CONSUMER PROTECTION IN THE NATIONAL MARKETPLACE, THE SCOPE FOR ACTION: A CONSTITUTIONAL REVIEW

Peter Finkle

Consumer Policy Framework Secretariat

February 15, 1991

Consumer Protection in the National Marketplace, The Scope for Action: A Constitutional Review

1. Purpose

The purpose of this study is to provide non-lawyers with a sense of the limitations and the opportunities provided by the **Canadian Constitution** and **Charter of Rights and Freedoms** to federal action to renew and enhance consumer protection in Canada. The study is designed to help departmental analysts and others to focus on the realistic possibilities which the present constitutional situation offers. That situation, in the context of this work, includes not only the legal limits and opportunities drawn from the courts' interpretation of the basic constitutional documents but also extends to the political limitations on federal action that are a consequence of present attitudes to federal-provincial relations. While the paper is written against the shadow of possible fundamental constitutional and national changes, its conclusions are more relevant than ever. This is because the needs and basic interests of consumers will remain and the legal and constitutional system must consider and address many of those needs whatever its eventual form. Indeed, it is particularly useful to consider how the present constitutional structure addresses those needs so that necessary fundamental adjustments can be made in the future.

This study is not an attempt to provide a definitive legal analysis of the likely constitutionality of any particular legislative or policy approach to consumer protection. That work will be undertaken in due course by the Department of Justice after an approach to policy and possible legislation has been developed.

2. Organizational Framework

A classification of the type of problems which consumers might encounter in the marketplace provides the organisational framework to this study in order to assure appropriate emphasis to general consumer problems. This, it is hoped, will result in a paper that is oriented to constitutional and legal issues that affect and even shape real consumer issues. The classifications which so far has been found to be most useful divide potential consumer problems into those concerned with: Information, Safety, Price, Quality, Availability and Redress.

This discussion of the constitution and consumer protection is essentially a consideration of how the constitution of Canada shapes the way the federal or provincial governments undertake to help the consumer with these five potential types of consumer problems. But prior to beginning that task, it might be useful briefly to consider the way the presence of a written

constitution affects the operation of government in a federal state (the role of a constitution in organizing the decision-making structure of the state will not be examined here).

3. Constitutionalism

A constitution is a form of "higher law" which entitles a government to legislate certain other ordinary laws. This aspect of a constitution is particularly important in a federal state because the constitution of such a state is the basis for the distribution of legislative and other powers between the federal or central level of government and the states, provinces or cantons (many names are used) that make up the regional level of government. It is basic to the operation of constitutional government that no legislation or governmental activity may legitimately be undertaken without it being specifically or implicitly authorized by the constitution of the state.

The problem is that it is sometimes difficult to determine exactly how far a grant or authorization of legislative or other power extends, especially when it seems to be inconsistent with an authorization or grant of power to another level of government. A classic Canadian expression of this problem arises from the grant of power to Parliament to legislate in the area of "trade and commerce" and the seemingly conflicting sections which allow the provinces power over property and civil rights in the province. Even where a constitution authorizes one level of government or one kind of grant of power to have priority over another in case of conflict (as does the Canadian constitution), a serious problem remains in defining when the type of conflict anticipated by the constitution exists and how precisely it should be resolved.

Most constitutions, including that of Canada, resolve the problem of interpretation through the use of courts or there functional equivalent which are independent of the two levels of government. Cases or problems are brought before the courts either by aggrieved governments who believe that the action or proposed action of the other government is beyond its jurisdiction or by private parties who are challenging the constitutional authority of a government to take an action or make certain legislation. A final court of appeal will resolve the dispute by deciding whether the legislation or other undertaking is within the powers granted by the constitution. This is no easy task and many if not most cases in the United States, Canada and Australia result in divided courts; that is the decisions are not unanimous (some courts do not allow for such decisions and only write unanimous opinions) When a legislative or other undertaking of a federal or provincial government is found by a court not to be authorized by a particular grant of power in the constitution it is null and

void. In legal terms, the legislation is ultra vires or without authority.

In this context, it may be worth considering why such a finding by a court is so important since in most situations the other level of government could theoretically undertake to pass the same legislation. Indeed, even the government whose legislation was defeated in court could likely implement the same policy through the use of the tax or spending powers of government which are more flexible and less susceptible to judicial challenge. For that matter, the constitution could be amended so as to provide constitutional authorization for the impugned government undertaking.

In fact, however, it is rarely possible to overcome a judicial decision which nullifies a particular legal expression of government policy. This is because most political decisions which result in government action are the outcome of a number of complex compromises which, once undone, are extremely difficult to renegotiate. As a practical matter, there is almost no chance that action by all ten provinces will provide a substitute for a federal undertaking which has been struck down by the courts because the provinces area unlikely to act in concert to retrieve the federal purpose. Similarly, there is generally little chance that agreement to implement a policy by federal legislation can be transformed into agreement to effectuate the same policy by the use of other more flexible means like the power to tax and to spend. The transactional costs of achieving the policy are different both in the fiscal impact on the government and on those in the private sector affected by the manner in which the policy is implemented. Finally, the inherent difficulties in amending the constitution foreclose that path around a court decision except in most unusual circumstances. A government policy and the means to implement it are a package that, once bundled together, cannot easily be separated.

While a constitution usually defines what can be done and by which level of government and implicitly restricts a government from doing things not authorized by the document, charters of rights and freedoms work in the opposite manner. Charters of rights restrict government from legislating or acting in certain ways but usually do not grant powers to government. The restrictions on the activities or undertakings of government enacted by a charter create constitutional rights. Charters create the same problems of interpretation as constitutions and disputes about their meaning are generally resolved in the same way.

From a political perspective, court decisions relating to the interpretation of a charter are even more difficult for governments to circumvent (assuming for a moment that they might wish to do so), than decisions about other aspects of the constitution. This is because charters of rights are created specifically for the purpose of preserving certain aspects of peoples lives from interference by government.[1] Both the specific rights embodied in the charter and the document as a whole typically generate a powerful and committed constituency which will strongly resist any attempt by government to circumvent court interpretations about charter rights. It is probably for this reason that the Canadian drafters of the new charter permitted governments to over ride charter interpretations by the courts in certain circumstances.

Constitutionalism, then, defines the appropriate way to make law and undertake other government activities under a constitutional system of government. It requires that every government undertaking and each piece of legislation be based upon a grant of power in the constitution. The idea of constitutionalism also embraces the existence of a charter that specifically restricts government action in certain ways. Constitutionalism limits government and usually requires that courts define the appropriate limits as set out in the constitution and the charter (if one exists).

