

**CONSUMER PROTECTION IN CANADA  
AND THE EUROPEAN UNION:  
A COMPARISON**

2009

**PIAC**

# **Consumer Protection in Canada and the European Union: A Comparison**

Prepared by



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## Executive Summary

This study uses the document, “Ten Principles of Consumer Protection”,<sup>1</sup> a principal source of consumer rights and protections in the European Community, and attempts to compare the content and effect of those provisions with parallel provisions existing in Canadian federal and provincial jurisdictions. The process of study and comparison shows that there are key differences in the policy approach and levels of guarantees that EU and Canadian jurisdictions have agreed to provide their constituents to avoid market anomalies or failure whenever industry actors and producers fail to deliver quality standards, or engage in unfair practices toward consumers.

Europe has been very active in drafting and introducing progressive consumer protection policies, through directives and council resolutions adopted at the European Commission level and which are transposed, implemented and very often surpassed in comprehensiveness by laws enacted by national intra-European authorities, over the last thirty years. Many of the directives and resolutions have been made with the goal of creating an efficient internal European market. To that end, consumer policy is seen as pivotal in the ultimate success of the economy of the region. In Canada, on the other hand, while the confederation has constituted an integrated market since its creation, the role of, and the importance placed upon consumer protection policy has not been as consistent as the European model over the last several decades. In fact, government policy emphasis on consumer protection has gradually decreased in Canada over the last twenty years, after important progress was made during the sixties and seventies in promoting consumer protection. This diminishing interest in the protection of consumers probably finds its best expression in the fact that the former national consumer authority, the Department of Consumer and Corporate Affairs, was dismantled in the early 1990s and its remnants shuffled in with a department unabashedly designed to advance the interests of the private industrial economic sector. As a result, today, Canada’s principal consumer protection agency at the Federal level is the Office of Consumer Affairs, a minuscule part of Industry Canada, a government department primarily directed to the promotion of supplier interests and the advancement of issues such as increasing economic activity in specific sectors. The Office of Consumer Affairs in Canada, however, does not have regulatory authority and its mandate is limited to promoting consumer interests through consumer awareness and education, policy development and research, and advocacy of consumer-friendly practices. Because of the relatively small clout of consumer affairs within Industry Canada, there is little balancing of consumer and supplier interests.

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<sup>1</sup> European Union, “*Consumer Protection in the European Union - Ten Basic Principles*”, Directorate General for Health and Consumer Protection 2005, online: <[http://ec.europa.eu/consumers/cons\\_info/10principles/en.pdf](http://ec.europa.eu/consumers/cons_info/10principles/en.pdf)>.

Consumer affairs in the European Community's system of governance on the other hand, are treated separately from industry issues and accordingly, each group of stakeholders has different assigned portfolios, presided over by different commissioners.

The disengagement of Canadian authorities from protection of the economic and marketplace rights of consumers at the federal level in Canada manifests itself in a number of practical ways. One significant example of the same is the lack of government support for a mandatory food labelling policy that includes disclosure of genetically engineered ingredients in consumer foods. Despite the fact that public surveys have consistently shown that a large majority (90%) of Canadians want clear labelling of genetically modified organisms (GMOs) in their food purchases, no requirement for the same has been implemented to date. The Canadian government has only supported the development of a voluntary standard on GMO labelling that, has not been implemented by food producers. To date in contrast to Canada, similar surveys that show 90% of Europeans demanding GMO labelling find expression in EU requirements for GMO labelling of foods. In this debate in Canada, the government would appear to be more responsive to the fears of the regulated industry than its citizens; in Europe, the interests of the consumer would appear to take precedence.

Food labelling approaches are not an outlier for the purpose of comparison. Other areas where significant gaps can be shown between the European and Canadian protection frameworks are the contrasting approaches of each jurisdiction to "plain vanilla" marketplace protections provided such as transparent price indication and cooling off periods for consumer transactions concluded on online. Once again, the Canadian regime is considerably less robust.

One significant area where the level of consumer protection has deteriorated significantly in Canada in comparison to comparable European jurisdictions is the local telephone market. Both jurisdictions have moved to open up such markets to competition. In Canada, in particular, there has been a relentless effort, cheerled by the incumbents to deregulate the services provided by large former monopoly operators of telephony services, including those that are considered essential. In the result, the large incumbent providers of telephony, internet, and television services have tended to be either the old local telephone provider or the old cable provider. In Europe, while the liberalization of markets has generally followed the same itinerary, more care has been taken to impose regulation upon the dominant providers, particularly in terms of interconnection and access so that unregulated duopolistic pricing and service are not the orders of the day.

It is arguable that Canada's aggressive deregulation of telecommunications services, accomplished with the political interference of the current government has stifled rather than enhanced the likelihood of genuine competition in the

markets accessed by ordinary consumers. At the same time, previous consumer protections for issues such as quality of service have fallen by the wayside.<sup>2</sup> The European Union has been more stringent in ensuring that genuine competition exists before loosening the obligations of the dominant carrier and has been quick to act where supposedly competitive markets have not produced consumer friendly results.<sup>3</sup>

The position of the global consumer of airline transportation is generally considered to have worsened in the area of quality of service over the last two decades. However, this is also an area where striking differences in approach exist between the EU and Canada. There is no general legislation in Canada equivalent to that of the European Union's rules providing compensation and other rights to airline passengers in the case of denied boarding, cancellation and flight delays. This difference, in the current context of negotiations between the EU and Canada to have an "Open Sky" agreement between the two jurisdictions (meaning Canada and the 27 member countries of the European Union as a bloc) may have a substantial impact on the competitiveness of Canadian airlines in relation to their European counterparts. The latter are generally mandated by EU law to guarantee levels of service to consumers that are not provided for by Canadian law and regulation.

There are also differences between Canada and the EU in the determination of product liability protection for online transactions and sale of products. Blanket liability exclusion clauses are of widespread use in 'click-wrap' contracts used by global providers of products and services distributed online (software programs in the majority of cases). Due to EU intervention, many of these contracts must actually include clauses advising European consumers that despite the exclusion of liability clause introduced by the supplier, its operation may be annulled if its inclusion is prohibited by national and local laws.

Consumer and short-term credit is also subject to different regulatory treatment in Canadian and European markets. The largest European economies -Germany, France, Italy, Belgium, Finland set limits on the interest charged on consumer

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<sup>2</sup> In Telecom Decision 2006-15, the Commission determined that the retail Quality of Service (Q of S) regime, including the retail Rate Adjustment Plan (RAP), would not apply to exchanges where forbearance from the regulation of retail local exchange services was granted. See: Canadian Radio-television and Telecommunications Commission CRTC, *Telecom Decision CRTC 2006-15, Forbearance from the Regulation of Retail Local Exchange Markets*, 6 April 2006, online: Canadian Radio-television and Telecommunications Commission CRTC <<http://www.crtc.gc.ca/eng/archive/2006/dt2006-15.htm>>.

