Street, Long Island City, New York 11101

## Harman/kardon Stereo Products Warranty

### **harman/kardon of Canada, Ltd.**

109 Montée de Liesse, St. Laurent, Québec H4T 1S9 Canada

#### **LIMITED WARRANTY**

The warranty on all HARMAN KARDON and CITATION electronic products remains in effect for *TWO YEARS* from the date of their original purchase.

The warranty on HARMAN KARDON tape decks and RABCO turntables remains in effect for *ONE YEAR* from the date of original purchase.

#### **WHO IS PROTECTED BY THIS WARRANTY?**

Your Harman Kardon warranty protects the original owner and all subsequent owners, so long as the original bill of sale is presented when warranty service is required.

#### **WHAT IS COVERED BY THE HARMAN KARDON WARRANTY?**

Your Harman Kardon warranty covers all defects in material and workmanship with the following specified exceptions. These are: (1) damage caused by accident, unreasonable use or neglect (including the lack of reasonable and necessary maintenance); (2) damage occurring during shipment (claims must be presented to the carrier); (3) damage to or deterioration of any accessory or decorative wooden surface; (4) damage resulting from failure to follow instructions contained in your owner's manual; (5) damage resulting from the performance of repairs by someone other than Harman Kardon or an authorized Harman Kardon warranty station; (6) any Harman Kardon unit on which the serial number has been effaced, modified, or removed; and (7) units used as demonstration or display models prior to purchase by the original consumer owner.

#### **HOW TO OBTAIN WARRANTY PERFORMANCE**

If your Harman Kardon product ever needs service, write to us at Harman Kardon (Attention: Customer Relations Department). We may direct you to an Authorized Harman Kardon Warranty Station, or ask you to send your unit to us for repair, in which case we'll also supply complete shipping instructions. Either way, you'll need to present the original bill of sale to establish the date of purchase. Please do not ship your Harman Kardon product to the Montreal address without our prior written authorization.

If service under this warranty is not necessary, but you have questions regarding the installation or operation of this unit, please write to our Customer Relations department at the address above.

#### **WHO PAYS FOR WHAT?**

Harman Kardon will be happy to pay all labor and material expenses for all repairs covered by this warranty. If necessary repairs are not covered by this warranty, or if a unit is examined which is not in need of repair, you will be charged for the repairs or the examination.

Although you must pay any shipping charges incurred in getting your Harman Kardon product to a Harman Kardon Authorized Warranty Station or to the factory, we will pay return shipping charges if the repairs are covered by the warranty. Please be sure to save the original shipping cartons because a nominal charge will be made for additional cartons.

#### **EXCLUSION OF CERTAIN DAMAGES**

Harman Kardon's liability is limited to the repair or replacement at our option, of any defective product and shall in no event include incidental or consequential commercial damages of any kind.

We sincerely thank you for your expression of confidence in Harman Kardon products. This equipment has been painstakingly assembled by highly trained craftspeople. It should give you many years of musical enjoyment.

# -1980 GENERAL MOTORS NEW VEHICLE LIMITED WARRANTY

## WHAT IS COVERED



General Motors of Canada Limited warrants each new 1980 vehicle.



### DEFECTS

This warranty covers any repairs and needed adjustments to correct defects in material or workmanship.



### REPAIRS

Your dealer will make the repairs or adjustments, using new or remanufactured parts.



### WHICHEVER COMES FIRST

This warranty is for 12 months or 20 000 kilometres, whichever comes first.



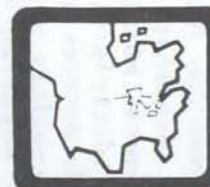
### WARRANTY BEGINS

The warranty period begins on the date the vehicle is first delivered or put in use.



### NO CHARGE

Warranty repairs (parts and labor) will be made at no charge. A reasonable time must be allowed after taking the vehicle to the dealer.



### WARRANTY APPLIES

This warranty is for GM vehicles registered and normally operated in the United States or Canada (not including Puerto Rico or the Virgin Islands).

## WHAT IS NOT COVERED



### TIRES

Tires are warranted by the tire maker. See tire warranty booklet for details.



### DAMAGE DUE TO ACCIDENTS, MISUSE, OR ALTERATIONS

Accidents or damage from objects striking the vehicle. Misuse of the vehicle such as driving over curbs, overloading, racing, etc. (Proper use is described in the Owner's Manual.) Alterations by changing or adding to the vehicle.



### DAMAGE FROM ENVIRONMENT

Airborne fallout (chemicals, tree sap, etc.), salt, hail, windstorm, lightning, etc.



### DAMAGE DUE TO LACK OF MAINTENANCE OR USE OF WRONG FUEL, OIL OR LUBES

Lack of proper maintenance as described in the Maintenance Schedule. Failure to use fuel, oil and lubricants recommended in Owner's Manual.



### MAINTENANCE IS OWNER EXPENSE

Cleaning and polishing, lubrication and replacing filters, spark plugs and worn brake and clutch linings are some of the normal maintenance services all vehicles require. See Maintenance Schedule for full details.



### EXTRA EXPENSES

This warranty does not cover payment for loss of the use of the vehicle during warranty repairs. This includes lodging bills, vehicle rentals, other travel costs or loss of pay.\*

**OTHER TERMS** This warranty gives you specific legal rights and you may also have other rights which vary from province to province.

General Motors of Canada Limited does not authorize any person to create for it any other condition or liability in connection with these vehicles. ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE APPLICABLE TO THIS VEHICLE IS LIMITED IN DURATION TO THE DURATION OF THIS WRITTEN WARRANTY.

GENERAL MOTORS OF CANADA LIMITED SHALL NOT BE LIABLE FOR CONSEQUENTIAL DAMAGES RESULTING FROM BREACH OF THIS WRITTEN WARRANTY.

\*Some provinces do not allow limitations on how long an implied warranty will last or the exclusion or limitation of incidental or consequential damages, so the above limitations or exclusions may not apply to you.

Sellers and consumers have quite different perceptions of the role of the warranty in sales transactions. Many if not most consumers tend to accept warranties uncritically, under the assumption that the mere existence of a warranty in association with their product purchase is an assurance of quality. It is not until the product malfunctions while under warranty that the terms of the written warranty becomes the focus of consumer attention. For sellers on the other hand, warranties have an entirely different meaning. One function of the warranty from the seller's viewpoint is as a promotional device, useful for differentiating his product from those of competing sellers....Even more fundamentally a seller believes a warranty to be a legal instrument that limits his obligations to the consumer according to the terms of the warranty.<sup>3</sup>

The marketing rationale for consumer product warranties is the most common one, at least as seen by suppliers. A very recent Canadian study (which will be discussed in more detail later) discovered that suppliers, by and large, viewed warranties primarily as competitive marketing tools:

Every organization interviewed in both the white goods appliance and automobile industries stated that they viewed the warranty as a competitive marketing tool and that the primary decisions on warranty have been made by marketing management.<sup>4</sup>

This marketing rationale, however, was rejected in a recent MIT study of this question. The MIT study concluded that consumer product warranties were not in actual fact a very important element in the competitive strategies of manufacturers or merchandisers.

The rapidity with which firms conform to a warranty change introduced by any of their major manufacturers suggests that the competitive advantage of any innovation in warranties is quite short-lived....Changes in warranty provisions which may be important from a competitive or cost standpoint tend to be adopted rapidly by most of the firms in the marketplace....Warranties play a less important role in consumer purchasing decisions than do manufacturers' reputations, price, previous brand experience, and product features. This suggests that specific warranty provisions are not a very important factor in the competition among brands nor an effective vehicle for communicating product reliability to consumers, though the lack of a warranty would likely be a serious market drawback for any particular brand.<sup>5</sup>

The basis for this conclusion was a careful study of 691 warranties across ten years of "competition." The MIT group found a remarkable convergence in both style and substance of warranty provisions: "Over the period 1965 to 1975 warranty provisions became more uniform within and across appliance types."<sup>6</sup> Recent Canadian data confirm these findings (see Exhibits 6 and 7).

The marketing rationale is simply not a sufficient explanation for the prevalence and use of modern consumer product warranties. In a recent and still unpublished study, Professor George Priest suggested that there are at least three different theories vying for acceptance: (1) the advertising theory, (2) the enterprise liability theory, and (3) the consumer information theory.<sup>7</sup> The advertising theory sees warranties as a method by which the supplier informs the buyer, prior to sale, of such things as product durability and expected repairs. The problem with this theory of course (apart from the empirical refutation discussed above) is that most consumers rarely look at or are influenced by warranties prior to sale, and most see the warranty document for the first time after sale has been completed. Therefore, the advertising explanation does not get you very far. Furthermore, if one looks at the actual contents of consumer product warranties, one will discover not the usual advertising puffery or quality boasts but rather disclaimers and exclusions -- hardly the stuff of modern-day commercial advertising.

The second theory, the enterprise liability theory, sees warranty as a vehicle that allocates risks between supplier and buyer -- warranties should generally shift more risk onto the manufacturer, since the manufacturer is better able to bear the product-related losses. Priest, however, rejects this theory because there is no prior way of deciding what allocation of risk is in fact optimal or what predictable results would follow from what particular arrangement of warranty provisions.

The third theory, the consumer information theory, sees warranties as nothing more than consumer information vehicles -- giving consumers relevant information about the product and its various characteristics. The problem here is that it is very difficult to find an adequate measure of the cost to consumers of acquiring or processing information about any specific, individual product characteristic or warranty provision, and consequently, argues Priest, all one can do here is engage in ad hoc and at best intuitive implication analysis.

For Professor George Priest none of these theories is a satisfactory explanation for the prevalence or use of modern-day consumer warranties. In his opinion the consumer product warranty is best understood as an insurance contract.<sup>8</sup> The manufacturer offers warranties (market insurance) for those losses or items of service for which market insurance is preferred by consumers to self-insurance. To the extent that the manufacturer then disclaims liability or excludes warranty coverage, he shifts to the consumer the obligation to self-insure. Dis-



Basic Warranty Coverage by Appliance

	Refrigerators		Ranges		Clothes washing machines		Television sets		Air conditioners	
	N	%	N	%	N	%	N	%	N	%
Number of warranties	20	100	24	100	18	100	24	100	22	100
<u>Coverage of all parts and labour</u>										
Parts coverage duration										
1 year	18	90	24	100	9	50	24	100	19	86
2 years	-	-	-	-	9	50	-	-	1	5
5 years	2	10	-	-	-	-	-	-	2	9
Labour coverage duration										
None	-	-	5	21	1	6	-	-	3	14
90 days	-	-	-	-	-	-	7	29	-	-
1 year	18	90	19	79	17	94	17	71	18	82
2 years	-	-	-	-	-	-	-	-	1	5
5 years	2	10	-	-	-	-	-	-	-	-

Source : Genner and Bryant, "Consumer Economics of Appliance Warranties" (Department of Consumer Economics and Public Policy, Cornell University, n.d.), as reproduced in Kennedy, Pearce and Quelch (1979) (Exhibit 8-4).

Warranty Coverage on Certain Components<sup>a</sup>

	Refrigerators		Ranges		Clothes washing machines		Television sets		Air conditioners	
	N	%	N	%	N	%	N	%	N	%
<u>Parts coverage duration</u>										
1 year	-	-	14	58	1	6	2	8	1	5
2 years	-	-	-	-	-	-	22	92	-	-
4 years	-	-	2	8	-	-	-	-	-	-
5 years	20	100	4	17	16	89	-	-	21	95
10 years	-	-	1	4	1	6	-	-	-	-
Life	-	-	3	13	-	-	-	-	-	-
<u>Labor coverage duration</u>										
None	-	-	4	17	-	-	-	-	2	9
90 days	-	-	-	-	-	-	2	8	-	-
1 year	1	5	16	67	1	6	-	-	3	14
2 years	-	-	-	-	-	-	22	92	-	-
5 years	19	95	-	-	16	89	-	-	7	77
10 years	-	-	1	4	1	6	-	-	-	-
Life	-	-	3	13	-	-	-	-	-	-

Source : Genner and Bryant, "Consumer Economics of Appliance Warranties" (Department of Consumer Economics and Public Policy, Cornell University, n.d.), as reproduced in Kennedy, Pearce and Quelch (1979) (Exhibit 8-5).

<sup>a</sup>The minimum coverage on certain components is that coverage provided for all parts and labor. When no special coverage on certain components is provided, the basic coverage is assumed.

claimers, says Priest, can then be said to be "demanded" by consumers because self-insurance by the consumer is cheaper than market insurance by the manufacturer. That is, the content of a warranty will be determined by the cost to consumers of self-protection versus the cost of market (read warranty) insurance. Professor Priest's analysis of 62 different warranties in 16 different product categories reveals the following common content features: (1) the exclusion of certain intensive-use parts to diminish the variance in payouts to consumers with respect to product parts that are most vulnerable to intensive use by the consumer; (2) the restriction of coverage to domestic use only, again in order to reduce the variance of claims across consumers, since commercial users subject the product to more intensive use, etc. All of this makes good sense to Priest and accords well with his understanding of consumer warranties as market-determined insurance contracts. According to Priest, almost all of the current warranty provisions found in various appliance and automobile warranties are predictable. His "warranty as insurance policy" theory says that basically there are really only two determinants of warranty content: (1) the warrantor as reasonable insurer will try to exclude coverage to the extent that the costs of self-insurance are less than those of market insurance; and (2) the warrantor as reasonable insurer will try to exclude coverage in any area where there may be considerable variance between consumers and expected payouts or when individual application and assessment is impracticable with respect to the various people being insured.<sup>9</sup> This theory of warranty as insurance contract is beginning to find acceptance in the literature.<sup>10</sup>

However, even if the insurance contract theory explains the use of the modern-day product warranty more satisfactorily than the other explanations proffered above, what accounts for their abuse? Certain problems have indeed materialized. In a comprehensive study of consumer product warranties, completed nearly a decade ago, the Ontario Law Reform Commission (OLRC) identified the following as areas of major concern: the complexity and general incomprehensibility of modern consumer product warranties; the deceptively captioned and sometimes meaningless warranty provisions; ambiguous and unconscionable warranty terms; problems in warranty administration, and in particular shortage of mechanics and delays in obtaining replacement parts; and inadequate dispute resolution mechanisms.<sup>11</sup> Close on the heels of the Ontario Law Reform Commission's Report, the Ontario Ministry of Consumer and Commercial Relations published a Green Paper in 1973.<sup>12</sup> The Ontario Green Paper, which went on to endorse the OLRC's proposal for comprehensive consumer product warranty reform, effectively drove home the point that modern consumer warranties were more a source of confusion for the average consumer than a source of protection:

Usually the purchaser is content with his "guarantee" whether it is oral or printed to look like a government bond. But if the product breaks down or does not live up to his expectations, the consumer more often discovers that the fancy document that is supposed to be a

guarantee is really a disclaimer which attempts to limit or remove the implied warranties and conditions of the Sale of Goods Act. Thus what looks like good protection in the bold print disappears in the fine print. The unwitting buyer when he accepts the seller's warranty or signs his contract is often giving away valuable rights and remedies implied by law. This means that if the product is deficient he has no basis upon which to recover his loss. If the warranty is at any value at all it is often severely restricted with different terms applying to different components. Thus the purchaser may find himself paying for some portion of parts, labour or transportation costs. Once again as with implied warranties and conditions, the express warranty has often become a source of confusion rather than a source of protection and assurance for the consumer....In the Ministry's experience very few people actually understand the nature and extent of the warranties they are now given whether express or implied. Even fewer, when faced with a disclaimer clause, will continue a dispute over defective merchandise notwithstanding the fact that the disclaimer may not stand up in court. A proliferation of legal terms and categories and different approaches to assigning responsibility for defective goods in Canada and the United States have contributed to the consumer's sense of confusion and frustration.<sup>13</sup>

Other studies and commentators have come to similar conclusions. Professor Terry Ison, for example, identified no fewer than ten important problem areas: the form of the warranty document; the extent of manufacturer or supplier discretion; consumer misunderstanding of implied warranty rights; ambiguous or unclear procedures regarding repairs; post-purchase problems regarding repairs; the unavailability of spare parts; persistent defects (the "lemon" problem); supplier indifference to warranty laws and consumer warranty complaints; inaccessibility to the legal system by the average consumer; and, generally, problems inherent in the structure of the modern warranty system itself.<sup>14</sup>

Given these various carefully documented concerns about not only the use of the consumer product warranty but, increasingly, its abuse, the demand for law reform became inevitable.

## 2. The Demand for Law Reform

Both the OLRC Report of 1972 and the Ontario Green Paper of 1973 emphasized one particular point quite clearly: the real or perceived problems arising out of the use or abuse of the modern consumer product warranty could not be resolved by reliance on or mere reform of the existing sales law. The doctrinal and institutional deficiencies of the

provincial sale of goods legislation were so substantial that wholesale reform was necessary. These deficiencies were ably summarized in the Ontario Law Reform Commission's Report:

[T]he Sale of Goods Act is largely divorced from present day commercial and consumer realities...it proceeds from the fictitious premise that the parties are bargaining from positions of equal strength and sophistication and it uses concepts to describe and distinguish between different types of obligations that are now obsolete and difficult to apply. It supplies a framework of remedies for breaches of the seller's obligations that are unrelated to practical realities. Especially serious is the Act's preoccupation with the bilateral relationship between the seller and the buyer, which totally ignores the powerful position of the manufacturer in today's marketing structure. This results at least in the Anglo-Canadian law in shielding the manufacturer from contractual responsibility to the consumer. By the same token the law has largely ignored the impact of manufacturers' express warranties and the defects in their contents and administration. Finally, our sales law is private law and it has failed to provide any meaningful machinery for the redress of consumer grievances. This last weakness is perhaps the most serious of all weaknesses for as has been frequently observed, a right is only as strong as the remedy available to enforce it.<sup>15</sup>

One of the most important insights of this 1972 study was its recognition that the assumptions underlying the nineteenth century enactments of the various provincial sale of goods laws, and in particular the assumption of equal bargaining power, no longer applied.

Modern techniques of mass production, mass marketing and above all mass communications, have effectively undercut many of the economic and social assumptions with respect to consumers that form the basis for the 1893 codification of Anglo-Canadian sales principles in the Sale of Goods Act. That Act, essentially unchanged for 80 years, presupposes an equality of bargaining power between consumer buyers and sellers that to a great extent no longer exists. Judicial attempts to make it do for consumers that which it was intended to do only underscores the fact that it is a statutory codification -- a situation that places the responsibility for its modernization in the hands of the legislature.<sup>16</sup>

The Ontario Law Reform Commission urged that the necessary modernization come about through the enactment of a comprehensive

Consumer Product Warranty Act. The proposed CPWA would not only extend and modernize the list of non-excludable, statutorily implied warranty rights, but would also explicitly prohibit the use of certain disclaimer clauses, regulate the suppliers' additional or "express" warranties, expand the range of private remedies available to the consumer and institutionalize innovative dispute resolution mechanisms featuring expeditious and informal consumer complaint handling. (A complete summary of the specific recommendations in each of these areas is contained in Exhibit 8).

B. Legislative Action in the 1970s

1. Canadian Developments

(i) Ontario. Ironically, although it was the Ontario Law Reform Commission's 1972 Report that laid the foundation for most of the provincial legislative initiatives in this area in the succeeding several years, Ontario itself ultimately shelved the study and ended up doing little if anything about the consumer product warranty problem. The Green Paper, published in 1973, did provide a fairly enthusiastic endorsement of most of the OLRC recommendations. It went so far as to propose in some detail the enactment of comprehensive consumer product warranty legislation. The Ministry's Green Paper proposals favoured a redefinition and modernization of the warranty concept that would not only include certain non-excludable, statutorily implied warranty rights but that would also extend to regulate suppliers' "supplementary" warranties which were deemed to be given to the consumer purchaser over and above the basic statutory minima. These statutorily prescribed warranties included the traditional sales warranties of fitness and merchantability and were also updated and expanded to include new implied warranties of reasonable durability and availability of spare parts and servicing facilities.<sup>17</sup> The Green Paper also discussed in considerable detail the regulation of manufacturers' "supplementary" warranties, the prohibition of disclaimer clauses, the problem of consumer-supplier privity, parol evidence, and rights and remedies generally.<sup>18</sup>

In 1976, the Ontario legislature finally gave first reading to Bill 110: "An Act to Provide Warranties in the Sale of Consumer Products."<sup>19</sup> The proposed Consumer Products Warranties Act, although deficient in several important respects,<sup>20</sup> attempted to give legal effect to most of the proposals in the Green Paper and to a substantial number of reforms suggested by the OLRC in its 1972 Report. Bill 110, however, never got beyond first reading and to date Ontario has taken no further action in this regard.

Three other provinces, however -- Saskatchewan, New Brunswick and Quebec -- have taken the initiative and have enacted comprehensive consumer product warranty legislation. The precise nature and extent of their respective warranty enactments are nicely summarized and compared in Exhibit 9. Still, a brief overview will be useful.

## GENERAL SUMMARY OF RECOMMENDATIONS

Set out below is a summary of the Commission's Recommendations.

### PART I

#### INTRODUCTION

##### The Nature and Extent of Consumer Warranty Complaints—Chapter 1

The Commission recommends that:

1. The Legislature of the Province of Ontario enact a new statute, to be known as *The Consumer Products Warranties Act*, which will deal comprehensively and systematically with all aspects of consumer warranties.
2. The proposed Act apply, in lieu of *The Sale of Goods Act*, to all persons selling consumer products to consumers, in the course of their business, and to all manufacturers of such products.
3. "Consumer products" be defined in the proposed Act as meaning goods that are regularly, although not necessarily exclusively, bought for personal use or consumption.
4. "Consumer" be defined in the proposed Act as an individual acquiring a consumer product for his own use or consumption, or for the use or consumption of another individual.
5. The proposed Act provide that where the buyer intends the product to be used for a business and a non-business purpose, the predominant purpose would govern the characterization of the use.
6. "Sale" in the proposed Act include all near-sale transactions, including leases with an option to purchase, leases for substantial terms, and should cover materials transferred under a contract for work and materials.
7. The proposed Act consist of the following principal parts:
  - a. A statement of the warranty obligations of the seller and manufacturer of a consumer product;
  - b. A code of basic guidelines for the contents of express performance warranties and their administration;
  - c. Machinery for the resolution of warranty disputes; and
  - d. General provisions for the administration of the Act.

### PART II

#### THE EXISTING LAW AND ITS SHORTCOMINGS

##### The Consumer and The Sale of Goods Act—Chapter 2

The Commission recommends that, under the proposed *Consumer Products Warranties Act*:

1. The distinction between contractual and non-contractual representations should be abolished and replaced by the single concept of "warranty", which should be defined as follows:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of any such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

2. The distinction between warranties and conditions should also be abolished and replaced by the single concept of a warranty. This change should be accompanied by the adoption of a new set of remedies for breach of the seller's warranty obligations, as outlined in recommendation 6, below.
3. The parol evidence rule should be abolished for consumer transactions and evidence should be admissible of representations which do not appear in the written agreement.
4. Effect should be denied in consumer transactions to clauses denying the authority of agents or employees of the seller to make representations which otherwise would fall within the usual scope of their authority.
5. The implied warranties conferred on a buyer in a consumer transaction should encompass:
  - a. Implied warranties of title, freedom from encumbrances, and quiet possession. These should follow the existing provisions in *The Sale of Goods Act*, subject to the adjustments in detail discussed in the text of section 5. a., chapter 2 (Implied Condition of Title), and to the observations and recommendations made in chapter 3 (Disclaimer Clauses).
  - b. The warranty of description should be deemed to be an express warranty. It should also be made clear that a sale in a self-service store is a sale by description and that a seller is deemed to have adopted as his own the labels or markings attached to the goods and all other forms of descriptive materials accompanying the goods.
  - c. An implied warranty of merchantability:
    - (i) The warranty should be renamed a warranty of "consumer acceptability";
    - (ii) It should be defined in terms of the definition approved in *Kendall v. Lillico*, except that the scope of the warranty should cover all purposes for which the goods are normally used unless the dealer or manufacturer has informed the consumer that the goods are not fit for all such purposes, or it is common knowledge among consumers that the particular goods are not fit for all such purposes;
    - (iii) It should apply to used as well as new goods but with proper allowance being made for the age of the goods, the price paid for them, and all the other surrounding circumstances of the transaction; and
    - (iv) The warranty should not apply with respect to such defects as have been adequately disclosed to the buyer or that would have been apparent to him in those cases where he has examined the goods prior to his purchase.

- d. An implied warranty that the goods (including, where appropriate, the individual components of the goods) shall be durable for a reasonable period of time, having regard to all the surrounding circumstances of the sale.
- e. An implied warranty that spare parts and reasonable repair facilities will be available for a reasonable period of time with respect to goods that normally require repairs.
- f. An implied warranty of fitness. This should follow the existing lines of section 15.1 of *The Sale of Goods Act*, except that in *The Consumer Products Warranties Act*:
  - (i) The condition of fitness should no longer be confined to sales where the goods are "of a description which it is in the course of the seller's business to supply", but should be extended to cover all sales in which the seller is acting in the course of business;
  - (ii) The proviso to section 15.1 should be repealed;
  - (iii) The provision in section 15.1 to the effect that the condition of fitness will be implied in a contract of sale only where the buyer makes known the particular purpose for which he requires the goods so as to show that he relies on the seller's skill and judgment should be replaced by a provision whereby the condition of fitness will be implied unless the circumstances are such as to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment; and
  - (iv) It should be made clear that the words "particular purpose" cover not only an unusual or special purpose for which goods are bought, but also a normal or usual purpose.
- 6. The buyer's remedies for breach of the seller's warranty obligations should be as follows:
  - a. Where the breach is remediable and the breach is not of a fundamental character, the retailer or manufacturer should have a reasonable opportunity to make good the breach, including any breach in the implied warranties of title, freedom from encumbrances, and quiet possession.
  - b. "Breach of a fundamental character" means
    - (i) That the product departs significantly in characteristics and quality from the contract description; or
    - (ii) That the product is substantially unfit for its ordinary or specified purpose; or
    - (iii) That the product, in its existing condition, constitutes a potential hazard to the health or property of the purchaser or any other person.
  - c. Where the defect is of a fundamental character and appears within a reasonable period after delivery of the product to the purchaser, the purchaser should be able to reject the product and be entitled to a refund of the purchase price, subject to a reasonable deduction for the use of the goods. The purchaser

should also be entitled to recover any other damages which he may have suffered, subject to the usual tests of foreseeability.

- d. In other cases, where the defect has not been remedied within a reasonable time, the purchaser should have the option of rescinding the contract as under c. or of having the defect remedied elsewhere and recovering the cost thereof from the retailer or manufacturer, together with any other reasonably foreseeable damages which he may have suffered.
- e. Where the dealer is being sued for a breach that is basically attributable to the manufacturer he shall have a right to "vouch over" and to be indemnified by the manufacturer in respect of any damages that the purchaser may recover from him, unless he is precluded from doing so by the terms of the agreement between him and the manufacturer.

#### Disclaimer Clauses: General Considerations and Judicial and Legislative Reactions—Chapter 3

The Commission recommends that:

1. Section 44a of *The Consumer Protection Act* should be removed from that Act and made a part of the new *Consumer Products Warranties Act*, subject to the following:
  - a. Rather than nullifying the effect of those types of disclaimer clauses set out in present section 44a, the new section should prohibit the use of disclaimer clauses to exclude, restrict or diminish express or implied warranty rights or the remedies otherwise available to the buyer for breach of them in a consumer transaction.
  - b. It should be clear that the new section applies to express and implied warranties, and remedies for breach thereof, in the case of second-hand goods or goods sold "as is" or with disclosed defects. The standard to be applied to goods sold in such circumstances would be that formulated under the implied warranty of "consumer acceptability", with proper allowance made for the age of the goods, the price paid for them, all surrounding circumstances of the transaction, and subject to the other features of this implied warranty set out in recommendation 5. d., chapter 2, *supra*.
  - c. The new section should make no exception allowing the exclusion of consequential damages.
  - d. The scope of the new section should include oral as well as written disclaimers.
  - e. Section 31 (1) (f) of *The Consumer Protection Act* should be repealed.
  - f. Section 53 of *The Sale of Goods Act* should be amended so as to make it clear that it does not apply to consumer sales governed by *The Consumer Products Warranties Act*.
2. The Commission makes no recommendation respecting the inclusion in *The Consumer Products Warranties Act* of any power to dispense with the prohibitions against contracting out or limiting the measure



of recoverable damages in consumer sales through the use of a regulation-making power where unfair hardship is claimed as a result of the recommended absolute prohibition. Such a power may or may not be a desirable feature of consumer transaction legislation, but the Commission concludes that the case for its inclusion and, if included, its scope, can only be made after a study of the experience under *The Consumer Products Warranties Act* in the recommended form.

3. An unconscionability provision similar to section 2-302 of the *Uniform Commercial Code* should be added to *The Sale of Goods Act*, pending a general review of that Act, to provide some protection in the case of an unfair bargain in a non-consumer transaction. The relevant part of section 2-302 of the *Uniform Commercial Code* reads as follows:

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

#### Problems of Vertical and Horizontal Privity—Chapter 5

The Commission recommends that:

1. The doctrine of privity of contract should be abolished in warranty claims by a consumer buyer against the manufacturer of the goods.
2. There should be in *The Consumer Products Warranties Act* clearly stated statutory rules holding a manufacturer civilly liable for breach of any express warranties and also deeming him to have given a consumer buyer (whether or not the consumer bought the goods from the manufacturer) implied warranties of the same type as run from the retail seller to the consumer buyer.
3. The same definition of an express warranty should apply in the case of representations by a manufacturer as will apply to a seller's representations.
4. The implied warranties of the manufacturer should be subject to adjustments in wording based upon the difference in the factual relationship between the consumer buyer and the retail seller and the consumer buyer and the manufacturer, as illustrated in section 1. d. (ii), *supra*.
5. The measure of damages recoverable by the consumer buyer and the extent to which a manufacturer can exclude or restrict his warranty liabilities to the consumer buyer should be governed by the same principles as obtain between the consumer buyer and his immediate seller in accordance with the recommendations obtained in chapters 2 and 3 of this report. Any notice of a disclaimer clause given to the consumer buyer by or on behalf of the manufacturer before or at the time of the purchase of the goods by the consumer buyer in writing or otherwise, and which may reasonably

be expected to come to the buyer's attention in the ordinary course of events shall be effective if the disclaimer or restriction of liability would otherwise be valid.

6. The introduction of the manufacturer's new warranty liabilities should not relieve the retail seller from his warranty obligations to the consumer. However, where the retailer is being sued by a consumer buyer, the retailer should be able to "vouch over" against the person from whom he bought the goods (whether or not that person was the manufacturer of the goods) and to claim an indemnity, unless he is precluded from claiming an indemnity by the terms of his agreement with the seller. The "vouching over" procedure should be similar to the procedure set out in Section 2-607(5) of the *Uniform Commercial Code*.

Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over

- (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.
  - (b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.
7. Where the retailer's right to indemnity is subject to a disclaimer or other restrictive clause in the contract between him and his seller, such clauses should be subject to judicial scrutiny and should be unenforceable, in whole or in part, if it would not be fair or reasonable in all the circumstances of the case to allow reliance on the clause.
  8. Subject to the qualifications in recommendation 7 above, where
    - (a) a retailer has purchased goods from a person other than the manufacturer of them; and
    - (b) the retailer is being sued by a consumer buyer for breach of warranty,
 the retailer should have a right of indemnity against the manufacturer that is co-extensive with the consumer buyer's rights against the manufacturer.
  9. The definition of "manufacturer" in the proposed Act should include the following classes of persons:
    - (a) The person who manufactures or assembles the goods, except where the goods are manufactured or assembled for another person who attaches his own brand name to the goods;

- (b) Any person who describes himself or holds himself out to the public as the manufacturer of the goods;
  - (c) Any person who attaches his brand name to the goods;
  - (d) In the case of imported goods, the importer of the goods where the foreign manufacturer does not have a regular place of business in Canada.
10. In order that the rights of a successor in title be adequately protected, "consumer buyer" should be defined in the proposed Act to include any person deriving his interest in the goods from or through the original purchaser, whether by purchase, gift, operation of law, or otherwise.
  11. For the purposes of recommendation 10, above, the rights of the successor in title should be no greater than those of the original consumer buyer.

### PART III

#### MANUFACTURERS' EXPRESS (PERFORMANCE) WARRANTIES

##### Legislative Regulation of Manufacturers' Warranties—Chapter 7

The Commission recommends that:

1. The scope of the proposed *Consumer Products Warranties Act* include provisions that empower the Ontario Government to regulate all aspects of express performance warranties, whether given by manufacturers or other suppliers, and their administration.
2. The proposed Act should deal with ensuring the availability of spare parts and general service facilities.
3. The proposed Act must contain strong and realistic enforcement provisions.
4. Subject to the guidelines contained in the *Report of the Royal Commission Inquiry Into Civil Rights*, the proposed Act should contain basic guidelines in as much detail as is practicable and create and employ a regulation-making power to complete the legislative scheme and to adjust it to the circumstances and needs of particular industries.
5. The proposed Act should contain a provision requiring that every regulation made thereunder be tabled in the Legislature within fifteen days, and stand referred to an appropriate Committee of the Legislature.
6. The proposed Act should include the power to require by regulation the adoption of standard form warranty documents and retail sales agreements, where such are desirable and practical for certain types of products.
7. The following guidelines should apply to the form and content of all written warranties, for all used as well as for all new goods sold in Ontario, except where the unique warranty problems of a particular industry require some modification by means of regulation:
  - a. The warranty shall state clearly the name and address of the person offering the warranty;

- b. The warranty shall be clearly legible (unless the size of the product makes this an unreasonable requirement, e.g., a lighter or a watch) and shall refer only to one product or to one product classification;
- c. The warranty shall not be deceptively worded;
- d. In particular the term "warranty" or "guarantee" shall not be used in the caption of the document unless
  - (i) the promisor undertakes at least to repair or replace any malfunctioning part free of charge to the consumer or to make him a fair allowance on account of the defective product on the purchase of a new product of comparable price and quality; and
  - (ii) the warranty covers all the major components of the product;
- e. The document shall state clearly the duration of the warranty but different periods may be stated for different components of the product;
- f. The document shall state clearly the procedure for the presentation of a claim under the warranty;
- g. No warranty shall make the warrantor or any person related to him commercially the sole judge whether a product is defective or whether the buyer is otherwise entitled to present a claim;
- h. The recognition of a claim under the warranty shall not be made contingent on the buyer returning the product to the manufacturer or selling dealer, at his own expense or otherwise, where the requirement is an unreasonable one;
- i. Subject to the regulations, a warranty shall not exclude or limit the express or implied warranties otherwise created by law or the buyer's right to claim damages or other forms of relief for breach of the express or implied warranties or for breach of the written warranty;
- j. Every written warranty shall state clearly that its terms are *in addition* to any rights or remedies the buyer may have under the Act unless the Act or its regulations permits the exclusion or limitation of the statutory warranties.