Consumer protection legislation and government sponsored consumer protection activities like all other government undertakings must be explicitly or implicitly authorized by the **Constitution of Canada** and not forbidden by the **Charter of Rights and Freedoms**. It is therefore necessary that there be a clear understanding of how these documents apply to existing and possible consumer protection activities. It is to that subject that we now turn.

4. Information

Information is the key to providing consumers with the capacity to make informed decisions about the products and services they purchase. While there is an inherent informational imbalance in favour of the seller, policies which maximise information availability in the marketplace tend to create a more balanced marketplace in terms of bargaining power of the participants. The disclosed information may also provide the basis for both

---

[1] Notwithstanding clause differs from most cons discuss.

criminal and civil sanctions which are based on false or misleading information.

Information may be generated and provided by government or by sellers either voluntarily or under legal sanction. It can take many forms including: the direct provision of information to consumers on federally sponsored or undertaken research; the requirement to use standard weights and measures; labelling; quality standard requirements and grading; process and manufacturing standards; provision of details regarding warranties; a requirement to list ingredients and/or nutrient content in certain ways; calculation of finance charges by comparable and standardized formula and the like.

Information pertinent to consumers may be generated by government internally through research and then distributed in a variety of forms. Alternatively, government may achieve the same result by contracting out to obtain research data or for distribution or both. Information may also be provided to the consumer by producers and sellers on a voluntary basis or the government may force or induce the provision of information to consumers (and government). Consumer advocacy groups may be encouraged to undertake research and inform both consumers and government of their views through various government programs (though such groups have the right to pursue their objectives whether or not government approves of and supports their programs or positions). Finally, the availability of information about individual consumers gathered through computerized credit card records, debit cards, hotel and health records, and through other similar means may pose problems of consumer privacy.

Each individual format for the generation and distribution of data to consumers raises special constitutional issues which will be examined in turn.

Government Generated Information

The federal government, itself, may generate and distribute information to consumers simply by virtue of being a government and pursuant to those sections of the Constitution Act that enable it to raise and spend money.[2] This inherent power of government allows either Ottawa or the provinces not only to tax and spend but to organise internally and thus to employ civil servants to undertake consumer protection research and then to

---

[2] Cite sections on spend and tax.

distribute the results of that research to consumers in a variety of forms. In fact, both levels of government have all those powers ordinarily available to any individual or business to contract, hold property, undertake civil actions, and generally carry on business.

Since this type of generation and distribution of research is undertaken pursuant to the inherent constitutional power which enables both levels of government to organise and carry out business, this power is separate from the legislative distribution of authority. Hence, both levels of government may undertake research and distribute data regarding matters which fall outside of their legislative powers as distributed in the Constitution. Put another way, the federal government could undertake and distribute the results of research on some aspect of property and civil rights in the province and the provincial governments might do the same on defense or fisheries.

The basic governmental powers to organise, tax and spend are not, however, unlimited. The Charter provides significant limits to how the government may organise itself, carry out its business, tax and spend.[3] In the context of the generation and distribution of information by government, these limits may not be as salient as in other areas, but they are applicable.

In sum, both levels of government may generate and distribute information either by contracting out for these services or undertaking the tasks internally. Both are free to undertake these activities even on subjects that lie outside of their range of legislative powers. On the other hand, both are bound by Charter limits in how this power is exercised.

Requiring Sellers/Producers to Provide Information

Another means of generating and distributing information is by requiring producers and others to gather certain types of data and to provide it to consumers in various ways. This could take the form of grading, labelling, providing nutrient content, requiring unit pricing or the use of standardized packages or formula for interest rates and the like. The possibilities are endless.

---

[3] Cite op. dismantle.

This is a very different from the situation where government, itself, generates and distributes data because a private party is required to do something under penalty of law. Appropriate legislation based on legislative powers provided in the constitution is the usual basis for this type of government policy. On the other hand, the inherent powers of government are also available to achieve the same ends. For example, government could, itself, buy only from suppliers and manufacturers that conformed to certain labelling and standardized packaging requirements. If government procurements were significant and depending on how the requirement were structured, these requirements might be imposed on the market. This very approach is now the basis for a federal affirmative action policy that is designed to reach companies not otherwise subject to federal jurisdiction.

The federal government has, in fact, taken the legislative route in order to provide certain types of grading and labelling information to consumers and thereby enhance the information available in the marketplace. In situations where safety is not at issue (safety will be discussed separately below), federal legislation to require that producers supply this type of information to consumers is usually dependent on either the federal power to regulate weights and measures or regulate trade and commerce or the federal power to make the criminal law as set out in the Constitution Act and interpreted by the courts.

The availability of an accurate and standard system of weights and measures is, perhaps, the most basic form of information needed by consumers. It is, also, from a constitutional perspective, one of the simplest aspects of the problem of providing information to consumers because the federal authority to so regulate is specifically provided for in the constitution and that power has not been subject to significant court challenge. Accordingly, there is little doubt that the federal government can provide important information to consumers by its power to regulate weights and measures.

At first glance, the trade and commerce clause in the constitution offers a clear route to the regulation of national standards, grades and the meaning of terms used in labels in an analogous manner to that provided by weights and measures. Both types of methods of standardisation are vital to consumers because they potentially provide objective information that can help in making rational decisions in the marketplace. As well, objective information on weights and measures, grades and standards and the meaning of terms used on labels permit buyers

and sellers to do business even at a distance with a common understanding of what is being bought and sold.

This aspect of government standardisation in the marketplace is especially valuable to small producers, distributers and retailers (not to mention consumers) because it permits them to compete without the necessity and incredible expense of creating a trademark or well known label. Indeed, it could be argued that the essence of a national market is this potential to do business at a distance.

That federal legislative capacity to impose standards, grades and labelling requirements in the marketplace is largely dependent on its constitutional power over trade and commerce. But what at first glance seems (and was meant to be) an extensive grant of power to the federal government has been severely attenuated because of the way the courts' have interpreted this clause.

Trade and Commerce Interpreted

Soon after the Privy Council begin to interpret the meaning of this grant of power, it was recognized that there was a tension between the federal trade and commerce power and provincial jurisdiction over property and civil rights. This is because regulation of trade and commerce necessarily touches commercial relations (property and civil rights) in the province. Indeed, the reverse is also true in that local commerce and trade necessarily affect national and even international trade and commerce.

This is because in reality, putting law aside for the moment, trade and commerce really forms a seamless web. Production in a local or provincial context and all that affect it will have an impact on markets outside the province, even if what is produced never leaves the province. This is because sales in the provinces of that type of production will inevitably affect similar products from outside the province that might otherwise have entered and been sold in the province. It is equally clear that availability of lower priced, higher quality goods from outside will affect production of similar type products in the provinces. Economics is in this way like ecology, everything is connected to and affects everything else.