<sup>3</sup> The 2007 *EU Roaming Regulation* introduced "Euro tariff" caps for calls made and received while travelling in the EU. As a result, Euro tariff roaming consumers saved on average 70% compared to 2005, before the EU acted. The rules have since been extended. See: European Union, *Regulation (EC) No. 544/2009 of the European Parliament and of the Council amending regulation (EC) No. 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services*, 18 June 2009, online: Eur-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:167:0012:0023:EN:PDF>>.

and short-term lending that varies from 7% to 20% annual percentage rate (APR). While Canada only has limits for federally incorporated lending institutions (at 60% APR, far exceeding most European levels), short-term “payday” lenders are allowed by some provincial authorities to charge consumers abusive interest rates that can work out to over 1000% APR in some cases.

There appears to be some evidence that the EU approach has had some insulating effect on the effects of credit abuse on the national economy. In Europe, the United Kingdom and Spain are the only two major countries that do not apply caps or set ceilings to the credit consumers can be charged for short-term, contingent credit. At the same time, possibly because the household sector was less protected in these two jurisdictions against abusive lending, these two economies have been the hardest hit in the European Community in the current economic global recession.

The report’s authors are not of the view that the differences elaborated herein are simply the natural result of democratic jurisdictions crafting consumer protection regimes to fit the particular features of their economy and political culture. Rather, it would appear that the relative comprehensiveness of European consumer protection reflects a policy priority to level the playing field between supplier and consumer, and to place consumer wellbeing as the key objective in the commercial transaction. The Canadian equivalent usually appears to be more engaged with the maintenance of supplier interests.

It is not possible in the context of this report to empirically determine the net effect on consumer welfare of the approach of each regime to the issues touched upon by the “Ten Principles” document. There have been judgments made by the authors that reflect the conviction that areas dealt with by the EU document reflect a necessary response to potentially serious market failure. As a consequence, the recommendations contained in the report, have been made with a view to advancing more effective remedies for consumers in Canada.

## Introduction

Consumer protection is the blanket term for the extensive accumulation of laws, rules and practice that are ultimately concerned with the protection of citizens in their economic role as consumers. Specifically, consumer protection is intended to prevent and deter conduct by suppliers of products and services that results in consumers afforded an unfair bargain in the marketplace, or where such conduct poses an unacceptable risk to consumer welfare. This report tries to draw some important comparisons with consumer protection in place in Canada, and that provided by the legal framework of the European Community.

It must be initially acknowledged, as there are a large number of laws applicable in both jurisdictions that have direct implications for consumers, this report does not pretend to be exhaustive in identifying parallels and differences. Instead, it uses the EU's Ten Principles of Consumer Protection as a benchmark for the purpose of conducting a process of comparison between the two jurisdictions. In order to introduce the reader to the main differences with regards to the EU principles and to provide some context for the approaches taken by each jurisdiction, the initial part of the report introduces a historical basis for modern consumer protection in both Europe and North America. This historical precedent sets the background for the following and final section, which focuses on the general state of relevant consumer protection legal frameworks in Canada using the lens of the EU's Ten Consumer Protection Principles.

The recent economic crisis, and the ensuing economic recess, are arguably the latest historical demonstrations of the consequences of inadequate consumer protection levels. Absent consumer protection, consumer economic welfare suffers and so diminishes consumer confidence in the economic process, government institutions and the trustworthiness of suppliers. A consensus around the globe seems to be developing that regulatory weakness undercuts market sustainability by giving market suppliers in a dominant position an incentive to use their position to the detriment of the weaker and less informed party, the consumer. The principal lesson that may be gleaned from the crisis that engulfed the credit sector in 2008 is that there is a direct causal link between a governmental failure to enact and enforce appropriate regulatory measures and subsequent marketplace conduct destroying market sustainability.<sup>4</sup>

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<sup>4</sup> Examples of coercive practices are the industry-broad contractual terms for basic communications services and consumer credit products whereby users are locked in and subject to an array of penalties or fees in amounts that have the effect of leaving no other practical or economical option than to continue with the same operator, resulting in the curtailing of effective competition. Common examples of these practices are long-term service contracts (one to three years) that include hefty penalties to consumers for early cancellation of the service.

## Part I: History

### 1.1 Consumer protection policy in the European Union

The origin of a European Union consumer protection policy can be traced back to the *Treaty establishing the European Coal and Steel Community*. The treaty was signed in 1951 in Paris by France, Germany, Belgium, Italy, Holland and Luxembourg as the first multilateral agreement to create a community of countries based on a common market, common objectives and common institutions.<sup>5</sup> The mission of the Community, as stated in Article 2 of the *Treaty of Paris* (as it is also known) was to contribute to the expansion of their economies, their employment levels and the improvement of the standard of living in the participating countries through the institution of a common market in harmony with the general economy of the Member States.<sup>6</sup> According to the *Declaration of 9 May 1950*, put forward by Robert Schumann, French Minister of Foreign Relations,<sup>7</sup> the pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the “federation of Europe”, and would have the effect of changing the destinies of those regions “long devoted to the manufacture of munitions of war, of which they have been the most constant victims”.<sup>8</sup>

#### **1.1.1 Protection of consumers at the heart of the European economic peace and stability effort**

The creation of a common market within Europe for these two essential input materials of the industrial era, proposed as a multilateral policy tool to defuse the risk of war, had a strong consumer protection element incorporated into core provisions of the *Treaty of Paris*. Access to basic commodities and resources was seen by the proponents of the European common market to be a fundamental part of the effort to stabilize and reconstruct a devastated Europe in the post war period, and indeed, allowing for such access was a cornerstone of the *Treaty*.

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<sup>5</sup> *Treaty establishing the European Coal and Steel Community*, [*Treaty of Paris*] Art. 1., online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <[http://www.ena.lu/treaty\\_establishing\\_european\\_coal\\_steel\\_community\\_paris\\_18\\_april\\_1951-020301854.html](http://www.ena.lu/treaty_establishing_european_coal_steel_community_paris_18_april_1951-020301854.html)>.

<sup>6</sup> *Ibid.*, Art 2.

<sup>7</sup> Jean Monnet, French merchant and first Secretary General of the League of Nations (the UN predecessor) is credited as having prepared the *Declaration of 9 May 1950*, read by Robert Schumann (the *Schumann Declaration*), French Foreign Minister, proposing the creation of the common market for coal and steel administered by a supranational entity.

<sup>8</sup> *Ninth and Final Draft of the Schumann Declaration*, 6 May 1950, online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <[http://www.ena.lu/ninth\\_final\\_draft\\_schuman\\_declaration\\_1950-022300049.html](http://www.ena.lu/ninth_final_draft_schuman_declaration_1950-022300049.html)>.

The importance of consumers within the proposed new common market was much more than just verbiage. Consumer welfare and the economic protection of consumers were recognized as concepts playing a crucial role from the point of view of European economic stability. Accordingly, the wording of Article 4 of the *Treaty* within the nascent common market prohibited:<sup>9</sup>

...  
(b) measures or practices discriminating among producers, among buyers or among consumers, specifically as concerns prices, delivery terms and transportation rates, as well as measures or practices which hamper the buyer in the free choice of his supplier;

...  
(d) restrictive practices tending towards the division of markets or the exploitation of the consumer.