### PART IV

#### PUBLIC LAW ASPECTS OF WARRANTIES AND GUARANTEES

##### Enforcement of the Consumer's Rights—Chapter 8

The Commission recommends that:

1. *The Consumer Protection Bureau Act* should provide that the Consumer Protection Bureau has the duty, in appropriate cases, to request that the Attorney General seek to initiate proceedings to refer any matter with respect to a warranty complaint to the courts under the provisions of *The Constitutional Questions Act*.

2. The proposed *Consumer Products Warranties Act* should contain a section under which a reference as described in recommendation 1, above, in respect of a matter arising under the proposed Act, is specifically authorized. Such a section might read as follows:

The Lieutenant Governor in Council may refer to the Court of Appeal or to a judge of the Supreme Court for hearing and consideration any matter arising under or in connection with this Act that he thinks fit, and the court or judge shall thereupon hear and consider the matter so referred.

3. *The Consumer Protection Bureau Act* should provide that, in addition to the existing powers of the Bureau, it has the power:
  - a. to mediate consumer disputes;
  - b. with the consent of the parties, to initiate arbitration in consumer disputes, if mediation fails;
  - c. in appropriate cases, under the direction of the Attorney General, to prosecute any violation of *The Consumer Products Warranties Act*;
  - d. as an alternative to prosecution, with the consent of the respondent, to issue a cease and desist order covering the practice or behaviour which has been the subject matter of the complaint; and
  - e. where the parties do not agree to arbitration or, notwithstanding such agreement, the matter is of such a nature that a more formal hearing is appropriate, to refer the issue to the Commercial Registration Appeal Tribunal of the Department of Financial and Commercial Affairs.
4. *The Consumer Protection Bureau Act* should provide for the establishment of arbitration machinery for carrying out recommendation 3. b., above, consisting initially of a single individual from or designated by the Consumer Protection Bureau in Toronto and from or designated by each Bureau branch office.
5. Once the basic arbitration machinery is operating as described in recommendation 4, above, arbitration committees should be established in those centres and for those consumer industries where the volume of business and necessity for specialization justify this step.
6. Arbitration committees should be established for particular sectors of the consumer industries, and should consist of three persons, one of whom is from the industry in question, one of whom is a member of the consuming public and one of whom is an independent professional person, although not necessarily a lawyer.
7. The fee payable to the arbitrator or arbitration committee should be borne by the Consumer Protection Bureau.
8. Certain of the arbitration committees should also be designated as warranty advisory committees, with one such committee for each major segment of Ontario's consumer industries, with responsibility, under the direction of the Consumer Protection Bureau:
  - a. to employ empirical knowledge about the specialized area dealt with by the committee to attempt to work out satisfactory warranty standards with the industries in question;
  - b. to evaluate product performance;
  - c. to assess the adequacy of service and repair facilities provided by the industry; and
  - d. to advise the Bureau about all aspects of the industries in question that relate to warranties and consumer protection.
9. The Commercial Registration Appeal Tribunal should have jurisdiction, upon reference of a matter from the Consumer Protection Bureau, to inquire into and determine whether there has been a violation of *The Consumer Products Warranties Act*, and to assess the quantum of the loss to the complainant, as a matter of restitution, caused by the breach.
10. In a hearing of a matter pursuant to recommendation 9, above, the Commercial Registration Appeal Tribunal should be governed by the provisions of *The Statutory Powers Procedure Act, 1971*, with power to require witnesses to appear, to compel production of documents and to do all other things necessary for a full and fair hearing.
11. If the Commercial Registration Appeal Tribunal finds a complaint referred to it pursuant to recommendation 3. e., above, to be justified, it should have power to:
  - a. make an order for restitution (but not for general damages) in favour of the complainant; and
  - b. make an order that the respondent cease and desist from the violation of the particular provisions of *The Consumer Products Warranties Act* identified by the Tribunal.
12. Where the Consumer Protection Bureau, with the consent of the respondent, issues a cease and desist order in accordance with recommendation 3. d., above, or where the Commercial Registration Appeal Tribunal issues an order pursuant to recommendation 11, above, such an order should be filed in the office of the Registrar of the Supreme Court, whereupon this order should be entered in the same way as a judgment or order of that court and be enforceable as such.
13. *The Consumer Protection Bureau Act* should provide that the establishment and execution of a programme of consumer product testing and performance evaluation should be a function of the Bureau.
14. Means should be provided to the Consumer Protection Bureau to engage in a vigorous and continuing public information programme, including regular publication of:
  - a. an account of the activities of the Bureau;
  - b. digests of important cases dealt with by mediation, arbitration or consent orders;
  - c. reports of cases of violations of *The Consumer Products Warranties Act* prosecuted by the Bureau under the direction of the Attorney General;

- d. reports of warranty cases referred to the courts by the Lieutenant Governor in Council pursuant to recommendations 1 and 2, above;
- e. reports of cases arising under *The Consumer Products Warranties Act* that are dealt with by the Commercial Registration Appeal Tribunal; and
- f. reports of the activities and recommendations of the Warranty Advisory Committees.

- 8. Legislation should be enacted to provide that in every trade sale of a used vehicle to a consumer in which a certificate is required to be signed by the selling dealer and issued to the buyer under section 58 of *The Highway Traffic Act*, but is not signed or is not issued, the dealer, for the purposes of an action brought under recommendation 7, above, shall be deemed to have signed and issued a certificate to the buyer to the effect that the vehicle met the prescribed requirements and performance standards on the date of delivery.

### Consumer Warranties and Public Standards—Chapter 9

The Commission recommends that:

1. *The Consumer Products Warranties Act* should contain a prohibition against the making of any false, misleading or deceptive statements by a manufacturer or distributor in any advertisement, circular, pamphlet or other representation to the public with respect to the terms, conditions or benefits to the consumer of any warranty that he offers or purports to offer, or that he indicates is offered in relation to the goods by any distributor or retailer with whom he deals.
2. *The Highway Traffic Act* should require that, whenever a certificate is issued pursuant to section 58, it must be signed by both the dealer and the mechanic who actually conducted or supervised the inspection and tests prescribed under the regulations to the Act.
3. *The Consumer Products Warranties Act* should provide that in the sale of a used vehicle by a registered dealer, there is, where a certificate is issued pursuant to section 58 of *The Highway Traffic Act*, as a component of the contract of sale, an implied warranty that the vehicle meets the standards prescribed under the regulations to the Act as at the date of the inspection, and, if the date of delivery is later than the date of the inspection, an implied warranty that the vehicle meets the same standards on the later date.
4. The certificate issued pursuant to section 58 of *The Highway Traffic Act* should be retitled a "Certificate of Minimum Safety".
5. The Certificate of Minimum Safety should clearly disclose on its face that its issuance represents an implied warranty in the terms described in recommendation 3, above.
6. The adequacy of fines prescribed for violation of the motor vehicle certification requirements in *The Highway Traffic Act* should be reviewed.
7. Legislation should be enacted to provide that in trade sales to consumers, both signatories of a certificate issued pursuant to section 58 of *The Highway Traffic Act* owe a duty to exercise reasonable care to all persons within the scope of the risk created by a failure to exercise such reasonable care, even though such persons are not in a contractual relationship with either signatory, to ensure that any used vehicle certified as meeting the prescribed requirements and performance standards on the date of the inspection (or in the case of a dealer, on the date of delivery if that is later than the date of inspection) in fact meets those standards.

(ii) The Saskatchewan Consumer Products Warranties Act, 1977. Saskatchewan enacted its Consumer Products Warranties Act<sup>21</sup> in 1977, basing both the statutory design and the content to a large extent on the 1972 Report of the Ontario Law Reform Commission.<sup>22</sup> The Saskatchewan enactment is comprehensive: it applies without limitation to all consumer products, used as well as new, and in addition to the expected regulation of consumer product warranties it also deals with the products liability (personal injury to the product user) problem. (This latter dimension was discussed in some detail by this author in the Products Liability study.<sup>23</sup>) The predominant concern of the Saskatchewan CPWA, of course, is not personal injury. Rather, the focus is product quality and consumer product warranties. The Act deals with these matters in a fairly well-integrated manner. There is, first of all, a substantial core of non-excludable, statutorily implied warranties: in addition to the usual sale-of-goods implied warranties of fitness and merchantability, Saskatchewan has added new implied warranties of acceptable quality,<sup>24</sup> durability for a reasonable period of time,<sup>25</sup> and availability of spare parts and repair facilities.<sup>26</sup> The Act deals with additional written warranties by requiring full disclosure of certain kinds of informational items<sup>27</sup> and by prohibiting certain kinds of warranty terms (e.g., "ship at the consumer's expense").<sup>28</sup> The Act also provides a more modernized and extended consumer private remedies section in an attempt to allow the consumer to deal more effectively with problems of repair or substantial breach.<sup>29</sup> There is also an expanded range of dispute resolution mechanisms, including mediation and arbitration vehicles as well as the more traditional judicial routes.<sup>30</sup> And there is, finally, a fairly extensive rule-making authority allowing the government to deal more precisely with the various categories of regulation.<sup>31</sup>

(iii) The New Brunswick Consumer Product Warranty and Liability Act, 1978. New Brunswick's Consumer Product Warranty and Liability Act<sup>32</sup> was proclaimed effective January 1, 1980 (with the exception of section 6, which was proclaimed effective January 1, 1981). The New Brunswick enactment relied mainly upon three internal reports of the provincial Department of Justice Consumer Protection Project.<sup>33</sup>

Like the Saskatchewan enactment, the New Brunswick CPWLA is comprehensive: it applies across the board to all consumer products, both new and used, and it extends to include not only retailers and manufacturers but all others in the distributional chain who supply a consumer product as part of their regular business.<sup>34</sup> The legislation is not limited to consumer product sales but also extends to include the supply of any consumer product, by lease or otherwise.<sup>35</sup> And, like the Saskatchewan enactment, the New Brunswick legislation also deals specifically with the product liability (personal injury to the consumer product user) problem.<sup>36</sup> This aspect was discussed in the Products Liability study mentioned earlier.<sup>37</sup>

Following Saskatchewan's lead, the New Brunswick CPWLA has extended the traditional list of statutorily implied warranties to include

## Summary of Recent Consumer Legislation in Three Provinces

	Saskatchewan	Quebec	New Brunswick
Title	Consumer Product Warranties Act (1977)	Consumer Protection Act (1978)	Consumer Product Warranty and Liability Act (1978)
Consumer products	Any goods ordinarily used for personal, family and household purposes... Includes - Used goods - Goods for installation - Leased goods - Conditional sale goods	Any moveable property used by any person, except a merchant who obtains goods or services for the purposes of his business... Includes - Leased goods - Used goods	Any tangible personal property, new or used, of a kind that is commonly used for personal, family or household purposes... Includes - Leased goods - Conditional sale goods
Implied warrantor	Manufacturer and retailer	Manufacturer and merchant	The seller
Privity of contract	Not a defence	Not a defence	Not a defence
Disclaimers	Prohibited	Prohibited	Prohibited
Who may claim	* Consumer * Subsequent owners by whatever means	* Any person using the product	* Any person who suffers a consumer loss because of the product.
Implied warranty	* Title * Freedom from encumbrance * Fitness for purpose * Fulfillment of description * Quiet possession  * <u>Durability</u> - The product and all its components shall be durable for a reasonable period of time, having regard to all the circumstances of the sale.  * <u>Acceptable quality</u> - That the product supplied under the contract is of acceptable quality (except where defects are pointed out or should have been apparent).  * <u>Spare Parts and Servicing</u> - That spare parts and reasonable repair facilities will be available for a reasonable period of time after the date of sale of the product.	* Title * Freedom from encumbrance * Fitness for purpose * Fulfillment of description  * <u>Durability</u> - Goods being the subject of a contract must be durable in normal use for a reasonable time, taking account of their price, the terms of the contract and the conditions of use of operation of the goods.  * <u>Spare Parts and Servicing</u> - Replacement parts and repair service must be available for a reasonable time after the making of the contract (except where the consumer is warned by the merchant or manufacturer that he does not supply spare parts).	* Title * Freedom from encumbrance * Fitness for purpose * Fulfillment of description * Quiet possession  * <u>Durability</u> - The product and any components thereof will be durable for a reasonable period of time.... In determining a reasonable period of time ... regard shall be had to all relevant circumstances.  * <u>Acceptable Quality</u> - That the product is of such quality, and as fit for the purpose or purposes for which products of that kind are normally used as it is reasonable to expect having regard to the seller's description, if any, the price, when relevant, and all other relevant circumstances.
Express warranty	Terms - Any written, oral or advertised claim made by retailer, manufacturer or agent/employee. Written Form - * Name and address of warrantor * Parts covered by warranty * Obligations of claimant * Costs borne by claimant, if any * Recourse procedure * Length of warranty * Name and address of repair facility * Statement that written warranty is in addition to statutory warranty	Terms - Any written, oral or advertised claim made by merchant, manufacturer or representative. Written Form - * Name and address of warrantor * Who may invoke the warranty * Obligations of warrantor * Recourse procedure * Length of warranty	Terms - Any written, oral or public claim made by seller or agent/employee acting within usual authority. Written Form - * No specific requirements
Parol evidence	Admissible, even where it adds to, varies or contradicts a written contract.	No specific mention	Admissible, even where it adds to, varies or contradicts a written contract.

Compiled by Peter Thirkell, Doctoral Candidate, The University of Western Ontario

Source : Kennedy, Pearce and Quelch (1979) (Exhibit 11-8).

new implied warranties of durability,<sup>38</sup> product quality<sup>39</sup> and compliance with all mandatory health and safety standards.<sup>40</sup> The statute also provides consumers with an expanded range of remedies, giving specific relief in situations where the warrantor will not or cannot satisfactorily respond to the problem of product defect.<sup>41</sup> One major point of difference with the Saskatchewan enactment is the absence in the New Brunswick legislation of any informational disclosure requirements. This study will return later to these points.<sup>42</sup>

(iv) The Quebec Consumer Protection Act Amendments. The Quebec Consumer Protection Act amendments came into force on April 30, 1980.<sup>43</sup> These amendments provide wide-ranging reform of not only consumer product warranty problems but also consumer credit contracts, business practices in advertising, and the role and responsibilities of the provincial consumer protection bureaux. Quebec's approach to consumer product warranties was very different from that of Saskatchewan or New Brunswick. Unlike the latter two provinces, Quebec did not set out to enact a comprehensive or omnibus consumer product warranty statute. Instead, it chose to deal with certain high-profile consumer product warranty problems in a piecemeal fashion. For example, one section of the CPA amendments deals with automobiles,<sup>44</sup> another with motorcycles<sup>45</sup> and a third with household appliance repairs.<sup>46</sup> But there is also a more generalized section that provides consumers with new and expanded statutorily implied warranties -- the consumer product must be fit for the normal purposes for which it is intended,<sup>47</sup> must stand up to normal use for a reasonable length of time<sup>48</sup> and must have reasonably available spare parts and repair facilities provided by the merchant or the manufacturer.<sup>49</sup> What is particularly interesting about the Quebec legislation is its specific delineation of mandatory warranties and mandatory warranty time periods. For example, the Quebec consumer may take civil action under the statutory warranties with respect to a used automobile or motorcycle or with respect to repairs effected to an automobile, motorcycle or household appliance, provided that he acts within three months following the discovery of the defect.<sup>50</sup> Dealing with used cars and motorcycles, the CPA amendments provide specific compulsory minimum warranty periods covering both parts and labour,<sup>51</sup> and if the merchant wishes to exclude liability for certain defects, the Act requires him to inform the buyer accordingly and to specify the nature of these defects as well as their estimated repair costs on the label affixed to the used automobile or motorcycle.<sup>52</sup> The contents of this label are regulated by the CPA and are deemed to form an integral part of the consumer contract.<sup>53</sup>

The CPA amendments also include numerous provisions dealing with the repair of automobiles and motorcycles. Here again specific minimum time and mileage warranty periods are statutorily provided.<sup>54</sup> The same applies to the provisions dealing with the repair of household appliances.<sup>55</sup> In all three areas -- automobiles, motorcycles and household appliances -- the CPA amendments delineate the merchant's responsibility with respect to the giving of repair estimates, the content of the repair bill itself and the obligation to post a conspicuous

notice informing consumers of their rights with respect to estimates and repairs.<sup>56</sup>

## 2. American Developments

(i) Federal Legislation: The Magnuson-Moss Warranty Act. The single most important development in consumer product warranty regulation in the United States was the enactment of the Magnuson-Moss Warranty Act.<sup>57</sup> The MMWA had three objectives: "to improve the adequacy of information available to consumers, to prevent deception and to improve competition in the marketing of consumer products."<sup>58</sup> The demand for consumer product warranty regulation was rooted in factors that proved to be very similar to those identified in Canadian studies -- the incomprehensibility of warranty language; the one-sidedness of the warranty "bargain"; the inadequacy and general inaccessibility of consumer dispute resolution mechanisms.<sup>59</sup> The MMWA was designed to respond to these problems by requiring certain kinds of pre-sale information disclosure, by regulating certain aspects of the supplier's written warranty and by providing a wider and more accessible range of consumer dispute resolution techniques.<sup>60</sup>

The Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act was signed into law by President Gerald Ford on January 4, 1975, and became effective July 4, 1975. It consists of two parts: Title I establishes a new legislative regime concerned exclusively with warranties and service contracts; Title II enlarges the FTC's jurisdiction, giving it new rule-making and consumer redress powers. Title I is significant historically because it is the first attempt by Congress to allow federal regulation of warranty practices. And yet the MMWA itself is quite benign and reveals a deep optimism and faith in the functioning of the consumer marketplace. The emphasis is on information, not regulation. Although extensive, the MMWA is basically permissive. Nothing in it requires that a consumer product be warranted or that a warranty be for any length of time. But once a warranty is given it must conform to certain federal standards. The Act provides for two basic kinds of warranty: "full" and "limited." One of these designations must appear conspicuously on all warranty documents of consumer products selling for more than ten dollars.<sup>61</sup> "Full warranties" are those which meet certain specified federal minimum standards and "limited warranties" are all others. The "full warranty" requirements are briefly these: (1) the warrantor must correct defects and malfunctions without charge and within a reasonable period of time; (2) no limitations of implied warranties are permitted; (3) limitations of consequential damages must be plain and conspicuous; (4) refund or replacement must be available as options for the consumer after the warrantor has been allowed a reasonable number of attempts to repair the consumer product; and (5) no duties except notification may be imposed on consumers as a condition of their securing remedies.<sup>62</sup>

The remedies provided by the MMWA are essentially threefold. First of all, government agencies (either the FTC or the Attorney



General) may take action on behalf of aggrieved consumers. Secondly, consumers themselves may sue, either through federal or state judicial mechanisms and, thirdly, new extra-judicial mechanisms for the resolution of disputes are prescribed and encouraged.<sup>63</sup>

The MMWA also gives the FTC new and broad powers to administer the legislation and to protect consumer interest. These powers are of various kinds but the most important among them is the FTC's authority to promulgate implementing regulations.<sup>64</sup> The FTC has to date promulgated only three rules under the Magnuson-Moss Warranty Act: one deals with the disclosure of warranty terms,<sup>65</sup> another with the pre-sale availability of warranties<sup>66</sup> and a third with informal dispute settlement procedures.<sup>67</sup>

The rule on disclosure of terms requires that at least nine specific pieces of information appear in a written warranty: the identity of warranty beneficiaries; the parts covered by warranty and, if necessary for clarity, the parts not covered; what the warrantor will do in order to remedy defects; the point in time when the warranty commences; a step-by-step explanation of the procedure to be followed to gain performance; information about informal dispute settlement procedures; limitations on implied warranties; exclusions or limitations on damages; and specified language advising the consumer of his or her statutorily provided rights. These disclosure regulations apply to all warranted consumer products selling for more than \$15.00.<sup>68</sup>

The pre-sale availability rule specifies the means by which warranties can be made part of the basis of a consumer's bargain. It does so by imposing new notification requirements on warrantors, retailers, catalogue and mail order sellers and door-to-door salesmen. The main onus of notification falls upon the retailer. The retail seller is required to use one of four possible methods to make warranty information available to consumers prior to sale: displaying the warranty text in close conjunction with the product, maintaining a binder with various warranty copies, displaying packages where warranty information appears in such a way that the warranty is plainly visible or placing in close proximity to the product a notice disclosing the warranty text. These pre-sale disclosure requirements are mandatory for all warranted products selling for more than \$15.00.<sup>69</sup> The third rule deals with standards relating to the establishment of "informal dispute settlement procedures." These "IDSPs" are described in detail later in this study.<sup>70</sup>

For a better and more detailed understanding of the Magnuson-Moss Warranty Act, the reader is encouraged to refer to the taxonomy chart (Exhibit 10) comparing the Uniform Commercial Code (UCC) and state legislative initiatives with the MMWA provisions. This three-page exhibit provides an easy, at-a-glance comparison of all of the important American (federal and state) developments in this area. The most recent state initiatives will nonetheless be briefly described in the section that follows.

Taxonomy of Warranty Statutes

Warranty provisions	Uniform Commercial Code (and interpreting case law)	Beyond the U.C.C.	Magnuson-Moss Act
Express/written warranties	* Not mandatory, no formal requirements		* Not mandatory, but if given must meet statutory requirements for "full" or "limited" warranties
Implied warranties	* Exist unless disclaimed	* Mandatory in Mass., Md. and Wash.	* Defined by state law
Oral warranties	* Not mandatory, subject to parol evidence rule		* Act's requirements inapplicable
Duration of: Express warranty Implied warranty	* Code does not address, based on proof of latent defect	* Must equal duration of written warranty (Calif., Ore.) * 1 year if no express warranty	* In the case of "limited" warranty, may be limited to equal written warranty of reasonable duration
Disclosure of warranty terms	* Must be part of the basis of the bargain	* Identification of warrantor and repair facilities (Calif., Ore., Md., Mich.) * Identification of pertinent terms (Mass.)	* Full and conspicuous in simple and readily understood language * Commission regulations specify terms to be disclosed, 16 CFR 701 * Pre-sale availability, 16 CFR 702 * Must say "full" or "limited"
Disclaimer of: Express warranty	* Conspicuous language * Part of the basis of the bargain	* Prohibition of blanket disclaimers which contradict express warranties	
Implied warranty of merchantability	* Must use word "merchantability" * Conspicuous language if written * Part of the basis of the bargain	* Prohibited in Mass., Md. and Wash.	* Can only be disclaimed for "limited" warranties * Must be clear, unmistakable, on face of warranty and conscionable
Implied warranty of fitness for particular purpose	* Conspicuous language * In writing only * Part of basis of the bargain	* Disclosure of terms in "as is" disclaimers required (Minn., Calif, Ore.)	

Warranty provisions	Uniform Commercial Code (and interpreting case law)	Beyond the U.C.C.	Magnuson-Moss Act
To whom warranties extend	Alternatives: * Purchaser's household and guests * Non-users expected to come in contact with product		* For full warranty, rights extend to any "consumer"
Servicing: Tolling of warranty		* Warranty tolled when product in hands of servicer (N.J., Calif.)	* FTC may promulgate regulations to extend warranty period when consumer deprived of product use
Service representatives			* Designation allowed but cannot make agent co-warrantor
Repair facilities		* Limitation on remedies not permitted unless repair facil- ities within the state (Wash., Mass.) * When delivery to servicer is impracticable, warrantor must service at buyer's home or arrange transportation (Calif, Ore.)	* No tie-in provision
Damages: Specifically for breach of warranty	* Difference between value of product as purchased and value had it been as warranted		
Consequential damages	* Can be limited or excluded unless unconscionable		* Can be limited or excluded in full warranty only if conspic- uously on face of warranty
Incidental damages	* Available		* Can be limited or excluded in full warranty except if remedy does not occur within "reason- able" time or imposes unreason- able duties on consumer

Minimum and punitive damages	<ul style="list-style-type: none"> <li>* \$25 minimum (Mass.)</li> <li>* Up to 3 times amount, not less than twice amount for willful violation (Mass., Calif.)</li> </ul>		
Remedies in warranty	<ul style="list-style-type: none"> <li>* Limitation to repair, replacement, refund, etc., is permitted</li> <li>* If limited remedy "fails of essential purpose" other Code remedies available</li> </ul>	<ul style="list-style-type: none"> <li>* Limitation not permitted unless repair facilities in state (Mass., Wash.)</li> </ul>	<ul style="list-style-type: none"> <li>* Limitation on remedies permitted for full and limited warranties</li> <li>* Anti-lemon provision directs refund or replacement after "reasonable number of attempts to remedy"</li> </ul>
Remedies outside warranty: Private rights of action	<ul style="list-style-type: none"> <li>* Can sue in state court for damages</li> <li>* State rules of civil procedure permit actions for other types of relief</li> </ul>	<ul style="list-style-type: none"> <li>* Class action statutes (Mass.)</li> <li>* Small claims courts</li> <li>* Extension of statute of limitations and injunctive relief (Mass.)</li> <li>* Arbitration (Pa., N.Y.)</li> </ul>	<ul style="list-style-type: none"> <li>* Informal dispute settlement procedure (IDSP)</li> <li>* Can sue in state and federal court for damages or injunctive relief</li> <li>* New standards for class actions</li> </ul>
Attorneys' fees		<ul style="list-style-type: none"> <li>* Available in winning parties (Calif., Mass.)</li> </ul>	<ul style="list-style-type: none"> <li>* Available to consumers</li> </ul>
Public remedies		<ul style="list-style-type: none"> <li>* Little FTC Acts give state power to restrain unfair and deceptive warranty practices (e.g., Vt.)</li> <li>* Consumer restitution sought by state agency</li> <li>* Parens patriae suits</li> <li>* Government agencies as informal mediators</li> </ul>	<ul style="list-style-type: none"> <li>* FTC may: <ul style="list-style-type: none"> <li>* review IDSP operation</li> <li>* restrain deceptive warranty practices</li> <li>* bring action for failure to comply with regulations</li> <li>* Title II remedies</li> </ul> </li> <li>* Violations of Magnuson-Moss are also violations of FTC Act</li> </ul>
Unconscionability of warranties	<ul style="list-style-type: none"> <li>* Any warranty term can be found unconscionable and therefore unenforceable</li> </ul>		<ul style="list-style-type: none"> <li>* Disclaimers of implied warranties must be conscionable</li> </ul>

Source: MIT Study (1978) at 2-124 to 2-126 (Table 1).

(ii) State Legislation: Recent Initiatives. During the last few years there has also been some legislative activity at the state level in the area of consumer product warranties. Generally speaking, the state-level initiatives have concerned themselves with one or all of the following specific matters: (1) requiring clearer and more conspicuous disclosure of terms and pertinent facts in written warranty documents; (2) providing safeguards against disclaimer or modification of implied warranties, and (3) providing more accessible and more effective consumer remedies.

With respect to the first category -- warranty disclosure requirements -- legislative activity has been fairly minimal. The major enactments in this area are in California and Oregon, where recent legislation now requires that warranties include the names and addresses of the warrantor's repair facility or the name and number the consumer can call to find out the name or address of the nearest repair facility.<sup>71</sup> The California provisions, after which those in Oregon were fashioned, are part of the Song-Beverly Consumer Warranty Act,<sup>72</sup> first enacted in 1972. This California statute was the first state effort to deal in a comprehensive fashion with consumer warranty problems. In addition to these California and Oregon laws, bills have been introduced in Maryland and Michigan in the last three or four years which would also require that warranties disclose information concerning repair facilities.<sup>73</sup> To date, however, these bills have not been enacted as law.

With respect to disclaimers and modifications of implied warranties of fitness for purposes of merchantability, state legislative activity has been significant but still statistically minimal. Only six states to date have enacted legislation prohibiting such disclaimers.<sup>74</sup>

Most of the legislative activity at state levels has focused on the consumer remedy problem. States have addressed this problem on two levels. First, they have provided the warrantor with certain obligations with regard to meeting the warranty requirements of a faulty product and, second, some states have enacted laws providing the consumer with procedural rules at court and adequate redress in the event that the warrantor fails to live up to his obligations under the warranty.<sup>75</sup> One of the main objectives of state warranty laws has been to ensure that the warrantor maintain adequate repair facilities reasonably close to the place of sale. Some states have approached this objective by mandating that unless the manufacturer provides and maintains adequate repair or service facilities within the state, there can be no limitation on remedies in the manufacturer's warranty, express or implied, such as, for example, a warranty provision stating that the warrantor was liable only for the repair (and nothing else) of the defective product. One such law has been enacted in Washington,<sup>76</sup> and various bills have also been introduced in recent years in several other states.<sup>77</sup> Another way in which state legislatures have tried to encourage manufacturers to provide service facilities within the state is to allow the consumer to achieve redress directly from the retailer.

In California, for example, the Song-Beverly Warranty Act provides that if the manufacturer does not maintain a state service facility, the consumer may go to the retailer and seek repair or replacement in accordance with the terms of the warranty.<sup>78</sup> The same provisions have also been enacted in Oregon.<sup>79</sup> Another protection for the consumer in obtaining compliance from the warrantor is the enactment of "tolling" legislation (now law in California and New Jersey) which requires that the period of warranty be "tolled" or suspended when the product is with the warrantor for examination or repair.<sup>80</sup> This ensures that the duration of the warranty does not include any time lost while the defective product is being repaired under warranty.

In addition to these warrantor-redress provisions, state legislatures have attempted to expand the nature and extent of legal redress that should be available to aggrieved consumers. Legislation has been enacted in some states dealing with, for example, limitation of remedies in warranties, minimum and punitive damages, the award of attorneys' fees and the procedures for collecting on a judgement.<sup>81</sup>

Finally, in addition to these various initiatives dealing with consumer product warranty problems directly, the vast majority of state legislatures in the last six or seven years have enacted unfair and deceptive practices laws. Indeed, by the end of 1974, 47 states had such legislation in force.<sup>82</sup>

### C. Where Are We Today?

#### 1. The Trend toward Omnibus CPW Legislation

Three Canadian provinces have now enacted consumer product warranty legislation and others, it seems, are thinking about doing likewise in the near future. One can describe the basic features of this generalized approach to CPW regulation as follows: (1) an omnibus design clarifying and reforming contractual doctrinal problems consistent with recent trade practices reforms,<sup>83</sup> (2) modernizing and expanding the statutorily implied warranty rights, (3) regulating the supplementary or additional warranties via disclosure requirements, (4) expanding consumer remedy provisions, and (5) providing a wider range of dispute resolution mechanism alternatives. These recent provincial initiatives, and particularly the ones in Saskatchewan and New Brunswick, were compared in another study in which the following observations were made:

In certain fundamental respects the legislation is very similar. The problem of oral representations is resolved by statutorily including all promises, representations or statements of fact under a rubric of "express warranty." Parol evidence establishing the existence of an express warranty is deemed admissible even though it varies or contradicts the terms of the

written agreement. More importantly no express warranty or contractual term may exclude or restrict any of the implied warranties provided by the statute. These statutorily implied warranties provide a non-excludable core of consumer product quality obligations that are couched in the general language of "acceptability" and "durability." Vertical and horizontal privity problems are either eliminated or substantially corrected, and the doctrinal problems relating to choice of remedy are clarified by the provision of a detailed statutory itemization of the remedies available to the consumer for breach of warranty.

The Saskatchewan Act is more extensive than New Brunswick's in at least three important respects. It attempts to provide some 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. It 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 endeavour to settle the dispute through mediation or, with the consent of the parties, submit the dispute to arbitration. Finally, unlike New Brunswick, Saskatchewan has provided for extensive regulation power that would allow the Lieutenant-Governor in Council to define with more precision, inter alia, the form and content of manufacturers' warranties, the nature of the supplier's obligation to provide reasonable repair facilities, and the various time periods permitted the warrantor for the reasonable repair of the defective product.<sup>84</sup>

These recent provincial initiatives are not of course the only provincial or federal laws that affect or regulate consumer product warranties. At the provincial level there are trade practices statutes in effect in British Columbia, Alberta, Saskatchewan and Ontario.<sup>85</sup> And at the federal level we have the misleading advertising provisions of the Combines Investigation Act (see Exhibit 11).<sup>86</sup> These enactments do have some impact on fair and honest warranty practices. But by and large they provide tangential regulation. For comprehensive, direct and problem-specific consumer product warranty regulation, one has to fall back on the provincial CPWA.