This raised severe problems for the interpretation of those sections of the Canadian constitution which dealt with economics. While the grant of power to Parliament over trade and commerce seemed complete and unequivocal (and realistic from an economic perspective), if it were treated as it would seem to have been

written, then it would overwhelm many if not most provincial laws that purported to regulate the local economy. These provincial laws were also provided for by the constitution which granted that level of government power over property and civil rights in the province and over local works and undertakings.

This interpretive conundrum was resolved in 1881 in the Parsons case and its result has been crucial to subsequent interpretations of this problem.[4] In that decision, the Privy Council laid out a two pronged approach to the interpretation of the trade and commerce clause. The first suggested that inter-provincial and international commerce, rather than all trade and commerce, was trade and commerce for purposes of interpretation. The court did not, however, spell out the exact degree of cross boundary movement that was necessary for an activity to fall within federal jurisdiction. The second approach suggested that the general regulation of trade did fall within federal jurisdiction, but only when such regulations do not encompass a particular trade.

This case severely attenuated the potential utility of the clause as a federal regulatory tool, but subsequent cases tended to restrict the meaning of the clause even further. In effect, the Privy Council and later the Supreme Court of Canada have attempted to balance the concept of inter-provincial trade against that of property and civil rights in the provinces in a case by case manner so as to preserve provincial rights from federal encroachment. The result has been the lack of a clear doctrine that would help predict the court's approach in the future situations.[5] That, in turn, has had a chilling effect on the use of this power by the federal government because it could not be sure when the employment of the power would be valid.

The general power branch or interpretation of the trade and commerce power has fared little better. While the interpretation given to that the trade and commerce power under this approach to interpretation did support federal legislation to create national trademarks in a 1937 case, an analogous use of the power to create national grades was considered valid.[6] Similarly, the use of this type of interpretation of the trade and commerce clause to sustain standardized labelling of beers was rejected by the

---

[4] Citizens Insurance Company v. Parsons (1881) 7 A.C. 96.

[5] See Monahan book.

[6] Get cases and cites.

Supreme Court because it regulated a single trade albeit a national one.[7]

Consequences of this Restricted Interpretation

One important consequence of the restrictive interpretation given to the trade and commerce clause is that it narrows the scope for federal legislative action to require sellers to provide information to consumers. Moreover, when legislation is based on this constitutional power, it must be very carefully constructed and, even so, will probably be challenged in court. This is a troubling conclusion because, from an economic perspective, both consumers as well as producers and sellers are clearly involved in a national marketplace for many products and services.

Despite the nature of the marketplace, the federal government seems to lack appropriate legislative tools to regulate the operation of the market because of the manner in which the trade and commerce clause has been interpreted. The only other direct legislative tool available is the federal criminal law power which, as will be discussed below under Safety, is a blunt and sometimes ineffective instrument. There is, then, a gap in the direct federal capacity to legislate directly in the field of information and thus provide an important element in the national marketplace. This federal weakness in the creation and structuring of a national marketplace could be overcome in a comprehensive fashion as an aspect of renewed federalism or in a more piecemeal way by the imaginative use of the spending and other inherent powers of government which are less rigidly defined than those legislative powers distributed by sections 91 and 92 of the Constitution Act. This suggests that there may be a need to turn to the inherent powers of government to foster and regulate the national market.

Alternatives to Direct Legislation

From a constitutional perspective, there are a wide variety of possible means to induce producers/sellers to afford consumers information in the marketplace. The most obvious approaches based upon either spending or taxing may be dismissed as too costly during an extended period of restraint, but there are other options.

---

[7] Labatts case cite.

One approach has already been mentioned, that is to use the considerable procurement requirements of the federal government as a lever to induce sellers/producers to provide more information to consumers.

Another is to use the inherent power of government to enter into contracts as the basis for creating a voluntary licensing system to provide information to consumers. A voluntary licensing system would involve the federal government or CCAC providing sellers/producers with a special label or mark for a fee. The display of the mark or logo would certify, not only that a fee had been paid, but that certain terms and conditions of the voluntary license had been complied with. Such a program might be designed to provide consumers with discrete bundles of information regarding, for example, the organic nature of certain types of food or could be used to induce use of unit pricing. It could be used to induce comparability in the calculation of the costs of consumer loans. Voluntary licenses might even be used to induce auto mechanics to meet certain training requirement and follow specific business practices by including those provisions in the licensing requirements.

This type of licensing system is only restricted by the marketplace itself. That is voluntary licenses will not sell, and hence can achieve nothing, unless consumers differentiate between those who display the license/logo and those who do not. This is an advantage because it restricts government to real concerns of consumers. Similarly, since anyone or any organisation could sell such a license, a government endeavour would be naturally be limited to areas where consumers believed that a government endorsement was especially valuable. This type of licensing approach comes with an automatic sunset clause, as well. When consumers lose interest, so will potential sellers/producers, and the specific license would cease to be bought. In effect, such a licensing approach is automatically linked to real consumer concerns.[8]

From the perspective of the producer or seller, sales could be enhanced because the mark could distinguish her product from others available in some significant way. From the perspective of government as regulator, this type of approach to providing information or other related forms of service to consumers is relatively inexpensive or wholly without cost depending on the fee structure and administrative requirements. Moreover, because it is an entirely voluntary program, compliance may be obtained

---

[8] Footnote env. Canada's program.

cheaply. Indeed, sellers and producers who violate the terms and condition of the license would be sanctioned twice; first by government financial penalties for breach of contract penalties (and possibly the crime of fraud) and second by consumers in the marketplace who might cease to purchase their products.

It is unlikely that provincial governments would oppose this sort of voluntary licensing program because it does not encroach on their legislative jurisdiction nor does it induce them to alter their financial or policy priorities. Nonetheless, this type of licensing approach could enhance the strength and visibility of the federal government in the national marketplace as well as fill a significant gap in the information available to consumers in a way that responds to the demands of consumers.

In sum inherent powers, including especially the use of voluntary licenses, can provide a useful for means for the federal government both to foster and control the national market in circumstances where direct legislative power may be uncertain. In addition, it is possible that voluntary licensing could be the compliance instrument of choice, even where direct legislative power clearly exists, because it is inexpensive to administer and enforce, voluntary in nature and inherently linked to consumer concerns.