A few years later, in 1957, the *Treaty Establishing the European Economic Community* also known as the *Treaty of Rome* was signed in Rome by Belgium, Germany, France, Italy, Luxembourg and the Netherlands. It had the objective of expanding the European common market from the strategic resources of coal and iron to include free movement of goods, services, capital and persons.<sup>10</sup> In the preamble to the Treaty, the founding countries of the European common market made clear their commitment to the “essential purpose” of constantly improving the living and working conditions of their peoples by ensuring the economic and social progress of their countries through the elimination of trade barriers and restrictions. This objective included concerted action among member countries to guarantee policies geared toward the achievement of balanced trade, fair competition, the strengthening of peace and liberty and poverty mitigation.<sup>11</sup>

As was the case with the *Treaty of Paris*, consumer protection was not, as a term of art, explicitly included in the wording of the *Treaty of Rome*, but the text of the treaty included explicit reference to the need to protect consumers from abusive commercial and anti-competitive practices. One example is provided by Article 39, which included an objective of common agricultural policy “to ensure reasonable prices in supplies to consumers”,<sup>12</sup> and continued in Article 40 by setting a common agricultural policy that included the creation of a shared organization of agricultural markets with a specific mandate:

...

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<sup>9</sup> *Supra*, note 5.

<sup>10</sup> *Treaty Establishing the European Economic Community (EEC), Rome, 25 March 1957*, online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <<http://www.ena.lu/treaty-establishing-european-economic-community-rome-25-march-1957-020302318.html>>.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, Art. 39.

40 (3). The organization shall confine itself to pursuing the objectives set out in Article 39 and exclude any discrimination between producers or consumers within the Community.<sup>13</sup>

Concerns about the unwanted economic consequences of abuse of dominant position and anti-competitive practices by companies found in the *Treaty*, were also based on the negative effect of such practices on consumers' welfare. Article 86(b) of the *Treaty* also included, within the proscribed practices "the limitation of production, markets or technical development to the prejudice of consumers".<sup>14</sup>

## 1.2 Origins of the current European Union Consumer Protection policy

The first common European policy developed with the specific objective of protecting consumer appeared in 1972 *Paris Summit*. In the joint statement from the *Summit*, the heads of government of the nine associated states declared at the time, the need to work on the political front of the union beyond simply economic concerns, to advance the goal of the creation of a common market. The project to expand the European market was presented not as an end in and of itself, but instead, as a first and fundamental step towards a more meaningful economic and political union that would see as its ultimate goal the economic well being of Union citizens and the raising of the quality of life of member countries:

3. Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind;...<sup>15</sup>

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<sup>13</sup> *Treaty Establishing the European Economic Community (EEC), Rome, 25 March 1957*, online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <<http://www.ena.lu/treaty-establishing-european-economic-community-rome-25-march-1957-020302318.html>>. Art. 40.

<sup>14</sup> *Treaty Establishing the European Economic Community (EEC), Rome, 25 March 1957*, online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <<http://www.ena.lu/treaty-establishing-european-economic-community-rome-25-march-1957-020302318.html>>. Art 86(b).

<sup>15</sup> *Statement from the Paris Summit, 1972, Paris, 19-21 October 1972*, online: European Navigator, Centre Virtuel de la Connaissance sur l'Europe (CVCE) <<http://www.ena.lu/statement-paris-summit-19-21-october-1972-020002284.html>>.

As a result of the meetings held in Paris, on April 14, 1975, the Council of the European Communities issued the *Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy*.<sup>16</sup> The adoption of this resolution by the European Council was considered as the first action that set the stage for Community measures expressly on behalf of the interests of consumers. While the creation and expansion of the common market contemplated in the *Treaty of Paris* included in its provisions the banning of trade practices that resulted in harm to the consumer,<sup>17</sup> the intent of those provisions was primarily to provide the industrial and economic policy tools to prevent anti-competitive practices such as price discrimination and price-fixing. The 1975 *Resolution* approved the consumer protection and information policy as a principle to be adopted at the community level and recognized the need of implementing such policy to fulfill “the task of improving the quality of life of member countries” through the “protection of the health, safety and economic interests of the consumer.”<sup>18</sup> With this document, the European Economic Community (EEC), predecessor to the current European Union (EU), proclaimed the basic rights of European consumers:<sup>19</sup>

3. The consumer is no longer seen merely as a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which may affect him either directly or indirectly as a consumer. Consumer interests may be summed up by a statement of five basic rights:

- The right to protection of health and safety;
- The right to protection of economic interests;
- The right of redress;
- The right to information and education;
- The right of representation (the right to be heard).

Although the need to protect consumers from the economic policy standpoint within the common market had been officially recognized by the signing countries in the *Treaty of Paris*, this was the first time the EEC proclaimed self-standing consumer rights as positive economic rights in the marketplace with profound legal and market ramifications for member states. As resolutions are intended as

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<sup>16</sup> *Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy*, 14 April 1975 [OJ 1975 C92/1], online: EUR-Lex, Access to European Union Law <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425(01):EN:HTML)>.

<sup>17</sup> *Supra* note 5. [*Treaty of Paris*].

<sup>18</sup> [OJ 1975 C92/1].

<sup>19</sup> *Preliminary programme of the European Economic Community for a consumer protection and information policy*, 14 April 1975 [OJ 1975 C92/1] online: EUR-Lex, Access to European Union Law <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425(02):EN:NOT)>.

directions to give effect and enact internal laws by means of transposition,<sup>20</sup> member European countries proceeded to enact consumer protection legislative frameworks relying on this document as a main legal source.<sup>21</sup>

### 1.3 The Thalidomide crisis and the birth of modern global consumer protection

One of the largest public health tragedies of the last century, the Thalidomide crisis, left some 15,000 children adversely affected in 46 countries; 12,000 among them born with birth defects and another 8,000 dead in their first year of life.<sup>22</sup> While not the first crisis generated by a pharmaceutical product causing death or putting consumers' health and safety at risk since the industrial revolution,<sup>23</sup> the Thalidomide crisis was an event of central relevance to consumer protection from the historical and legal standpoints. The large number of victims the drug caused worldwide prompted strong public reaction and forced governments to establish or strengthen legislative and regulatory protections to discharge their obligation to better protect the safety of their citizens. Given the proportions of the failure and the nature of the crisis, it demonstrated the need for more specific legal safeguards to adequately protect consumers in the context of a progressively complex marketplace. Such safeguards were also seen as required to counter the tendency of markets to fail when there exists an undue preference for purely mercantile producer interests over the health interests of users.

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<sup>20</sup> Transposition of European directives into national law is carried out by intra-national member governments and parliaments sometimes involving regional and local authorities. The Commission monitors the transposition of directives as well as respect of EU law more generally (regulations, decisions and EC Treaty rules).

<sup>21</sup> It should be noted that other EU member countries are free to legislate internally on areas related to the establishment of the common market, but they are bound to use European law as guidelines and must guarantee that European law is incorporated as a baseline and minimum standard for national laws.

<sup>22</sup> Roger von Moos, Rachel Stolz, Thomas Cerny and Silke Gillissen, *Thalidomide: from Tragedy to Promise*, Swiss Medical Weekly, 2003, Vol. 133 at 77, online: Swiss Medical Weekly <<http://www.smw.ch/docs/pdf200x/2003/05/smw-09947.PDF>>.