And here, even though the trend seems to be in the direction of more such laws, the overall outlook is not very optimistic. Increasingly, these consumer product warranty initiatives are attracting extensive criticism from various sources. From the business community, from the consumer advocate and increasingly from other less partisan sources, serious doubts are being cast on the approach that is presently being

EXHIBIT 11

Excerpts from the Combines Investigation Act

36.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) make a representation to the public that is false or misleading in a material respect;

(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;

(c) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or

(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

(2) For the purposes of this section and section 36.1, a representation that is

(a) expressed on an article offered or displayed for sale, its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,

shall be deemed to be made to the public by and only the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by

(f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e), and

(g) the person who imported the display into Canada, in a case described in paragraph (c).

(3) Subject to subsection (2), every one who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. R.S., c. C-23, s. 36; 1974-75-76, c. 76, s. 18.



taken to the regulation and resolution of consumer product warranty problems. Fundamental questions are being asked about the overall design, content and empirical integrity of the current direction in consumer product warranty reform.

## 2. Growing Controversy and Confusion

(i) Concerns of the Business Community. Perhaps not surprisingly the manufacturer and retailer organizations have responded to the enactment of CPW legislation with sustained opposition. Their criticisms and concerns are twofold: criticisms of the specific statutory content and a more generalized criticism of the overall need for omnibus legislation.

Dealing first with the specific content criticisms, representatives of the various manufacturer and retailer associations have made it abundantly clear to provincial governments that they are not very happy with the direction being taken in Saskatchewan or New Brunswick. Of particular concern to them is the proliferation of new statutorily implied warranty rights such as "consumer acceptability" or "reasonable durability" or, indeed, "reasonable repair or servicing facilities." The objection is increasingly being voiced that these new and highly open-textured warranty rights are much too ambiguous and can only add uncertainty to the marketing of consumer products -- an uncertainty that will add to the cost of these products, which cost will then have to be passed on to the consumer.<sup>87</sup> A recent Canadian study of marketing executives in both the white goods and auto industries confirmed this uniform and strongly held opposition to legislatively prescribed ambiguity. Was the term "reasonable durability," for example, intended to refer to product reliability, product appearance, product longevity or to all of the above?

The word durability was found to have multiple meaning among people associated with the new white and new automobile industries....[The executives surveyed] did not like the uncertainty that "reasonable" created and wanted a specific list of circumstances of the sale that would bear on an interpretation of the word reasonable.<sup>88</sup>

At the more general level of criticism, business representatives question the need for omnibus consumer product warranty legislation at this time. In their view, provincial CPW regulation is not really needed. Existing legislation, they feel, is more than adequate to handle whatever problems are now arising and, furthermore, businesses are already voluntarily making necessary improvements with respect to such issues as warranty readability. Business advocates point to such innovations as the "plain language" Inglis warranty (see Exhibit 12) and the "24-Hour Whirlpool Cool-Line Service" now being advertised across the country (see Exhibit 13). The recent Canadian study referred to earlier also noted significant and generalized improvements in warranty service:

## An Example of a "Customer-Language" Warranty

INGLIS LIMITED

HEAD OFFICE  
14 Strachan Avenue  
Toronto, Ontario, Canada  
M6K 1W6

Dear Customer:

Good performance. That's what this letter is all about.

We know that you expect good performance from your WHIRLPOOL\* Refrigerator and we aim to see that you get it. Here's how its performance is protected.

### WARRANTY FOR YOUR WHIRLPOOL REFRIGERATOR

During the first year after purchase, all parts of the appliance which we find are defective in materials or workmanship will be repaired or replaced by Inglis free of charge and we will pay any labour charges.

During the first five years after purchase, all parts of the sealed refrigerator system, which consists of the compressor, condenser, evaporator and connecting tubing, which we find defective in materials or workmanship will be repaired or replaced by Inglis free of charge, labour no charge. However, at distances greater than twenty miles from the nearest service organization authorized by Inglis to service WHIRLPOOL appliances, we reserve the right to charge transportation and travelling costs for the excess distance.

This protection is yours as the original purchaser for single family use in your home and is not transferable without written permission from Inglis. It requires that all service be performed by a service organization authorized by Inglis to service WHIRLPOOL appliances. Naturally, it doesn't cover damage by accident, misuse, improper installation, fire, flood, or acts of God. But it does cover you wherever you live in Canada...even if you move and take the refrigerator with you.

Now, about servicing. Let's face it. Sometimes even the best products need service. So, if that's ever true of your WHIRLPOOL refrigerator, there is a way to get action fast. Just call your Inglis Factory Service Branch, or the nearest service organization authorized by Inglis to service WHIRLPOOL appliances. They are trained to make whatever's wrong right, and there are over 340 locations in Canada.

We suggest you keep this letter with your sales slip. It's nice to know you'll have protection, even though you may never need it.

Sincerely,  
INGLIS LIMITEO

For service, call your nearest Direct Factory Branch listed below.

CHICOUTIMI, 163 Bosse Street.....	543-0267	BARRIE, No. 7 4 Alliance Blvd.....	726-3922
QUEBEC, 2289 Leon Harmel.....	681-3538	HAMILTON, 324 Hilton Drive.....	547-2335
SHERBROOKE, 764 King Street East....	563-6565	LONDON, 962 Leathorne Street.....	686-8633
THREE RIVERS, 5427 Royal Blvd.....	375-9674	WINOSOR, 3180 Grand Marais East....	944-3551
MONTREAL, 855 Autoroute Laval West		REGINA, Box 1095, 632 East 4th Ave...	569-9681
Chomedey, Ville de Laval.....	382-8110	SASKATOON, No. 5-1624 Ontario Ave...	652-9285
OTTAWA, 28 Capital Drive.....	225-0510	EDMONTON, 12235 Fort Road.....	474-8576
TORONTO WEST, 5945 Ambler Drive,		CALGARY, 1338-11th Avenue S.W.....	245-2201
Mississauga.....	624-2800	VANCOUVER, 1610 Ingleton Ave.....	299-7411
TORONTO EAST, 110 Torbay Road,		VICTORIA, 3121 Steele Street.....	386-2208
Unit 1, Markham.....	495-9511		

DISTRIBUTOR SERVICE  
MANITOBA -- THOMAS RATHWELL LIMITEO, WINNIPEG, 774-4561

For services in areas other than those listed, contact your WHIRLPOOL appliance dealer. Consult your local telephone directory for the nearest Inglis Authorized Service Depot.

FOR YOUR PROTECTION ALWAYS INSIST ON FACTORY SPECIFIED PARTS

\*Trademark in Canada. Used by Authority of Canadian Trademark Owner,  
WHIRLPOOL CORPORATION, U.S.A.

PN 20142435

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 8-11).

# How a phone call got a part-time bachelor off the hook.

*Based on an actual call made to the toll-free 24-hour Whirlpool Cool-Line® service.*

## (Telephone Rings)

**Cool-Line Consultant:** Whirlpool Cool-Line. May I help you?

**Man:** If you don't she's going to kill me.

**Consultant:** What happened?

**Man:** It's our new self-cleaning oven. I think I ruined it. What can I do?

**Consultant:** We're here to help. Tell me about it.

**Man:** My wife is in the hospital. So for a week I've been batching it. Today she's coming home. So I decided to clean the oven for her. I turned the knob to CLEAN, but the oven won't heat up. And the oven door won't close. Can I get a serviceman out here fast?

**Consultant:** You really don't have to call a Whirlpool franchised Tech-Care® representative. Even though your warranty does cover it.

**Man:** I can never understand warranties.

**Consultant:** Ours are written so you can. But I think we can fix that oven over the phone. When a self-cleaning oven is turned to CLEAN, an automatic safety arm hooks the door closed. If your oven door wasn't closed when you turned it to CLEAN, the arm's blocking the door open.

**Man:** How can I get the door closed?

**Consultant:** Look on the edge of the oven for a small

button. It operates the oven light and is part of the safety interlock system. Push the button in until you hear the motor stop running.

**Man:** Okay, the motor's running. Now it stopped.

**Consultant:** With the button still pushed in, turn the control dial back to OFF. The lock should retract.

**Man:** It's working! Now the door closes.

**Consultant:** Your oven will heat up, too.

**Man:** You really saved me. Now I've got to pick up my wife and... new baby.

**Consultant:** Call again if we can help with your Whirlpool appliances. And congratulations on your baby.

This is the kind of two-way communication we've been having with our Whirlpool Cool-Line service for the past eleven years. It's just one example of the continuing concern we have for customers who purchase quality Whirlpool appliances.

If you ever have a question or problem with your Whirlpool appliance, call our toll-free 24-hour Cool-Line service at 800-253-1301. In Alaska and Hawaii, the number is 800-253-1121. In Michigan, call 800-632-2243.



We see in both the white goods appliance and new automobile industries a shift in business concept in the last decade to put more emphasis on fulfilling warranty obligations and a more recent shift in business concept among the automobile manufacturers which we interviewed from one of sales to one of sales and service....The emergence of more centralized and larger organizations assuming responsibility for in-warranty and for the white goods appliance industry post-warranty service has been followed by a number of changes in operation which should result in improved system operation....There is within both industries an emphasis on decentralization of decision-making on warranty claims to minimize customer problems created by time delays....Finally in both the white goods appliance and automobile industries there is current examination and some experimentation with mediation systems.<sup>89</sup>

Moreover, a recent survey of Ontario consumers found that the great majority of consumers believe that business is responding increasingly to consumer concerns and is generally improving its practices.<sup>90</sup> These were two of the survey's conclusions as documented in Exhibits 14 through 21:

1. While most people do not see business as naturally altruistic, they seem to believe that when subject to checks and balances, companies are responsive to consumer needs. [See Exhibits 14 and 15.]
2. Apparently the public sees these arrangements as working tolerably well. Ontarians express the general belief that the treatment they receive in the marketplace is reasonably satisfactory. Most say they have not had cause to complain of late about a product or service. When they do they take the matter to the retailer or manufacturer rather than to a third party, and after the complaint they usually report that they have had an acceptable settlement. Moreover, the consensus is that industry's treatment of consumers has been improving.<sup>91</sup> [See Exhibits 16 to 21.]

Representatives of the business community point to these and other recent studies that suggest a similar consumer confidence in industry voluntariness. They also point to the important empirical studies, discussed in Chapter III, that suggest the overall ineffectiveness of current consumer product warranty regulation efforts. They demand, perhaps not without justification, some indication that current CPW law reform is proceeding in a principled and well-informed manner. To date, as far as they are concerned, both consumers and producers have been the victims of ill-considered and intuitive governmental and legislative "ad hocery."

EXHIBIT 14

Beliefs about Business and Government (Question 8)	
<u>Statement</u>	<u>Percentage of respondents with an opinion who agree with the statement</u>
Business is becoming more aware of social responsibilities, such as pollution and safety	85
The attitude of business today is "let the buyer beware"	66
Government favours business more than it does consumers	64
The attitude of most stores is that the consumer is always right	52
Most manufacturers care only about making a profit and not about the quality of their product	51

Source: Moyer (1978) at 8 (Table 2).

EXHIBIT 15

Interest of Business and Government in Consumer Needs (Question 20)		
	<u>Percentage of respondents who report that degree of interest</u>	
<u>Degree of interest</u>	<u>By business</u>	<u>By government</u>
Very interested	31	12
Fairly interested	51	47
Not too interested	13	28
Not at all interested	4	11
Don't know	1	2

Source: Moyer (1978) at 7 (Table 1).

EXHIBIT 16

Incidence of Complaints (Question 5)		
Number of times in in the past year	Percentage of respondents who	
	Had good reason to complain	Actually did complain
None	65	69
1	13	14
2	10	5
3	6	5
4	3	2
5	2	2
6 or more	<u>1</u>	<u>3</u>
Total 1 or more	35	31

Source: Moyer (1978) at 31 (Table 22).

EXHIBIT 17

Whom Complaints Are Taken To (Question 5)	
Most serious complaint was taken to	Percentage of respondents <sup>a</sup>
Dealer, retailer or store	72
Manufacturer	22
Better Business Bureau	9
Lawyer	4
Utility company	4
Local elected official	3
TV or radio station	2
Trade association	2
Newspaper action line	1
Consumers' Association of Canada	1
Letter to editor	1
Ombudsman	0
Others	5
No response	2

Source: Moyer (1978) at 33 (Table 24).

<sup>a</sup>Figures add to more than 100 per cent because some respondents mentioned more than one answer.

EXHIBIT 18

Other Consumer Problems (Question 3)	
<u>Statement of problem</u>	<u>Percentage of respondents who have had dealings in this area who agree with the statement</u>
Computer billing errors are difficult to have corrected	76
There are too many dangerous products on the market	60
Very many products break or go wrong soon after you buy them <sup>a</sup>	48
It's very difficult to get car insurance claims settled fairly	43
Most car insurance claims are not settled promptly <sup>a</sup>	39
Most companies do not handle complaints properly <sup>a</sup>	34

Source: Moyer (1978) at 19 (Table 10).

<sup>a</sup>The statements listed above are all negative in tone. In fact, during the administration of these questions, some statements were positive and some negative. To provide comparable statements in the table, the positive statements in the questionnaire are presented here in the negative form.

EXHIBIT 19

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Outcomes of Complaints (Question 6)	
<hr/>	
<u>Result of complaint</u>	<u>Percentage of respondents who gave that result</u>
Item repaired	21
Item replaced or exchanged	20
Money back or credit note	13
Explanation of reason for problem	9
Apology	9
Item delivered	3
Accounting, clerical error fixed	2
Other	4
No settlement yet	15
Gave up -- no satisfaction	19

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Source: Moyer (1978) at 35 (Table 26).

EXHIBIT 20

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Degrees of Satisfaction with Outcomes of Complaints (Question 6)	
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<u>Degree of satisfaction</u>	<u>Percentage of respondents who were that satisfied</u>
Very satisfied	35
Fairly satisfied	32
Not too satisfied	13
Not at all satisfied	20

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Source: Moyer (1978) at 35 (Table 27).



EXHIBIT 21

Evaluation of the Present and Future concerning Various Aspects of Consumerism (Question 13)						
<u>Aspect of Consumerism</u>	<u>Percentage of respondents who see the situation as better or worse</u>					
	<u>In the last 2 or 3 years</u>			<u>In the next 2 or 3 years</u>		
Safety testing of products	77	6	+71	76	3	+73
Information about content of products	69	9	+60	63	7	+56
Information about how to take care of/operate/ assemble products	52	10	+42	52	7	+45
Handling of consumer complaints by business	40	14	+26	49	7	+42
Relationship between consumer and business	37	19	+18	45	9	+36
Treatment of consumer by business	33	18	+15	44	9	+35
Misleading claims about products	31	25	+6	43	11	+32
Quality of products and services	27	37	-10	42	19	+23
Getting things repaired properly	19	39	-10	30	21	+9
Fair cost of having things repaired	7	70	-63	17	49	-32

Source: Moyer (1978) at 36 (Table 8).

(ii) Criticism from Consumer Advocates. The reaction of the product manufacturers and retailers to recent CPW reforms may have been to some extent predictable. What is more surprising, both to law reformers and legislators, is the criticism that is increasingly being voiced by consumers and consumer organizations. The recent CPW initiatives are being criticized by many consumer advocates as misguided and empty-handed legislative gestures that amount to nothing more than symbolic and, worse, retrogressive law reform. The futility and empirical irrelevance of much of what purports to be "consumer law reform" today is attracting a growing literature.<sup>92</sup> The point was dramatically made in a recent Quebec study of the overall ineffectiveness of current Canadian consumer protection legislation:

We have no alternative but to insist that the legislators cease multiplying consumer protection laws if they do not intend to deal first of all with the training of those to whom enforcement is delegated, the provision of adequate penalties to ensure that the laws are respected, the informing of the consumer to ensure that they are well-known and a provision of budget sufficient to back them up. Without this there is every good reason to fear that the existing laws and all of those that will emerge in the future will continue to constitute a veritable paper arsenal.<sup>93</sup>

The specific deficiencies of the current CPW initiatives, argue the consumer critics, are many:

- the omnibus reforms do not in fact provide meaningful consumer product warranty regulation;
- the continued use of a legislative-judicial model is anachronistic;
- what is needed is better information disclosure and even standard form-of-warranty regulation, and perhaps even specific product standard regulation, extending the various federal and provincial product safety statutes to include product quality concerns as well; or, at least, plain language legislation requiring simpler and more easily readable consumer warranties;
- the various rights given by current consumer protection laws are not known by the average Canadian consumer, and the various publicity and educational efforts to date have failed in their purpose;
- giving consumers more "legal rights" without also providing meaningful and effective remedies is worse than doing nothing at all;
- most of the legislation to date is of this ilk;

-- to make the various rights meaningful and workable, radical remedies have to be provided and implemented.

In sum, then, the argument is being made for more effective disclosure, more explicit consumer rights and more meaningful consumer remedies.<sup>94</sup>

It is somewhat ironic that the concerned consumer advocate is spotting the same kinds of weaknesses in current consumer protection thinking that the business advocate has also noted: the lack of systematic research and planning, the concern that "some kind of law...any kind of law" should be enacted without regard to either present-day realities or future implications, the continuing disregard of relevant empirical research, the continuing legislative "ad hocery" -- in short, again, the fundamentally unprincipled nature of current policymaking in this area.

(iii) Loss of Confidence in Government Generally. Compounding this controversy and adding to the criticisms being voiced by business and consumer advocates is a further and more deeply rooted dimension: the growing realization by more and more Canadians that modern government really can't do much about anything anymore. The increasing citizen malaise and general distrust or doubt about governmental capability is especially pronounced in the consumer protection field. The late 1960s and early 1970s saw substantial legislative headway being made in the area of consumer protection law reform. But there was little if any street-level impact. And, by the mid-1970s, with the general deterioration in the economy and the growing reaction to a burgeoning governmental bureaucracy, there came the increasing realization (noted above) that much of the legislation that was being enacted was largely symbolic and, more often than not, meaningless to most Canadians. As the 1980s began, policymakers were being confronted with the reality that consumers were less and less willing to rely on governmental action and were becoming increasingly concerned about governmental ineptitude generally. This growing disillusionment with government size and effectiveness was prompted in part by the realization that much of governmental decision-making today continues to be highly intuitive, generally uninformed and profoundly unprincipled.

In a recent and important article in the *University of Pennsylvania Law Review*, Robert Reich, Director of Policy and Planning for the Federal Trade Commission, concluded that "consumer protection is everywhere in retreat."<sup>95</sup> Unfavourable economic conditions are, of course, one explanation. Since 1973, oil embargoes, soaring prices, recession and high unemployment have plagued North America. Consumer protection was encouraged when the economy was buoyant, but in times of belt-tightening it is coming to be regarded as an unaffordable luxury. Greater sophistication in the business community -- lobbying and grass-roots politicking -- may also account in part for the decline in political support for consumer protection in recent years. But the most critical factor, argues Reich, is this:

Underlying the economic and political shifts of recent years has been a growing public unease about the function of consumer protection. It is not so much that the goal worries people. Ask the average consumer whether he wants unsafe cars, carcinogenic drugs, adulterated foods, dangerous toys, or advertising intended to exploit the gullibility of his four year old and he will answer with a resounding no. But ask him whether governmental regulators should intervene to remedy these problems and his response is likely to be ambivalent. Increasingly, the public debate about consumer protection has centered less on the question of which marketplace evils should be cured than upon the propriety of having the government administer the remedy. In its crudest form the question has become: who do you trust less -- big business or big government.<sup>96</sup>

A 1978 survey of Ontario consumers found that "many citizens think that consumer laws and regulations are costly and excessive"<sup>97</sup> (see Exhibit 22). Of the consumers surveyed, 66 per cent believed that it was absolutely useless to complain to government with respect to redress. Forty-three per cent of the consumers preferred consulting the Better Business Bureau to asking governments either at the federal or provincial level to do something about a particular problem (see Exhibit 23). The Ontario study noted that in the public mind the Better Business Bureau is much more prominent as a place to take complaints, and requests for purchase information and information on consumer rights than government or consumer organizations (see Exhibits 23 and 24 and recall Exhibit 17). Similar conclusions about governmental ineffectiveness were also drawn in a recent survey of Quebec consumers. Exhibit 25 shows that the provincial consumer protection bureaux and Consumer and Corporate Affairs Canada received the most negative evaluation in terms of their own effectiveness, even from their own staff members.<sup>98</sup>

(iv) The Empirical Realities. Finally, we come to the most unsettling and perhaps the most serious ingredient in the continuing controversy about CPW law reform: the empirical evidence. In recent years the social sciences have shown a growing interest in both consumer behaviour and legislative impact analysis. Several important and revealing empirical studies have now been completed with findings that should give any serious-minded policymaker reason to pause. These studies are described and their various findings are discussed in detail in Chapter III of this study. The main point to note here is that as this empirical evidence is being catalogued and analyzed, serious doubts are beginning to emerge about a whole host of issues and factors that up to now have not really been carefully examined or considered: the nature and extent of the so-called consumer product warranty "problem"; the degree and design of necessary or appropriate governmental intervention; the extent to which policymakers have hitherto misunderstood the nature

EXHIBIT 22

Beliefs about Remedies (Questions 8 and 12)	
<u>Statement about remedy</u>	<u>Percentage of respondents with an opinion who agree with the statement</u>
The consumer movement has helped improve the quality and standards of products and services	89
Competition among companies is the best way to keep prices down	85
In most cases it's useless complain- ing to the government because it can't or won't do anything about it	66
Consumers would get a bad deal if companies were not regulated by government	61
There is too much government regulation of business	54
Consumer laws and regulations increase the costs of goods and services	47
Most consumers' problems result from their own carelessness	46
The activities of the consumer movement in the long run will lead to too much government control	44

Source: Moyer (1978) at 25 (Table 17).

EXHIBIT 23

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Sources of Information on Consumer Rights (Question 16)	
<u>Source</u>	<u>Percentage of respondents who would go to that source<sup>a</sup></u>
Better Business Bureau	43
Government of Ontario	20
Government of Canada	12
Lawyer	12
Newspaper, TV or radio	9
Friend or relative	6
Chamber of Commerce	6
Banks	1
Other	21
Don't know	16

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Source: Moyer (1978) at 29 (Table 20).

<sup>a</sup>Figures add to more than 100 per cent because some respondents mentioned more than one source.

EXHIBIT 24

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Sources of Information and Assistance on a Major Purchase Decision (Question 17)	
<u>Source</u>	<u>Percentage of respondents who would go to that source<sup>a</sup></u>
Stores	34
Friends or relatives	32
Paper, TV, radio, magazines	20
Better Business Bureau	16
Lawyer	13
Banks	5
Library	4
Chamber of Commerce	2
Community information centres	2
Government of Ontario	1
Government of Canada	1
Don't know	9

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Source: Moyer (1978) at 30 (Table 21).

<sup>a</sup>Figures add to more than 100 per cent because some respondents mentioned more than one source.

Evaluation of Certain Consumer Organizations' Effectiveness by the Organizations Themselves

Organization effectiveness	CCAC		CPB		CFEA		CAC		IPIC		APA		BBB	
	N	%	N	%	N	%	N	%	N	%	N	%	N	%
Good	11	12.5	9	10.2	55	62.5	20	22.7	35	39.7	40	45.4	17	19.3
Average	25	28.4	25	28.4	13	14.8	15	17.0	17	19.3	16	18.2	12	13.6
Nil	25	28.4	39	44.4	2	2.3	10	11.4	3	3.4	9	10.2	32	36.4
No response or does not know	27	30.7	15	17.0	18	20.4	43	48.9	33	37.5	23	26.1	27	30.7
Total	88	100.0	88	100.0	88	100.0	88	100.0	88	100.0	88	100.0	88	100.0

Source: Masse and Marois (1978) at 58 (Table 11).

CCAC - Consumer and Corporate Affairs Canada

CPB - Consumer Protection Bureau

CFEA - Cooperative Family Economics Association

CAC - Consumers' Association of Canada

IPIC - Institut de promotion des intérêts du consommateur

APA - Automobile Protection Association

BBB - Better Business Bureau or Bureau d'éthique commerciale



of the consumer product warranty system -- both its structure and its operation; the impact and overall effectiveness of current disclosure regulation; the meaningfulness of remedies that are now being given to consumers in the recent CPW enactments; the overall utility and accessibility of the legislative-judicial (court-focused) model that continues to be used; and the viability of various consumer education and information techniques.

Of the factors mentioned thus far -- business concerns, consumer criticisms, increasing disillusionment with governmental intervention and disturbing empirical realities -- it is the fourth, the empirical research, that has done the most to undermine and expose the current initiatives in this area as fundamentally unprincipled and uninformed.

That's where we are. The question is, What, if anything, should be done about it? Or, more precisely, What, if anything, can be done about it?

Notes

1. Feldman (1980) at 143.
2. Pursuant to provincial sale of goods legislation. See, for example, Ontario Sale of Goods Act, R.S.O. 1970, c. 421, ss. 15(1) and (2). Discussed extensively in Ontario Law Reform Commission (1972) and (1979a).
3. Feldman (1980) at 143.
4. Kennedy, Pearce and Quelch (1979) at 54.
5. MIT (1978) at 1-8 and 1-9.
6. Id., at 2-23.
7. Priest (1978).
8. Id.
9. Id.
10. See Bryant and Gerner (1978). Also see Star (1979) at 131.
11. Ontario Law Reform Commission (1972) at 80-91.
12. Ontario Ministry of Consumer and Commercial Relations (1973).
13. Id., at 4.
14. Ison (1980) at 149-64.
15. Ontario Law Reform Commission (1972) at 23.
16. Id., at 166.
17. Ontario Ministry of Consumer and Commercial Relations (1973) at 6-10.
18. Id., at 13-27.
19. 3rd Session, 30th Legislature (1976).
20. Bill 110 excluded all consumer products sold for under \$25.00 and also excluded from coverage food, drink, medicine, cosmetic and clothing products. See Ontario Law Reform Commission (1979b) at 45-46.
21. S.S. 1976-77, c. 15.

22. The background and statutory design of the Saskatchewan Act are discussed in detail in Romero (1978-79) and (1979-80).
23. Belobaba (1983) at 10-12.
24. Section 11(4).
25. Section 11(7).
26. Section 11(8).
27. Section 17(2).
28. Section 17(3)(c).
29. Sections 20 to 26.
30. Sections 31 to 33.
31. Section 37.
32. S.N.B. 1978, c. C-18.1.
33. New Brunswick (1974) (1976a) and (1976b).
34. Section 1(1).
35. Id.
36. Section 27(1).
37. Belobaba (1983) at 12-13.
38. Section 12(1).
39. Section 19(1)(a).
40. Section 19(1)(b).
41. Sections 13 to 23.
42. See Chapter IV.A.2.
43. Assemblée nationale du Québec, Bill 72, 3rd Session, 31st Legislature (1978). Proclaimed effective April 30, 1980.
44. Division IV, sections 151 to 166.
45. Division IV and V, sections 151 to 181.
46. Division V, sections 183 to 187.

47. Section 37.
48. Section 38.
49. Section 39.
50. Sections 272 to 275.
51. Sections 159 to 164.
52. Section 162.
53. Section 157.
54. Section 176.
55. Section 186.
56. Sections 173 and 185.
57. 15 U.S.C. 2301 et seq. (1976).
58. Id., s. 2302(a).
59. See Denicola (1975), Hodgson (1976), Strasser (1976) and Wisdom (1979).
60. The MMWA literature is extensive: see, for example, Brickey (1978), Eddy (1977), Popper (1977), Rothschild (1976), Smith (1978), Strasser (1976) and Wisdom (1979). Also see works cited in Wisdom (1979) at n. 5.
61. MMWA, s. 2303.
62. Id.
63. Discussed in MIT (1978) at 2-138 to 2-165.
64. MMWA, s. 2303(b).
65. 16 C.F.R. 701.2
66. 16 C.F.R. 702.
67. 16 C.F.R. 703.
68. See generally MIT (1978) at 2-140 to 2-143.
69. Id., and MMWA, ss. 2301(13) and (14).
70. See Chapter IV.A.4.

71. MIT (1978) at 2-72.
72. Cal. Civ. Code ss. 1790-1795.5 (West 1973). See Swanson (1974) and MIT (1978) at 2-71 et seq.
73. MIT (1978) at 2-72.
74. MIT (1978) at 2-73 to 2-76. The six states are Massachusetts, Maryland, Washington, California, Oregon and Maine.
75. Id.
76. MIT (1978) at 2-77.
77. Id.
78. Supra, note 72, s. 1793.3.
79. Ore. Rev. Stat. Ch. 413, s. 16. Discussed in MIT (1978) at 2-78.
80. MIT (1978) at 2-78.
81. Id., at 2-80.
82. Id., at 2-81. Discussed in Belobaba (1977) at 331-34.
83. See Belobaba (1977) passim.
84. Belobaba (1980) at 428-29.
85. Described in detail in Belobaba (1977).
86. R.S.C. 1970, c. C-23, as amended by S.C. 1974-75-76, c. 76.
87. See, for example, Snelgrove (1979) and Wright (1979).
88. Kennedy, Pearce and Quelch (1979) at 44 and 86.
89. Id., at 68.
90. Moyer (1978).
91. Id., at 4.
92. See Belobaba (1977) and literature cited therein. Also see Bugge (1976) and Macaulay (1979) and the literature cited in Chapter III of this study.
93. Masse and Marois (1978) at 207.

94. See, for example, Consumers' Assoc. of Canada (1973) and Edmonston (1982).
95. Reich (1979) at 1.
96. Id., at 3.
97. Moyer (1978) at 4.
98. Masse and Marois (1978) at 58. Also see Haefner and Leckenby (1975).



## Chapter II

### THE NEED FOR A MORE PRINCIPLED APPROACH TO CPW REGULATION

#### A. Towards a More Principled Policymaking

Not all of the federal or provincial consumer protection initiatives of the last two decades have been unprincipled or shortsighted. Indeed, by and large, one can fairly say that most federal and provincial legislators have been well-informed or at least well-intentioned in their efforts to redress real or perceived problems in the consumer marketplace. Increasingly, however, as is evident from the analysis above, modern-day consumer protection policymaking is being subjected to critical review and reassessment. When business and consumer critics combine to voice their concerns about the absence of principle, or when social scientists point out the glaring absence of empirical data and, worse, the continuing disregard of existing empirical analyses, law reformers and lawmakers have to take note. And their first response to these concerns has to be an institutional reassurance that the law reform initiatives are at least proceeding in a plausibly systematic and principled way. This means that policymakers today have to take seriously the obligation to itemize a well thought-out action agenda and begin to articulate their fundamental premises about the whens, whys and hows of governmental intervention. Relevant and well-done empirical research clearly has to play a very important role at every stage of consumer policymaking: the needs assessment stage, the program formulation and design stage, the implementation stage and the evaluation of impact stage.<sup>1</sup> As has been noted elsewhere:

The challenge in the future will be to confine the spread of statute to those areas of human activity that demonstrably require regulation....economists, lawyers and political scientists will have to combine their research energies to better understand the complexities of regulation. But it is here that the focus of attention will remain -- in the selection, design and continuing evaluation of legislative technique.<sup>2</sup>

A principled policymaking agenda is absolutely crucial for effective and meaningful consumer protection policymaking in the 1980s, and particularly in the consumer product warranty area. There are at least five steps in the formulation of a sensible policymaking agenda.

##### 1. Problem Identification

This is, of course, step number one -- to make sure that a problem does in fact exist. A French philosopher, George Bernanos, once said that "the worst, the most corrupting of lies are problems poorly



stated."<sup>3</sup> In the consumer product warranty field, very few policymakers have stopped to ask these obvious first questions. What exactly is the problem? What is its nature and magnitude? Where is the evidence to support this? Clearly it is not enough to intuit or to build policy analysis on anecdotal or personal experience. Empirical research will be necessary to help determine the nature and the extent of the problem. Although most policymakers would agree with the obvious -- that one first of all has to identify the problem before one begins to plan a legislative response to it -- this critical first step is altogether absent from consumer product warranty policymaking in Canada today. The absence of this first and obvious step has meant that a great deal of relevant empirical research has been either ignored or overlooked. The significance of this empirical research as well as its implications for consumer product warranty reform will be examined in more detail in Chapter III.

## 2. The Rationale for Intervention

This is also a fairly obvious item for any sensible policymaking agenda. One cannot, of course, simply assume that governmental intervention is always necessary or desirable in order to solve a particular consumer market problem. The policymaker who suggests legislative intervention should be doing so from a theoretical perspective that can explain and justify both the particular decision and the design and degree of the proposed governmental intervention. Policymakers today have to have some sense of when they ought to be proposing legislation and why.

One very popular and prevalent rationale for governmental intervention with respect to consumer protection problems is "market failure," and more specifically "information market failure." But even here one should be careful. The common rationale for judicial and legislative intervention in modern-day consumer markets and transactions may very well be that the consumer is imperfectly informed. But is this enough to justify legislative intervention? Some commentators argue that simply because the consumer is uninformed about a particular product, or a particular market lacks such informative capability, it does not mean that governmental intervention should necessarily follow. In a recent study, Professors Schwartz and Wilde suggest that the normative question should always be whether the imperfect information has in fact produced non-competitive prices and terms.<sup>4</sup> This means, they say, that one should always ask whether or not the imperfect information has in fact caused non-competitive behaviour. Schwartz and Wilde point out that the Magnuson-Moss Warranty Act was enacted to improve the adequacy of information available to consumers. Yet a study of new car buyers completed prior to the enactment of the MMWA found that 34 per cent of the consumers correctly understood the maintenance terms of the warranty and 64 per cent correctly understood the warranty length. Were these sufficient percentages to justify the enactment of the MMWA? Were the Act's disclosure terms necessary? Conventional information analysis does not provide an easy answer. Schwartz and Wilde conclude that

decision-makers should attempt to ascertain whether or not competitive behaviour is "occurring" in the relevant market before intervening. And if, indeed, it has been determined that a market is behaving non-competitively, then the preferable state response is not to regulate prices or prohibit the use of specific contracts or contractual terms, but to attempt to increase competition in that market.<sup>5</sup> For reasons that are developed in Volume I (Products Liability and Personal Injury), this particular criticism of the traditional information market failure rationale is not at all appropriate in the personal injury area.<sup>6</sup> But the points made by Schwartz and Wilde provide a worthwhile caution to policymakers who are attempting to define and articulate their own rationales for intervening in the consumer product warranty (financial loss only) area.