Information and Privacy

A final aspect of the problems and possibilities related to consumer information is the growing concern regarding the potential misuse of information drawn from credit instruments by banks and credit card companies (similar misuse of information from other computerized records, not related to consumer spending, is not addressed here though the problems are analogous and inter-related). Potential issues here involve the sale of purchasing profiles of individual consumers, damaging mistakes about consumers, provision of information to government or other institutions from consumer credit records and other possible violations of privacy.

The potential for encroachments into individual privacy are enormous and, with the increased use of interlinked computers, growing. In this area of technology, as in others, the fact that something can be done, creates a powerful tendency to do it. A potentially serious problem in the realm of individual privacy clearly exists, but does the Constitution provides either the

federal or provincial governments with adequate legislative powers to address potential concerns about privacy?[9]

If the problem of protecting the privacy of consumers from the accumulation and use/misuse of their credit record is correctly stated from a factual perspective, then the constitutional answer seems to follow. This type of problem could not have existed at the time of confederation and it was not possible for it to have been anticipate at that time. Moreover, this concern cannot be successfully addressed by the provinces because if even one of them fails to legislate in essentially the same manner, information collected in the other provinces may be accumulated and used in that province. Indeed, it is in the nature of this technology that provincial and even international boundaries are easily surmounted and international solutions may be necessary.

For these reasons, the only practical and comprehensive way that this concern for consumer privacy could be regulated is by federal action. This is a textbook description of when the federal residuary power found in the "peace order and good government" clause of section 91 may be validly used as the basis for federal legislation.[10] This clause has been used as a means to provide the constitution with the flexibility to address issues which could not have been anticipated when the British North America Act was drafted and which are clearly a national concern.

Summation

This extensive review of the constitutional capacity of the federal government to address the concerns of consumers in the area of information suggests that the **Constitution Act** provides a wide variety of diverse powers on which legislation and programs might be based. In this area, it is evident that careful and imaginative use of these diverse constitutional resources, including in particular the use of inherent powers of government, is necessary if the federal government is adequately to serve the needs of consumers and to help provide informational balance in the national marketplace.

---

[9] Cite present inadequacy of existing privacy legislation and note Quebec legislative project on the subject.

[10] Cite article and Hauser and anti-inflation cases.

5. Safety

This class of potential consumer protection concerns involves assuring that products that enter the market are reasonably safe for normal use. In the design of regulatory regimes to protect the public from unsafe products, there is considerable concern regarding the appropriate level of risk and the costs associated with reducing such risks. These issues are of limited relevance to constitutional discussion, so long as the public safety concern is real. This is because as a matter of historical fact, the criminal law, the making of which is a federal power, has always been concerned with both public safety and public morality (which is really another form of public safety).

Federal Authority for Safety

Hence, for constitutional purposes, the constitutional capacity for the federal government to legislate about matters of consumer safety is clear so long as the problems addressed can be cast into a criminal law type mode. Criminal law traditionally involves a total prohibition of a real wrong rather than the regulation of an act. Hence, criminal law could not be used to permit a potentially harmful activity until a certain threshold is reached as is the case with much environmental regulation. Similarly, if the federal government were to create a regulatory program which actually concerned itself with economic or other problems, this should not be characterised as being a criminal matter (as has been attempted in the past).[11]

Before considering the provincial authority to regulate in the area of safety, it may be useful to explore several, perhaps, esoteric aspects of the exercise of this federal power. First, it may be useful to note that there is no need for legislation created pursuant to the criminal law power to be placed in the Criminal Code. Other legislative formats are equally acceptable. That is to say that when the Parliament creates legislation based on the criminal law power, it need not place that legislation organisationally in the Criminal Code of Canada.

A second interesting aspect of the legislation made under the criminal law power is that there can be considerable practical difficulties in drafting and enforcing the law because proof of intent is virtually always an element in criminal law. A fuller discussion of this problem and the technical and practical

---

[11] Oleo case.

differences between criminal and regulatory offences can be found in a companion research work in this series entitled "Compliance and Enforcement of Consumer Protection Policy: Where the Rubber Meets the Road"[12].

A final matter worth raising concerns the enforcement of criminal or other (including provincial) regulatory regimes. Prior to the adoption of the Charter, there were virtually no legal limits to the discretion that politicians, regulators or prosecutors wished to exercised in the enforcement of criminal law or regulatory regimes. But that broad discretion in enforcement may be ended because of the adoption of a charter that guarantees equal protection and benefit of the law and fundamental fairness.

According to some scholars, such equality and fundamental justice cannot be ascertained in the abstract, but only in the actual application (enforcement) of the law.[13] There can hardly be any actual inequality if a law was not enforced and, conversely, a law which was equal on its face, could actually be implemented in an unequal manner. If what counts is the inequality which occurs, then ad hoc enforcement (which is always highly discretionary) would be contrary to the Charter because it is inherently unequal. This, in turn, suggests that there is a need for a consistent pattern of enforcement so as to assure that appropriate fairness and equality as demanded by the Charter. So far, no cases have tested this theory. In this context, it should be noted that the issue of lack of systematic enforcement has received considerable attention recently both in academe and within the public service, that issue is addressed in a separate research paper as noted above.

Provincial Authority for Safety

While the federal authority over the criminal law and, hence, for criminal aspects of public safety is complete and exclusive that does not preclude provincial power to address safety issues. Provincial jurisdiction over safety is derived from its authority over local works and undertakings and property and civil rights in the province. Provincial concerns for safety are manifest in building codes, various forms of safety inspections, licensing and certification standards that incorporate safety concerns,

---

[12] Cite paper.

[13] Cite Finkle law review article.

automobile infractions and the like. Since provincial authority over safety issues is channelled through its powers over property and civil rights and over local works and undertakings rather than criminal law, it is necessary for their laws to be cast as regulatory offences. This facilitates flexibility in structuring offences and may permit somewhat less stringent adherence to **Charter** standards in compliance and enforcement activities.

Overlapping Authority for Safety

It is clear that safety is an area of overlapping jurisdiction and concern which finds expression through different constitutional paths depending on the problem and concerned level of government. Legal and practical problems can arise when federal and provincial policies are inconsistent or contradictory, this will in fact often be the case and is a natural occurrence in a federal state. The implication of the issue will be explored below in a comprehensive discussion of this problem.

Summation

In conclusion, the consumer safety as an aspect of public safety may fall within the legislative jurisdiction of Canada by virtue of its power over the criminal law, but the provinces have extensive power to address similar concerns through other sections of the constitution. The provincial power over safety may be expressed in more flexible legal regimes because they need not be criminal in nature.