<sup>23</sup> In the United States, the content of the *Pure Food and Drug Act* of 1906 was oriented mostly to industry's patented products and formulas instead of was less concerned with consumers' health. It was not effective in the first half of the century to prevent entry into the market of products with little or no efficacy at all and even compounds that were outright harmful to consumer's health. Some examples of such products include *Banbar*, a worthless "cure" for diabetes nevertheless protected under the *Act*; *Lash-Lure*, an eyelash dye that blinded some women; *Radithor*, a radium-containing tonic that sentenced users to a slow and painful death; and the *Wilhide Exhaler*, which falsely promised to cure tuberculosis and other pulmonary diseases. A Tennessee company manufactured a product called *Elixir Sulphanilamide*, an untested product that was a highly toxic and a chemical analogue of antifreeze that caused over 100 deaths, many of them to children. All of these products were legally manufactured and distributed under the existing 1906 *Act*. The rate of failures prompted the passage of the *Food, Drug and Cosmetic Act* in 1938, which was in place when the Thalidomide crisis hit in 1962. See: United States Food and Drug Administration, *History of the FDA: The 1938 Food, Drug, and Cosmetic Act*, online: U.S. Food and Drug Administration <<http://www.fda.gov/oc/history/historyoffda/section2.html>>.

Thalidomide was a sedative developed by Ciba, a German company, in 1953. The drug was tested on animals in order to study its pharmacological properties, but after a short period of testing, without major findings as to effectiveness, Ciba discarded the drug.<sup>24</sup> Later in 1957, another German pharmaceutical company, Chemie Grünenthal, found that the drug worked as an effective hypnotic, with the added observed benefit that it allowed patients who had trouble falling asleep to have a quick, natural sleep. Grünenthal became the new patented maker of the drug and hailed its non-addictive, non-hangover effects and the fact that it was “completely non-poisonous”, “completely safe” and harmless “on pregnant women and nursing mothers.”<sup>25</sup> The drug became widely popular under the name *Contergan* in the German market and sales volume in Germany averaged 90,000 packets of the drug every month, all of them over-the-counter.<sup>26</sup> Three years later in 1960, it was sold to millions in 46 countries around the world,<sup>27</sup> including Europe, North America, Latin America, Africa and Asia under 37 different names.<sup>28</sup> Although the United States Food and Drug Administration (FDA) withheld the green light for the drug to enter the United States market, in Canada the drug was approved for sale to the public in 1959.<sup>29</sup>

The U.S.-based distributor of Thalidomide, Richardson-Merrell, managed to get approvals by Canadian authorities under Prime Minister John Diefenbaker’s government to distribute the drug in the country. It was available in the form of sample tablets in 1959 and by 1961 it was approved for medical prescription though medical journals around the world had already warned about the drug’s side effects.<sup>30</sup> When the thousands of victims around the world became news, it was soon learned that Canada had not escaped harmless from the tragedy and 125 children with Thalidomide-induced deformities were reported in the country.<sup>31</sup> Ironically, the United States home base to the distributor, that Canadian authorities allowed to introduce the drug into the country, was largely spared from its effects thanks to the work of a Canadian working as an inspector for the

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<sup>24</sup> Kristina E. Lutz, *From Tragedy to Triumph: The Approval of Thalidomide*, Harvard Law School Legal Electronic Document Archive Home Page LEDA, online: LEDA <<http://leda.law.harvard.edu/leda/data/351/Lutz.html#fn10>>.

<sup>25</sup> William A Silverman, MD., *The Schizophrenic Career of a “Monster Drug”*; *Paediatrics* [Official Journal of the American Academy of Paediatrics], Vol. 110 No. 2 August 2002, 404-406, online: <<http://pediatrics.aappublications.org/cgi/content/full/110/2/404>>.

<sup>26</sup> Kristina E. Lutz, *From Tragedy to Triumph: The Approval of Thalidomide*, Harvard Law School Legal Electronic Document Archive Home Page LEDA, online: LEDA <<http://leda.law.harvard.edu/leda/data/351/Lutz.html#fn10>>.

<sup>27</sup> Elisabeth A. Cawthon, *Medicine on Trial*, A Handbook with Cases, Laws and Documents Published by ABC-CLIO, March 2004, at 45.

<sup>28</sup> *Supra* note 25 [Paediatrics].

<sup>29</sup> Interestingly, the FDA Medical Reviewer who withheld the authorization for thalidomide to enter the U.S. market was a Canadian pharmacologist from McGill University, Frances Oldham Kelsey, who had earned a Ph.D. in the field from University of Chicago and later also an MD. The Richardson-Merrell pharmaceutical company of Cincinnati submitted an application to the FDA in September 1960 to sell thalidomide under the brand name *Kevadon*.

<sup>30</sup> Thalidomide Victims Association of Canada, *What is Thalidomide?*, online: Thalidomide Victims Association of Canada <[http://www.thalidomide.ca/en/information/what\\_is\\_thalidomide.html](http://www.thalidomide.ca/en/information/what_is_thalidomide.html)>.

<sup>31</sup> *Ibid.*

Food and Drug Administration Agency (FDA), Dr. Frances Oldham Kelsey. Doctor Kelsey's well-founded suspicions of the drug resulted in the FDA withholding approval to market the drug in the U.S. This precautionary measure spared the U.S. from the harms the drug inflicted on consumers around the world, including Canada. At the end of the crisis, only 17 cases of Thalidomide victims were reported in the U.S.

The back story of the review of the drug in the U.S. approval process is instructive. Grünenthal's drug importer in the U.S., Richardson-Merrell, had started the process of securing an FDA approval for manufacturing and distributing Thalidomide by sending samples of it to physicians as part of an effort to gather data on preliminary results on patients and later submit that data to the FDA. Thalidomide was sent to 1,267 physicians across the country, with enough dosages for some 20,000 patients, a scale of distribution unprecedented until that moment in the U.S., given that previously, there had never been a drug tested on more than 200 patients or sent to more than 200 doctors.<sup>32</sup> Dr. Kelsey, the FDA medical reviewer in charge of the approval process of the drug, noticed the fact that Richardson-Merrell had avoided mentioning side effects related to Thalidomide even though they were being reported by European medical journals.<sup>33</sup> Instead of well-documented studies, the company submitted mostly patient' testimonials in their application to the FDA. The omissions of reports concerning side effects and the lack of scientific evidence included in Richardson-Merrell's repeated applications to have the drug approved raised Dr. Kelsey's suspicions. Although Richardson-Merrell's representative, Dr. Joseph Murray, complained to FDA officials about Kelsey's concerns with the drug calling them "unreasonable", Dr. Kelsey would not sign off on the approval of the drug.<sup>34</sup>

In December 1960, while the FDA was withholding Thalidomide's approval in the United States, the *British Medical Journal* published a letter from Leslie Florence, a British physician who had been prescribing Thalidomide to his patients. The letter reported peripheral neuritis (also known as phocomelia), a painful tingling of the arms and feet in patients who had taken the drug over a long period of time. The article was followed by a growing tide of cases of women across Europe giving birth to babies suffering dramatic malformations, including abnormally short limbs, with toes sprouting directly from the hips or extremely small and deformed arms, internal-organ malformations, eye and ear defects. Many women were also giving birth to babies who would die soon after being born as a result of the physical abnormalities.

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<sup>32</sup> Elisabeth A. Cawthon, *Medicine on Trial*, Published by ABC-CLIO, 2004, at 45.