In addition to the prevalent "information market failure" rationale for governmental intervention, another common explanation comes down to what some have described as a "cost-benefit rationale"; that is, the cost of mandating producer or supplier compliance with certain legislative standards is outweighed by the increased informational and product quality benefits enjoyed by the many more consumers. And yet, here again, well-known consumer commentators offer a word of caution. For example, Robert Reich, currently Director of Policy and Planning at the Federal Trade Commission, argues that the "cost-benefit rationale" for governmental intervention is not only paternalistic but outmoded and fundamentally unprincipled.<sup>7</sup> His proposal calls for a new policy, a non-paternalistic response by government to consumer market problems using market structure criteria. In Reich's view, governments ought not to regulate product quality, but should confine their legislative interest to increasing the stake which sellers have in building and maintaining goodwill in particular consumer markets: "The least costly and most effective strategy for consumer protection is to increase the stake which sellers have in building and maintaining goodwill."<sup>8</sup> Consumer protection laws and governmental intervention generally would be justifiable only where market conditions did not provide sellers with sufficient incentives to prevent rational consumers from making costly mistakes. The only relevant criterion or question according to Reich would be this: How likely is it that consumers in this particular market will misestimate physical or economic risks associated with the product in question?<sup>9</sup>

Neither the Schwartz and Wilde analysis nor the Reich proposal has been expanded upon by any of these authors to date. However, the point for our purposes is simply this: conventional rationales for governmental intervention in the consumer product warranties field are being subjected to increasing criticism and challenge. Policymakers today have to be able to articulate where they stand and why. But whether or not the resulting rationale proffered by the policymaker is conventional or otherwise, the serious-minded policymaker today must have a well thought-out and principled theory of consumer market failure and governmental intervention.

### 3. The Degree and Design of Desirable Intervention

Once the problem has been indentified and the decision to intervene has been made, the policymaker then has to determine the degree and general design of desirable governmental intervention. In consumer protection law reform the basic design question is often whether to use a legislative-judicial model or a legislative-administrative model. The former model is, of course, the more popular today. As has been noted elsewhere:

Most of the legislative intervention to date in the commercial and consumer field has been of the legislative-judicial variety -- the statute merely clarifying or correcting the common law or providing a more detailed set of directions for implementation and application by the common law courts. The responsibility of the courts as a primary vehicle for legal enforcement, however, is not altered. The recent provincial trade practices and consumer product warranty initiatives do provide some administrative remedies but, in the main, retain a court orientation.

If the legislative-judicial model is determined to be appropriate, then the technique question is relatively easy. The choice is between a broad legislative direction which delegates a considerable discretion to the court or a narrower more detailed discretion. The paradigm example of the former of course is the broad unconscionability mandate that was given American courts by the Uniform Commercial Code. Examples of the latter can be found in the "shopping list" of deceptive and unconscionable practices contained in the provincial trade practices legislation.

The decision to use a broad as opposed to a more detailed legislative-judicial technique or vice versa, depends on the legislator's perception of first, the nature and extent of the doctrinal problem that requires resolution, and secondly, the degree of direction that is demanded by the common law courts.<sup>10</sup>

The legislative-judicial model, of course, relies very heavily on victim initiative for remedy or enforcement. Not every consumer market problem lends itself to this kind of resolution. The reasonable policymaker should be aware that certain kinds of marketplace imperfections or imbalances, not to mention problems of consumer education or access to dispute resolution mechanisms, may require that the intervention be legislative-administrative. The government could adopt a rule-making power dealing specifically with particular problems or concerns, or it could establish an administrative agency structure with wider-ranging investigatory and enforcement powers. It is important to note

that the experience not only in Canada and the United States, but also in the United Kingdom and Europe suggests an increasing legislative utilization of administrative structures in the enforcement of important consumer protection laws and a growing shift away from the judicial to the administrative model.<sup>11</sup> Both the strengths and the weaknesses of the legislative-judicial and legislative-administrative models have been canvassed fairly extensively in the literature to date.<sup>12</sup> Sophisticated policymakers have to be aware of this literature and base their decision accordingly. This, then, brings us to our next point.

#### 4. The Specific Design and Implementation of the Regulatory Instrument Selected

Even after the threshold determination (judicial or administrative) has been made, there is still a fairly wide range of possible alternatives for the policymaker as the specific design stage begins. This is especially so in the consumer product warranty area. Take, for example, the problems associated with the readability, understandability and overall fairness of the consumer product warranty document itself. Here the threshold decision would have been in favour of some sort of legislative-administrative response. The range of administrative options specifically open to the policymaker even then are considerable. In order of increasing interventionism they are as follows: (1) information disclosure (and readability) requirements, (2) prohibition of specific terms, (3) mandatory specific terms, (4) pre-clearance of standard form of warranty, and (5) mandatory standard form of warranty. As the policymaker moves from a consideration of one alternative to the next, the questions encountered are wide-ranging and complex. In an earlier study, the range of choice available to the policymaker with respect to the content regulation of the product warranty document was considered:

1. Disclosure. This has proven to be the most popular administrative technique in the consumer field particularly in the area of credit and truth-in-lending. The supplier is required to stipulate certain items or suffer the risk of contractual non-enforceability. For many theorists the disclosure remedy is an easy and inexpensive information vehicle. In the context of automobile warranties an itemization of coverage and remedy terms could be required.

Increasingly, however, the disclosure advocates are being subjected to a cross-examination. Under what circumstances should disclosure be required? Only when there is evidence of non-competitive behaviour? Or can disclosure be mandated short of such a finding? What is the function of disclosure regulation? In the context of automobile warranties, should it focus on pre-contractual "best buy" information or post-contractual rights and remedies? What kinds of disclosure are

desirable? How should they be worded? What about the problems of information overload? And finally, how does one design a methodology for measuring the cost-effectiveness of the disclosure program?

In addition to these questions, two other points will have to be considered by the policy-maker: first, there is a growing literature suggesting that many of the disclosure programs to date have had only a minimal impact on consumer choice behaviour, and secondly, disclosure alone will not prevent the imposition of harsh or unreasonable terms.

2. Prohibition of Specific Terms. The policy-maker might decide that certain kinds of harsh or unreasonable terms should simply be legislatively prohibited. An administrative authority such as a Director of Trade Practices, say, could be empowered to issue cease and desist orders when violations are discovered. Although no province has yet moved to establish an administrative facility that would deal exclusively with standard form contracts, some initiatives in this direction are being taken. The Saskatchewan Consumer Products Warranties Act, for example, prohibits the inclusion in any written warranty of the following provisions: (a) any term that makes the warrantor the sole judge in deciding the validity of a warranty claim (b) any term that purports to exclude or limit any express or statutory warranties or any of the rights or remedies contained in the Act (c) any term that makes warranty service depend upon the product being returned to the warrantor where this is unreasonable (d) any term that limits the benefit of the warranty to the consumer and denies that benefit to an assignee or donee and (e) any term that is deceptively worded.

Several questions present themselves to the policy-maker. First, what terms should be prohibited? Is it enough to simply proscribe any contractual clause that attempts to vary, negate or exclude the implied conditions of the Sale of Goods Act? Or, is a more specific Saskatchewan-type approach necessary? Secondly, what assurance is there that these provisions will be complied with? Is it necessary to design an administrative enforcement authority as suggested by the Swedish and West German experience? What kinds of powers or remedies should be provided? Finally, is this really the most cost-effective method of dealing with harsh or unfair contractual terms? Instead of taking a prohibition approach why not take the more direct approach and simply delineate mandatory warranty terms?

3. Mandatory Terms. Here again the Saskatchewan warranty legislation provides a useful illustration. The warrantor is required to disclose not only such purely informational items as name, address, extent of coverage, and complaint procedure but is also required to include a statement that "the provisions of the additional warranty are in addition to and not a modification of or subtraction from the statutory warranties and other rights and remedies contained in this or any other Act." The idea here is to ensure that the consumer sees the written warranty as nothing more than an additional promotional package that cannot undermine the product quality guarantees that are statutorily provided.

The mandatory term approach poses several challenges to the legislator. What kind of product quality or warrantor performance term should be mandated? What kind of legislative language should be used? Should the quality standard be a general one such as "consumer acceptability" or "durability" or should there be an additional regulation-making capacity to add specificity? Should the legislature itself mandate precise durability periods for various products? What efforts will be necessary to ensure compliance? Is it sufficient to require that all mandatory terms be printed plainly on the face of every written warranty? Or will this impede readability and result in information overload? Would it make more sense to simply require the submission of all written warranties for government pre-clearance?

4. Pre-clearance of Standard Forms. This administrative technique would establish a government body that would be empowered to give prior approval to the commercial use of a particular standard form. The Israeli experience with this technique has indicated its major deficiency: very few businesses will voluntarily submit their contractual forms for pre-clearance.

In addition to the problem of encouraging the commercial community's utilization of a pre-vetting facility, there are other difficulties. What kind of administrative structure would be required? How large would the administrative bureaucracy have to be? How exactly would the administrative body determine the acceptability of a particular contract or warranty? Would it have to develop generally applicable standards of disclosure and document design for a particular industry or product? Would this process yield a series of government-approved standard forms? If so, would it

not be more sensible to delegate this de facto design power more directly?

5. Mandatory Standard Forms. The argument is increasingly being made that the effective control of unfair contractual terms requires a more direct government involvement in the drafting and design of the standard form contract. One commentator has suggested that by the year 2001, statutorily-designed standard forms will be commonplace:

"At a minimum the state will dictate what we today consider boilerplate or standardized items...mass produced contracts involving essential or commonly used consumer commodities and services will be dictated by public authorities either totally or to the extent of major standardization or key terms."

This prognosis is already proving to be accurate, particularly in several European jurisdictions such as Sweden and West Germany, where extensive administrative schemes for the regulation of standard forms have been implemented. These developments, in my view, reflect a growing realization that consumer adhesion contracts cannot be regarded as contracts at all but should be thought of as "products" just as the products sold pursuant to them; that this perception of the adhesion contract as a "thing" will allow the policy-maker to consider a wider range of quality control techniques such as mandatory standard forms.

In deciding upon the adoption of this administrative technique, the following questions will have to be resolved. First, what circumstances will merit the adoption of this technique? What kind of administrative structure will be required? How will the administrative authority determine the need for mandatory forms in a given industry or product area? To what extent will government officials consult with representatives of the affected industry or product area in the drafting and design of the standard form document? To what extent will our current experience with standard form insurance contracts be relevant in other areas? Will it be possible to design a methodology to evaluate the cost-effectiveness of this administrative technique?

These are some of the kinds of questions that will confront the policy-maker as he or she proceeds to evaluate the various legislative-administrative techniques

that are available in the control of harsh or unfair standard form automobile warranties or indeed consumer standard forms generally. No doubt a similar series of technique questions can be formulated in other areas of consumer protection as well, such as the regulation of trade practices or the control of product quality. My concern here was merely to illustrate the range of choice and the degree of difficulty that is entailed in designing the appropriate administrative response.... Sophistication in the selection and design of effective administrative instruments will be achieved eventually but not without systematic evaluation and ongoing experimentation.<sup>13</sup>

##### 5. Ongoing Evaluation of Impact and Effectiveness

The final prerequisite for principled policymaking is also fairly self-evident. The most meaningful measure of the effectiveness of modern consumer law reform initiatives is at the street level. Whatever regulatory instrument is finally selected and implemented, its impact and effectiveness has to be measured empirically. There has to be ongoing evaluation particularly where the program being proposed is innovative or experimental in nature, as it may well be in the consumer product warranty area. The resulting empirical evidence would not only reassure the policymaker that the game was worth the candle but would also provide worthwhile information with respect to the development and implementation of future regulatory initiatives.

Consumer impact analysis research is still in its embryonic stages. However, there is already a very helpful literature describing in detail the appropriate methodology for consumer protection program evaluation.<sup>14</sup>



Notes

1. Anderson (1978) at 68.
2. Belobaba (1980) at 451.
3. Quoted in Moynihan (1973) at 23.
4. Schwartz and Wilde (1979).
5. Id.
6. See Belobaba (1983) at 107-14.
7. Reich (1979) at 13.
8. Id., at 4.
9. Id., at 20 and 25.
10. Belobaba (1980) at 451-52.
11. Id., at 454 and the studies cited therein at n. 177.
12. See Belobaba (1980) at 442-61.
13. Id., at 455-59.
14. Savitt (1975).

### Chapter III

#### THE NEED FOR A MORE INFORMED APPROACH TO CPW REGULATION

##### A. The Nature and Extent of Recent Empirical Research

It was said above that the single most important first step in principled policymaking is problem identification: determining the exact nature and magnitude of the "problem." The most important ingredient here of course is the empirical ingredient. The policymaker needs information -- hard information: the facts, the data, the real empirical evidence. No policymaker can sensibly proceed to discuss or recommend legislative action until empirical research has demonstrated the existence of a problem that deserves a governmental or legislative response. Otherwise the legislative action, however well-intentioned it may be, is destined to join the lengthening list of consumer protection enactments that end up being nothing more than symbolic, ineffective and ultimately irrelevant legislative initiatives.

Increasingly, legislators are being criticized from various perspectives that their law reform initiatives, although well-intentioned and academically impressive, lack an empirical or "real world" relevance. We see more and more law reform initiatives that provide either solutions where no problems exist or academic-lawyer biased solutions that would be rejected outright if the relevant data or empirical evidence were thoroughly and rigorously evaluated. An example of the first (solution but no problem) is the Ontario Law Reform Commission's Report on Sale of Goods.<sup>1</sup> An example of the second (problem but no solution) is the Ontario Law Reform Commission's Report on Products Liability,<sup>2</sup> critically discussed in Belobaba.<sup>3</sup>

The relevant empirical literature is growing. In the last two or three years there have been significant developments in the consumer research area and particularly with respect to consumer warranty issues -- consumer decision-making and purchasing behaviour, consumer complaint behaviour, consumer satisfaction and dissatisfaction generally, as well as street-level impact analyses of various governmental regulatory techniques that have been attempted thus far. Indeed, in a recent publication of Consumer and Corporate Affairs Canada, the authors list no less than 1 161 such studies.<sup>4</sup> To the extent that these and other studies are relevant, they will be described in appropriate detail in the balance of this paper. However, there are three or four recent studies that deserve specific mention at this point.

There is first the important federal study of Consumer Satisfaction, Dissatisfaction (hereafter referred to as the Ash study), recently Published by Consumer and Corporate Affairs Canada.<sup>5</sup> The study's empirical findings will be referred to extensively in the pages that follow. Secondly, and of particular relevance to this paper, is the Kennedy,

Pearce and Quelch study entitled "Consumer Product Warranties" (hereafter referred to as the Kennedy study).<sup>6</sup> Professors Kennedy, Pearce and Quelch of the University of Western Ontario School of Business Administration completed this study for Consumer and Corporate Affairs Canada in November 1979. Their purpose was twofold: first, to identify and assess industry practices and viewpoints in the areas of product durability, express warranties, post-purchase systems of relationship with customers, and other parts of the supplier system as they relate to product economic life; and, second, the authors were asked to provide Consumer and Corporate Affairs Canada with options for durability rules and guidelines for rules on manufacturers' express warranties. The research was confined to two Canadian industries: new automobiles and new white goods (i.e., major home appliances). Field data were collected from three classes of respondents: consumers, manufacturers and members of the distribution trades. These data were then compiled, tabulated and worked into a wide-ranging analysis of consumer product warranties in Canada today. Although their study was limited to new automobiles and major household appliances, the authors are of the view that their findings and comments "are generalizable to all consumer major durable purchases."<sup>7</sup> The Kennedy study was understandably of particular relevance to the present study and is referred to and discussed extensively throughout the balance of this paper.

Several recent American studies should also be emphasized. The most extensive and perhaps the most relevant for Canadian policymakers is the four-volume study Consumer Durables: Warranties, Service Contracts and Alternatives, published by the Center for Policy Alternatives at the Massachusetts Institute of Technology in 1978 (hereafter referred to as the MIT study).<sup>8</sup> This study provides a careful analytical and empirical investigation of consumer product warranty problems, service contracts and the various available alternatives as applied to major consumer durable products (i.e., the principal household appliances). The MIT research group assesses the effectiveness of current arrangements and goes on to examine alternative means of providing protection from or compensation for product failure. The purpose of this study was "to provide information and policy guidance to all parties affected by the operation of warranties and service contracts....these parties include manufacturers, dealers and service agencies, public policy-makers and consumers."<sup>9</sup>

The entire MIT study, but particularly Volume I -- Policy Alternatives for the Problem of Product Failure -- should be required reading for all Canadian policymakers concerned with consumer product warranty problems. The findings and analyses contained in the MIT study will be referred to where appropriate in the pages that follow.

Three other recent American studies also deserve special mention. They were all prepared by or for the Federal Trade Commission in the last two or so years. The first, entitled Warranty Rules: Consumer Baseline Study,<sup>10</sup> was prepared for the FTC by a private con-

sulting company and was published in 1979. The purpose was to collect a baseline of data so that later FTC rule-making efforts with respect to consumer product warranties could be evaluated against this baseline. The data collected relate to consumer purchase behaviour, complaint behaviour, product warranty attribute evaluation, perception of warranty coverage, warranty information usage by consumers, consumer satisfaction and dissatisfaction generally and warrantors' behaviour.

The second important FTC study, Warranty Content Analysis,<sup>11</sup> was also published in 1979. This study looked at automobile warranties over a ten-year period, from 1967 to 1977, in an attempt to determine if the content of these warranties had changed and, if so, whether the changes could be attributed to the 1975 enactment of the Magnuson-Moss Warranty Act.

The third American study is an FTC Staff Report entitled Impact of the Magnuson-Moss Warranty Act: A Comparison of Forty Major Consumer Product Warranties from before and after the Act.<sup>12</sup> As the title indicates, the staff research group compared forty product warranties that were offered before the MMWA was enacted with the same forty warranties that were being offered in 1977-78.

All three of the FTC studies mentioned above will be referred to in detail where appropriate in the balance of this paper. Of course, in addition to these major studies are other smaller but still noteworthy empirical studies both in Canada and the United States that will be of relevance to Canadian policymakers. These will also be referred to in the pages that follow.

#### B. The Ten Most Important Findings of the Empirical Research

Each of these empirical studies deserves a careful reading. Any attempt to synthesize or summarize their salient points risks the dangers of distortion or oversimplification. Still, the reader (and especially where the reader is also a policymaker) should have some appreciation of the most important empirical findings that emerge from this recent Canadian and American research. What is proposed here is to summarize the ten most important empirical findings about the consumer product warranty problem today.

#### Empirical Findings regarding the Nature and Extent of the Consumer Product Warranty Problem

##### 1. Consumers Generally Do Not See Consumer Product Warranties as a High Priority Consumer Protection Problem

All four of the traditional consumer data collection techniques -- complaint tabulation, attitude surveys, satisfaction and dissatisfaction studies, and direct consumer probing -- suggest the same thing: consumers, by and large, do not rank consumer product warranties as a high priority consumer protection problem. One of the best known exam-

ples of the first technique -- complaint tabulation -- is Box 99 at Consumer and Corporate Affairs Canada. Data collected by Box 99 indicate that consumer warranties still constitute a very small proportion of total complaints received -- only 3 per cent in 1974-78 and less than 5 per cent in fiscal year 1978-79.<sup>13</sup> Consumer complaint tabulation of course presents a distorted and often incomplete picture.<sup>14</sup> The data being collected are not based on a representative sample of the public and thus may not accurately reflect public dissatisfaction. The categorization of complaints is often confusing or misleading, and there is rarely any indication as to the number of complaints that were found to be unjustified or those that were justified but later resolved. Furthermore, complaint data rarely show who is responsible for the complaint -- the retailer, distributor, manufacturer or, indeed, the consumer. In order to overcome these difficulties in problem identification and accurate measurement, a second technique has been developed: the consumer attitudinal survey.

The consumer attitude survey is more broadly based and is administered on a random sampling basis in a particular region. The recent study of Ontario consumers is one example.<sup>15</sup> The Moyer study found that a "fair deal for consumers" was only of medium priority (see Exhibit 26), ranking eighth behind such major concerns as unemployment, inflation, government spending, education, cost of health care, energy and lower taxes. With respect to consumers' concerns in the consumer product area, the following were the priority items: food prices, prices generally, household rentals and purchases, product quality, quality of service and repairs, too much packaging, too much advertising, too much credit, failure to live up to claims, inadequate guarantees and warranties, misleading and confusing labelling, inadequate information regarding products and not knowing what to do with respect to a defective product (see Exhibit 27).

An attitudinal survey of Quebec consumers, also conducted in 1978, reached similar conclusions.<sup>16</sup> Masse and Marois found that the most serious consumer problems were these: auto repairs, auto sales, credit, guarantees, poor quality products and domestic appliances (see Exhibit 28). Returning again to the Ontario study, it is interesting to note that where consumers did complain to either the retailer or the manufacturer, 67 per cent were quite satisfied with the results and only 20 per cent were left unsatisfied (recall Exhibit 20).

The most recent and also the most comprehensive Canadian example of the third tabulation technique -- the broad scale consumer satisfaction/dissatisfaction survey -- was completed by Professor Ash and published by Consumer and Corporate Affairs Canada in 1980. The Kennedy study analyzed the Ash findings and concluded that "the overall level of consumer dissatisfaction with major appliances and automobiles is roughly 13 per cent and 22 per cent of purchasers dissatisfied respectively" (see Exhibits 29 and 30).<sup>17</sup> The Kennedy study also found that "the overall level of consumer dissatisfaction was only 27 per cent for auto repairs and service and 23 per cent for small and large household appliances" (see Exhibit 31).<sup>18</sup>

Priority Public Issues (Question 1)

Issue	Percentage of people who mention that issue <sup>a</sup>			
	Issues which concern people personally		Issues which should have government priority	
		Rank		Rank
Unemployment	44	1	55	1
Inflation	41	2	46	3
Government spending	33	3	47	2
Education	30	4	16	7
Cost of health care	26	5	25	4
Energy	22	6	22	5
Lower taxes	22	7	20	6
Fair deal for consumers	19	8	14	8
Law and order	17	9	14	9
Pensions	11	10	13	10
Environment	11	11	11	11
Abortion	10	12	3	15
Immigration	8	13	11	12
Public safety	6	14	6	14
National security	3	15	8	13

Source: Moyer (1978) at 13 (Table 6).

<sup>a</sup>The answers total more than 100 per cent because respondents were asked to name the three issues that concerned them personally the most and the three issues which should have the highest priority for government. Respondents were also invited to name any other unlisted issue. Quebec and the issue of national unity were mentioned by about 1 per cent of all Ontarians, but no others were mentioned a significant number of times.

EXHIBIT 27

Priority Consumer Issues (Question 2)	
<u>Issue</u>	Percentage of respondents who are extremely or moderately concerned about that issue
Food prices	88
Prices of many other products	86
Cost of renting or owning a house or apartment	80
Poor quality of many products	74
Poor quality of after-sale service and repairs	66
Too much packaging	65
Too much advertising	64
Too much credit available	63
Failure of many companies to live up to claims made in their advertising	60
Inadequate guarantees or warranties	56
Misleading and confusing labelling	54
Not enough information about different products and services	46
Not knowing what to do if something is wrong with a product	39

Source: Moyer (1978) at 17 (Table 8).

EXHIBIT 28

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Index of Seriousness of Consumer Problems

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	<u>ON 5</u>
Auto repairs	3.6
Auto and accessory sales	3.4
Credit (financial services)	3.3
Misleading advertising	3.2
Credit (loans)	2.9
Real estate	2.6
Mail-order sales	2.6
Collection agencies	2.5
Personal services	2.5
Guarantees	2.5
Repair of household articles	2.4

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Source: Masse and Marois (1978) (Table 10).



National Consumer Satisfaction/Dissatisfaction Study:  
 Durables Purchase; Importance Rating; Satisfaction/Dissatisfaction Rating Section:  
 Appliances and Personal Care Equipment

Category	Purchase	Importance rating	Satisfaction/dissatisfaction rating	Total satisfaction/dissatisfaction							
	% of respondents <sup>a</sup> having purchased	% of purchasers rating important	Rank by importance rating	% of purchasers				% of purchasers			
				Satisfied		Dissatisfied		Satisfied		Dissatisfied	
				Quite	Somewhat	Somewhat	Quite	Total	Rank	Total	Rank
1. Refrigerators, freezers	30.8	89.0	2	65.0	24.0	7.6	3.4	89.0	6	11.0	13
2. Ranges, ovens, grills	22.5	88.4	3	60.6	26.8	6.9	5.7	87.4	8	12.6	10
3. Microwave ovens	5.1	35.3	16	46.1	38.5	9.6	5.8	84.6	12	15.4	7
4. Washers, dryers, dishwashers	36.4	86.0	4	67.5	22.1	7.2	3.2	89.6	5	10.4	14
5. Air conditioners, de- humidifiers, electric heaters	17.9	52.0	11	56.2	37.3	5.4	1.1	93.5	2	6.5	17
6. Vacuum cleaners, carpet sweepers, floor polishers	35.4	68.4	8	58.4	26.0	11.2	4.4	84.4	13	15.6	6
7. Garbage disposers, trash compactors	1.4	71.4	7	53.3	46.7	--	--	100.0	1	--	18
8. Water filters, purifiers	2.0	55.0	9	52.4	28.6	9.5	9.5	81.0	18	19.0	1
9. Sewing machines, electric scissors	12.6	50.0	12	53.8	39.2	3.1	3.9	93.0	3	7.0	16
10. Snow blowers, lawnmowers, other lawn equipment	25.6	54.7	10	57.1	35.6	6.5	0.8	92.7	4	7.3	15
11. Small kitchen appliances	60.2	43.9	14	56.0	31.1	7.0	5.9	87.1	10	12.9	9
12. Electric razor, electric hair clippers	16.3	47.2	13	62.9	25.1	7.2	4.8	88.0	7	12.0	12
13. Electric hair dryers, curlers, make-up mirrors, etc.	43.3	34.2	17	51.0	34.2	10.6	4.2	85.2	11	14.8	8
14. Exercise or body- building machinery	7.4	27.0	18	53.2	29.9	13.0	3.9	83.1	15	16.9	4
15. Electric vibrators, massagers	3.4	38.2	15	35.3	47.1	14.7	2.9	82.4	16	17.6	3
16. Eyeglasses, contact lenses	49.1	90.8	1	63.2	24.2	8.9	3.7	87.4	8	12.6	10
17. Hearing aids	1.9	78.9	6	42.1	42.1	15.8	--	84.2	14	15.8	5
18. Wheelchairs, other medical appliances	3.6	83.9	5	54.1	27.0	2.7	16.2	81.1	17	18.9	2

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 2-6).

National Consumer Satisfaction/Dissatisfaction Study:  
Durable Purchase; Importance Rating; Satisfaction/Dissatisfaction Rating Section:  
Cars and Other Transportation

Category	Purchase	Importance rating		Satisfaction/dissatisfaction				Total satisfaction/dissatisfaction			
	% of respondents <sup>a</sup> having purchased	% of purchasers rating importance	Rank by importance rating	% of purchasers		Dissatisfied		% of purchasers		Dissatisfied	
				Satisfied	Somewhat	Somewhat	Quite	Satisfied	Rank	Total	Rank
1. New car	29.8	93.3	1	49.5	28.7	14.7	7.1	78.2	11	21.8	2
2. New truck, van, off-the-road vehicle	6.9	85.8	4	40.8	36.6	12.7	9.9	77.4	13	22.6	1
3. Used car	27.5	86.5	3	41.0	37.5	14.8	6.7	77.5	12	21.5	3
4. Used truck, van...	7.6	72.4	7	41.8	43.0	7.6	7.6	84.8	9	15.2	5
5. Snowmobile	4.3	32.6	12	56.8	31.8	6.8	4.5	88.6	7	11.3	7
6. Motorcycle	5.0	36.0	11	53.8	36.5	1.9	7.7	90.3	5	9.6	9
7. Motor home, travel trailer, camper	7.2	56.9	9	62.2	28.4	8.1	1.3	90.6	4	9.4	10
8. Airplane	0.5	40.0	10	20.0	60.0	20.0	--	80.0	10	20.0	4
9. Adult bicycle	18.2	29.6	13	48.9	38.3	9.6	3.2	87.2	8	12.8	6
10. Child's car seat, safety harness	9.8	89.8	2	75.2	19.8	5.0	--	95.0	2	5.0	12
11. Tires, batteries, accessories	61.8	79.5	5	57.5	32.7	5.7	4.1	90.2	6	9.8	8
12. Antifreeze, engine oil, other maintenance...	67.4	74.2	6	67.4	30.8	1.8	--	98.2	1	1.8	13
13. Parts & equipment for home repairs of car	31.8	69.5	8	54.0	40.0	3.0	3.0	94.0	3	6.0	11

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 2-7).

<sup>a</sup>N = 1030

The fourth and perhaps most revealing approach to consumer problem identification analysis is the "direct consumer probe" technique or focus group research. The Kennedy study noted that "while the preceding data (from the Ash study) indicate that consumer dissatisfaction with the performance of new automobiles and appliances may be a problem of some magnitude, it is not obvious exactly what the dimensions of the problem are."<sup>19</sup> The Kennedy team thus probed consumers in scientifically structured small group situations for more precise answers. Here is what they found:

Some but by no means all consumers expressed expectations regarding the economic life of products. The principal reason why consumers did not express their expectations more often was probably their expressed recognition of a number of factors, many of them under the control of the individual consumer, which determine product longevity.

Consumers in all focus groups were aware of the existence of warranties, although they were equally if not more inclined to call them guarantees. There was no recognition of different types of warranties and, in particular, focus group participants had no knowledge of implied warranties in general, much less implied warranties of fitness for purpose or merchantability. In short, none of the consumers in these focus groups indicated that they had any awareness of rights in law.

Consumers, however, were clear that a warranty given by a manufacturer or a retailer could and did limit seller obligation to the purchaser. At the same time, no consumer in the focus group challenged the right of the seller to circumscribe his warranties as he sees fit. Consumers were unable to recall with confidence the terms of the warranties on the automobiles and white goods which they had purchased during the previous two years. Recall of warranty terms seemed more impressive for products which had broken down....Knowledge of warranty terms appeared to be greater for automobiles than for white goods, and knowledge of the duration of warranties appeared to be greater than knowledge of specific items covered or excluded....Focus group consumers perceived little differentiation among competitive brands within a product category on the basis of warranty terms.

Access to the precise warranty terms prior to purchase was identified as a problem by several consumers. This problem was associated predominantly with white goods. Express warranties were described by focus group members as complicated, ambiguous, and as being presented

National Consumer Satisfaction/Dissatisfaction Study:  
Services Purchases Importance Rating; Satisfaction/Dissatisfaction Rating Section:  
Repairs and General Services

Category	Purchase % of respondents <sup>a</sup> having purchased	Importance rating		Satisfaction/dissatisfaction rating				Total satisfaction/dissatisfaction			
		% of purchasers rating important	Rank by importance rating	% of purchasers		% of purchasers		% of purchasers		% of purchasers	
				Satisfied Quite	Satisfied Somewhat	Dissatisfied Somewhat	Dissatisfied Quite	Satisfied Total	Satisfied Rank	Dissatisfied Total	Dissatisfied Rank
1. T.V., radio, stereo repairs	48.9	58.7	9	46.9	30.0	14.1	9.0	76.9	15	23.1	6
2. Auto repairs and services	73.6	90.6	1	35.3	36.6	16.3	11.8	71.9	19	27.1	2
3. Heating, air conditioning repairs	38.3	87.2	2	61.2	24.4	9.5	4.9	85.6	7	14.4	13
4. Other appliance repairs	32.7	67.3	5	41.4	35.3	13.7	9.6	76.7	16	23.3	5
5. Plumbing, carpentry, other home repairs	37.5	76.5	4	50.1	31.6	10.2	8.1	81.7	11	18.3	10
6. Watch, clock, jewelry repairs	40.2	32.1	19	41.8	34.2	15.2	8.8	76.0	17	24.0	4
7. Carpet cleaning, window washing, home care services	19.4	41.8	17	47.5	36.3	10.8	5.4	83.8	10	16.2	11
8. Yardwork, snow removal, lawn care services	20.4	54.9	10	46.0	35.2	11.7	7.1	81.2	12	18.8	9
9. Home redecorating	13.0	59.2	8	58.8	30.1	6.6	4.4	88.9	3	11.0	18
10. Home improvement services, (siding, insulation installation)	16.7	77.8	3	56.3	27.8	9.7	6.2	84.1	9	15.9	12
11. Cesspool, septic tank services	7.4	63.5	6	63.6	23.4	7.8	5.2	87.0	4	13.0	17
12. Furniture upholstery/refinishing service	16.4	49.4	14	65.5	24.0	5.3	5.3	89.5	1	10.6	20
13. Laundry, dry cleaning service	67.8	49.3	15	52.5	36.6	8.5	2.4	89.1	2	10.9	19
14. Coin-operated laundry service	25.1	49.0	16	39.4	40.2	12.1	8.3	79.6	14	20.4	7
15. Domestic help, maid service	9.3	52.7	13	48.5	37.1	10.3	4.1	85.6	7	14.4	13
16. Moving and storage service	11.2	59.8	7	50.8	35.6	9.3	4.3	86.4	6	13.6	15
17. Water-softening service	5.8	53.4	11	35.5	45.2	6.4	12.9	80.7	13	19.3	8
18. Photographic service	65.7	28.9	20	46.4	40.5	10.0	3.1	86.9	5	13.1	16
19. Parcel delivery and freight service	44.6	53.4	11	36.7	33.7	18.6	11.1	70.4	20	29.7	1
20. Mail order firms	40.0	33.0	18	37.8	38.1	14.0	10.1	75.9	18	24.1	3

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 2-8).