6. Quality and Price

Providing consumers with protection against surprises and confusion regarding the price or the quality of the goods or services that they purchase is the most basic form of consumer protection. In this class of consumer problem, the issue is neither low quality nor high price, per se, because purchasers may deliberately seek low quality goods and services in order to obtain a commensurately lower price. Similarly, high price is not, in itself, necessarily a problem because many are willing and able to pay a higher price to obtain a better quality product or service. Consumers are, however, concerned with misrepresentation, misunderstanding or surprises about quality and price.

As well, there may sometimes be consumer concern with government policies or regulatory activities that raise the price or affect the quality of goods and services. The federal government can adversely affect consumers in this way through its control over taxes, import duties, and trade policy. The provinces, too, have the power to raise prices and influence quality by their power over taxes, their ability to restrict trade with other provinces by raising non-tariff barriers and by the use of licenses that restrict entry and competition in various types of undertakings.

In the present context, the focus is, first, upon the constitutional capacity of the federal and provincial governments to address consumer problems related to surprises about price and quality. Secondly, it will be necessary to examine the means used by government to influence prices and quality.

Federal Capacity to Regulate in the National Marketplace

The first and most basic task of assuring that consumers do not misunderstand or confuse indicators of price and quality before a sale and are not surprised about these aspects of a product or service after a sale are divided by the constitution between the federal and provincial governments. The federal government has addressed this consumer protection challenge both directly and as part of the more general task of creating and maintaining a national marketplace throughout Canada. A fundamental aspect of the national marketplace is the establishment of the most basic rules of business morality through the criminal law. Examples of this include, for example, the law pertaining to misrepresentation, fraud and aspects of the Competition Act.

Another aspect of the establishment of a national marketplace is the creation of national standards of various kinds which permit trade and commerce to take place at a distance. Such national standards include, at a minimum, common weights and measures, but may extend considerably further and encompass national quality standards (grades), national standards for calculating interest, and national certifications or licenses for activities falling within federal jurisdiction. These national standards, which permit the operation of a national market, may be provided under a variety of constitutional powers including the spending and contracting power, trade and commerce, weights and measures, banking and currency and the power to make the criminal law. As noted above, the federal government because of uncertainty about the scope of its power over trade and commerce may have difficulty in directly structuring and regulating a national marketplace without resort to more flexible inherent powers.

The provinces, too, can undertake to help consumers avoid misunderstanding and confusion about prices and quality by setting the basic rules of the provincial marketplace. This they do by shaping the law of property, contract and tort that create individual obligations and rights in the provincial marketplace. A particularly crucial aspect of this provincial task is the manner in which the commonly missing elements in sales contract are provided for in provincial law because this may determine, for example, the nature of warranties which are available to the consumer, the legal effect of form contracts and so forth. Most provincial activities relating to the creation of individual legal obligations and rights in the provincial marketplace are undertaken pursuant to their constitutional power over property and civil rights in the province.

Provincial Authority in their Marketplace

The provinces, like the federal government, may also provide quality and other standards for use in their provincial marketplace. These standards may not be the same as federal standards. Their constitutional capacity to create provincial standards which facilitate the operation of the provincial marketplace is derived from their power over property and civil rights, their control of local matters and their inherent governmental power to spend and contract.

The Problem of Concurrent Authority

There is clearly considerable scope for overlap and inconsistency between provincial and federal activities which structure their respective markets and, thereby, help consumers avoid and respond to misunderstanding and confusion regarding price and quality. In fact, the two levels of government will usually <u>not</u> pursue precisely the same policies because each has to respond to different constituencies and must satisfy unique constellations of interest groups. Business interest groups often are troubled by such overlapping regulations.

These overlaps arise because even if both levels of government are responding to the same political pressures, they are forced to shape their policies in different ways because of their different grants of constitutional power. As well, it is common for governments to differ with regard to the best means to address a problem, even if they agree on the parameters of the issue. Of course, it is possible for real disagreement to exist on whether or not a consumer issue exists and how to characterise

a set of facts. Whatever the circumstances, it will be common for both governments to seek to address or confront an issue regardless of the seeming appropriateness of their constitutional grant of power to respond to the issue because each wants to be seen to be responsive and active. That is, of course, the way that democratic governments should act! Hence, it must be expected (and it is normal) for there to be differing approaches to consumer protection regarding price and quality as well as considerable variation in the way markets are structured at both levels of government.

It may be useful to note, for illustration, two possible differences in approach between the two levels of government. First, the provincial standards of appropriate market behaviour are likely to be expressed, in the main, through the civil law which creates enforceable individual rights. These may be different from standards imposed by the criminal law which is created by the federal government. Similarly, the measures of quality, other standards, and requirements for certification to various positions mandated by the different levels of government may be different.

Serious inconsistencies between governmental undertakings in this, and other, areas (see safety above) may sometimes be resolved resort to the courts. A judicial approach to federal-provincial conflict is, however, quite narrowly confined to the determination of whether a particular exercise of power is permitted to the federal or provincial government by the constitution. If a government is exercising power not permitted to it by the constitution (in fact, by the court's interpretation of that document), then the undertaking is ultra vires and void to the extent of the conflict with the constitution. If both governments have authority in the area and there are inconsistent or contradictory undertakings, then the federal government would have legal supremacy to the extent of the contradiction between the two policies.

In practice, however, most inconsistencies are not resolved by court action, because they usually involve a valid exercise of power which happens to overlap in certain circumstances with a similarly valid exercise of authority by the other level of government. Indeed, since it is often the case that regulatory regimes at both levels of are often not actually enforced, an overlap often has no legal consequences. Such overlaps create both problems and opportunities. The main problem is they often seem to increase the regulatory burden on business and may confuse consumers. On the other hand, these inconsistencies create multiple different opportunities to respond to some

problem; some being better than others. The hope is that the better approaches will be noted, demanded by consumers and others and thereby survive and spread to other jurisdictions. The value of federalism, then is similar to the value of a free market; the consumer (or citizen) get to choose and by their choice shape the policies that governments adopt.[14]

There is, then, usually little reason to seek and not much chance to achieve a coordinated set of federal-provincial consumer protection policies and laws. Legal action will eliminate those which are ultra vires, but political and administrative attempts to eliminate overlap are unlikely to be fruitful. Indeed, they may serve to mitigate against the variety and experimentation that is one of the (misunderstood) beauties of federal systems of government. At any event, care should be exercised when either level of government tries to coordinate policies to assure that the effects of policies which may be eliminated are fully understood.