<sup>33</sup> The first report of peripheral neuritis associated with Thalidomide was published in the *British Medical Journal* in December 1960. Other publications in Germany and Australia reported on the side effects in 1961. See: *Supra* note 25. [Paediatrics]

<sup>34</sup> U.S. Food and Drug Administration, *Frances Oldham Kelsey: FDA Medical Reviewer Leaves her Mark on History*, FDA Consumer Magazine, March-April, 2001.

Later in November 1961, William McBride and Widukind Lenz, two doctors working independently (McBride in Australia and Lenz in Germany) discovered a link between the consumption of the drug among pregnant women and the birth of children with deformities.<sup>35</sup> Lenz, a professor and assistant at the Children's Clinic at Hamburg University was contacted by a young lawyer named Karl Shulte-Hillen, whose wife and sister had given birth to babies with shrunken arms and missing fingers. Shulte-Hillen hypothesized that some common cause to blame was in his town, but Dr. Lenz discovered that while one single case of phocomelia had been reported between 1930 and 1955, the number of cases reported from September 1960 to October 1961 had jumped to fifty.<sup>36</sup> Dr. Lenz informed the company about his findings but the company refused to take action. Ten days later, German health authorities pulled the drug off the market. Unfortunately, by the time the drug was eventually recalled from the market it was too late for victims in Europe and abroad: of the 15,000 victim children reported in 46 countries, 12,000 presented birth defects and 8,000 died before their first year of life.<sup>37</sup>

#### **1.4 Origins of modern consumer protection policy in North America**

By the time the Thalidomide crisis made the news around the world, the Federal Trade Commission (FTC) was in the process of conducting a large-scale investigation on anti-trust (anti-competitive) practices such as price fixing. The anti-trust effort was intended to protect the economic interest of consumers by cracking down on practices designed to eliminate meaningful competition in a market characterized by excessively high prices and companies' return on investment beyond reasonable levels.<sup>38</sup> Congress had also attempted legislative action to correct the abuses found by both by the FTC and the Senate Sub-Committee on Antitrust and Monopoly, chaired by Senator (D) Estes Kefauver.<sup>39</sup>

However, the advent of the Thalidomide crisis had a strong galvanizing effect on public desire for general reform, both in North America and in the rest of the world, as it demonstrated the need for increased oversight of the industry to protect competitiveness and consumer safety. The investigation that started as government action against anti-competitive practices found itself expanded to

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<sup>35</sup> Swiss Medical Weekly, *Thalidomide: from Tragedy to Promise*, 2003, Vol. 133 at 77.

<sup>36</sup> Kristina E. Lutz, *From Tragedy to Triumph: The Approval of Thalidomide*, Harvard Law School Legal Electronic Document Archive Home Page LEDA, online: LEDA <<http://leda.law.harvard.edu/leda/data/351/Lutz.html#fn10>>.

<sup>37</sup> Health Canada, *Status of Thalidomide in Canada*, October 17, 2006, online: Health Canada <[http://www.hc-sc.gc.ca/dhp-mps/prodpharma/activit/fs-fi/thalidomide\\_fs\\_fd-eng.php](http://www.hc-sc.gc.ca/dhp-mps/prodpharma/activit/fs-fi/thalidomide_fs_fd-eng.php)>.

<sup>38</sup> Merrill Gozner, *The \$800 Million Pill: The Truth Behind the Cost of New Drugs*, California University Press, Berkeley, CA. 2004, at 213.

<sup>39</sup> *Ibid.*

include abusive marketing practices and claims advanced by manufacturers with respect to the efficacy and safety of specific drugs for public health.<sup>40</sup>

#### **1.4.1 Kennedy's special address to Congress outlining consumers' rights**

President John F. Kennedy seized the political moment and addressed the public's concern over the crisis to muster public support for a legislative overhaul of the 1938 *Food, Drug and Cosmetic Act*.<sup>41</sup> On March 15, 1962, when public concern about the safety of consumer products was widespread, he took the step of addressing Congress to underline the magnitude of the situation and the importance of protecting the consumer interest. Kennedy described consumers as:<sup>42</sup>

*the only important group in the economy who are not effectively organized, whose views are not often heard (...) Fortunate as we are, we nevertheless cannot afford waste in consumption any more than we can afford inefficiency in business or Government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers.*

Then he proceeded to enumerate four fundamental consumer rights and to urge the need for Congress to approve legislative and administrative measures to meet its responsibility with consumers and the exercise of their rights. According to Kennedy's address, the basic consumer rights included:<sup>43</sup>

(1) The right to safety: to be protected against the marketing of goods which are hazardous to health or life.

(2) The right to be informed: to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labelling, or other practices, and to be given the facts he needs to make an informed choice.

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<sup>40</sup> James Q. Wilson, *The Politics of Regulation*, in *The Political Economy*, Thomas Ferguson and Joel Rogers eds., M.E. Sharpe Inc., 1984 at 88.

<sup>41</sup> *Food, Drug and Cosmetic Act of 1938*, § 201.

<sup>42</sup> John F. Kennedy, *Special Message to the Congress on Protecting the Consumer Interest*, March 15, 1962, online: University of California-Santa Barbara. <<http://www.presidency.ucsb.edu/ws/index.php?pid=9108>>.

<sup>43</sup> *Ibid.*

(3) The right to choose: to be assured, wherever possible, access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices.

(4) The right to be heard: to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals.

The proclamation of consumer rights made by President Kennedy was the basis for much of the consumer protection legislation enacted since the sixties in North America and the seventies in Europe.<sup>44</sup> It continues to be an important source and founding document of modern consumer and marketplace protection legislation.

However, since the turn of the 20<sup>th</sup> century and up to the 1960s, significant efforts had been taking place in the US Congress to craft legislation to guarantee some degree of safety for consumers in key areas such as food, cosmetics and medicine, where the commercialization of defective and/or outright dangerous products had caused many accidents, illnesses and sometimes death.<sup>45</sup> While protection of patent holders' rights alone were central to early legislation, consumer-oriented quality standards were gradually introduced to provide some degree of protection against toxicity.<sup>46</sup> Among these laws were the *Pure Food and Drug Act* of 1906; the *Meat Inspection Act* of 1906 and the *Food, Drug and Cosmetic Act* of 1938 in the United States, and in Canada, the *Canadian Patent and Proprietary Medicine Act* of 1909.<sup>47</sup>

#### **1.4.2 The Kefauver-Harris Act of 1962**

The Senate Subcommittee on Antitrust and Monopoly, under the chairmanship of Senator Estes Kefauver (D) had recommended, in 1959, the amendment of the

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<sup>44</sup> [OJ 1975 C92/1].

<sup>45</sup> *Supra* note 23.

<sup>46</sup> The *Pure Food and Drug Act* of 1906 in the United States and the *Canadian Patent and Proprietary Medicine Act* of 1909 were only concerned with the purity of the products in the market. It was not until the *Food, Drug and Cosmetic Act* of 1938, passed under the administration of President Franklin Delano Roosevelt that toxicity tests and safety for human consumption were required. See: Paul M. Wax, *Elixirs, Diluents and the Passage of the 1938 Federal Food, Drug and Cosmetic Act*, *Annals of Internal Medicine* (American College of Physicians), online: *Annals of Internal Medicine* <<http://www.annals.org/cgi/content/full/122/6/456>>.