<sup>a</sup>N = 1052

in fine print. At the same time warranty terminology was not viewed as deliberately designed to confuse the consumer, although some consumers are frustrated by the fact that certain components of overall repair costs are limited or excluded in some warranties.

Some consumers who express the belief that warranty coverage was often inadequate did so on the grounds that consequential damages were not covered. Time costs in obtaining redress and replacement transportation were suggestions for inclusion in warranty coverage. A further example, although not consequential damage in the legal sense, was redress for loss of resale value for inadequate rustproofing performance.

Restriction on warranty transferability on resale was of concern to some consumers. It was thought to exist more in the case of automobiles than white goods. The consensus of focus group consumers was that warranty transferability should be permitted.

Several problems involving poor in-warranty service were cited by consumers, with greater frequency for automobiles than for white goods.

Consumer expectations regarding speed of dealer service appeared to be greater the more recent the purchase, although there was diversity within the focus groups as to whether or not dealers met this expectation.

The expectations of focus group consumers regarding speed of service were frequently not fulfilled, especially for automobiles.

Quality of service was also the subject of numerous focus group consumer complaints. Once again, the great majority of complaints concerned automobiles. The requirement that warranty repair work be performed by an authorized service representative was seen both as weakening consumer bargaining power with the dealer and preventing consumers from doing their own repair work at lower cost. Non-performance of work was seen as a problem by some consumers, as was inadequate dealer attention to major repairs....Overall, quality of service was perceived almost exclusively as a dealer problem, with only one consumer identifying the idea that quality of service might be related to the dealer-manufacturer relationship.<sup>20</sup>

The FTC Consumer Baseline Study<sup>21</sup> also found that, by and large, consumer product warranty problems were not a priority issue with

surveyed consumers. Most problems, said consumers, stopped with the retailer or manufacturer. Of the product purchasers who reported that they had a warranty and who had requested repair or replacement of a product with problems that was covered by the warranty, over two-thirds (68.6 per cent) said they were very satisfied with the way their product performed after it was repaired or replaced. Over four-fifths (82.7 per cent) said they were at least somewhat satisfied with such repair or replacement, and only 8.2 per cent reported that they were very dissatisfied with their product's subsequent performance after repair or replacement (see Exhibit 32).

The Kennedy study concluded its general assessment of consumer complaints data, attitude studies, satisfaction surveys, and consumer probe evidence with the following comment:

While the preceding data indicate that consumer dissatisfaction with the performance of new automobiles and appliances is a problem of some magnitude, it is not obvious exactly what the dimensions of the problem are.<sup>22</sup>

2. There Are, However, Several Serious Problems That Can Be Specifically Itemized

Even though the data do not support the suggestion that consumer product warranties are a high or in some cases even a medium priority consumer protection problem, both the data collected by the Ash satisfaction/dissatisfaction study and the analysis conducted in the Kennedy study reveal several serious problems that can be specifically identified. For example, the Kennedy study spent some time analyzing the data collected by the Ash satisfaction/dissatisfaction survey and concluded as follows:

Data from the Ash study provides evidence from the consumer perspective as to the magnitude and source of consumer dissatisfaction with products purchased in the previous three years. [Exhibit 33] shows that in situations of high customer dissatisfaction with a purchase, quality of product materials and workmanship are perceived as a high problem area source across all the product categories. Question 10, which incorporates the notions of both product reliability and product longevity, also generated a high response across all product categories. With the exception of cars and trucks, responses to questions related to express warranty offers and delivery of service against those offers (questions 12-15) indicate fewer perceived problems in this area, as well as more product specific problems than for those related to materials and workmanship, and expectations about product reliability and product longevity. A somewhat comparable pattern

## Tabulations of Consumers' Overall Satisfaction with Problem Handling

**TASK 4: Consumers' Overall Satisfaction with Problem Handling by Total Number of Repair Attempts of Service Agent**

Problem Handling Level of Satisfaction	Number of Repair Attempts		
	1	2 - 3	≥ 4
Satisfied	89.7%	69.8%	28.6%
Neutral	3.3	4.8	22.8
Dissatisfied	7.0	25.4	48.6
n =	(300)	(126)	(35)

**TABLE 5: Consumers' Overall Satisfaction with Problem Handling by Their Satisfaction with Product's Performance After Repair/Replacement \***

Problem Handling Level of Satisfaction	Product's Performance Level of Satisfaction			n =
	Satisfied	Neutral	Dissatisfied	
Satisfied	90.9%/93.5%	42.1%/2.1%	26.2%/4.4%	/(385)
Neutral	3.5/58.3	31.6/25.0	6.1/16.7	/(24)
Dissatisfied	5.6/31.0	26.3/7.0	67.7/62.0	/(71)
n =	(396)/	(19)/	(65)/	

**TABLE 6: Consumers' Overall Satisfaction with Problem Handling by Their Satisfaction with Their Case/Complaint's Final Result \***

Problem Handling Level of Satisfaction	Case/Complaint's Final Result Level of Satisfaction			n =
	Satisfied	Neutral	Dissatisfied	
Satisfied	94.4%/98.4%	11.1%/0.4%	7.0%/1.2%	/(256)
Neutral	1.9/41.7	66.7/50.0	2.3/8.3	/(12)
Dissatisfied	3.7/19.6	22.2/3.9	90.7/76.5	/(51)
n =	(267)/	(9)/	(43)/	

\*Percentages and numbers to left of slash in these tables relate to column totals; those to right of slash relate to row totals.

Source: Arthur Young and Co., Consumer Baseline Study (1979) at 187-88 (Exhibit IV-16).

Reasons for Dissatisfaction Reported by Purchasers Who Identified the Product Category as the Most  
Unsatisfactory Purchase of One or More Highly Dissatisfying Purchase Experiences

Reasons for dissatisfaction	Percentage indicating reason for dissatisfaction							
	New cars and trucks	Used cars and trucks	Refrigerators, freezers	Ranges, ovens, grills	Clothes washers and dryers, automatic dishwashers	Vacuum cleaners, carpet sweepers, floor polishers, rug shampooers	Small kitchen appliances	Electric hair dryers, curlers, etc.
	N=45	N=41	N=13	N=14	N=17	N=14	N=49	N=23
1. The quality of materials was inferior	47%	37%	31%	71%	47%	57%	37%	13%
2. The quality of workmanship was inferior	53	27	23	43	17	50	39	13
3. The product had drawbacks that I was not told about when I bought it	20	49	31	14	29	21	14	13
4. The cost of using the product is higher than I was led to believe	20	24	8	0	6	0	4	0
5. The item that was delivered was different from the one I bought	0	2	0	14	0	0	2	0
6. The product was damaged when delivered	9	12	31	21	12	7	4	0
7. I had to wait a long time before the product was delivered	2	2	8	7	12	14	4	0
8. The product was misrepresented to me by the salesman	7	17	0	7	6	29	2	4
9. The product did not correspond to the general impression created in an advertisement	9	15	7	0	18	43	4	26
10. The product did not perform as well or last as long as advertising claims led me to believe	42	20	46	21	47	36	41	78
11. The credit terms were misrepresented to me	2	2	0	0	0	0	0	0
12. The warranty (guarantee) did not cover all of the things that went wrong	33	17	8	0	12	21	10	4
13. The warranty (guarantee) was not as extensive as the general impression created in advertising	16	12	8	7	6	14	2	9
14. Repairs or services under the warranty (guarantee) were unsatisfactory	38	17	15	21	6	14	16	9



Percentage indicating reason for dissatisfaction								
Reasons for dissatisfaction	New cars and trucks N=45	Used cars and trucks N=41	Refrigerators, freezers N=13	Ranges, ovens, grills N=14	Clothes washers and dryers, automatic dishwashers N=17	Vacuum cleaners, carpet sweepers, floor polishers, rug shampooers N=14	Small kitchen appliances N=49	Electric hair dryers, curlers, etc. N=23
15. The warranty (guarantee) was not honoured	11	7	0	14	0	7	4	0
16. The store was unwilling to provide a refund or an exchange	7	10	8	0	6	14	2	13
17. The dealer misrepresented his ability to provide parts and service for the product	18	17	15	7	12	0	0	4
18. I was tricked by a salesman into buying a more expensive model than I needed	7	2	0	0	0	14	0	0
19. The price that was charged was higher than what I had agreed to pay	4	0	0	0	0	7	0	0
20. The price that was charged was higher than the advertised price	0	0	0	0	0	0	0	0
21. The product was unsafe	2	20	0	7	12	7	4	13
22. The product advertised as a "special" or "bargain" was unavailable at the store	2	0	0	7	6	0	4	0
23. The product wasted energy resources	20	17	0	21	12	7	6	0
24. The instructions for using and taking care of the product were incomplete or impossible to read	0	7	0	0	0	0	4	0
25. Other reasons not listed above	18	22	15	14	12	21	10	4
Number of purchasers	380	356	317	232	376	365	620	446

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 6-4). Compiled from the working paper of Ash (1980).

Note: Cars and trucks were in a category set of 13 product groupings which included transportation vehicles of all types, together with accessories and home use maintenance and parts products. The other six categories were in a category set of 18 product groupings which included major and small appliances of various groupings, together with several categories of durable personal and health care products. Electronic home entertainment products were not in this category set.

emerges in [Exhibit 34], in which the respondents were asked to indicate "the one most important reason for their dissatisfaction." [But note that] the data in [Exhibits 33 and 34] were collected from highly dissatisfied purchasers. They should not be construed as applying to the total population of purchasers.<sup>23</sup>

Relying then to some extent upon the Ash data but also upon their own consumer probe and business executive interview data, the authors of the Kennedy study summarized what in their opinion were the key problems currently existing in product delivery in warranty and post-warranty service systems for white goods and automobiles. The Kennedy study lists 18 specific problem areas, noting that with the exception of the first problem area, the problem set is not ordered in terms of magnitude. The Kennedy study's identification of the 18 specific key problem areas is as follows:

Key Problem Areas for White Goods and Automobiles

1. Lack of consistency and/or quality of service performance -- In-warranty service, Post-warranty service. We see the above problem because of its pervasiveness, the fact that there is widespread consumer requirements for service, and the knowledge that it impacts on a number of other problems in the set, as being the most serious one in the set in terms of an expectation-performance gap.
2. Expectations on the part of some consumers with respect to product reliability, service costs and, to some extent, product longevity, are higher than distribution/manufacturer ability and willingness to provide at prices those same consumers are willing to pay...
3. Information on total economic costs of product ownership not readily available to consumers...
4. Short to medium term shortage of competent service personnel (technical and managerial) over total service systems, and particularly in rural areas...
5. Responsibility for warranty performance not clearly defined...
6. Competition policy which lowers service sys-

Distribution of the "One Most Important Reason" for Dissatisfaction  
for Dissatisfied Purchasers in Eight Product Categories

Percentage indicating reason for dissatisfaction								
Reasons for dissatisfaction	New cars and trucks N=45	Used cars and trucks N=41	Refrigerators, freezers N=13	Ranges, ovens, grills N=14	Clothes washers and dryers, automatic dishwashers N=17	Vacuum cleaners, carpet sweepers, floor polishers, rug shampooers N=14	Small kitchen appliances N=49	Electric hair dryers, curlers, etc. N=23
1. The quality of materials was inferior	13%	22%	15%	14%	12%	21%	18%	13%
2. The quality of workmanship was inferior	20	12	8	14	12	14	22	0
3. The product had drawbacks that I was not told about when I bought it	2	17	15	0	18	7	4	0
4. The cost of using the product is higher than I was led to believe	2	5	8	0	0	0	0	0
5. The item that was delivered was different from the one I bought	0	0	0	7	0	0	0	0
6. The product was damaged when delivered	0	2	8	14	6	0	0	0
7. I had to wait a long time before the product was delivered	0	0	0	7	6	0	0	0
8. The product was misrepresented to me by the salesman	0	5	0	0	0	0	0	0
9. The product did not correspond to the general impression created in an advertisement	4	0	0	0	0	7	0	0
10. The product did not perform as well or last as long as advertising claims led me to believe	13	5	15	7	12	14	29	57
11. The credit terms were misrepresented to me	0	0	0	0	0	0	0	0
12. The warranty (guarantee) did not cover all of the things that went wrong	9	5	0	0	0	7	2	0
13. The warranty (guarantee) was not as extensive as the general impression created in advertising	4	2	8	0	6	0	0	4
14. Repairs or services under the warranty (guarantee) were unsatisfactory	11	0	0	7	0	7	4	4

15. The warranty (guarantee) was not honoured	0	5	0	14	0	0	2	0
16. The store was unwilling to provide a refund or an exchange	0	2	0	0	0	0	0	0
17. The dealer misrepresented his ability to provide parts and service for the product	4	2	8	0	12	0	0	4
18. I was tricked by a salesman into buying a more expensive model than I needed	0	0	0	0	0	7	0	0
19. The price that was charged was higher than what I had agreed to pay	2	0	0	0	0	7	0	0
20. The price that was charged was higher than the advertised price	0	0	0	0	0	0	0	0
21. The product was unsafe	2	5	0	0	6	0	4	4
22. The product advertised as a "special" or "bargain" was unavailable at the store	0	0	0	0	0	0	2	0
23. The product wasted energy resources	2	0	0	0	6	0	2	0
24. The instructions for using and taking care of the product were incomplete or impossible to read	0	0	0	0	0	0	0	0
25. Other reasons not listed above	9	10	15	14	6	7	10	4

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Source: Kennedy, Pearce and Quelch (1979) (Exhibit 6-5). Compiled from the working paper of Ash (1980).

tem performance when it discourages shared information on systems for improved service planning and delivery, and monitoring of delivery performance...

7. Scope and quality of information systems which monitor warranty and service system performance of variable quality...
8. Low consumer interest in available information...
9. Lack of consistency and/or quality of salesman communication at point of sale...
10. Lack of consistency and/or quality of pre-delivery inspection (automobiles)...
11. Warranty information not as available or understandable as it could be...
12. Existence of, and information on implied warranty rights not known/understood by virtually all consumers and many members of the distribution/manufacturing system...
13. Portability of warranty protection within and across provinces not consistent...
14. Systematic product failure which becomes known after the end of the express warranty period, or beyond the financial resources of supplier system member(s) to fix...
15. High consumer psychic costs in a warranty system in which the organization responsible for warranty protection is not clearly identified and/or has final non-legal decision power...
16. Consumer misperception of how warranty systems operate with respect to registration and expiry period...
17. Lack of consistency of governmental requirements for warranty system[s] across jurisdictions...
18. Outdated and/or vaguely phrased legislation which does not have intended effects and/or has unintended side effects...<sup>24</sup>

The MIT study noted that the two main problems with modern warranties are complexity and cost. With respect to the latter point, the MIT research discovered that consumer education calls can account for as much as 30 per cent of all in-warranty service calls (i.e., unnecessary service calls requiring the service person to merely instruct the consumer to plug in the appliance or adjust the television set, or to use soap detergent in his or her new washing machine).<sup>26</sup> The same point about unnecessary and costly service calls was noted in the Kennedy study as well:

It was reported by one appliance service organization that in 24% of service calls for color televisions in the first year of ownership, the service task was to adjust the picture.<sup>26</sup>

In addition to the above-mentioned findings regarding key problem areas, it is also interesting to note the empirical findings as to what are not consumer product warranty problems. The Kennedy study, for example, concluded that neither the availability of parts nor product longevity was in fact a consumer product warranty problem today.

Parts availability does not appear in the problem set for the product classes we have focussed on because it is our conclusion that it is not a problem of any substantial nature in these industries. Length of product economic life is also not in the problem set... in the study because the limited data available lead us to [conclude] that length of economic life of appliances and automobiles does not appear unreasonable.... the limited data available suggest that product economic life is not as short as perceived by most consumers.<sup>27</sup> (Also see Exhibits 35 and 36.)

### 3. Many of These Specific Problems Relate to the General Structure and Strains of Modern Consumer Warranty Systems

Both the Kennedy study and the MIT study spent time analyzing the evolution of the structure and the operations of warranty systems in both household appliance and automobile industries in North America. Later, this study will consider the implications of the "two-party" versus "three-party" warranty structure debate, and also the implications of the retailer/"housebrand" (brand owner concept) phenomenon.<sup>28</sup> Both of these specific structural concerns will have some relevance for the consideration of statutory design choices in Chapter IV. In terms of empirical research, the Kennedy study found four specific problem areas in the structure and operation of modern-day warranty systems:

(1) Warranty service capability. The first problem area relates to the warrantor's capability to provide service. The Kennedy study found that there is today a serious short- to medium-term shortage

Dominant Factors Affecting Functional Reliability  
of White Goods Appliances and Automobiles

Pre-sale	Early life	Later life
<ul style="list-style-type: none"> <li>. Level of manufacturing quality and quality control</li> <li>. Number of mechanical/electrical/thermal subsystems</li> <li>. Predelivery inspection (automobiles)</li> <li>. Design for extended maintenance (automobiles)</li> </ul>	<ul style="list-style-type: none"> <li>. Level of manufacturing quality and quality control</li> <li>. Number of mechanical/electrical/thermal subsystems</li> <li>. Predelivery inspection (automobiles) and installation (white goods)</li> <li>. Consumer knowledge of how to operate the products</li> <li>. Amount and style of usage</li> <li>. Physical environment of use</li> </ul>	<ul style="list-style-type: none"> <li>. Number of mechanical/electrical/thermal subsystems</li> <li>. Amount and style of usage</li> <li>. Physical environment of use (automobiles)</li> <li>. Product design</li> <li>. Level of product maintenance (automobiles)</li> <li>. Level of product service (automobiles)</li> <li>. Quality of energy and water supplies (white goods)</li> </ul>

Dominant Factors Affecting Length of Economic Life  
of White Goods Appliances and Automobiles

---

- . Household resources
  - . Household values with respect to product functional, aesthetic and psychic performance levels
  - . Rate of product and/or manufacturing technological change
  - . Relative levels and rates of change in new product, maintenance, repairs and operating costs
  - . Product design
  - . Amount and style of usage (style of usage more critical for automobiles)
  - . Level of maintenance and service (maintenance more critical for automobiles)
  - . Physical environment of use (more important for automobiles)
  - . Level of product reliability
  - . Collisions (automobiles)
- 

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 6-14).



Reasons for Dissatisfaction Reported for the Five Repairs and General Services Categories Identified as  
Having the Greatest Absolute Number of Highly Dissatisfied Purchasers

Reasons for dissatisfaction	Percentage indicating reason for dissatisfaction				
	Auto repairs and services	Television, radio, stereo repairs	Parcel delivery and freight service	Plumbing, carpentry and other home repair services	Appliance repairs (other than TV, radio, or stereo
	N=80	N=38	N=24	N=22	N=22
1. The service was provided in a careless, unprofessional manner	43%	34%	63%	36%	36%
2. The service was not completed in the agreed time	31	40	75	36	23
3. The service was not performed correctly the first time	70	63	33	59	59
4. I was charged for services that were not performed	18	13	17	5	18
5. I was charged for materials that were not furnished	6	0	4	0	0
6. The fee was much higher than the amount agreed upon in advance	20	13	0	9	5
7. The fee was higher than an advertised price for the service received	5	0	4	0	5
8. The quality of materials which were furnished was inferior	15	3	0	18	23
9. Things were worse after the service than before	43	24	4	23	9
10. An item was lost or broken	15	8	50	5	0
11. A professional confidence was violated to my embarrassment or injury	1	5	0	0	0
12. The professional advice I received was incorrect and caused me substantial losses	14	0	0	5	5
13. Services were performed in an incompetent manner with very harmful results	19	11	21	9	9
14. I was tricked by the person providing the service into buying services I didn't want	9	11	4	0	5
15. Results fell far short of those claimed in ads	10	0	17	0	5
16. I was harassed by bill collectors	1	0	0	0	0
17. Credit terms were misrepresented to me	6	3	4	0	0
18. The warranty (guarantee) did not cover everything that went wrong	24	8	6	5	8
19. I feel I was treated with extreme rudeness	9	3	17	5	9
20. Other reason not listed	9	11	29	9	18
Number of purchasers in category	774	514	469	394	344

N for total sample = 1052

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 8-11). Compiled from the working paper of Ash (1980).

Distribution of the "One Most Important Reason" for Dissatisfaction for  
Four Service Purchase Categories

Reasons for dissatisfaction	Percentage indicating reason for dissatisfaction				Total number	%
	Auto repairs and services	Television, radio, stereo repairs	Plumbing, carpentry and other home repair services	Appliance repairs (other than TV, radio or stereo)		
	N=80	N=38	N=22	N=22		
1. The service was provided in a careless, unprofessional manner	13%	8%	18%	9%	19	12%
2. The service was not completed in the agreed time	4	13	9	9	12	7
3. The service was not performed correctly the first time	31	37	36	32	54	33
4. I was charged for services that were not performed	3	11	0	9	8	5
5. I was charged for materials that were not furnished	0	0	0	0	0	0
6. The fee was much higher than the amount agreed upon in advance	5	3	9	0	7	4
7. The fee was higher than an advertised price for the service received	3	0	0	0	2	1
8. The quality of materials which were furnished was inferior	8	0	5	9	9	6
9. Things were worse after the service than before	13	8	14	5	17	11
10. An item was lost or broken	1	3	5	0	3	2
11. A professional confidence was violated to my embarrassment or injury	0	0	0	0	0	0
12. The professional advice I received was incorrect and caused me substantial losses	3	0	5	0	3	2
13. Services were performed in an incompetent manner with very harmful results	5	5	0	5	7	4
14. I was tricked by the person providing the service into buying services I didn't want	1	0	0	0	1	1
15. Results fell far short of those claimed in ads	0	0	0	0	0	0
16. I was harassed by bill collectors	0	0	0	0	0	0
17. Credit terms were misrepresented to me	3	0	0	0	2	1
18. The warranty (guarantee) did not cover everything that went wrong	5	3	0	9	7	4
19. I feel I was treated with extreme rudeness	1	3	0	0	2	1
20. Other reason not listed	4	8	0	14	9	6

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 8-12). Compiled from the working paper of Ash (1980).

in both the white goods appliance and automobile industries of competent technical and managerial service personnel. "There is an acknowledged problem in both industries with lack of consistency and/or quality of service performance."<sup>29</sup> Interviewing both business executives and consumers, the researchers found that "the biggest problem in both in-warranty and post-warranty service is that the product is not fixed right the first time."<sup>30</sup> The Kennedy study's findings are confirmed by the data in the Ash study as well (see Exhibits 37 and 38). Also related to the organizational capability to provide warranty service is a group of problems associated with the speed of the warranty claim response. This primarily is a problem in the automobile industry. The Kennedy study also noted the trend on the part of offshore manufacturers to adopt policies of discontinuing the supplies of certain parts.<sup>31</sup>

(2) Warranty service willingness. The second problem area identified by the Kennedy study was described as willingness or unwillingness on the part of the warrantor or warranty system to provide reasonable service. The specific problems identified here were ambiguous warranty language, the division of responsibility regarding necessary warranty work, the dealer's financial constraints, the portability or lack thereof of warranty service and the inability to make necessary evening repair calls in situations where the consumer is not home during the day.<sup>32</sup>

(3) Consumer knowledge and beliefs regarding repair costs and services. The Kennedy study found that "consumers seriously underestimate the after purchase cost associated with product use and...may overextend themselves financially with respect to product purchase and downplay service considerations in the decision as to place of purchase ...[and] view product breakdown requiring repairs as a nasty psychic and budgetary surprise."<sup>33</sup> This general tendency on the part of many consumers to underestimate the post-purchase expenses and particularly the labour costs associated with post-purchase repairs is again discussed in some detail in Chapter IV.B, in the section that deals with life cycle costing.

(4) Shared data collection and other government-related problems. The Kennedy study found that many members of the white goods appliance and home entertainment industries felt that sharing of service information would improve the overall level of service performance -- so much so that they formed the Canadian Electronic and Appliance Service Association (CEASA) to achieve that goal. However, no such comparable association has been established in the automobile industry. The Kennedy researchers found that the automobile industry, being particularly sensitive to governmental combines concerns, has refused to pursue any inter-company objectives, even those that relate solely to the sharing of service information data. This lack of shared information has lowered service system performance.<sup>34</sup> But even where members have associated for purposes of data collection such as the CEASA, there is often a lack of relevant statistical data. For example, Statistics Canada does not collect data for any electronic products other than

television. The Kennedy study found that this created substantial service planning problems in the growing area of home entertainment products.<sup>35</sup>

Empirical Findings regarding Consumer Purchase Behaviour and Information Disclosure Regulation

4. Consumers Neither Read Nor Care about the Consumer Product Warranty Before Making a Purchase

This is one of the most important findings in the recent empirical research. The Kennedy study put the point quite succinctly:

While consumers say that the warranty is an important factor in the purchase of an automobile or white good appliance, most acknowledge that they do not acquaint themselves with warranty items prior to or at the time of purchase. Further, most consumers are perceived by focus group participants as investigating warranty terms only after product failure. This behaviour is attributed by focus group participants to occur because consumers do not take warranty terms and performance into account sufficiently at time of purchase and/or do not value warrant[ies] highly as a relevant variable at the time of purchase....the majority of consumers use only that information at a given point in the buy/use process that they perceive as functional at that point in time. Both the focus group data and industry interviews strongly support the notion that while the general concept of existence of express warranty may be salient at the point of purchase, for many consumers the specifics of the warranty do not become relevant unless and until there is a product failure.<sup>36</sup>

The findings of the Kennedy study -- that consumers simply don't read warranties or care much about them prior to or at the point of purchase (see Exhibit 39) -- are amply supported by American data as well. The recent FTC Consumer Baseline Study revealed that even though 81.6 per cent of the consumers surveyed said that the warranty was indeed available prior to purchase, only 28.4 per cent actually read the warranty before buying a particular item. Up to 75 per cent of the consumers surveyed said that they didn't really bother to worry about or to read the warranty until after the product was purchased and was taken home (see Exhibit 40). As to why consumers didn't bother to read warranties before making their purchase, the same study reveals that 78.1 per cent said simply that they "already knew all they wanted to know" (see Exhibits 41 and 42). Similar Canadian data can be found in a recently published Consumer and Corporate Affairs Canada study of consumer perceptions of pre-purchase shopping problems.<sup>37</sup>

Key Consumer Characteristics in the Purchase and Use of  
Major Durable Products

- . tends to use a small proportion of the available information
- . acquires and processes information sequentially over economic life:
  - (a) purchase
  - (b) use
  - (c) warranty
  - (d) service
- . thinks in terms of purchase cost, not economic life cost, with consequent overemphasis on purchase price
- . knows that warranty coverage is reflected in the purchase price
- . uses surrogate information for judging performance:
  - (a) existence of warranty and warranty period for reliability, longevity
  - (b) retail outlet or brand name for reliability, longevity, existence of warranty, and quality of warranty and service systems
  - (c) product appearance for overall functional performance and reliability
  - (d) magnitude of repair costs for functional reliability
- . has slow-changing belief structure on the relationship between product materials and product longevity
- . wants fast response to problems
- . has little or no interest in or knowledge of legal rights, especially if expressed in legal language
- . has expectations about product performance, especially product reliability, that are based on selective references to prior experience
- . perceives that some consumers misuse products
- . has little bargaining power with organizations which choose not to bargain
- . neglects maintenance/service to an increasing extent
- . perceives direct relationship between size of cost outlays and risk protection against performance failure.
- . works on assumption that things will go right unless explicitly told otherwise
- . buys, to an increasing extent, more complex products.

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 9-6).

EXHIBIT 40

Respondent Purchasers' Reading of Their Warranties before  
and after Purchase<sup>a</sup>

Product category	Read the warranty (as % of those who said they had a warranty)	
	Before purchase	After purchase
Motor vehicles	36.8	79.9
Tires	30.8	53.4
Auto batteries	33.7	56.1
Major home appliances	29.6	76.3
Small home appliances	24.4	75.6
Home electronic products	28.3	79.9
Photographic equipment	25.0	78.8
Personal care products	24.3	75.0
Watches	27.6	78.0
Furniture and bedding	23.9	58.4
Lawnmowers and power tools	29.4	74.6
All products	28.4	72.3

Source: Arthur Young & Co., Consumer Baseline Study (1979) at 58 (Exhibit 111-8).

<sup>a</sup>These responses are not mutually exclusive -- i.e., a respondent may have read the warranty both before and after purchase.

Warranty Input into the Consumer Purchase Decision:  
Respondent Purchaser Acquisition of Warranty Details

Product category	Before product purchase					
	Read details of warranty <sup>a</sup>			Got warranty details from salesman <sup>a</sup>		
	Number of purchasers	% of those who knew warranty details <sup>b</sup>	% of those who had warranty <sup>c</sup>	Number of purchasers	% of those who knew warranty details <sup>d</sup>	% of those who had warranty <sup>e</sup>
Motor vehicles	172	47.1	36.8	247	67.7	52.9
Tires	246	45.6	30.8	267	49.4	33.5
Auto batteries	139	46.3	33.7	137	45.7	33.3
Major home appliances	308	46.9	29.6	424	64.5	40.7
Small home appliances	325	59.9	24.4	181	33.3	13.6
Home electronics	210	50.2	28.3	233	55.7	31.4
Photo equipment	73	65.8	25.0	46	41.4	15.8
Personal care products	98	74.8	24.3	21	16.0	5.2
Watches	168	55.8	27.6	123	40.9	20.2
Furniture and bedding	54	41.2	23.9	84	64.1	37.2
Lawnmowers and power tools	109	52.4	29.4	91	43.8	24.6
All products	1 902	51.3	28.4	1 854	50.0	27.7

Source: Arthur Young & Co., Consumer Baseline Study (1979) at 129 (Exhibit IV-8).

<sup>a</sup>Consumer reported as many ways by which they acquired warranty details as applied in their product purchases. Hence, Read Details of Warranty and Got Warranty Details From Salesman are not mutually exclusive; some purchasers likely used both methods to obtain warranty details.

<sup>b</sup>Percentage was calculated based on the number of purchasers within each product category who knew of warranty details before product purchase (i.e.,  $172/365=47.1$ ).

<sup>c</sup>Percentage was calculated based on the number of purchasers within each product category who said the product in fact had a warranty (i.e.,  $172/467=36.8$ ).

<sup>d</sup>Percentage is based on the number of purchasers within each product who knew of warranty details before product purchase (i.e.,  $247/365=67.7$ ).

<sup>e</sup>Percentage is based on the number of purchasers within each product category who said the product in fact had a warranty (i.e.,  $247/467=52.9$ ).

Warrant Input into the Consumer Purchase Decision:  
Respondent Purchaser Knowledge of Warranty Gained by Reading Warranty

Product category	Before product purchase								After product purchase	
	Read warranty just before purchase <sup>a</sup>		Read warranty while shopping/ before shopping <sup>a</sup>		Read all of warranty <sup>b</sup>		Glanced at warranty <sup>b</sup>		Read warranty after product purchase <sup>c</sup>	
	N	%	N	%	N	%	N	%	N	%
Motor vehicles	62	38.0	101	62.0	110	67.1	54	32.9	373	80.9
Tires	121	50.4	119	49.6	149	62.9	88	37.1	426	54.4
Auto batteries	81	59.1	66	40.9	100	72.5	38	27.5	231	56.5
Major home appliances	105	34.5	199	66.5	224	73.7	80	26.3	794	77.2
Small home appliances	174	55.8	138	44.3	192	61.9	118	38.1	1 005	76.1
Home electronics	76	36.9	130	63.1	143	70.1	61	29.9	593	80.2
Photo equipment	34	48.6	36	51.4	49	72.1	19	27.9	230	79.6
Personal care products	53	55.2	43	44.8	58	61.7	36	38.3	303	75.4
Watches	88	55.7	70	44.3	97	63.0	57	37.0	475	78.4
Furniture and bedding	21	38.9	33	61.1	35	66.0	18	34.0	132	60.0
Lawnmowers and power tools	49	45.4	59	54.6	57	53.8	45	46.2	276	74.8
All products	864	46.5	894	53.4	1 214	66.4	614	33.5	4 838	72.3

Source: Arthur Young & Co., Consumer Baseline Study (1979) at 131 (Exhibit IV-9).

<sup>a</sup>Percentage is based on the number of purchasers within each product category who read the content of the warranty before product purchase (i.e.,  $62/163 = 38.0$ ,  $101/163 = 62.0$ ).

<sup>b</sup>Percentage is based on the number of purchasers within each product category who read or glanced at the content of the warranty before product purchase (i.e.,  $110/164 = 67.1$ ,  $54/164 = 32.9$ ).

<sup>c</sup>Percentage is based on the number of purchasers within each product category who said the product in fact had a warranty before product purchase (i.e.,  $373/464 = 80.9$ ,  $426/798 = 53.3$  -- allowance for missing data).



5. Information Disclosure Requirements and Truth in Warranty Regulation to Date Haven't Had Much Impact

Empirical research in this area has now been building for several years. The literature is quite extensive and generally points in the same direction: by and large, information disclosure regulation and so-called "truth in warranty" requirements have not had, to date, a discernible beneficial impact. The most relevant study was published in 1979 in the Stanford Law Review.<sup>38</sup> It provides readers with an empirical assessment of the overall impact of the Magnuson-Moss Warranty Act. One of the stated purposes of the MMWA, as noted earlier, was to improve the clarity and accuracy of information contained in consumer product warranties.<sup>39</sup> In an effort to improve information disclosure in warranties, the MMWA requires that all written warranties contain certain uniform information and that this information be "fully and conspicuously" disclosed.<sup>40</sup> The intended objective was clear: simplification of written warranties, increased information disclosure for better consumer decision-making and enhanced consumer protection. The Stanford study, however, compared the warranties that were being offered with certain consumer products before the MMWA was enacted with the warranties that are currently being offered with the very same products. The products included in the sample were automobiles, refrigerators, TV sets, toasters, digital watches and tennis rackets. They were selected because they varied widely in cost, durability, technical complexity and also in the type and amount of use received. The Stanford researchers also felt that these products were fairly equally represented among consumers from various socio-economic backgrounds, and, finally, each one was typically sold with a written warranty.