Prices, Quality and Government Actions

Aside from possible confusion and misunderstanding regarding price and quality, consumers may be concerned with prices that result from some types of government interventions in the marketplace. Such government intervention might be through the imposition of taxes; the creation of marketing boards; restrictions on imports; the maintenance of import duties, or through the imposition of various barriers to interprovincial trade. While most of these government interventions has the effect of imposing higher prices on consumers, some have an impact on quality as well.

Both the federal and provincial governments can impose additional cost on the consumer through their respective tax powers, though it is more difficult for the provincial government to conceal the effect of its taxes since it must, according to the constitution, levy its taxes directly.[15] Both governments sometimes impose taxes more for their regulatory effects than as a means to raise revenue. Generally, as taxes on a particular product or service go up, there is a point reached where the financial take to government begins to drop because consumers begin to reduce their

---

[14] Cite Breton.

[15] Cite section con act.

(open or legal) acquisition of the product. A regulatory control is, in effect, placed on the product or service being taxed.

This imposition of implicit regulatory controls by taxation raises a number of serious issues because it is a means to circumvent the normal legislative boundaries of the Canadian federal system. The courts are aware of the possibility of government using taxes (and spending) to regulate in areas where they do not have legislative jurisdiction and have occasionally found such taxes to be ultra vires. But such judicial attempts to control the inherent powers of government have been rare and are likely to remain so. It is simply too difficult for a court to "know" the purpose of a tax, grant or other government endeavour. Moreover, there are so many government actions to judge. In the event, courts in Canada and in virtually all other federations have been most reluctant to intervene when governments use their inherent powers.

From the perspective of the consumer or tax payer, it is not always immediately evident whether a tax is primarily a revenue raising measure or is designed to control behaviour. The problem for the taxpayer is the same as for the courts, taxes and other inherent powers have mixed regulatory and fiscal effects that are virtually inseparable. Though at least with a direct tax, it is difficult for anyone to miss the additional cost imposed on the consumer.

Similar, but more subtle issues regarding the costs to the consumer arise from other government interventions to "shape", "stabilize" or render certain markets more "fair". To achieve the objective of altering what has or might occur in a particular marketplace without government intervention, governments can employ various types of specialized interventions such as marketing boards, trade quotas and tariffs. These government interventions into the marketplace are more serious than direct taxes whatever there level from the perspective of the consumer since they are sometimes made with little public (or government) awareness of the cost to the consumer.

The federal government has the power to set import duties and restrictions that are basic to the operation of any marketing boards. Such measures, of course, also have a direct impact on price regardless of the presence of such boards. In this context, it is noteworthy that there are many barriers to internal Canadian trade that have the effect of raising prices to the consumer. It is difficult, however, to determine whether it is the federal or provincial government that must assume responsibility for these internal trade barriers. While the

provincial governments seem, in the first instance, responsible, federal action to remove such barriers, though possible using many constitutionally available powers, has been rare except where prompted by external forces.[16]

It that context, it is interesting to consider the motivations for these market interventions of government. A tax may be a revenue raising measure, a regulatory tool or a little of both. This can be seen by considering the possible motivations of government and the actual effects of various taxes on tobacco products. Similarly, price increases may be the incidental result of government policies to protect certain industry sectors, such as the higher prices for domestic automobiles which results from "voluntary" quotas on imports. Finally, unanticipated higher prices may result from the imposition of a strict regulatory standard or even from the frequent changes to such regulations.

In many cases, it is clearly difficult without undertaking a systematic effort for the consumer or the government to assess whether the value of the intervention is worth the addition costs imposed on consumers. It is noteworthy how rarely the full range of effects on consumers is fully and publicly explored. Despite the ubiquity of consumers, there are rarely systematic evaluations of the impact on consumers of regulations, license and the like. It would be within the constitutional power of either level of government to undertake systematic consumer impact assessments when new government undertakings, likely to have an impact on consumers, were contemplated. Indeed, such assessments could even be made of actions proposed or undertaken by the other level of government.

Summation

In conclusion, there are broad areas of possible overlap between the federal and provincial constitutional powers to structure their respective marketplaces and thereby help consumers avoid confusion and misunderstanding prior to and after a transaction. This creates difficulties for the consumer when inconsistent, contradictory or otherwise confusing quality or other market standards are created. Consumers may benefit, however, from competition between governments to provide higher consumer protection standards of behaviour and better access to redress (the question of redress is discussed separately below).

---

[16] Conditional grant and equalization in final analysis.

Both levels of government have the capacity through the tax power to increase consumer prices; indeed this tax power is easily and often used for regulatory purposes.

The federal government can affect consumer prices in often subtle ways through it powers over import duties and other import restrictions. This federal power over imports must also be used if marketing boards created by the action of both levels of government are to exercise effective control over prices.

Both levels of government are responsible for increases in consumer prices and affects on quality that result from interprovincial barriers to trade.

The federal and provincial governments structure and affect the operation of the marketplace particularly with reference to prices and quality through their regulatory and licensing activities more than is general supposed. The constitutional powers at the disposition of both level of government permit such impacts on the market to be made with some facility. Consumer impact assessments are rarely undertaken to evaluate the impact of such regulatory initiatives on prices and quality of goods and services to the consumer.

7. Availability

A possible consumer concern in the marketplace is the lack of availability of a product. This concern encompasses both being able to purchase many entirely different types of goods as well as having a range of prices and qualities available for a particular product. In the later case of a wide range of a prices and quality of a particular good, it is a corollary that a higher quality product must be discernable from lower quality items of the same type. If this were not the case, then consumers would spend equal amounts of money for both higher and lower quality products and, thus, perversely effect the operation of the market.[17] Services, too, can be restricted by government action creating artificial shortages, and thus price, quality and availability problems for consumers. Market entry policies can also influence information availability and the quality of goods and services. (Such policies also impact on the availability of jobs, but that is a separate aspect of market entry that will not be pursued here).

---

[17] Note here that Agriculture Canada grades are of the type that conceal high and lower quality from consumer, do it subtly.

The reason that market entry is so crucial variable in both federal and provincial economic policy making is that many producers and sellers would like to be able to use government to limit other entrants to the market or to otherwise avoid competition. Indeed, competition is a genuine benefit mainly to consumers and a burden to be overcome, despite the rhetoric, to producers, suppliers of services and sellers. It is for this reason that producers as different as dairy farmers and taxi drivers implore government to restrict entry to their callings.

Many government activities can directly or indirectly affect the availability of goods to consumers. Such activities include, most basically, the rules governing market entry, as well as the imposition of tariffs and other import restrictions, the tax structure for the goods in question, the presence of marketing boards or other restrictions on production, safety and quality regulations and the past history of such activities in Canada. It is noteworthy that many of these government activities have been described above as having impacts on quality and price, this is because from an economic perspective the problems of price and quality are intertwined with issues of availability.