<sup>47</sup> James Q. Wilson, *The Politics of Regulation*, in *The Political Economy*, Thomas Ferguson and Joel Rogers Eds., M.E. Sharpe Inc., 1984 at 88.

applicable 1938 *Act* following a 10-month process of hearings that included testimony and evidence given by over 150 witnesses and their assistants. Prior to the hearings (which had met with significant opposition by industry representatives), Senator Kefauver's Subcommittee had compiled extensive data on pharmaceutical practices, prices and profits that led to an opinion that the probe of the industry was necessary to correct those practices and protect against ongoing and systemic anomalies in the marketplace. During the hearings, many important issues that negatively affected consumers surfaced, such as the role of advertising and promotion to doctors, the relationship between trademarked and generic drugs and related naming practices, claims made by the manufacturers about the efficacy of their drugs and whether consumers were being adequately informed about side effects.<sup>48</sup>

News from around the world confirming thousands of Thalidomide victims coincided in time with this probe of the industry. Its impact on public opinion was crucial in the final effort to approve the 1962 *Drug Amendments* to the old 1938 *Food, Drug and Cosmetic Act*,<sup>49</sup> which in essence, incorporated a strong consumer protection component. The Thalidomide tragedy played a pivotal role in triggering a profound policy shift in the United States as well as in Canada leading to changes in the area of consumer protection law. For the first time, food, drug and cosmetics legislation would emphasize protection of the safety, health and economic wellbeing of consumers by requiring products to not only be safe but also effective. Protection was not based only the purity of the compounds but on their actual clinically tested effectiveness.

The 1962 *Drug Amendments* were passed by Congress unanimously.<sup>50</sup> The amendments tightened control over prescription drugs, new drugs and investigational drugs. They also introduced the precautionary principle that no drug is truly safe unless it is also effective, and effectiveness must be established by testing conducted according to scientific standards as part of the application process for approval prior to marketing.

### **1.4.3 Thalidomide and its role on consumer protection policy in Canada**

Thalidomide left some 150 victims in Canada, a number ten times higher than the number of victims in the U.S. It also left a lingering uneasiness among Canadians in general, with unanswered questions about why a drug that had not received approval to be sold in the United States market was allowed to be sold in Canada by the same distributor who had been denied approval in the United States. The angst was increased by the knowledge that Dr. Kelsey, the FDA inspector who raised questions and withheld the approval of Thalidomide in the U.S., was a

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<sup>48</sup> Daniel Scroop, *A Faded Passion? Estes Kefauver and the Senate Subcommittee on Antitrust and Monopoly*, Business and Economic History, Vol. 5, 2007, online: The Business History Conference <<http://www.thebhc.org/publications/BEHonline/2007/scroop.pdf>>.

<sup>49</sup> *Food, Drug and Cosmetic Act* of 1938, 21 U.S.C. § 334(a)(1).

<sup>50</sup> *Food, Drug and Cosmetic Act [Drug Amendments, 1962 (Kefauver Act)]*, 21 U.S.C. 321 § 107.

Canadian.<sup>51</sup> In the House of Commons, government officials were questioned on why it took Canada over three months to recall the product on March 2, 1962 after the first recall of the product in Germany on November 26, 1961, especially considering that the U.K. had recalled it just 6 days after, on March 2 of the same year.<sup>52</sup>

The legislative outcome of the Thalidomide crisis in Canada was not as sweeping as that of the U.S., despite the higher number of Canadian Thalidomide victims. The old 1953 *Food and Drugs Act* was not amended but instead some changes were introduced to the existing *Food and Drug Regulations* by the Department of Health (Health Canada) that echoed the changes introduced by the *Kefauver Amendments* south of the border.<sup>53</sup> For the first time, drug manufacturers in Canada were required to submit to the federal agencies authoritative scientific evidence on the efficacy and safety of new drugs when applying to obtain a Notice of Compliance or approval before the product enters the market.<sup>54</sup>

## 1.5 The spread of consumer protection legislation through North America and Europe

The economic importance of the consumer and the centrality of the consumer in the free market economy have been historically acknowledged in key works of economic literature:<sup>55</sup>

Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer.

The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it. But in the mercantile system, the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all industry and commerce.

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<sup>51</sup> John K. Crellin, *A Social History of Medicines in the Twentieth Century: To be Taken Three Times a Day*, Haworth Press, 2004, at 168.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Food and Drugs Act*, R.S., c. F-27, s. 1.

<sup>54</sup> Health Canada, *Brief History of Drug Regulation in Canada*, online: Health Canada <<http://www.hc-sc.gc.ca/dhp-mps/homologation-licensing/info-renseign/hist-eng.php>>.

<sup>55</sup> Adam Smith, *The Wealth of Nations*, Hayes Barton Press, Book III, Chapter 8 at 363.

However, the societal importance of a consumer's choices in the marketplace and the subsequent protection of those choices found minimal validation in the policies of Western governments until the promulgation of consumer protection legislation in North America, commencing the 1960s. Levelling the playing field for consumers by establishing legal prohibitions on industry misconduct gave rise to a form of rights for consumers that was usually coupled with a special obligation to be assumed by the government to enforce such rights. This form of recognition had its catalyst, to a great extent, in the Thalidomide crisis and the crisis' galvanizing effect on the public. As we have noted, President Kennedy's special address to Congress followed soon after, proclaiming a list of fundamental consumer rights, much in the style of a 'charter' of economic rights.<sup>56</sup> The European Union, guided as well by principles, its founding would follow on the same path by officially proclaiming basic rights for consumers in 1975 through the *Council Resolution on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy*<sup>57</sup> developed from the 1971 Summit of Paris statement.<sup>58</sup> In Canada, the government's recognition of consumers' rights has not elicited the same kind of explicit policy declarations as seen in the U.S. or Europe, despite periodic upgrades over the last several decades to existing legislation that seek to either promote product safety, warranties or some degree of fairness for consumer purchases and contracts.

The Liberal minority government that took power in April 1963 in Canada began to act on the issue of consumer protection reform raised by the Thalidomide tragedy and the Kennedy administration. Governing with the cooperation of Tommy Douglas, the leader of the small fledgling New Democratic Party, Prime Minister Lester B. Pearson brought progressive legislative reform to Canada in the form of national programs that have become enshrined as central elements of the Canadian system of government. These programs include public universal health care, the Canada Pension Plan and the Canada student loans program.<sup>59</sup> Pearson is arguably the most influential modernizer of the federal government of any of the Canadian Prime Ministers of the last century. His political career had an impact that was also felt around the world in his role as Canadian statesman and Nobel Prize winning peacemaker.

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<sup>56</sup> John F. Kennedy, *Special Message to the Congress on Protecting the Consumer Interest*, 15 March 1962, online: The American Presidency Project <<http://www.presidency.ucsb.edu/ws/index.php?pid=9108>>.

<sup>57</sup> [OJ 1975 C92/1].

<sup>58</sup> *Supra* note 15 [*Statement from the Paris Summit*].

<sup>59</sup> Lester B. Pearson is also renowned globally as an extraordinary world statesman and peacemaker. He is acknowledged to have directly influenced the modern idea of peacekeeping and have gained for Canada the reputation as a peacekeeping country. He kept Canada out of the Vietnam War, which later proved a failure and defeat for the U.S. However, Pearson's decision of keeping Canada out that war was not welcome at the time by President Lyndon B. Johnson.