With the enactment of the MMWA in 1975, all written warranties had to disclose the following uniform terms: the period of coverage, the parts of the product which were covered by the warranty and the obligation of the warrantor. The Stanford study found that most of the old warranties (i.e., those being used before the enactment of the MMWA) already had the various required disclosure items as part of the warranty document. Similarly, the newly required procedural complaint and redress information was also a part of the old warranties content design. The Stanford study did find that there was fairly good compliance with the MMWA labelling requirement of "full" versus "limited," but that compliance with the MMWA-required legal rights provision<sup>41</sup> (a statement informing consumers that they may have rights in addition to those listed in the warranty) was surprisingly low: 21 of the 64 new warranties -- nearly one third -- did not contain the required statement.<sup>42</sup>

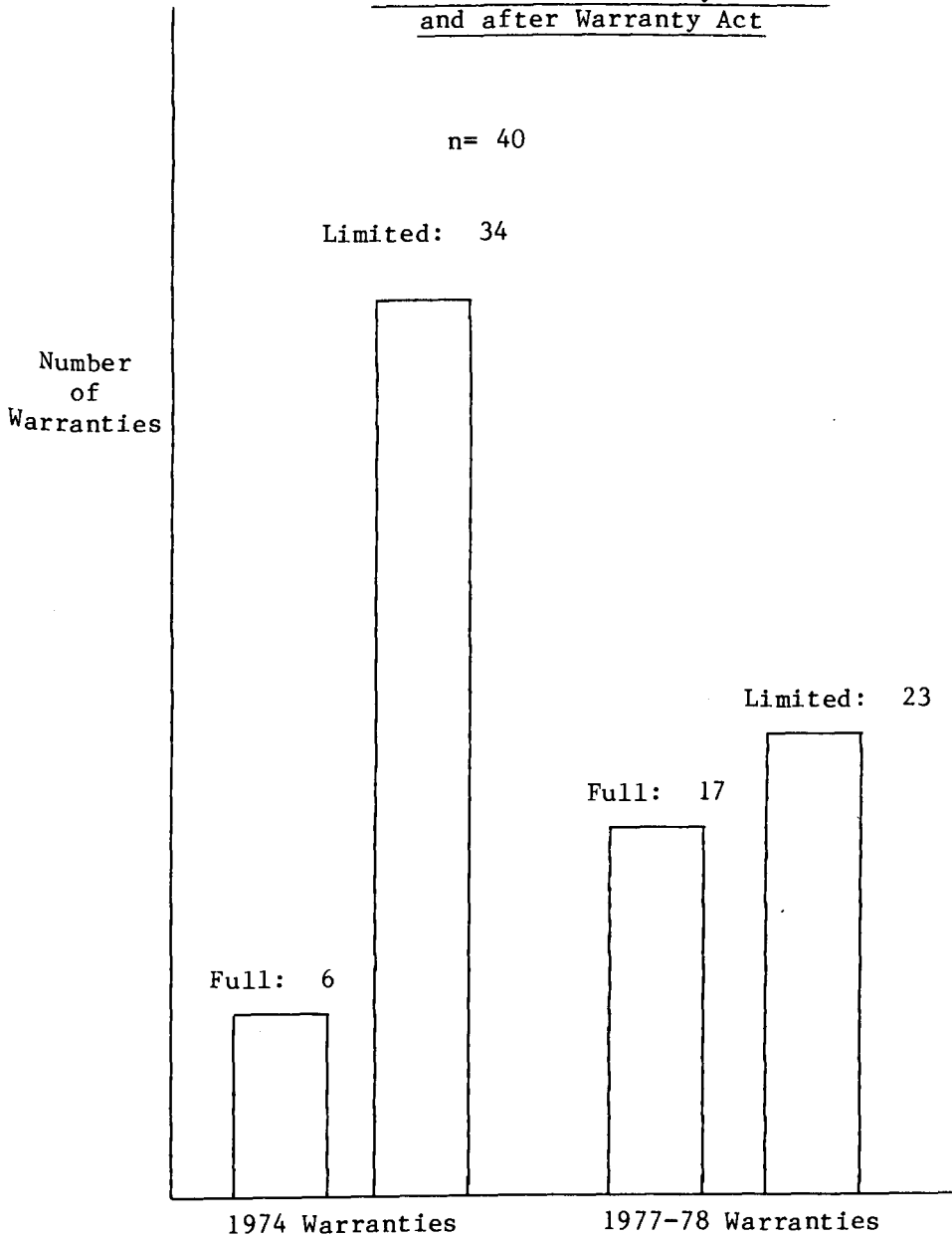
In Canada, information disclosure requirements are found only in the Saskatchewan legislation.<sup>43</sup> To date, no equivalent compliance studies have been done.

6. There Is Some Evidence of "Better Warranty" Coverage

There is some evidence to suggest that warranty disclosure

EXHIBIT 43

"Full" and "Limited" Designations  
First Year of Warranty before  
and after Warranty Act



Changes in Warranty Coverage:  
1977-78 over 1974

	Coverage increased	Coverage reduced	Both increased and reduced	No change
Home appliances (19)	6	2	2	9
Mobile home/RV (13)	5	2	3	3
Automobile (4)	3	0	0	1
Home entertainment (4)	0	2	0	2
Total (40)	14	6	5	15

Source: FTC Staff Report (1979) at 26 (Table 2).

requirements, and in particular the requirement in the United States to designate the warranty as "full" or "limited," has resulted in better warranties. The FTC Impact study<sup>44</sup> compared consumer warranties before the enactment of the Magnuson-Moss Warranty Act with the same warranties after the enactment of the MMWA and found that on balance there were more full warranties after the enactment than before. Of the 40 warranties studied, the FTC found an increase from 6 full warranties to 17 full warranties, an increase that can probably be attributed to the enactment of the disclosure requirement (see Exhibits 43 and 44).

7. But There Is Very Little Evidence That Disclosure Regulation Has Improved Warranty Readability or Understandability

Most of the empirical research to date has found little if any evidence to support the claim that mandated information disclosure or readability requirements actually work in practice. In fact, the evidence thus far is fairly uniform: legislatively prescribed disclosure and readability requirements have not measurably improved either warranty design or consumer understandability.<sup>45</sup> Similar findings have come out of the recent American research as well.

The recently published FTC Warranties Content Analysis<sup>46</sup> studied automobile warranties over a ten-year period, from 1967 to 1977. The study found three specific changes that occurred and that were "possibly due to the promulgation of the MMWA disclosure rules." These changes occurred in the 1974-77 period, consistent with the enactment and publication of the MMWA: increased identification of dispute contact point, decreased use of warrantor tie-in requirements, but only slightly increased readability of consumer product warranties. This latter finding

is, of course, the most relevant one for us here. The FTC study found that readability increased from a 1975 Flesch Test standard of 16.6 to a 1976 Flesch Test standard of 26.0. But even a score of 26.0 still means that consumer product warranties are very difficult to read and understand. As the FTC study concluded, "few of the warranties in 1977 appear to have satisfied the actual requirement that warranty terms and provisions be presented in 'readily understood language.'"<sup>47</sup>

Similar findings are contained in the FTC Impact analysis.<sup>48</sup> This study found that warranties became only "slightly more readable" with the enactment of the MMWA but were, by and large, still "difficult" to understand (see the documentation in Exhibits 45 to 48).

The Stanford study referred to earlier found that the average length of warranty text increased by over 15 per cent as a consequence of the MMWA disclosure requirements.<sup>49</sup> The overall complexity of consumer warranties also increased. The study concluded that the MMWA did not fulfill its goal of simplifying consumer product warranties. The impact of the MMWA on readability and understandability was summarized as follows:

A simple tallying of the success and failures of the Act might indicate that overall it has been a failure. Of the Act's three goals analyzed in this study -- simplification, improved disclosure and increased consumer protection -- only improved disclosure has met with any substantial success....[But] warranties are no easier to read than before the passage of the Act. In fact the typical warranty is now longer and according to the Fog Index Analysis, slightly more difficult to comprehend.<sup>50</sup>

The Kennedy study also had something to say about the impact of disclosure requirements here in Canada, where a good many consumer product warranties are simply American-designed warranties exported to or used in Canada.<sup>51</sup> The Kennedy study noted that "overall, the current trend in warranty complexity is a mixed one, with simplification of provision language and process information taking place at the same time as complication in legal exclusions and, for automobiles, an increase in the number of separate warranty provisions."<sup>52</sup>

#### Empirical Findings regarding Consumer Awareness of Consumer Protection Laws

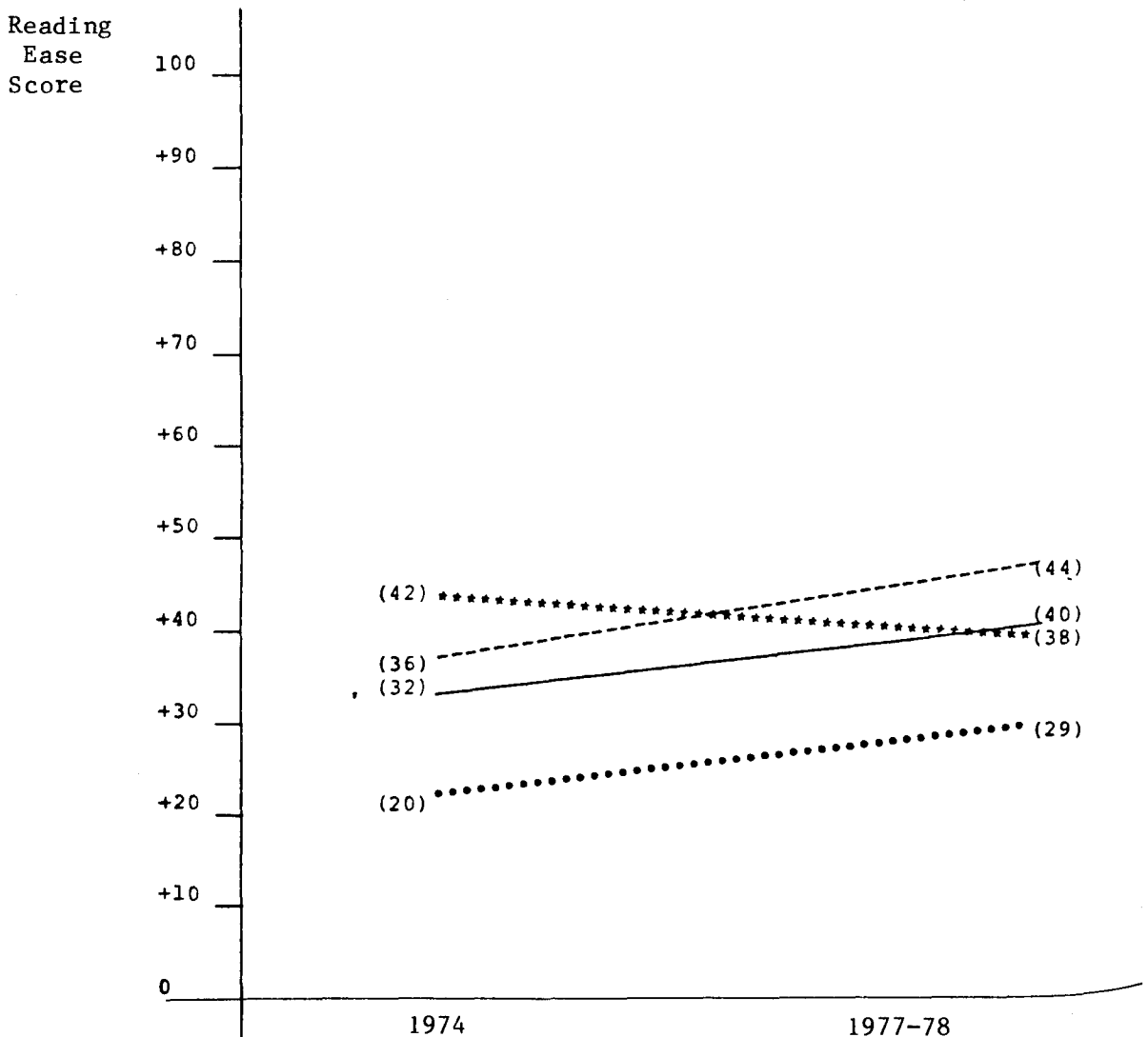
##### 8. The Average Canadian Consumer Has No Awareness of His or Her Legal Rights in This Area

Several recent studies have now amply documented the harsh reality of today's consumer protection environment: no one, except for

EXHIBIT 45

Average Reading Ease Scores  
for Four Product Categories  
1974 and 1977-78 Warranties

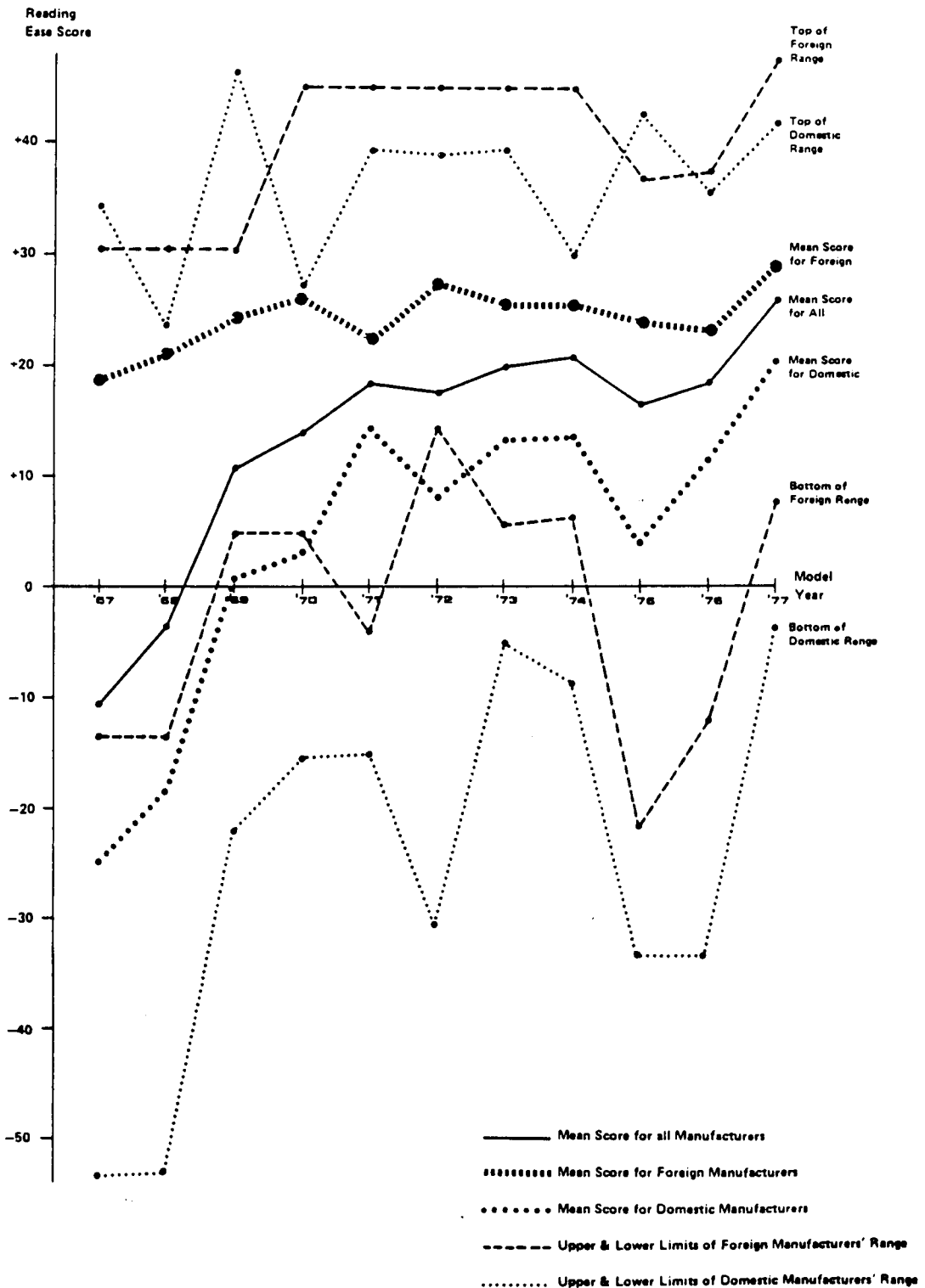
\*\*\*\*\* Home Entertainment  
----- Household Appliances  
..... Mobile Homes/RV  
\_\_\_\_\_ Automobiles



Source: FTC Staff Report (1979) at 30 (Table 3).

# Warranty Readability

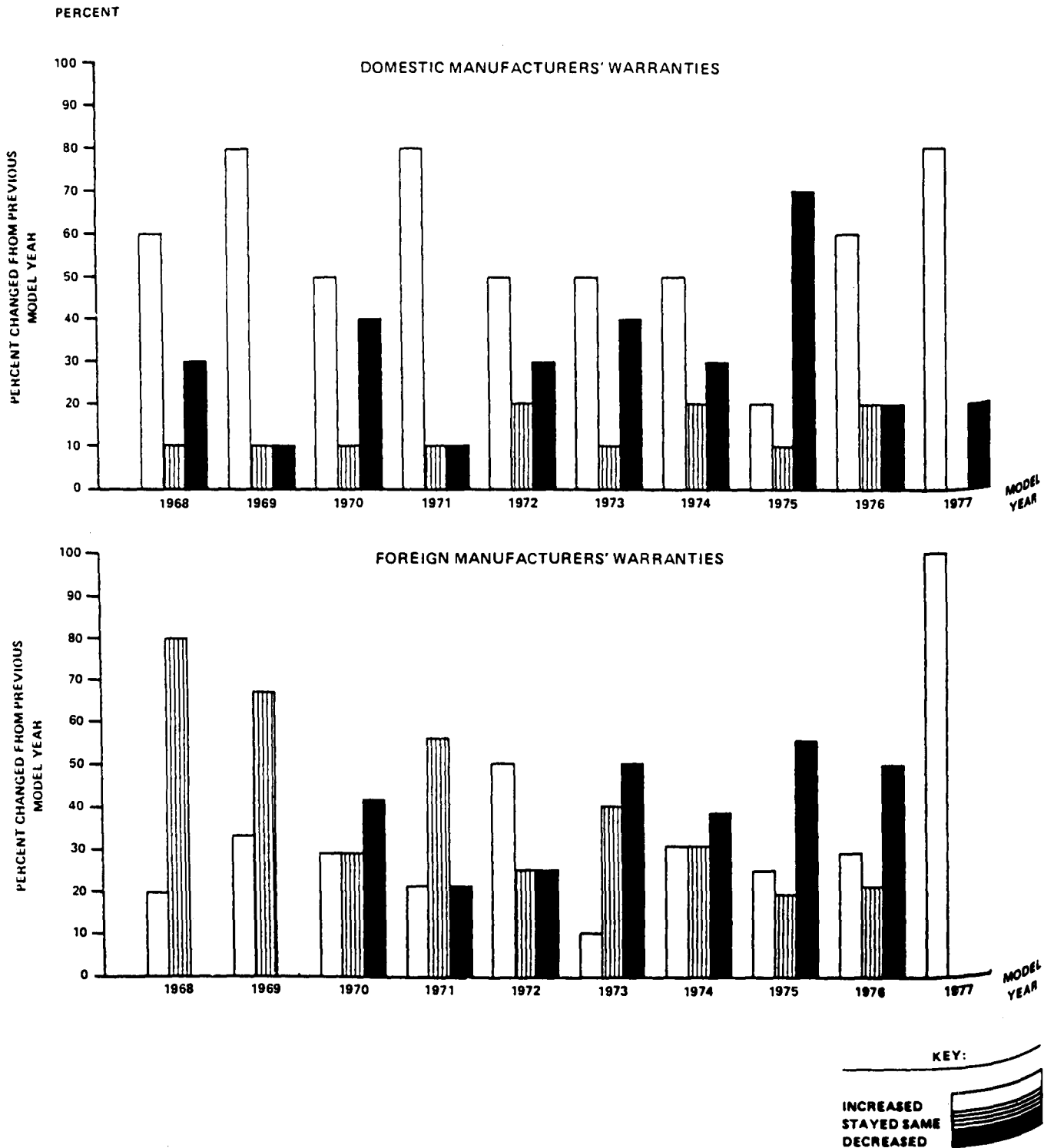
EXHIBIT 46



Source: Arthur Young & Co., Warranty Content Analysis (1979) at 37 (Exhibit 111-9).

# Direction of Annual Change in Readability of Warranties

EXHIBIT 47



Source: Arthur Young & Co., Warranty Content Analysis (1979) at 39 (Exhibit 111-10).

Warranty Input into the Consumer Purchase Decision:  
Warranty Availability and Ease of Understanding Warranty

Product category	Warranty was available to read before purchase <sup>a</sup>		Understandability of the warranty									
			Very easy <sup>b</sup>		Somewhat easy <sup>b</sup>		Not easy or hard <sup>b</sup>		Somewhat hard <sup>b</sup>		Very hard <sup>b</sup>	
	N	%	N	%	N	%	N	%	N	%	N	%
Motor vehicles	352	88.9	157	35.1	158	35.3	80	17.9	44	9.8	8	1.8
Tires	497	81.3	328	47.3	205	29.6	119	17.2	39	5.6	2	0.3
Auto batteries	292	89.0	205	55.9	100	27.2	52	14.2	7	1.9	3	0.8
Major home appliances	712	84.3	401	41.9	278	29.1	225	23.5	49	5.1	4	0.4
Small home appliances	774	73.2	672	54.0	329	26.4	192	15.4	46	3.7	5	0.4
Home electronics	521	85.6	295	42.4	225	32.4	128	18.4	46	6.6	1	0.1
Photo equipment	190	81.9	146	53.7	71	26.1	51	18.8	4	1.5	0	0.0
Personal care products	260	78.5	223	58.8	95	25.1	52	13.7	9	2.4	0	0.0
Watches	416	81.1	301	52.5	157	27.4	87	15.2	22	3.8	6	1.0
Furniture and bedding	130	77.8	102	52.6	44	22.7	41	21.1	6	3.1	1	0.5
Lawnmowers and power tools	253	84.3	175	51.3	91	26.7	58	17.0	15	4.4	2	0.6
All products	4 397	81.6	3 005	50.4	1 753	29.4	1 085	18.2	287	4.8	32	0.5

Source: Arthur Young & Co., Consumer Baseline Study (1979) at 133 (Exhibit IV-11).

<sup>a</sup>Percentage is based on the number of purchasers in each product category who had a warranty and answered the question.

<sup>b</sup>Percentages are based on the number of purchasers within each product category who read the details of the warranty (i.e., 157/447 = 35.1).



the odd government consumer protection officer or law professor, knows the first thing about the existing consumer protection laws or about his or her legal rights. The empirical data, both Canadian and American, supporting this finding are substantial. The Kennedy study discovered that consumer focus group participants lacked even a general understanding of implied warranties, much less a specific awareness of the implied warranties of fitness for purpose or merchantability. In fact, none of the consumers in these focus group interviews revealed any awareness or understanding of their legal rights as consumers.<sup>53</sup> The Moyer study found that "Ontario consumers are largely unaware of specific consumer laws and are often uncertain as to where to learn of their consumer rights."<sup>54</sup> The study revealed that 62 per cent of Ontario consumers were unable to name even one consumer legal right (see Exhibit 49). Also recall Exhibit 23 (Sources of information on consumer rights), which showed that most consumers would sooner go to the Better Business Bureau for information about the law than to governmental officers or departments.

A survey of Quebec consumers in 1975 revealed a similar lack of consumer awareness of legal rights. Masse and Marois found, as is evident in Exhibit 50, "a profound ignorance of the protection mechanisms among those who are intended to be their beneficiaries."<sup>55</sup> The authors registered this observation: "The nearly unanimous view [of the consumer organizations surveyed] is that the public has little if any knowledge of the law....some laws are known but even in these cases, they are poorly understood and misinterpreted."<sup>56</sup> A 1980 survey of Metropolitan Toronto consumers revealed a similar lack of consumer legal knowledgeability.<sup>57</sup>

This is discouraging enough but even more surprising is the fact that few, if any, lawyers or judges are any better informed about consumer protection laws or their implications, or about the various rights that are accorded consumers pursuant to various federal or provincial statutes. This was discovered by the present author while completing a survey of Ontario judges in 1977 with regard to their knowledgeability about the recently enacted Ontario Business Practices Act.<sup>58</sup> Professor Stewart Macaulay conducted a similar survey of Wisconsin lawyers in an attempt to test their knowledgeability of consumer product warranty laws and found that "most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act -- in fact many had never even heard of it."<sup>59</sup>

These findings will, of course, have substantial implications in the formulation and design of consumer protection policy in the 1980s and 1990s. Policymakers will have to (finally) deal with this reality. Some suggested directions for reform are considered in Chapter IV below.

#### 9. Current Advertising and Information Techniques Haven't Worked

Many provincial policymakers continue to believe that all that is necessary to improve consumer awareness -- and to educate consumers generally about consumer protection legislation and about their various

EXHIBIT 49

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Knowledge of Consumer Protection Laws (Question 19)

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<u>Consumer laws</u>	<u>Percentage of respondents who are aware of</u>
None	62
Cooling off period	10
Labels and weights	7
Truth in advertising	6
Guarantees, warranties	4
Consumer Protection Act/Bureau	4
Better Business Bureau	4
Canadian Standards Association	3
Auto safety standards	2
Food and Drug Act	2
Food standards, grading	1

---

Source: Moyer (1978) at 27 (Table 18).

and sundry legal rights -- is a systematic public education campaign, either by using media advertising or by distributing or mailing informational brochures. After several years of futile effort and countless millions of dollars in expenditures across the country, we now know that informational advertising will not result in increased consumer legal education, particularly in the consumer product warranty area.

In a recent survey of Saskatchewan consumers, for example, the Saskatchewan Consumer Affairs Department found that media advertising had little if any impact in raising consumer consciousness about the recently promulgated Consumer Products Warranties Act.<sup>60</sup> With respect to consumers, the research study indicated that the advertising campaign conducted by the Saskatchewan Consumer Affairs Department did succeed in raising general awareness levels. However, the campaign was not successful in increasing the knowledgeability levels of the province's consumers. In terms of awareness, the advertising campaign raised awareness from 38 per cent to 61 per cent. In terms of knowledgeability, the advertising had virtually no impact -- knowledgeability was increased from 9 per cent to only 11.8 per cent.<sup>61</sup>

Similar empirical findings came out of the Macaulay study of Wisconsin lawyers referred to earlier.<sup>62</sup> Even after a wide-ranging and very expensive mail and media publicity campaign by the Federal Trade Commission, Macaulay found that the average Wisconsin lawyer hadn't even

EXHIBIT 50

Respondents' Knowledge of Consumer Law Measured  
by Number of Correct Responses to Pertinent Questions

Number of correct responses	Number of respondents	%	Cumulative % top to bottom	Cumulative % bottom to top
1- 3 correct responses <sup>a</sup>	9	3.6	3.6	100.0
1- 4 correct responses	12	4.8	8.4	96.4
2- 5 correct responses	19	7.7	16.1	91.6
3- 6 correct responses	28	11.3	27.4	83.9
4- 7 correct responses	58	23.4	50.8	72.6
5- 8 correct responses	44	17.7	68.5	49.2
6- 9 correct responses	39	15.7	84.2	31.5
7-10 correct responses	20	8.1	92.3	15.8
8-11 correct responses	18	7.3	99.6	7.7
9-12 correct responses	1	0.4	100.0	0.4
Total	248	100.0		

Source: Masse and Marois (1978) at 58 (Table 59).

<sup>a</sup>These correct responses could be the result of chance (percentages are calculated vertically).

heard of the Magnuson-Moss Warranty Act. Macaulay's conclusion is worth repeating:

Reformers and law professors often assume that laws published in the state capital automatically go into effect in all the county court houses in the state. Experienced lawyers know better.<sup>63</sup>

#### Empirical Findings regarding Dollar Value of Longer or "Better" Warranties

##### 10. Longer or "Better" Consumer Product Warranties May Cost Consumers More Than They Are Worth

An interesting finding of the Moyer survey of Ontario consumers revealed that while consumers wanted better warranties and guarantees, most said that they would not be prepared to pay very much more to get them. Indeed, fewer than one-half would even pay 1 per cent more for this additional coverage.<sup>64</sup> What the consumers were saying, of course, is intuitively obvious: warranties cost money. What is not at all obvious, however, is the suggestion that warranties in fact cost more money than they are worth.

This was one of the most interesting and indeed one of the most important findings of the MIT study. The MIT research group discovered that the cost of "longer" warranties may in fact be higher than the cost of the actual repairs themselves.

For all consumers, the prices of (longer) extended warranties and appliances do not appear to match the economic value of the protection offered....The question raised by the economic mismatch of long term warranty price and cost is whether public policy-makers should encourage warrantors to lengthen the duration of warranties, especially for products for which the design and manufacture technologies are reasonably mature and stable. Obviously, longer manufacturer guarantees would provide incentives for higher product reliability, but it does not appear that the consumer will benefit economically from mandated longer warranties.<sup>65</sup>

The MIT study found that current product pricing practices, especially those involving distributor or dealer mark-ups, may actually mean that on average "the consumer might be better off economically with a more limited warranty, paying the service agency directly for all repairs beyond that point."<sup>66</sup> The study noted that the price that a consumer pays for an appliance contains an implicit component for the warranty protection provided. Lacking access to detailed company records, the MIT research group found that it was not possible to determine this implicit price directly. By using a statistical technique called hedonic price analysis, however, the study group was able to estimate

with considerable accuracy the cost to consumers of warranty protection.<sup>67</sup> The hedonic price analysis confirmed the basic conclusion that average implicit warranty prices are very high, in actual fact higher than would be the per repair costs without such warranties.

The statistical evidence is strongest for refrigerators and ranges whose estimated implicit warranty prices exceeded even the prices of comparable service contracts. Ten year warranty coverage for refrigerator compressors was estimated to be roughly twice the expected cost of replacing a worn out compressor with a new one.<sup>68</sup>

The MIT study found that for 1975 model-year cooking ranges and clothes washers, one-year parts and labour warranties had estimated average prices of \$68 and \$48 respectively. Using reference data on appliance failure rates during warranty, the life cycle per actual repair cost computations amounted to only \$3.40 and \$6.58 respectively. "This very large difference between derived warranty prices and estimated warranty costs," concluded the MIT study, "suggests that there could be indeed a significant mark-up of direct warranty costs."<sup>69</sup>

This empirically documented revelation that longer warranties are not necessarily in the consumer's best interests and, further, that the consumer might be better off refusing a consumer product warranty altogether and instead pay for repairs as they arise, is bound to have serious implications for policymaking in this area in the future.

In addition to the MIT study discussed above, other recent American studies using a "modified hedonic price analysis" also confirmed that it would well be in the consumer's own interests to bear the warranty risks himself and to pay cash for repairs as they occur.<sup>70</sup> Some of the policymaking implications that arise from this finding, such as the "unbundling" of consumer product warranties, are considered in Chapter IV.

Notes

1. Ontario Law Reform Commission (1979a). Criticized in Belobaba (1980). Also see Ramsay (1980).
2. Ontario Law Reform Commission (1979b).
3. Belobaba (1983) passim.
4. Zins et al. (1979).
5. Ash (1980).
6. Kennedy, Pearce and Quelch (1979).
7. Id., at 91.
8. MIT (1978).
9. Id., at 1-1.
10. Arthur Young & Co. (1979a).
11. Arthur Young & Co. (1979b).
12. FTC Staff Report (1979).
13. Kennedy, Pearce and Quelch (1979) at 7.
14. Day (1979b).
15. Moyer (1978).
16. Masse and Marois (1978).
17. Kennedy, Pearce and Quelch (1979) at 9.
18. Id., at 7.
19. Id., at 10.
20. Id., at 18-21.
21. Arthur Young & Co. (1979a).
22. Kennedy, Pearce and Quelch (1979) at 10 (emphasis added).
23. Id., at 36-37.
24. Id., at 78-79 (emphasis and numbering added).

25. MIT (1978) at 1-11 to 1-12.
26. Kennedy, Pearce and Quelch (1979) at 36.
27. Id., at 77 and 44.
28. See infra, Chapter IV.A.7.
29. Kennedy, Pearce and Quelch (1979) at 69.
30. Id.
31. Id., at 69-70. And see research proposals, infra, Chapter IV.B.1.
32. Kennedy, Pearce and Quelch (1979) at 70-71.
33. Id., at 71.
34. Id., at 72.
35. Id.
36. Id., at 18-19 and 75.
37. Claxton and Ritchie (1979).
38. Wisdom (1979).
39. Supra, note 58, Chapter I and accompanying text.
40. 15 U.S.C., s. 2302(a).
41. 16 C.F.R., s. 701.3(a)(9).
42. Wisdom (1979) at 1136.
43. S.S. 1976-77, c. 15, s. 17(2).
44. FTC Staff Report (1979).
45. See Anderson (1978); Brandt, Day and Deutscher (1975); Brandt and Day (1974); Cranston (1978b); Day (1979a); and Wisdom (1979).
46. Arthur Young & Co. (1979b).
47. Id.
48. FTC Staff Report (1979).
49. Wisdom (1979).