Nevertheless, it is useful to treat the issue of availability from a separate and special perspective because the issues of concern here are often treated differently by both the federal and provincial government as well as by administrative entities created by both levels of government.

Federal and Provincial Roles in Restricting Market Entry

Restrictions on market entry may be created at the provincial level by the use of licenses and other entry requirements. These have been used to the benefit of, for example, taxis owners and lawyers. At the federal level, market entry may also be restricted by similar means where the activity falls under federal jurisdiction, for example in the realm of communication or transport. Often market entry,is regulated by both levels of government working in concert as in the case of restrictions on the number of poultry or dairy farmers (including limitations on the nature and amount of their production).

The federal government not only restricts market entry, but also has legislation designed to enhance competition and combat certain types of restraints of trade. The potential conflict between these two purposes will not be explored in the present context.

In the provincial realm, market entry is mainly controlled as an aspect of their constitutional power over property and civil rights in the province. It is by virtue of this power that municipal government, a creature of the provincial government for legal and constitutional purposes, controls the licenses and hence the entry into the market of taxis, hairdressers and so on. The provinces have also controlled the entry into their marketplace of out of province goods and services by restricting their movement into the provinces in the case of products and by restricting entry into services. Provincial and federal procurement are also used to restrict market entry and may have effects on product and service availability for consumers. The federal often contributes to provincial efforts to control market entry through the exercise or failure to exercise its constitutional power over trade and commerce.[18]

Tension in Federal Policies regarding Market Entry

There is a certain tension between federal laws and policies which create safe market niches for some and other federal laws that seek to limit monopolies and enhance competition. This tension exists not only at the level of law and policy but in ideological terms as well for both government (in practice usually the federal government) and private industry. There are, after all, frequent paeans of praise by both government and industry to the value of competition though in practice both work to limit it. Perhaps, competition is like virtue, something of value in others.

Problems related to the availability of goods are amongst the most complex consumer issues from a constitutional perspective. This is because the creation of most restrictions on entry into production, which usually results in problems of availability, price and quality are often a cooperative effort of both levels of government. That cooperation may, however, be tacit or result from a political reluctance to confront certain types of restraints on market entry. In this context, it is useful to note that there are often strong coordinated interests seeking to limit market entry and relatively few voices favouring more open entry and competition. The problem of restrictions on market entry is often complex, sometimes quite subtle and rather more political than legal in nature.

---

[18] Describe recent constitutional discussions about comp act.

Moreover, government efforts to address issues of availability often run afoul of economic "rights" which it created as a sometimes unforseen of an attempt to solve past concerns which, did not then appear to be related to consumer concerns (as in the creation of farm marketing boards to help farmers). Having once created special rights for farmers, taxi drivers or others, it is exceedingly difficult politically to change the "system" because to do so involves a quite literal financial taking from specific given people. But this is, once more, a political rather than a legal issue.

In sum, restrictions on market entry may be made by either the federal or provincial governments, though the acquiesence or cooperation of the other level of government is often necessary to making such restrictions effective.

The benefits of restrictions generally flow to a specific group while the disbenefits are usually very widespread.

The problem of restricted availability of goods and services is more political than constitutional in nature.

8. Redress

Redress for the consumer is a process whereby a problem with a product or service is resolved after a transaction. It is possible, and often the case, that redress involves the vindication of a private legal right based in contract or tort through a legal brought by the consumer, but redress may be achieved through other mechanisms as well. Redress, for example, may be obtained voluntarily following a complaint; can be gained after negotiations between the buyer and seller or the negotiations may extend to the distributor and manufacturer, or negotiations may proceed at the encouragement of a third party. The "third party" could be a private mediator/arbitrator or government employed consumer ombudsman or mediator. No-legal or alternate forms of redress depend, however, on the existence of legal standards that define the nature of a "wrong" in the marketplace. In addition, the existence of involuntary, traditional legal redress provides a background or climate which may encourage or induce "softer", more voluntary forms of settlement.

Redress may also take a public as compared to a private form. When criminal or regulatory standards are breached, redress is, theoretically sought on behalf of vindicate society as a whole, even though the wrong in question may have been directed at a

particular individual. This public redress can satisfy a consumer's demand for justice by making the wrong doing seller pay, even if not to her and not in monetary terms. On the other hand, criminal and regulatory offences and their sanctions can be shaped to provide consumers with direct monetary redress that is linked to the nature of the consumer's loss and the degree of wrongful conduct leading to the loss.

It is important to recall that civil society, to a large extent, rests on the capacity of the state to assure through its procedures that redress is reasonably obtainable. If this were not the case, there would inevitably be resort to self-help by individuals that rapidly breaks down into violence and vendettas. Government must, then, do all in its power to provide and be seen to provide effective and fair redress as one of its fundamental responsibilities.

Provincial Authority over Redress[19]

Civil redress to vindicate personal rights acquired by contract, tort or property law are within the power of the provincial governments both as to the form or procedure for redress as well as to the substance of the rights in question.[20] Hence, for example, the terms and conditions of implied or non-written warranties of sale may be provided by provincial legislatures under their power over property and civil rights in the province. Similarly, the procedural question of whether to permit class actions suits rests with the provincial government. Provinces also possess the power under the same sections of the constitution referring to the administration of justice to develop alternative dispute resolution mechanisms.

Alternate dispute settlement mechanisms such as government mediators and ombudsman have recently been seen as convenient and inexpensive means for consumers to gain redress when compared to formal legal actions. Nevertheless, there is little solid evidence that these new mechanism are functionally different from small claims courts. Both use relax evidentiary rules, are relatively informal compared with regular courtroom procedures (though small claims courts are more formal than mediatory forums) and both involve mediation of claims. Mediatory mechanisms have the edge in providing a non-threatening

---

[19] Cite Redress paper.

[20] Cite 91 (14) and sections on property civil rights.

environment for those uncomfortable with the idea of courts; indeed, their procedures may be held in private. The other side of the coin is that this informality may sacrifice the consumer's rights to fundamental justice under the **Charter** which **cannot** be contracted away. The most important disadvantage for the consumer is with mediation or other alternative mechanisms may be the fact that she forfeits the right to appeal the decision except for denial of fundamental justice or other similar matter. In small claims courts, the judges are clearly highly cognisant of all procedural requirements and the consumer can appeal any decision on a variety of grounds and obtain a new trial in a regular court.

There may be a need to further explore the advantages and disadvantages of mediatory and small claims processes in order that both can be improved. That research could be taken by either level of government though it would a provincial decision to use the findings to improve both systems.