The elevation of the stature of consumer protection in Canada is part of the legacy of Pearson's years as Prime Minister. Despite some successor governments' efforts to decrease the level of commitment of government resources to protect the economic rights of the electorate as consumers, Pearson's work continues to be relevant both in the form of institutions created to help protect Canadian consumers and the improvements to the relative position of the consumer in the Canadian marketplace. Consumer protection legislation was one of several economic measures that implemented interventionist measures to modernize the Canadian economy and accomplish socially relevant goals. These measures included the introduction of the National Labour Code (its main features were the institution of the minimum wage, the 40-hour work week and two-week vacation), crop insurance for farmers, interest-free student loans and a merit-based, race-neutral immigration system. Pearson also signed the Canada-United States Auto Agreement, which created thousands of new jobs in Canada and paved the way for the North American Free Trade Agreement (NAFTA). At the same time that these political and economic landmarks were being realized, the 1960s and 1970s featured unprecedented levels of economic growth for the country.

## **1.6 Lester B. Pearson and the Department of Consumer and Corporate Affairs**

The creation of the Department of Consumer and Corporate Affairs was an official recognition of the centrality of the consumer in the Canadian economy. The importance and relevance of having a governmental department whose title included both consumer protection and corporate oversight together on an equal footing cannot be overstated. It is a central tenet of belief for consumer advocates that consumer wellbeing is essential to market stability, since consumers, as a group, constitute the very backbone of the market.<sup>60</sup> In simple terms, the free market works when industrial and commercial suppliers respond to consumer demand by creating a market that responds to consumer needs.<sup>61</sup>

The consumer component of the equation for success elaborated above has been obscured in the current framework of Canadian public policy-making. However, the historical record shows that the economic role of citizens as consumers was given greater weight within the Canadian governmental structure at one time in the past. In December 1965, Prime Minister Pearson announced the need for the reorganization of the government's responsibilities in creating favourable economic conditions. This reorganization would afford protection to consumers, investors and business and by 1966, the *Government Organization*

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<sup>60</sup> *Supra* note 54 [Adam Smith].

<sup>61</sup> "The quantity of the finished work which they sell to the inhabitants of the country necessarily regulates the quantity of the materials and provisions which they buy. Neither their employment nor subsistence, therefore, can augment, but in proportion to the augmentation of the demand from the country for finished work". See: Adam Smith, *The Wealth of Nations*, Book 3, Chapter 1.

*Act* had created the Department of the Registrar General. In the process of creating the department, the Prime Minister expounded on its importance:

Legislation in these areas, must not merely record commercial rights but protect the national interest and the rights of individuals and act as an instrument in the promotion of social and economic goals.<sup>62</sup>

Later, in December 1967, the Pearson government created the Department of Consumer and Corporate Affairs (CCA), under the authority of an act of Parliament, the *Department of Consumer and Corporate Affairs Act*.<sup>63</sup> The Minister of Consumer and Corporate Affairs had jurisdiction over:<sup>64</sup>

**9.(...)**

- (a) consumer affairs;
- (b) Corporations and corporate securities;
- (c) Combines, mergers, monopolies and restraint of trade;
- (d) Bankruptcy and insolvency;
- (e) Patents, copyrights and trademarks;
- (f) Standards of identity and performance in relation to consumer goods; and
- (g) legal metrology.

An important element of the *Act* was its use of language that expressed the unequivocal intention to place the consumer at the centre of policymaking for the market. While the Minister was given jurisdiction over a number of economically sensitive areas, consumer affairs was listed first. In addition, in order to carry out overall superintendence within this area, the *Act* gave the Minister a specific mandate to play an active role in advancing the consumer interest:<sup>65</sup>

**6.(1)** In exercising his powers and carrying out his duties and functions in relation to consumer affairs under this Act, the Minister shall:

- (a) *initiate*, recommend or undertake programs designed to promote the interests of the Canadian consumer;
- (b) *coordinate* programs of the Government of Canada that are designed to promote the interests of the Canadian consumer;

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<sup>62</sup> G. Bruce Doern, *How Ottawa Spends Your Tax Dollars: National Policy and Economic Development 1982*, James Lorimer & Company, 1982, at 176.

<sup>63</sup> *Department of Consumer and Corporate Affairs Act*, S.C. 1967-68, c. 16.

<sup>64</sup> *Ibid.*, s. 6.

<sup>65</sup> *Ibid.*, s. 9.

- (c) *promote and encourage* the institutions of practices or conduct tending to the better protection of the Canadian consumer and cooperate with provincial governments or agencies thereof, or any bodies, organizations or persons, in any programs having similar objects;
- (d) *undertake, recommend or assist* in programs to assist the Canadian consumer to be more fully informed about goods and service
- (e) *provide* such inspection services for the protection of the Canadian consumer as
  - (i) he considers necessary for the enforcement of any Act under his administration, or
  - (ii) the Governor in Council may direct him to provide.

The Department of Consumer and Corporate Affairs was given many responsibilities: coordinating the enforcement of a number of federal statutes that governed corporations and corporate securities; combines (competition), mergers, monopolies and/or restraint of trade; bankruptcy and insolvency; patents, copyrights, trademarks and industrial design; and consumer affairs and programs designed to promote the interests of Canadian consumers. The Minister of Consumer Affairs was the Registrar General of Canada (to whom incorporation applications are made) and custodian of the Great Seal of Canada the Privy Seal of the Governor General and the seals of the Administrator and Registrar General of Canada. The Bureau of Competition Policy, including the Restrictive Trade Practices Commission, was also part of the CCA, as well as the Bureau of Consumer Affairs, which was a unit within the department concerned with policy research and advocacy geared towards the protection of consumers in the marketplace. The Bureau of Corporate Affairs was concerned with the regulatory scheme overseeing federally incorporated corporations.<sup>66</sup> Among the federal consumer protection statutes the CCA had enforcement power over were the *Food and Drugs Act*,<sup>67</sup> the *Hazardous Products Act*,<sup>68</sup> the *Motor Vehicle Safety Act*,<sup>69</sup> the *Textile Labelling Act*,<sup>70</sup> the consumer notes provisions of the *Bills of Exchange Act*,<sup>71</sup> the *Weights and Measures Act*,<sup>72</sup> and the *Consumer Packaging and Labelling Act*.<sup>73</sup>

<sup>66</sup> *Prebushewski v. Dodge City Auto (1984) Ltd.*, [2005] 1 S.C.R. 649, 2005 SCC 28.

<sup>67</sup> S.C. 1952-53, c. 38.

<sup>68</sup> S.C. 1968-69, c. 42.

<sup>69</sup> S.C. 1969-70, c. 30.

<sup>70</sup> S.C. 1969-70, c. 34.

<sup>71</sup> R.S.C. 1952, c. 15, Part V (added by S.C. 1969-70, c. 48, s. 2).

<sup>72</sup> S.C. 1970-71-72, c. 36.

<sup>73</sup> S.C. 1970-71-72, c. 41.