50. Id., at 1144-45. Also see Feldman (1980) at 157-58 and Davis (1977) and literature cited therein.
51. For example, Exhibits 1 to 5, supra, are all "Canadian" warranties although the majority are clearly designed and printed in the United States by the parent American company.
52. Kennedy, Pearce and Quelch (1979) at 59 (emphasis added).
53. Id., at 18.
54. Moyer (1978) at 6.
55. Masse and Marois (1978) at 170.
56. Id., at 51.
57. Dandy (1980).
58. Belobaba (1977) and (1979a).
59. Macaulay (1979) at 118.
60. Shaw (1978).
61. Id.
62. Macaulay (1979).
63. Id., at 143.
64. Moyer (1978) at 18.
65. MIT (1978) at 1-11.
66. Id., at 1-19.
67. For a detailed explanation of hedonic price analysis see MIT (1978) at 2-02 to 2-30.
68. MIT (1978) at 1-20.
69. Id., at 1-21.
70. Accord, Bryant and Gerner (1978).





## Chapter IV

### WHERE DO WE GO FROM HERE? AN AGENDA FOR ACTION

The ten findings listed in Chapter III raise serious questions about current approaches to consumer product warranty policymaking. Hitherto unquestioned attitudes and assumptions have to be re-examined. The data about the nature and extent of the consumer product warranty problem, about the nature of consumer decision-making behaviour, about the overall ineffectiveness of information disclosure regulation, about the disproportionately high costs of implicit warranties, about consumer legal knowledgeability and about the viability of publicity and media education techniques -- all of these points must give serious-minded Canadian policymakers pause.

These empirical findings do not say that there is no problem or that consumer product warranty law reform is unnecessary, or that improved disclosure or warranty readability is not attainable. Indeed, the empirical data confirm that there are significant problems but that these problems are fairly specific, that consumer product warranty law reform is still very much necessary but needs to be more sensitive to street-level reality, that better disclosure and improved warranty readability is still desirable but experimentation may be necessary in the design of the appropriate regulatory instrument. Given this state of affairs, where do we go from here? What should provincial policymakers be doing in the short term? In the long term? Each will be dealt with here in turn.

#### A. Immediate Action for Provincial Policymakers

##### 1. Enact Omnibus Consumer Product Warranty Legislation but Do So with More Care and Sophistication

The trend toward the enactment of omnibus CPW legislation should not necessarily be interrupted. There is considerable value in consolidating and clarifying consumer product warranty law under one general statute. If nothing else, the need for extensive doctrinal reform would itself justify the enactment. There are many anomalies and anachronisms in current consumer sales law that have to be redressed and clarified. These anomalies have been canvassed extensively in two recent reports of the Ontario Law Reform Commission:<sup>1</sup> they include problems involving the condition-warranty distinction, the admissibility of parol evidence, vertical and horizontal privity, and the appropriate range of individual consumer remedies.<sup>2</sup> If these doctrinal reforms are necessary (and virtually every commentator to date has agreed they are), then the appropriate vehicle for reform is legislative and not judicial. Although the common-law courts are beginning to move in more sensible doctrinal directions, they still cannot be counted on to

achieve the degree of uniformity or specificity that is necessary and that can only be attained through legislation.<sup>3</sup>

Of course, the evidence to date suggests that in the short run at least, the omnibus CPW enactment will provide consumers with more symbolism than substance. We know that even a properly drafted CPW law will have little if any impact on, nor will it be understood by, the average consumer. This being the case, one may reasonably question the need for enacting legislation simply to resolve academic-doctrinal problems. The point is surely a valid one. But the reason for encouraging the enactment of modern consumer legislation is primarily for long-term effect. The modernization of CPW doctrines will make for easier and ultimately more worthwhile consumer education programs, either via ad hoc publicity campaigns or via more systematic public and high school legal education programs. There is also the point made by Professor Stewart Macaulay that sterile consumer protection legislation can have a measurable although indirect market impact. Macaulay explains:

The failure of statutes which create individual rights to provide means for their vindication does not necessarily indicate that such laws are ineffective....The passage of a law may force a definition of means and ends. Moreover a particular law such as the Magnuson-Moss Warranty Act cannot be viewed in isolation. Magnuson-Moss is but one event in the entire consumer movement. All of the many consumer protection laws may only reflect a general dissatisfaction with the marketing of modern consumer goods and services, and this dissatisfaction itself may be what has prompted an ever increasing concern by manufacturers with improving quality and using public relations techniques to avoid complaints and minimize those that do occur. Of course, the process likely involves complicated interactions; dissatisfaction prompted the laws and they in turn helped focus the dissatisfaction and make it newsworthy; the scandals then may have made jurors more willing to find against manufacturers and administrators more willing to enforce regulations vigorously. Even laws which may appear to have but a limited impact may be part of a general vague threat -- if the dissatisfaction that prompted the law continues and the law is seen by those who can press for legislation as flawed, then new and more distasteful legislation may be forthcoming and such threats may affect behaviour....interviews with officials of the large American automobile manufacturers indicate that [the MMWA] did play some part in placing the issues of product and service quality on their agenda.<sup>4</sup>

Returning, then, to the omnibus CPW enactment, most of the necessary statutory design decisions have already been made. The

so-called "extended warranty" approach taken in both New Brunswick and Saskatchewan seems to make sense. Furthermore, the general consensus that pure economic loss questions should be part of this extended statutory-warranty approach, rather than a part of the much-criticized provincial strict liability tort reform initiatives, is also supportable.<sup>5</sup> The only real questions that remain are specific statutory wording problems. For example, how should the traditional "fitness for purpose" and "merchantability" warranties be modernized? Should the omnibus CPW enactment use the language of "consumer acceptability" or "reasonable durability" or both?

The argument has been made that the durability concept is not really new to merchantability at all, and only clarifies the merchantability concept.<sup>6</sup> On the other hand, we have noted how various business groups and also consumer groups have expressed concern and objection to the use of "durability" as part of a modern CPW enactment.<sup>7</sup> The Kennedy study also noted the various definitional problems regarding "consumer acceptability."<sup>8</sup> The study found that consumers tend not to use the word "durability" and are generally not very comfortable with it -- indeed the consumer focus group research indicated that no one really knew what it meant.<sup>9</sup> Furthermore, consumers were of the view that the phrase "reasonable length of time" was also not particularly desirable, even from the consumer viewpoint. The surveyed consumers were concerned that such language created undue uncertainty and ambiguity.<sup>10</sup>

A way out of the definitional quagmire may be that suggested by the Consumers' Association of Canada. They recommended that a more contemporary vocabulary be used in drafting the statutorily implied product quality warranty (i.e., "that goods be fully usable for their normal purposes for a reasonable length of time having regard to all the relevant circumstances such as price, usage, etc.").<sup>11</sup>

At the end of the day, the yardstick appears to be something like "reasonable value" or "reasonable quality." And, if neither of the two groups primarily served by the CPW enactment favours the open textured phrase "reasonable durability," it may be appropriate to jettison the concept outright.

Apart from this particular definitional debate, provincial policymakers may also want to reconsider the inclusion of a new implied spare parts and repair facilities warranty. On balance, the addition of this new warranty seems to be sensible, reflecting nothing more than a modern consumer understanding of the traditional "merchantability" protection.<sup>12</sup> To the extent that it clarifies and gives more precise expression to this notion, it should be welcomed and included in any omnibus CPW enactment. But the issue deserves careful consideration.

## 2. Deal with Manufacturers' Written or Express Warranties via a Carefully Designed Information Disclosure Requirement

Even though most of the empirical research to date indicates

that disclosure programs have been largely ineffective in terms of achieving their objectives, there may still be some value in continuing on with information disclosure experimentation. Several critics of information disclosure concede that ultimately the value may well be in its long-term educational impact.<sup>13</sup> Indeed, long-term educational effects are cited as the single most important reason why information disclosure requirements should continue.<sup>14</sup> Professor Ross Cranston, for example, suggests that even given the negative data so far, disclosure regulation can perform a useful if supplementary role in consumer protection.<sup>15</sup> Its continued use together with rising levels of consumer education will render it more worthwhile with time. Cranston believes that it would be misguided to adopt the attitude that simply because consumers at present do not use the information, there is therefore no need for it.<sup>16</sup> The Whitford study also concluded that even though the critics of disclosure regulation are correct when they argue that the regulation has had minimal empirical impact, if disclosure regulation were abandoned as a technique of consumer protection a great deal would be lost.<sup>17</sup> The case has yet to be made, said Whitford, that disclosure regulation can have no significant impact.<sup>18</sup> The more important question today it seems is not whether, but how.

Whitford considered the advantages of both pre-contractual disclosure regulation and post-contractual disclosure regulation (such as legislative requirements regarding claims, complaints, repair procedures, remedies, etc.) and concluded that compulsory post-contractual disclosure was by far the more attractive type of regulation.<sup>19</sup> Post-contractual disclosure would be more likely to cause behavioural changes in consumers than conventional pre-contractual disclosure. Because most pre-contractual disclosure is formulated on the belief that consumers should use the information in making purchase decisions, it has in fact little persuasive impact, since it doesn't come to the consumer's attention until long after the consumer has made the very purchase decision it was supposed to affect.<sup>20</sup> Post-contractual disclosure, however, has greater potential for actually affecting consumer decisions and for doing so at the critical moment. The Whitford study concluded that greater experimentation in post-contractual information disclosure was needed.<sup>21</sup>

This endorsement of the long-term educational rationale and also of the post-contractual disclosure technique is also evident in the Kennedy study. Professors Kennedy, Pearce and Quelch said this:

On the whole our research indicates that consumers do want access to warranty information pre-sale. However, there was little support for imposing such information on the consumer as opposed to simply making it available for those who were interested....Consumers process information sequentially on an as-needed basis. Requiring disclosure of information at a time that the consumer does not believe it relevant may therefore not only be ineffective, but even dysfunctional if more

appropriate times are accordingly missed. Therefore, the choice of when to require disclosure is very much inter-related with what information will be required, and when the consumer wants that information....A combination of availability of detailed information for those interested with disclosure of general information to all pre-sale is likely preferable to required disclosure pre-sale of details to all....In general, consumers currently want information available when product performance problems arise -- that is, post-sale. This argues for at minimum, disclosure of relevant information in the literature accompanying the product.

The most difficult issue...is the question of disclosure about what. Most everyone we talked with agreed that consumers have a right to such basic information as the warrantor's name and address, how to process a warranty claim, and who makes decisions about allocation of economic loss. Again we point to the Saskatchewan Act, section 17(2), with the exception of (f), as an example of such an approach. Beyond that, there is divided opinion. It is important to note, however, that such information should be available even if no express warranty is offered. Therefore, requiring it to be included in the express warranty is not necessarily the best approach in those situations of "marginal" sellers running on the edge of the law, because the presence of such information would tend to lull consumers into a false sense of security.<sup>22</sup>

The Kennedy study then concluded as follows:

In general, we think the evidence supports a limited informational disclosure approach pre-sale and a more extensive disclosure post-sale.<sup>23</sup>

The key to meaningful information disclosure regulation in the future will be ongoing experimentation and continuing evaluation: first, experimentation with the suggested use of post-contractual disclosure regulation (as opposed to the more conventional pre-contractual disclosure technique) and, then, continuing and systematic empirical study of the impact on consumer decision-making and complaint-making behaviour. A point made by Professor Anderson bears repeating:

Unless information programmes incorporate sound conceptual and empirical analysis of consumer behaviour, costs are likely to exceed their benefits and policy officials will continue to be subject to criticisms of sponsoring an abundance of largely ineffective information disclosure regulations.<sup>24</sup>

### 3. Provide Consumers with Stronger and More Meaningful Remedies

The point has been made time and again in the literature that without effective consumer remedies, consumer protection laws are virtually meaningless.<sup>25</sup> For a statutory right to be meaningful, there has to be a correlative statutory remedy. If automobile manufacturers or warrantors, for example, do not perform as promised, the extensive range of statutory rights provided by recent provincial CPW enactments or by the MMWA come to naught unless there is an equally effective range of consumer remedies. Unfortunately, policymakers are quickly discovering that the private remedy technique is not resolving the problem of consumer access or consumer complaint resolution. If statutory rights are to be made meaningful, then more effective consumer remedies are necessary. These remedies may have to go beyond the traditional, private-vindication, court-oriented model that has been used to date.<sup>26</sup>

In an extensive study of American automobile warranty problems, for example, Professor Whitford found that it was fruitless to rely on the courts to police warranty disputes.<sup>27</sup> In his view the most effective way to influence automobile warranty dispute settlement practices was to directly regulate the manufacturers' own rules and practices for administering the warranty. Whitford concedes that this proposal raises serious questions about governmental intervention in an area of warranty practice that has hitherto been left to the warrantor on the basis of expertise and self-efficiency. But if meaningful reform is to be achieved, then more drastic remedies may be necessary.

Perhaps the most radical proposal in this area is that of Professor Terry Ison.<sup>28</sup> Ison's point is that we need a legislative structure that will create a systematic and broad-scale pressure to fulfill warranty obligations. Providing more individual remedies to allow the rare privately initiated action by the more aggressive consumer is not the answer, says Ison. Nor should we be content with perpetuating the institutional and financial disincentives of small claims court reforms. A major difficulty with the recent provincial CPW initiatives, says Ison, is that they rely far too much upon case-by-case adjudication. "The need," he says, "is for a remedy more clearly available in precisely defined circumstances so that the rights and obligations of all the parties can be readily understood."<sup>29</sup>

Ison's proposal amounts to this: where a consumer notifies a manufacturer or a retailer of a defect falling within a warranty, he or she should be able to rescind the contract where the product cannot be repaired or replaced, or a 14-day period has passed without the warrantor's reasonable cooperation. Rescission here would mean the return of all monies paid in exchange for the consumer's return of the product. The idea, simply put, is to give the manufacturer a reasonable opportunity to repair the defect. But where the manufacturer cannot or will not, then a complete money-back guarantee is substituted and the consumer can get out of the deal. This, says Ison, would give consumers enough leverage to ensure warranty performance.<sup>30</sup> The most important

advantage here is the return of the full price paid. There is thus no need to worry about any measurement problem with respect to damages, etc. Greater certainty, simplicity and economy in terms of an action for debt rather than an action for damages and, more importantly, greater leverage against the manufacturer regarding warranty compliance would result. This structure, says Ison, would create the necessary legal pressure to fulfill warranty obligations.<sup>31</sup> Furthermore, argues Ison, the concept of damages which is central to most of the recent omnibus initiatives is not really understood by the public at large. Most consumers and retailers think in terms of "Can I get my money back?" and not in terms of recovering damages.<sup>32</sup> The Ison proposal, although somewhat radical when compared to conventional thinking, would certainly give meaning to the notion of private consumer remedy. It deserves further study.

Provincial policymakers should also provide for government-initiated "substituted action" on behalf of individual consumers or consumer classes where statutory warranty rights are being violated and private vindication is not likely. Substitute action provisions are, of course, part of some provincial trade practices enactments.<sup>33</sup> They should also be a part of any modern CPW enactment.<sup>34</sup>

If the recommendations of Professors Whitford or Ison are thought to be too drastic and conventional private remedy approaches are to be preferred, then, at the very least, policymakers ought to take more seriously the need to develop innovative and more responsive dispute resolution mechanisms. This point is developed below.

#### 4. Develop Innovative and More Responsive Dispute Resolution Mechanisms but Do So on an Experimental Problem-Specific Basis

The Kennedy study found that "simplicity and economy in redress mechanisms was desired by [consumer] focus group participants."<sup>35</sup> The basic arguments favouring speedier, less costly and generally more accessible dispute resolution mechanisms have been canvassed extensively in the literature.<sup>36</sup> In fact, the nature and extent of various proposed alternatives to achieve these objectives has generated more consumer literature than any other single topic. Most of the criticism to date has been directed at small claims courts.

Some writers, such as Professor Terry Ison, have argued for a radical restructuring of the small claims court system.<sup>37</sup> The adversary system, the rules of evidence, indeed the very concept of a trial -- all of this would give way, in Ison's plan, to more innovative dispute resolution mechanisms such as "trial by telephone" and "justice on wheels." The basic thrust of Ison's proposal is in the direction of non-curial, community-based, informal dispute settlement centres. Other studies of small claims courts have been more sympathetic, arguing for major reform but not for major restructuring. The Sigurdson study and the recent British Columbia Project are examples of the latter.<sup>38</sup>



Another approach being proposed is not to reform the existing small claims court system but rather to encourage greater industry involvement in dispute resolution. Under the MMWA, for example, provision has been made for the establishment of informal dispute settlement procedures (IDSPs).<sup>39</sup> IDSPs have to satisfy minimum requirements prescribed by the FTC in addition to certain statutory standards.<sup>40</sup> Once an IDSP has been approved by the FTC, it must then be used by consumer disputants before any court action invoking the MMWA is taken. Decisions handed down by an IDSP are not binding. Either party can still pursue judicial remedies. To date, however, only three IDSP plans have been submitted to the FTC for approval: one by a trade association, one by a profit-making dispute resolution corporation and one by the Council of Better Business Bureaux.<sup>41</sup> All three have received informal assurance from the FTC that their plans conform to the requirements, and all are now seeking corporate subscribers. No individual warrantor, however, has yet moved to establish an IDSP. The MIT study explains why:

IDSPs impose expensive and time consuming record keeping and audits on their sponsors. Also, some companies may feel that the consumers would interpret the establishment of an IDSP as an adversary or at least a defensive action. A firm would much rather be regarded as a company supplying good warranty service cooperating with consumers and having no dispute to settle. Because no warrantor is required to establish an IDSP, the extent to which business firms formulate and implement these procedures or subscribe to plans drawn up by independent agencies will depend on how the procedures compare with alternative solutions in terms of cost effectiveness.<sup>42</sup>

Although American businesses have thus far shown little interest in the MMWA-endorsed IDSPs, there is still some potential for their use in the future and, if they are not established voluntarily, there are indications that Congress will be approached by the FTC to impose mandatory informal dispute settlement procedures, particularly in the area of automobile warranty disputes.<sup>43</sup>

A third general area deserving further research is dispute resolution by third-party arbitration. The Kennedy study, for example, concluded as follows:

The right to third-party dispute arbitration might be considered a minimum right. This would be an interim step between unilateral judgment by the warrantor, and going to the court system. For example, this might require the warrantor to participate in, if not establish, a company-independent dispute handling group for all economic loss claims above a stipulated threshold dollar amount (or proportion of purchase price). This mechanism should only be available to the consumer if he had made a previous effort to resolve the problem

directly with the responsible party and the judgment of this mechanism should be appealable to the courts by the consumer or by the business organization involved.<sup>44</sup>

There is, of course, an extensive literature on consumer arbitration and consumer mediation as techniques for the resolution of consumer warranty disputes.<sup>45</sup> Some attempts (such as the Major Appliance Consumer Action Panel<sup>46</sup>) have worked; others have not. Much depends on the particular product industry, the nature of the warranty and servicing system, and the real or perceived extent of the consumer product warranty problem.<sup>47</sup>

Clearly, the provincial policymakers today should not turn a blind eye to the arguments and commentaries of those advocating more innovative and more responsive dispute resolution mechanisms. But at the same time, it would be irresponsible law reform to plunge into a radical restructuring without first testing the nature and the dimension of the consumer product warranty problem in a particular area and discerning the necessity or desirability for substantive reform.

In an age where there is still a considerable absence of empirical data with respect to the overall effectiveness of academically plausible reform proposals, the wise policymaker should confine his or her dispute resolution initiatives to two concerns: first, to encourage the development of informal dispute resolution machinery by various product or industry groups acting voluntarily and, second, to continue to improve and modernize and generally make more accessible the small claims court system. Apart from these initiatives, there appears to be to date no good reason to expend limited resources trying to design new, costly and perhaps ultimately unworkable "utopian" dispute resolution mechanisms.

When the necessary empirical research has been done, it may be that our intuitive bias towards a more informalized and decentralized "neighbourhood" consumer dispute resolution mechanism (to take but one example from the recent literature) will turn out in actual fact to be fundamentally flawed. In fact, in a recent address at Osgoode Hall Law School, Professor Stewart Macaulay of Wisconsin suggested that informal, non-judicial neighbourhood dispute resolution centres are simply not working. Empirical research is showing that people, by and large, prefer the formality and the confidentiality of a small claims court system.<sup>48</sup> The future, then, for more accessible and more effective consumer dispute resolution mechanisms may well be in the reform of existing structures: the small claims courts, the voluntarily established industry panels, the increasingly effective mediation role of the Better Business Bureau,<sup>49</sup> or even in the more modest suggestion of Best and Andreasen<sup>50</sup> that retailers be required to disclose their complaint-handling procedure and to keep a simple record of complaints received as well as their resolution -- a record that could, in the case of a small store, be contained in a single notebook, remaining on the counter and readily available for public inspection. These and other initiatives are

more likely to accord with the reality of consumer complaint behaviour.<sup>51</sup> The key to attaining even a limited success in this area is experimentation and ongoing evaluation.

5. Encourage Consumer Product Industry Groups to Standardize Voluntarily Their Consumer Product Warranty Forms

The point has already been made that modern consumer product warranties are confusing if not completely incomprehensible to the average consumer. Although some headway is being made in this area,<sup>52</sup> the average consumer product warranty document still suffers from excessive legalese and boilerplate printing.<sup>53</sup> If consumer product warranties are ever to become the information vehicles that they purport to be, major re-design and re-drafting of the warranty form is necessary. Apart from re-drafting for readability, it would also be worthwhile to re-design for uniformity. Various trade associations or retailer or manufacturer industry groups should be encouraged to provide not only more readable but also more standardized warranty documents.

The Kennedy study itemized a short list of some of the initiatives that could be undertaken voluntarily by business to help reduce the "expectations-performance gap." One of the voluntary initiatives suggested was "more attention, clarification and communication of what a reasonable consumer can and should expect for his or her money in terms of product performance and post-sale obligations of the seller."<sup>54</sup> Put simply, a more readable and meaningful consumer product warranty document.

Several well-known manufacturers have already taken this initiative. Inglis, for example, has attempted to design a plain language warranty document (recall Exhibit 12). Various insurance companies have also begun to advertise the readability of their insurance policies ("You don't have to be a lawyer to understand our Insurance Policy").<sup>55</sup> Increasingly, manufacturers and retailers are beginning to recognize the marketing advantages that arise from having a clearer and more readable consumer warranty or other contractual document. Provincial policymakers should continue to encourage these various private sector initiatives and should also start taking more of a lead in arranging industry group meetings where problems of warranty readability or design can be addressed and remedied.

6. Consider Government Standard Form of Warranty Regulation but Only Where Demonstrably Necessary

A government-mandated standard form of warranty program may prove necessary if voluntary business initiatives are deemed inadequate. None of the recent provincial or American legislative enactments to date has attempted such regulation of actual warranty content. Information disclosure has been required, but beyond that no governmental standardization or mandatory use of certain standard warranty forms has been imposed.

In Europe, however, such governmental intervention is not unusual. Various European legislatures have, for example, insisted that warranty documents be precisely designed according to governmental prescriptions.<sup>56</sup> Some Canadian commentators have urged a similar intervention in the area of car rental agreements.<sup>57</sup> The question of government-mandated consumer product warranty forms should not be addressed, however, until voluntary schemes have been tested. Governmental involvement in the standardization of consumer product warranties should be seen as a last resort when moral suasion and other voluntary initiatives have failed.

On the other hand, a limited degree of governmental intervention in this area can be justified even today. Consumer product warranties should contain a "legal rights statement" that would clearly communicate to the consumer not only the express but also the statutorily implied warranty rights. A government-mandated restatement of the various implied warranty rights under provincial CPW legislation on the face of the warranty would be more meaningful to the consumer than the MMWA-prescribed "You may have other rights..." statement.<sup>58</sup>

#### 7. Examine and Assess the Structure and Operation of Modern Consumer Product Warranty Systems

A recent American study concluded that "much of the consumer problem with warranty services has been attributable not to sellers' wilful intent to evade obligations but to their inability to meet them,"<sup>59</sup> and further that this inability to provide reasonable warranty service was influenced by two important factors: the degree of warrantor control over the warranty service and the availability of the necessary resources.<sup>60</sup> The structural obstacles to improved warranty service are considerable. There are wide variations in the degree of control that a warrantor may exercise over the provision of warranty service and in the way that the service is provided. From the consumer's point of view, of course, the ideal situation is one where the warrantor has complete control over the warranty service operation. Many warrantors, however, are unable to provide direct supervision or direct repair facility programs and are thus faced with the problem of having to rely on others less subject to their control for the provision of service — for example, on the retailer who sold the merchandise or an independent organization specializing in the provision of warranty service. The nature of the relationship between the warrantor and the consumer (i.e., whether it is a three-party or a two-party relationship) is important and has substantial consequences for the quality of service being performed.

Another factor that determines the ability of the warrantor to affect the quality of warranty service received by the consumer is the method by which the servicing organization is compensated. Under one method, known as "in-boarding," the warranty servicing agency bills the warrantor at an agreed-upon rate for the services performed under the warranty. Where, however, an "out-boarding" approach to warranty

service is used, the dealer that both sells and services the product is paid for the warranty service in advance by receiving a discount on the price of the product. "Out-boarding" may thus have an unfavourable impact on consumers in that in the course of competing to make a sale, the dealer may in fact bargain away the amount reserved for warranty work, thus making him reluctant to perform the needed work when the occasion arises.

Finally, warranty service may suffer because the means by which the service should be performed are lacking. For example, either through misjudgement or as a matter of deliberate policy, a warrantor may maintain an inadequate stock of service and repair parts. Or he may lack sufficient skilled personnel to service the warranted items. Both problems, as identified by the Kennedy study, were discussed in Chapter III.B.3 of this paper.

The MIT study, in its analysis of warranty system failure, asked whether or not it would be possible to remove the three-party relationship that exists in most appliance warranty claims. The MIT study found that three-party arrangements generally provide more opportunity for fraud and for abuse of the warranty system to the disadvantage of the consumer. The MIT study noted, for example, the following:

An audit of warranty payments made by a large appliance manufacturer to authorized repair agencies disclosed that the corporation had paid out \$700 000 more than it should have in a period of two and a half years. The causes of warranty abuse are many and often difficult to discover. Because most warranty arrangements involve three parties -- manufacturer, consumer and repair agency -- an opportunity is created for collusion between two of the parties to the detriment of the third, usually the manufacturer. For example, a repair man could bill a manufacturer for fixing an out of warranty appliance by reporting the purchase date as later than it actually occurred. In submitting a claim the service agency may simply exaggerate the extent of the work performed.<sup>61</sup>

The MIT study goes on to note that the argument favouring a two-party arrangement is fairly persuasive: the potential for abuse and fraud would be lower, the payouts would be less and the consumer would enjoy lower appliance prices through the elimination of such abuses and consequential markups.

However, if warranty risks are assumed by retailers alone, there will also be disadvantages to the consumer. The MIT study considered the problems inherent in two-party warranty arrangements:

If warranty risks are assumed by retailers...there are

disadvantages to the consumer. Some retailers may try to avoid even legitimate warranty costs by withholding or delaying service and there is the problem of transferring warranty responsibility if a new appliance owner moves to another location. Further, the failure information which is so valuable to the manufacturer's product design and production functions would be very difficult to obtain. These disadvantages are not present if the manufacturer is also the service agent. For major firms that have a sufficiently large market penetration to make a national service system economically feasible, the advantages of cost and quality control and accuracy of feedback are attractive features of a two party warranty arrangement.<sup>62</sup>

However, except in the case of those major firms that have the necessary market penetration to make a national service system economically feasible, the continuation of three-party warranty systems was thought unavoidable. The MIT study concluded that susceptibility to fraud and abuse in a three-party arrangement remains a significant problem. But no generalized or cost-effective solution appears to be in sight. Several partial answers exist which do not require major changes: one is warrantor surveillance of warranty claims, service agency performance and customer rights; another is to shorten the length of the warranty period. This would, of course, limit the warrantor's exposure to fraud or abuse.<sup>63</sup>

Other problems in modern warranty systems include unnecessary service calls,<sup>64</sup> the need for warranty servicing legislation requiring manufacturers to pay fair compensation to independent warranty service agencies<sup>65</sup> and proposals for the training of more skilled service personnel.<sup>66</sup> All of these points have attracted some comment in the literature and will continue to be discussed and debated by Canadian policymakers in the future as well. Further study, though, is necessary.

#### 8. Consider Seriously the Proposal for "Unbundling" Consumer Product Warranties

In its survey of Canadian consumers, the Kennedy study discovered that "there was some support for the offering of alternative warranties at different prices."<sup>67</sup> This intuitive reaction of the surveyed consumers accords well with the empirical research conducted by the MIT research group with respect to the disproportionately high costs of most modern consumer product warranties. This paper discussed the hedonic price analysis employed and the empirical findings of the MIT study in Chapter III.B.10. Not surprisingly, the MIT study recommended that steps be taken to "unbundle" modern consumer product warranties. The consumer would still be protected by statutorily implied warranties but would not have to pay the inflated implicit prices of the manufacturer's express warranty. As the MIT study explained:

Ideally a warranty would be unbundled from the appliance purchase and made available to consumers as an option. One would be able to buy an appliance with no warranty protection at all. This would not leave the consumer without any recourse in the event of product failure, since implied warranties which are mandatory in all 50 states would still be in effect. Manufacturers could offer either a standard warranty or a variety of warranty packages with varying degrees of financial protection for product failure.<sup>68</sup>

The MIT research group went on to explain how an unbundled warranty system would work:

The consumer purchases a product at a price which does not include a warranty cost component. He may then purchase separately whatever product failure warranty is available. Thus a consumer may buy no protection at all, a parts only warranty, a parts and labour warranty, a parts and labour warranty that covers consequential damages for different lengths of time and so forth depending on what is offered. Because they would be specifically priced, unbundled warranties would closer resemble service contracts but would be offered by manufacturers or manufacture merchandisers.<sup>69</sup>

According to the MIT study, "unbundled" warranties would result in "fairer allocation of product failure costs among consumers."<sup>70</sup>

As warranties increase in length and coverage, the greater is the likelihood that a product failure is related to usage and abuse, rather than defective manufacture. The household whose usage rates and care for equipment yield lower than average failure rates subsidizes the household where higher than average use or abuse generates more frequent failures. Unbundled warranties would allow consumers to assess their individual probabilities of failure and to then purchase those portions of warranty service most appropriate for their expectation of warranty use.<sup>71</sup>

The unbundling of consumer product warranties, concluded the MIT study, would persuade policymakers that longer or "better" consumer product warranties may well cost consumers more than they are worth.

It is doubtful that extending appliance warranties much beyond current practice is in the consumer's best economic interest. After the initial rash of product failures that can be attributed to manufacturer-based faults, failures increasingly are the result of con-

sumer use and abuse. Not only is it questionable whether protection from such failure should be mandated because of the inequity this imposes on the careful or light user of the product, but current mark-up and pricing policy also impose a penalty on all consumers: they pay more than necessary for the value received. The diseconomies to the consumer of longer, broader warranties are a strong incentive to keep warranties to a reasonable length and scope.<sup>72</sup>

The implications and conclusions of the MIT hedonic implicit price analysis technique are one of the most interesting aspects of the MIT consumer product warranty study. It should be required reading by all Canadian policymakers as they begin to discuss the appropriate or "reasonable" length and scope of modern consumer warranty protection.

9. Make a Greater Commitment to Long-Term Consumer Education via Plain Language Legislation and High School Level Law Teaching

The empirical reality of consumer legal knowledgeability (as was seen in Chapter III.B.8) is most discouraging: the average Canadian consumer has little if any understanding of his or her legal rights. Also, the prospects of effective short-term legal education via media or other advertising are dismal to say the least. The provincial policymaker has to recognize the futility of short-term initiatives and has to make a clear commitment to longer-range consumer education. In fact, this commitment would find ready support with most consumers -- the Moyer study found that Ontario consumers believe the most effective remedy in this area is public education (see Exhibit 51).

Long-term consumer education would require, first, the adoption of a plain language priority and, second, the commitment of more provincial resources to high school level law teaching. The "plain language" priority is more than simply recognition of the need for a plain language law. The enactment of legislation requiring all consumer contracts and, in particular, all consumer product warranties to be drafted in readily understandable language is a popular state-level law reform in the United States today.<sup>73</sup> It could be easily implemented at the provincial level as well. But the so-called plain language law is only a small part of the plain language commitment noted above. A more important aspect of this commitment is in the governmental recognition that plain language housecleaning must begin at home.

All provincial (and ideally all federal) consumer protection statutes have to be rewritten in readily understandable plain language terms. Before asking the business community to comply by way of easier readability, it is certainly appropriate for government to take the lead and clarify and simplify its own legislation.<sup>74</sup> Once this legislation has been rewritten so that the average Canadian can easily understand its import, all of the relevant consumer protection statutes should then



EXHIBIT 51

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Effectiveness of Consumer Remedies (Question 11)

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<u>Kind of remedy</u>	Effectiveness rating
	(5 = excellent) (3 = average) (1 = poor)
Teaching consumer education in the schools	4.1
Getting the media to publicize the issue	3.9
More consultation between consumer groups and government	3.6
Getting consumer representatives on supervisory agencies such as marketing boards	3.6
Refusing to deal with specific companies or not buy their product	3.5
Getting consumer representatives on company boards of directors	3.4
Writing or phoning elected representatives	3.2
Taking manufacturers, dealers etc., to court	2.8
Sit-ins or other kinds of public demonstrations	2.1

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Source: Moyer (1978) at 28 (Table 19).

be consolidated, either physically into one comprehensive code or at least sequentially, for a more integrated presentation of the various relevant legislative enactments. For the provincial policymaker, then, there would be three steps: first, a serious-minded re-drafting of all provincial consumer legislation for easier readability; then a codification or at least a consolidation of all consumer protection laws under a more accessible legislative umbrella; and finally the enactment of a plain language law requiring private sector compliance in the area of consumer contracts and, in particular, consumer product warranties.