The provinces are not only responsible for the private rights of consumers, but have considerable regulatory authority over consumer transactions. This allows the province to structure and regulate virtually every aspect of most consumer transactions. This aspect of provincial redress will not be examined here because it is addressed in two other papers produced by the department in this series.[21]

Federal Authority over Redress

The criminal law, too, provides consumers with redress for harm done them in certain transactions. As noted above, many consumers are able to find some personal redress in seeing a person who did wrong "pay the price" to society. A problem with criminal law as a means of redress is that, ordinarily, government or police officials take the decision to prosecute a case not the consumer. Moreover, if after conviction a fine is assessed, that money is paid to the Crown not the consumer. A final problem with the criminal law is that in many situations regular enforcement of the law is absent either because of government or police priorities.[22]

---

[21] See Redress and Compliance.

[22] See Compliance paper.

It is significant that traditionally under the common law and by virtue of special legislation in regulatory matters, individual citizens can press criminal or regulatory actions as private prosecutions. Further, such laws can permit citizen to recover their losses and the expenses associated with bringing the private prosecution out of the fines that would otherwise have gone to the Crown. Important and sometimes overlooked aspects of a policy of encouraging private projections are that it both induces more prosecutions by the regular authorities and can provide ordinary citizens with a real and considerable sense of their own potency. The main disadvantage of using private prosecutions of criminal or regulatory offences to achieve redress is that the burden of proof the consumer acting for the Crown (as on the Crown itself) is beyond a reasonable doubt. This is a considerably heavier burden than what is required in a civil case: that is a preponderance of the evidence. Another significant barrier to effective use of private prosecution to gain redress is the costs of bring the action are usually greater than the likely recover.

For these reasons, in practice, most private prosecutions involve federal regulatory statutes that are designed to facilitate such citizen action as a means of encouraging enforcement. There are, however, many ordinary private prosecutions under the criminal code which occur without facilitating legislation. But private prosecution can be made a more potent redress mechanism by adjusting procedures, sanctions and administrative actions to aid the private prosecutor.

The federal government has the constitutional power to arrange the criminal law, its regulatory offences and procedures so as to facilitate private prosecutions as a form of redress for consumers. A secondary effect of encouraging such prosecutions is to encourage regular enforcement by police and prosecutors who do not wish to appear dilatory. The provinces, too, can foster effective private prosecution of their consumer oriented regulations. There motive would likely be to encourage and focus their enforcement policy, rather than to facilitate consumer redress which they can address directly through their control of property and civil rights.

Redress and Substantive Law

While redress is of vital importance, redress can never be more effective than the substantive laws which provides the basis for consumer action. The norms of conduct in the marketplace are,

after all, defined primarily by legal norms that are derived from criminal, regulatory or civil law. On the other hand, without adequate redress mechanisms to vindicate legal rights, the law and with it the government will appear to be all puff and noise symbolizing nothing.

9. Conclusion

Constitutions shape policy. This is particularly the case in federal states because they provide the means for the expression of policy. Where constitutional means for the expression of a particular policy are restricted, then that policy can only be implemented within a limited number of permitted forms. These permitted forms, then, help shape the policy.

This is a particularly important aspect of federal economic policy-making in Canada because the key constitutional instrument for direct economic regulation, the trade and commerce clause, has been severely attenuated in scope by judicial interpretation. The clause must be viewed as an uncertain instrument, whatever its scope, because judicial interpretations have failed to provide government with a predictable pattern or doctrine about the meaning of the trade and commerce. Resort to the clause is thus chilled and legislation based on it seems vulnerable.

Without the solid underpinning of control over trade and commerce in Canada, the federal government must use its remaining constitutional tools in the most imaginative possible fashion if a strong national marketplace is to be created, maintained and regulated. In constitutional terms this suggests that the fullest possible scope be given to the criminal law power to set the fundamental rules of the national marketplace. This power, despite its inherent limitations provides a meaningful scope for federal legislative activity to protect consumers.

In certain specific fields, such as banking and weights and measures, clear grants of constitutional power exist, but there have been few attempts to uncover test their limits. In appropriate situations this may be worth doing or, alternatively, scholarly work might be encouraged to explore the potential of these federal powers.

The spending, taxing and inherent or prerogative powers have the greatest unexplored promise of use to regulate and structure the national marketplace and thereby provide a degree of equal consumer protection to all Canadians. This inherent power, though very flexible in comparison to legislative powers, is,

nonetheless, subject to **Charter** limits. A clear and obvious concern for these values in the design and implementation of any program based on these inherent powers would serve not only to assure against successful judicial challenge, but, more important, would serve to legitimize the use of the power and the program itself.

Finally, there is an old military adage that suggests that commanders should concentrate their forces. This is even more important where those forces are thin! From the constitutional, not to say fiscal, perspective, the federal forces are, in fact, thin. This suggests that federal policies to promote and strengthen a national marketplace and to provide consumer protection should be focused rather than diffused.

In constitutional terms, account should be taken both of the policies that seem most worthwhile as well as the nature of the constitutional power to carry out the policy. In practical political terms, this involves selecting only the most vital and visible area for action. From an administrative perspective, considerable planning must be accorded to the compliance policy associated with existing or proposed programs to ascertain their costs. Finally, from a federal-provincial perspective, it means accepting that the provinces will exercise considerable responsibility in the marketplace.

This does not mean that there need be no federal action nor does it suggest that federal policies cannot overlap with and even be inconsistent with provincial ones. Indeed, this analysis demonstrates the virtual inevitability of overlap and a degree of competition between the federal and provincial governments as well as competition between the provinces, themselves. What it does mean is that the federal government, like most business in the private sector, must find its appropriate niche.

Finally, while this is an analysis of the present constitutional structure of Canada, it does suggest certain directions for change if there were to be a need to alter fundamentally our constitution. In that regard, it is vital that the direct federal economic power to structure and regulate the national marketplace be enhanced. The Founding Fathers of the British North America Act understood the need for centralised and powerful economic levers to provide a solid base for the nation. There original constitutional plan provided that solid, central economic base which the courts have undermined. The American Founders also recognised that need and wrote of it clearly in the

Federalist Papers.[23] Without direct, clear, centralised political power over the national economy, each province will inevitably seek to create its own market, maximise its special advantages, create its own rules to exclude others and by doing so will cause the whole nation to spin towards economic and political anarchy.

There is simply no answer to the economic and then political tendency to decentralisation in a federation other than centralised economic power at the centre to counter that tendency. Canada's century will come only when there is direct, centralised power to shape the national marketplace and foster a national competitive edge.

---

[23] Cite Federal paper.