Paralleling these three suggested steps would be an even greater commitment to the establishment or improvement of high school level law teaching. This latter point deserves strong emphasis. The past several years have seen a surprisingly uniform trend across North America to greater legal education initiatives in the high schools. The rationale is simple enough. The best way to sensitize and educate future consumers about their various legal rights and remedies is to lay a solid foundation at a time when most of them are completing their formal education (i.e., in grades 11, 12 and 13).

In several Canadian provinces, community legal education groups have already started to interact with interested high school teachers as well as Ministry officials to develop sophisticated teaching programs for those teachers who want to establish or improve their high school level law courses.<sup>75</sup> All provincial policymakers seriously interested in consumer education should become involved with these initiatives. The establishment or improvement of high school level law teaching will require a substantial investment of provincial monies. But as the Kennedy study observed, "[w]e believe any educational campaign must be extensive, long-lasting and thus, expensive."<sup>76</sup> Although the costs are great, the benefits are surely greater. Several empirical studies have already concluded (again not surprisingly) that consumer education in the long run can lead to significant changes in consumer behaviour.<sup>77</sup>

#### 10. Work toward Inter-provincial Uniformity in Consumer Product Warranty Regulation

To the extent that Canadians should try not only to maintain their political union but also to secure a greater economic union, the rationale for greater inter-provincial uniformity is obvious. Products and product warranties could flow across provincial lines without differential regulation and consequential inconsistency or confusion. Legislative uniformity, although not essential in this area, would clearly be desirable. The Kennedy study considered the problem of inter-provincial uniformity and also some of the proposed alternatives and concluded as follows:

Time and again...the business executives we interviewed strongly asserted that uniformity in warranty legislation was highly functional. The alternative was to see more "disclaimers" in express warranties along

the lines of "provincial law may differ...check with your local consumer affairs office." We believe as do executives and consumers that such a situation serves no one well. We see two possible approaches to obtaining greater uniformity of warranty law. The first option is joint draftmanship of critical sections (such as minimum rights) by representatives of the provinces ....[A] related but somewhat different approach involves development of a model statute. This approach has been used in the past, notably in the UCC and the printer's ink statute in the United States. Such a statute could be developed by a Task Force composed of provincial representatives and then offered to all jurisdictions as an appropriate rationalized solution to some aspects of the warranty problem.<sup>78</sup>

The values of inter-provincial uniformity have also been documented in recent law reform studies.<sup>79</sup> Once provincial policymakers have sorted out their priorities and strategies in this area, they would do well to consolidate their initiatives and work towards greater uniformity.

## B. Future Directions

### 1. Related Research Suggested by Kennedy, Pearce and Quelch

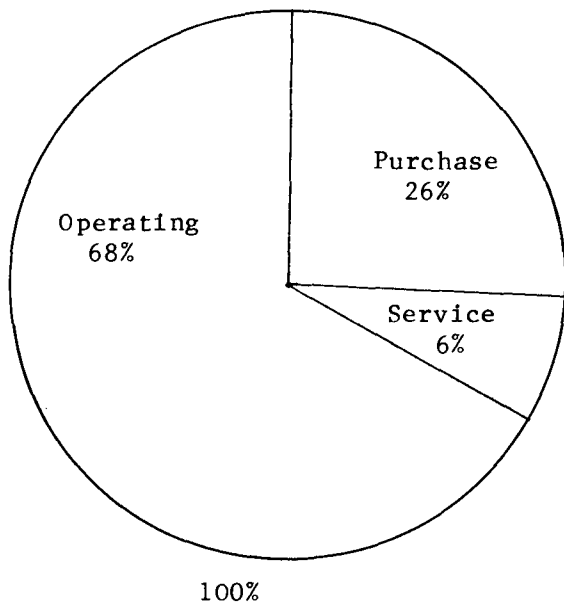
In addition to the research directions proposed above, several other items of related research were suggested in the Kennedy study. This study noted the following existing or potential problem areas: (1) lowered maintenance levels on the part of automobile owners, which may be leading to increased public safety risks; (2) the trend on the part of offshore suppliers to adopt policies resulting in the discontinuation of parts and supplies; and (3) the lack of sales data for electronic products other than TV for use in service system planning.<sup>80</sup> Each of these areas is commended to the attention of provincial policymakers for further and related immediate research.

### 2. Research regarding Life Cycle Costing

One of the most exciting developments in the consumer product warranty research field has been the development of life cycle cost information. Many consumers consider the purchase cost as the only relevant financial cost in making a product purchase decision. Yet, obviously, post-purchase energy costs, repair costs and, generally, operating and service costs are equally relevant factors that should be considered when the purchase decision is made. The Kennedy study discovered that "one reason why consumers do not take such costs into consideration prior to purchase is that they do not have easy access to information on total costs associated with owning and using products."<sup>81</sup> For most modern consumer products, the purchase price is often nothing more than a small proportion of the actual cost of the product as extended over its product life (see Exhibits 52 and 53). In the case of

Economic Life Costs of Two Products

Refrigerator

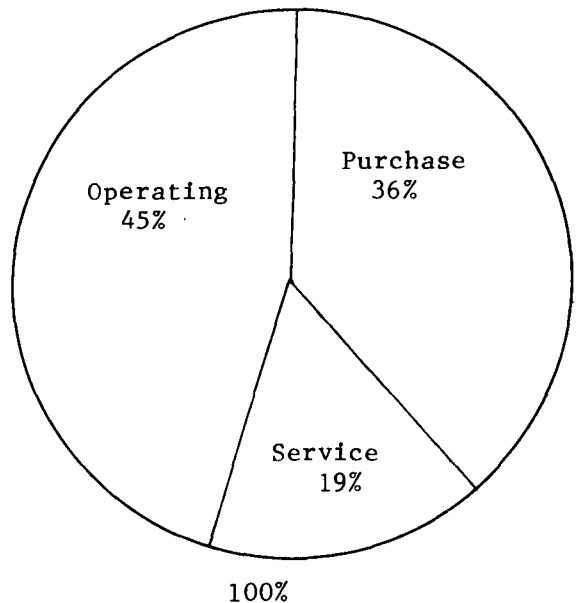


Explanatory data

Model year: 1972  
Economic life: 14 years

Simple cost:		
Acquisition	\$	275.00
Operating		750.00
Service		75.00
		<hr/>
	\$	1 100.00

Standard Sized Automobile



Explanatory data

Model year: 1972  
Economic life: 10 years

Simple cost:		
Acquisition	\$	4 900.00
Operating		6 050.00
Service		2 580.00
		<hr/>
	\$	13 530.00

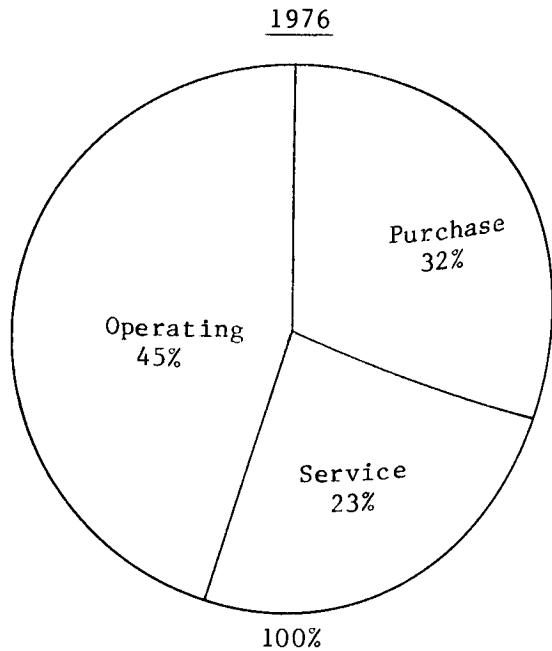
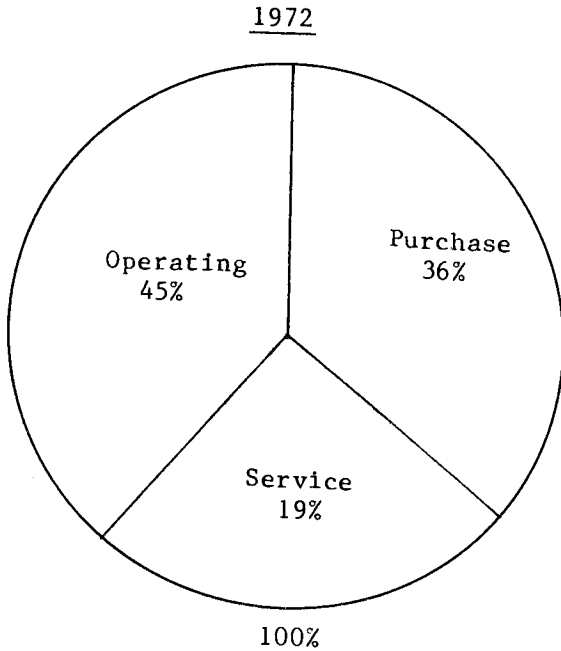
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Source: Kennedy, Pearce and Quelch (1979) (Exhibit 3-2).

EXHIBIT 53

Economic Life Costs  
of a Standard Sized Automobile

1972 vs. 1976



Explanatory data

Model year: 1972  
Economic life: 10 years

Simple cost:

Acquisition	\$ 4 900.00	
Operating	6 050.00	+14%
Service	2 580.00	+33%
		+60%
<hr/>		
	\$13 530.00	24%

Percentage change  
1972-1976

Explanatory data

Model year: 1976  
Economic life: 10 years

Simple cost:

Acquisition	\$ 5 625.00
Operating	8 100.00
Service	4 130.00
<hr/>	
	\$17 855.00

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 3-3).

a refrigerator or an automobile, for example, the purchase price is a mere 36 per cent of the product's overall life cycle costs (see Exhibits 52 and 53). If these overall life cycle costs could be identified, itemized and individually calibrated, then the quality of the consumer purchase decision would be improved immeasurably.

Research is now going on at MIT to see whether and to what extent individually calibrated life cycle costing information is a feasible informational development. The MIT study discussed throughout this report provides an exciting overview of the state of the art in life cycle costing research in the United States and concludes with the following assessment of its role and importance in the future:

As useful as the concept may be in consumer policy research, the really enormous potential for life cycle costing is in its extension to direct use by the individual consumer. If it were to become possible for each person to base his or her purchase and use decisions on an individualized expected life cycle cost, it would revolutionize the consumer decision process. The effect on the nature and prices of consumer products would be substantial.

If a life cycle cost information system can be devised and placed into general use, we foresee many major changes in the market for consumer durable products. In the first place, life cycle cost criteria place much greater emphasis on product performance -- reliability, efficiency and life -- and this will shift your attention away from the initial purchase price as the exclusive economic consideration....The availability of life cycle cost to consumers would be a powerful incentive to product manufacturers and merchandisers to modify their product design and marketing strategies to capitalize on the new criterion for product choice. One such strategy would be to differentiate products regionally according to climatic, energy price, or other key variables in life cycle cost. There is every reason to believe that the air conditioner for the small rural family in Maine should have little resemblance in price efficiency or even reliability to the air conditioner for the small urban family in Houston, Texas....Life cycle costing should reduce the need for legislated product requirements. Mandated changes in product design are an awkward way to accomplish public policy objectives....The product that is inefficient in energy consumption is not necessarily an unwise alternative in all situations. Let the individualized life cycle cost calculation help make the decisions. If the individual consumers acting in their economic self-interest buy energy-inefficient products, it is because

the combination of all costs, including energy price, is lower for their own circumstances than would be the case for more efficient models. In the long run, informed individual choice is likely to be a more conservative approach to changing consumer buyer practices and is less likely to inject new distortions into the market.<sup>82</sup>

The implications of life cycle informational labelling for consumer purchasing decisions and consumer behaviour generally in the future are immense. Current research will have to be continued with the encouragement of both private industry and government. Fortunately, in Canada, serious research has already begun in this area.<sup>83</sup> It should continue to receive both federal and provincial support.

### 3. Extended Service Contracts

In recent years, a new phenomenon has emerged in the consumer product warranty field -- the increasing use, especially in the durable consumer product area, of "extended service contracts." Most consumers are already familiar with Chrysler's, General Motors' or Ford's three-year or five-year "protection plans."<sup>84</sup> Although service contracts are similar to manufacturers' express warranties in that both are forms of insurance designed to average risks across all buyers, there is at least one fundamental difference between the two. Express warranties are an integral part of the product offer; service contracts, on the other hand, are a separate offer, indeed a separate insurance contract. Exhibits 54 and 55 provide examples of extended warranty plans for both appliances and automobiles.

Although the availability of service contracts is a relatively recent phenomenon, it is already attracting some degree of criticism and concern and will undoubtedly require serious research and study in the future. An important foundation for Canadian research in this area will be the work already done in the MIT study. This study considered the problems that are currently being associated with service contracts in the United States: they cost too much, there are problems of overlap and there are problems of service contractor bankruptcy and insolvency.<sup>85</sup>

The MIT study notes that consumers typically purchase service contracts in order to obtain financial protection against product failure beyond that provided by the warranty. Here again the implicit price of the extended service contract is vastly disproportionate to the actual repair costs that the consumer would have to pay during the period of the service contract. For example, the MIT study found that the five-year service contracts being sold for some colour television sets are in fact almost ten times higher than the present value of the actual repair costs that would have to be incurred.<sup>86</sup> This is one problem area: the inordinately high costs of extended service contracts. Another problem area is the overlap that could arise between the implied warranties, the

EXHIBIT 54

Rate Card for Eaton's Extended Warranty Plan

		Age of appliance by EWP annual rate			
		<u>EWP annual rate by age of appliance</u>			
	3-yr. discounted package (on 1-yr.-old unit)	1 yr. old	2 yrs. old	3 yrs. old	4 yrs. old
T.V. colour	177.95	59.95	65.95	71.95	79.95
T.V. B & W	95.95	31.95	35.95	38.95	42.95
Stereo	83.95	27.95	30.95	33.95	36.95
Auto washer	72.95	23.95	26.95	29.95	31.95
Auto dryer	49.95	16.95	18.95	20.95	22.95
Twin-tub or wringer washer	56.95	18.95	20.95	22.95	25.95
Dishwasher	83.95	27.95	30.95	33.94	36.95
Standard range	56.95	18.95	20.95	22.95	25.95
Self-cleaning range	79.95	26.95	29.95	31.95	35.95
Standard refrigerator	58.95	19.95	21.95	23.95	26.95
Side-by-side refrigerator	79.95	26.95	29.95	31.95	35.95
Freezer	56.95	18.95	20.95	22.95	25.95
Micro-wave oven	87.95	29.95	31.95	35.95	38.95

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 8-2).

Note: All prices subject to change without notice. All items out of full warranty may require inspection at customer's expense. Bonus: 10 per cent discount if you purchase EWP on more than one item or year.



Suggested Retail Prices for Automobile Manufacturer Service Contracts  
GM Continuous Protection Plan -- 1979 Charges<sup>a</sup>

Group Division	A	B	C		D		E
MSR price	\$151	\$181	\$211		\$241		\$271
Chevrolet	Chevette	Monza Nova	Camaro (except Z28) Berlinetta Malibu	Monte Carlo Bel Air Impala Caprice	Camaro Z28		Corvette
Pontiac	Acadian	Sunbird Phoenix	Firebird Esprit Formula Le Mans	Grand Prix Laurentian Catalina Parisienne	Trans Am		--
Oldsmobile	--	Omega	Cutlass	Delta 88	Ninety-Eight		Toronado
Buick	-	Skyhawk Skylark	Century Regal	Le Sabre	Electra		Riviera
Cadillac	--	--	--	--	--		All models
Trucks -- Pleasure only 2-wheel drive	--	Manufacturer's GVW <sup>b</sup> up to 5,500 lbs.	Manufacturer's GVW 5,501 to 7,800 lbs.	Blazer Jimmy	Manufacturer's GVW 7,801 to 10,000 lbs. El Camino	Caballero Suburban Sportvan Rally Wagon	--
MSR price			\$337		\$437		
Trucks -- Pleasure only 4-wheel drive	--	--	GVW 5,501 to 7,800 lbs.	Blazer Jimmy	GVW 7,801 to 10,000 lbs.	Suburban	--

Source: Kennedy, Pearce and Quelch (1979) (Exhibit 8-3)

<sup>a</sup>Coverage: 3 years or 60 000 kilometres, deductible: \$25 per occurrence.

<sup>b</sup>GVW = Gross vehicle weight.

Surcharges: \$25.00 for each of the following equipment: diesel engine, electronic fuel injection, trip computer.

manufacturers' express warranties and the protection accorded by the service contract itself. The MIT study does nothing more than simply identify this as an area for potential future study and research.<sup>87</sup>

The most important problem area, however, is contractor bankruptcy or insolvency. When a service contractor goes bankrupt, service contract owners (consumers) face the prospect of receiving less than they were entitled to and, more often than not, nothing at all. Bankruptcy proceedings, in the United States at least, treat consumers no differently than other creditors and because consumer claims are almost always unsecured, they stand last in the assets distribution list. In effect, consumer claims are often worthless.

In response to these three major problem areas, the MIT study recommended that: (1) extended service contracts should generally not be encouraged; (2) there should be full, clear and conspicuous disclosure of service contract terms and their interrelationship with express and implied warranties; and (3) to protect consumers against contractor bankruptcy, federal bankruptcy laws should be amended to give consumer claims priority over the claims of other creditors.<sup>88</sup> The MIT study preferred this latter approach over the insurance regulation or posting of bonds approach that some states are currently considering.<sup>89</sup>

These recommendations will not necessarily be the ones that accord with Canadian realities or with the Canadian sense of appropriate action (if indeed any is deemed desirable), but the MIT study and its recommendations will undoubtedly be of some use to policymakers as they begin to think about the future of extended service contracts.

#### 4. The Regulation of Consumer "Services" Generally

In the near future as well, more research ought to be directed towards the possibility of extending CPW legislation to include not only consumer goods but also consumer services. This point has already attracted a considerable literature in the United States.<sup>90</sup> Various commentators have argued that the reach of implied warranties should not be confined to purchasers of goods but should also be extended to consumers of services, and that the anachronistic distinction between the two should be legislatively eliminated. This proposed extension of CPW legislation to services could well be the next and logical step, but appropriate research would first have to be done.

Notes

1. Ontario Law Reform Commission (1979a) and (1979b).
2. Also see Belobaba (1983) at 14-17.
3. The institutional limitations of the common-law method, particularly in the area of consumer product warranties, is discussed at length in Belobaba (1980) at 442 et seq.
4. Macaulay (1979) at 64, n. 7.
5. See Ontario Law Reform Commission (1979b) at 79-85.
6. Ontario Law Reform Commission (1979a) at 215.
7. Noted above in Chapter I.C.2.
8. Kennedy, Pearce and Quelch (1979) at 115-16.
9. Id., at 119.
10. Id., at 23.
11. Consumers' Association of Canada (1973).
12. Accord, Ontario Law Reform Commission (1979a) at 215-16.
13. Star (1979) at 78. Also see Cranston (1978b) and the literature cited therein at 303-06.
14. Id.
15. Cranston (1978) at 305.
16. Id.
17. Whitford (1973).
18. Id.
19. Id.
20. Recall the findings discussed in Chapter III.B.4.
21. Whitford (1973).
22. Kennedy, Pearce and Quelch (1979) at 104-06.

23. Id., at 107.
24. Anderson (1978) at 68. And see generally FTC Information Task Force (1979).
25. Belobaba (1977) at 356-65 and the literature cited therein.
26. For an extensive bibliography see Swanson (1974) at 575, n. 2.
27. Whitford (1968).
28. Ison (1979).
29. Id., at 46.
30. Id.
31. Id.
32. Id., at 48. Also see Ison (1980) at 160-65.
33. Discussed in Belobaba (1977) at 370-72.
34. Accord, Kennedy, Pearce and Quelch (1979) at 116-17.
35. Id., at 22.
36. See, for example, Ontario Law Reform Commission (1972) at 106-23.
37. Ison (1980).
38. Sigurdson (1976) and British Columbia (1976).
39. Discussed in detail in MIT (1978) at 2-117 to 2-123.
40. 16 C.F.R. 703.
41. Described further in MIT (1978) at 1-107 to 1-109.
42. MIT (1978) at 1-109.
43. See Pertschuk (1978).
44. Kennedy, Pearce and Quelch (1979) at 116-17.
45. See Roine (1976), Belobaba (1977), Ontario Law Reform Commission (1972) and the literature cited therein.
46. Major Appliance Consumer Action Panel: a national organization established in 1970 to handle consumer complaints for its members in the home appliance industry. See MIT (1978) at 2-104 to 2-105.

47. Roine (1976).
48. Paper presented at Osgoode Hall Law School on March 16, 1981 (unpublished).
49. "Better Business Bureau May Judge Auto Repair Bills," Globe and Mail (July 3, 1979) at 4.
50. Best and Andreasen (1977).
51. For an economic analysis of consumer redress mechanisms, particularly the small claims court, see Shapiro (1980).
52. Recall Exhibits 4 and 5 and the Inglis Warranty (Exhibit 12).
53. Recall Exhibits 1, 2 and 3.
54. Kennedy, Pearce and Quelch (1979) at 99.
55. See, for example, the recent "plain language insurance policy" advertising of Royal Insurance, Aetna Insurance and other insurance companies in both the United States and Canada.
56. Alpa (1979).
57. See, for example, Hasson (1979).
58. Recall Exhibits 1 to 5. Accord, Kennedy, Pearce and Quelch (1979) at 59.
59. Feldman (1980) at 152.
60. Id.
61. MIT (1978) at 1-18.
62. Id., at 1-15 to 1-16.
63. Id., at 1-24 to 1-25.
64. Discussed in Chapter III.B.2 of this study.
65. Criticized in Day and Glassman (1979).
66. Kennedy, Pearce and Quelch (1979) at 69. Discussed above in Chapter III.B.3.
67. Id., at 22.
68. MIT (1978) at 1-22.

69. Id., at 1-49.
70. Id.
71. Id., at 1-51.
72. Id., at 1-64.
73. See Moukad (1980) and Siegel (1980).
74. Further developed in Belobaba (1978).
75. I am currently involved with Community Legal Education Ontario and with interested Ontario high school boards in an effort to improve both the quality and the effectiveness of high school level legal education.
76. Kennedy, Pearce and Quelch (1979) at 109.
77. Id., at 108-09.
78. Id., at 119-20.
79. See, for example, Ontario Law Reform Commission (1979b) at 125, and Shiroky and Trebilcock (1978).
80. Kennedy, Pearce and Quelch (1979) at 79.
81. Id., at 13.
82. MIT (1978) at 1-24 to 1-26.
83. See, for example, Anderson and Hutton (1980).
84. "Extended Car Warranties Gain Momentum," Financial Times (Feb. 11, 1980) at 3.
85. MIT (1978) at 1-27 to 1-34 and 1-87 to 1-105.
86. Id., at 1-27.
87. Id., at 1-28.
88. Id., at 1-29 to 1-35.
89. Id., at 1-33.
90. See Singal (1977) and the literature cited therein.



## Chapter V

### CONCLUSIONS

#### A. Specific

1. Consumer product warranties are not a high priority consumer protection problem in Canada today. The empirical documentation described in Chapter III.B.1 provides ample support for this conclusion. Recent consumer surveys have also found that most Canadian consumers, when questioned about marketplace trends, felt that "things are improving" and "will continue to improve."<sup>1</sup>

2. But there are a number of specific problems that deserve immediate governmental attention and possibly legislative intervention. These problems were itemized in detail in Chapter III.B.2.

3. Although Canadian consumers believe that product quality generally is deteriorating<sup>2</sup> (a finding that is admittedly hard to reconcile with the first conclusion noted above), there is thus far no demonstrable need for greater governmental involvement in the regulation of consumer product quality. The federal product safety legislation described in Belobaba is, of course, necessary and appropriate.<sup>3</sup> But, with respect to non-personal injury, "shoddy product only" problems, the need for governmental product quality regulation has not been demonstrated. Regulation in this area should be limited to the existing federal and provincial misleading advertising and unfair trade practices legislation.<sup>4</sup> Apart from this, any further governmental involvement in the setting of consumer product quality standards would be both costly and controversial. As the Kennedy study observed:

Stipulation of explicit standards for many products will be an administrative nightmare unless the standards are set exceedingly low or the penalties for non-observance are exceedingly high....Further, such an approach, especially if incomplete, may well lull the consumer into a false sense of security....Second-order effects may also occur. For example, technology may change at a rate greater than the relevant standards, resulting in situations where there are market rigidities which create economic waste....Finally, there are political and philosophical considerations. On the whole, product standard regulations may be argued to reduce consumer choice and to be directly in conflict with "free market" philosophy. Such regulations, in the absence of public safety considerations, are difficult to justify in our Canadian society unless (a) industry is obviously negligent and/or (b) industry does not respond to real changes in market require-



ments....We have had and will continue to have government stipulation of product performance standards. Experience has shown that it is an involved, politically difficult approach to improving the marketplace and in general is not an appropriate approach unless other public policy initiatives have been tried and found ineffective.<sup>5</sup>

4. There are, however, certain specific governmental initiatives, legislative and otherwise, primarily at the provincial level, that should be taken. These recommended initiatives were described and discussed in some detail in Chapter IV.A. Ten matters deserving immediate provincial attention were identified.

- (1) Enact omnibus CPW legislation but do so with more care and sophistication.
- (2) Deal with manufacturers' written or "express" warranties via a carefully designed information disclosure requirement.
- (3) Provide consumers with stronger and more meaningful remedies.
- (4) Develop more 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 proposals for "unbundling" consumer product warranties.
- (9) Make a greater commitment to long-term consumer education via plain language legislation and high school law teaching.
- (10) Work towards greater inter-provincial uniformity in consumer product warranty regulation.

5. In addition to the action suggested above, there is also need for longer-range research initiatives in at least four related areas. These were described in Chapter IV.B:

- (1) Research suggested by the Kennedy study with respect to the following existing or potential problem areas: (1) lowered maintenance levels on the part of automobile owners may be leading to increased public safety risks, (2) the trend on the part of offshore suppliers to discontinue parts and supplies, and (3) the lack of sales data for electronic products other than television for use in service system planning.
- (2) Further research into life cycle costing.
- (3) Extended service contracts.
- (4) The extension of CPW regulation to include "services" generally.

## B. General

This study of consumer product warranty law reform has in some respects wider dimensions -- dimensions that go beyond the consumer product warranty problem. The latter problem is only a microcosm of larger difficulties that plague current consumer protection law reform initiatives. A study of consumer product warranties reveals a more generalized and more pervasive problem with consumer protection policymaking in Canada today. There are lessons here that go beyond consumer product warranties. Let us briefly itemize some of them.

1. The first lesson for serious-minded policymakers is that effective consumer protection policymaking has to be built upon solid analytical foundations: it has to be both principled and informed. The current tendency of many provincial policymakers to base their decision-making on intuitive and largely personalized assessments of consumer behaviour has to be minimized if not eliminated. Principled, informed consumer protection policymaking will require nothing less than a greater commitment to theoretical analysis and an equal commitment to wide-ranging empirical research.

The probability of influencing change in consumer behaviour is much greater when the activity designed to influence change is based on a foundation and understanding of existing consumer behaviour.<sup>6</sup>

2. Given the increasing vulnerability of both doctrine and data to public and private sector scrutiny, it is imperative that consumer protection policymaking in general adopt a more problem-specific orientation. Increasingly, consumer commentators are urging that the search for "solutions" proceed on a more problem-specific or product-specific basis.<sup>7</sup> For example, by any measure used today, the number one consumer problem according to all the opinion surveys and data collected in North America is automobile repairs.<sup>8</sup> Various studies

have shown that over one-half of the car repairs done today are in fact unnecessary.<sup>9</sup> In the United States alone, they result in no less than \$13 billion each year in needless repair expenses.<sup>10</sup> Sensible consumer protection policymaking will respond to this visible and documented consumer abuse area by dealing with it as a specific problem area requiring specific action.<sup>11</sup>

3. Although the design of the appropriate regulation is a difficult matter requiring keen sensitivity to all the relevant theoretical and empirical literature, an equally important policymaking commitment is in the need for more experimentation and ongoing evaluation. Whether the reform is limited to consumer product warranties or extended to include more wide-ranging consumer issues, the proposed solutions, even after implementation, have to be monitored, empirically evaluated and regularly reassessed.

4. Finally, the serious-minded policymaker has to recognize the need for a greater and ongoing commitment to empirical research. In addition to the consumer product warranty-related research noted above, there is an increasing need for generalized empirical study of consumer behaviour, decision-making, knowledgeability, education, and response to various dispute handling and dispute resolution mechanisms. A recent bibliography published by Consumer and Corporate Affairs Canada itemizes a worthwhile research agenda with respect to each of these issues at several points in its survey.<sup>12</sup> As the twentieth century enters its last two decades, the message for more effective federal and provincial consumer protection policymaking is clear: take the time, spend the money, but do it right.

### C. A Final Observation

As the reader is well aware, this study of consumer product warranty reform sounds a cautious, indeed a conservative note. It argues for a more reasoned, a more sophisticated and, generally, a more careful approach to consumer warranty regulation. It urges caution and experimentation. In doing so, this study must register one final observation: consumer protection policymaking in Canada today reflects what has to be the ultimate in irony. Where we know what has to be done, we sit back and do nothing. Where we know next to nothing, we legislate like mad.

Belobaba details the extensive theoretical and empirical literature that more than amply substantiates the need for immediate adoption and implementation of universal first-party no-fault accident compensation.<sup>13</sup> Yet, in the face of this overwhelming empirical and theoretical documentation, provincial policymakers are still considering tort liability reform,<sup>14</sup> even after the triviality of these measures has been exposed time and time again. "Where we know what has to be done, we sit back and do nothing." On the other hand, as this study has shown, where we know next to nothing -- for example, about consumer product warranties or related consumer behaviour or knowledgeability problems --

we enact sweeping legislation, seemingly oblivious to the fact that it is largely unprincipled, uninformed and will prove in actual fact to be generally irrelevant. This tendency in consumer protection policymaking in Canada today has to be reversed. We have to begin to correlate knowledge with action and lack of knowledge with caution and experimentation. The way ahead for serious-minded consumer product warranty reform is fairly clear. It is hoped that this study has provided some direction.

Notes

1. Recall Exhibit 21.
2. Moyer (1978) at 37; Masse and Marois (1978) at 267.
3. See Belobaba (1983) at 113-15.
4. Discussed above in Chapter I.C.1.
5. Kennedy, Pearce and Quelch (1979) at 121.
6. Id., at 75.
7. See, for example, Claxton and Ritchie (1981) at 35, and Reich (1979) at 39-40.
8. Foster (1979), U.S. Comptroller-General (1980), and Masse and Marois (1978) at 47.
9. "Half Car Repairs Not Needed," Toronto Star (May 8, 1979) at 10-D.
10. U.S. Comptroller-General (1980) and U.S. Dept. of Transportation (1978).
11. Also see Margolis (1983).
12. Zins et al. (1979) at 13-16, 167-69 and 265-67.
13. Belobaba (1983).
14. See, for example, Ontario Law Reform Commission (1979b). Criticized in Belobaba (1983) at 118-25 and in Belobaba (1980) at 269-74.

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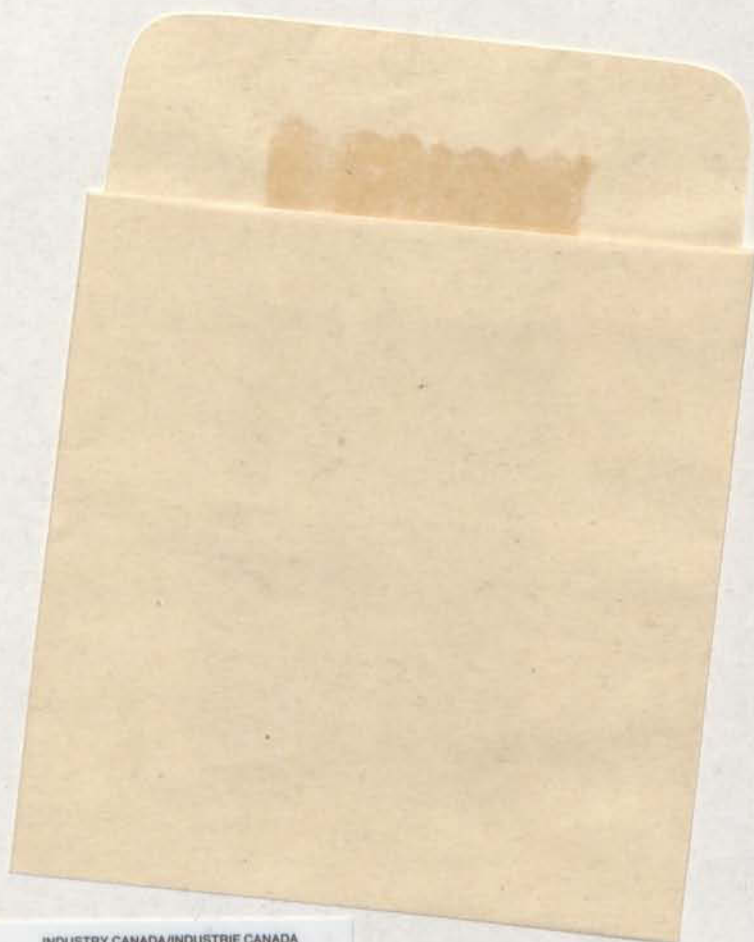
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