The CCA years coincided with the highest levels of economic growth for the Canadian economy in the 20<sup>th</sup> century: the sixties and seventies. In the approximately 25 years of its history, the CCA's mandate went through a number of substantial transformations from emphasizing checks and balances in the marketplace through consumer advocacy, to pro-competitive regulation and later, refinement of enforcement activities. Despite the changes, even as late as 1987, the department's role was still to uphold the consumer interest. According to printed materials published and distributed by the department, the main purpose behind the creation of the CCA was to "protect consumers by establishing a fair and efficient marketplace through measures designed to reduce inequality between seller and buyer, and to provide personal and economic safety by regulating marketplace deception, unfair trade practices and unsafe products."<sup>74</sup> By the early nineties, the CCA was a target for deep budgetary reductions in the areas of knowledge and research capability to support advocacy efforts and program innovation.<sup>75</sup> The reductions paved the way for the complete elimination of the department as a separate entity as a result of a sweeping reorganization.

It is reasonable to believe that President Kennedy's influence on consumer protection was felt in Canada as it was in Europe given Pearson's economic policies and the creation of the CCA. The consumer rights that Kennedy proclaimed in his address to Congress in 1962 informed his progressive policies and shaped U.S. legal reforms. These reforms sought to protect the economic rights of citizens in the marketplace with an attendant effect on market stability. After Kennedy's assassination, many aspects of his consumer-related policy initiative were continued and passed into legislation by the succeeding administration of President Lyndon B. Johnson. The creation of the CCA as the federal consumer watchdog and the provision of sector-based codes and piecemeal consumers' rights bills defined the Canadian response to the events of the 1960s. However, no set of universal or general consumer rights have been officially recognized at the executive or parliamentary level to this date in Canada in the manner suggested by President Kennedy's *Address to Congress* in 1962 or the EU's *Consumer Protection and Information Policy* in 1975.

## 1.7 Competition law and consumers

From 1935 to 1960, approximately 600 cases were pursued by federal authorities under the *Combines Investigation Act* (Predecessor of the *Competition Act*, 1986), the majority of them involving commercial and industrial conspiracies to restrain trade. However, by 1966, despite the large number of cases prosecuted, only one monopoly had been broken and not a single merger had ever been found to be detrimental to the public interest in Canada<sup>76</sup> The lack of a competition policy with real teeth was seemingly at odds with the Pearsons

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<sup>74</sup> Consumer and Corporate Affairs Canada. *The Marketplace in Transition: Changing Roles for Consumer, Business and Governments?*, Ottawa, April 1992, at 2.

<sup>75</sup> *Ibid.*, at 21.

<sup>76</sup> *Ibid.*

government's commitment to a fair marketplace for consumers. The protection of consumer rights guaranteeing access to workably competitive markets should have been at the core of competition and anti-monopoly (antitrust) policy and its set of enforcement tools.<sup>77</sup>

Historically, this seemingly lethargic official policy in the area of competition had its origins, in part, from the concern that Canadian firms were too small to compete successfully in the marketplace, and thus their efforts to become more profit intensive, through conduct negatively affecting competition, should be given considerable leeway. Unfortunately, the net effect of this lenient approach was usually a detriment to consumers. Although some high profile cases had been brought under the *Combines Investigation Act* against some producers and distributors for anti-competitive behaviour,<sup>78</sup> Canadian appellate courts interpreted the provisions of the *Act* in a way that rendered the existing anti-monopoly law in Canada almost meaningless.

*Eddy Match* was a case concerning the aggressive commercial practices of a manufacturer as a means to establish its monopoly in the market of wooden matches. In 1953, the court laid out the necessary test for the competition authorities to find that a firm is or has acted in "detriment to, or against the public interest", as proscribed by the *Act*. The test required a finding that the conduct did not just attempt the "systematic elimination of competition", but the "systematic elimination of competition to the extent that the presumption of detriment becomes violent".<sup>79</sup> While in that case the court did, in fact, find the defendant liable, the decision set a high standard requiring a burden of proof that was extremely difficult to meet. In *B.C. Sugar*, a case that dealt with the merger of the only two sugar refineries in Western Canada, the court ruled, "it is not an offence against the *Act* for one corporation to acquire the business of another merely because it wants to extinguish a competitor".<sup>80</sup> Detriment to the interest of the public is only found if there is "undue elimination of competition". Whether the elimination of competition was "undue" or not was a matter of fact to be determined by the court.<sup>81</sup>

Later, in the in the 1970s, the Supreme Court of Canada further diminished the effectiveness of the existing anti-combine legislation in *K.C. Irving*,<sup>82</sup> a case concerning single firm control over the entire English newspaper industry in New Brunswick. The court decided that there was no presumption of detriment simply because one firm had complete control over an industry. Detriment to the public interest had to be proven by the Crown to have a successful prosecution. Chief Justice Laskin stated:

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<sup>77</sup> Michael Trebilcock, Edward M. Iacobucci et al., *The Law and Economics of Canadian Competition Policy*, University of Toronto Press, Toronto-Buffalo-London, 2002 at 17.

<sup>78</sup> *The Combines Investigation Act*, R.S.C. 1927, c. 26.

<sup>79</sup> *Eddy Match Company et. al. v. The Queen*, [1953] 109 C.C.C. 1 at para. 67.

<sup>80</sup> *R. v. British Columbia Sugar Refining Co.*, [1960] 129 C.C.C. 7 at para, 160.

<sup>81</sup> *Ibid.*, at para 37.

<sup>82</sup> *R. v. K.C. Irving, Ltd. et al.*, [1978] 1 S.C.R. 408

In my opinion, the same conclusion must follow, namely, that proof must be adduced of this element and it cannot be presumed, as the Crown would have it, merely by showing complete control of a business let alone substantial control only. The evidence must go beyond that and it was not adduced in the present case. True enough, there was testimony taken from witnesses, referred to as expert witnesses by the trial judge, who spoke of the threat to newspaper independence (and likely resulting public detriment) where there was centralized ownership of a number of newspapers with a right to control their policies in both editorial views and news reporting. They spoke theoretically, without having made any study of the situation in New Brunswick, nor did they address themselves to the facts relating to the operation of the newspapers involved in the present case.<sup>83</sup>

For the highest court in Canada, complete elimination of competition by a firm was not enough to merit sanction. Even in a case of a monopoly in a sector as sensitive as communications and media, specific evidence of detriment was required,<sup>84</sup> effectively shifting the burden of proof required for action against monopolies to complainants and/or the competition authorities. This meant the burden was to be borne by the party least likely to be aware of the extent of the prejudice caused by the conduct of the dominant player or have sufficient specific knowledge that such detriment is effectively taking place.

## **1.8 The Demise of the Department of Consumer and Corporate Affairs**

The study of Canadian government efforts to safeguard consumer interests is arguably not a happy one for consumer advocates. The systematic downsizing of the focal ministerial CCA portfolio was seemingly at odds with the assurances and statements made by elected officials throughout the years about the importance of protecting consumer wellbeing in Canada. The struggle for a more prominent place for consumer affairs in the government bureaucracy continues from that diminution without success.

As noted earlier, throughout the 1970s and 1980s, consumer affairs had department status within the portfolio of Consumer and Corporate Affairs Canada (CCA). However, after a reform initiated in 1993 by the government of Prime

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

Minister Kim Campbell, a reorganization of cabinet departments took place. The reorganization was based on a theory of “policy convergence” that surmised that supplier concerns and consumer concerns could be resolved within the same department. In the result, the superintendence of consumer matters by the federal government went from occupying a place at the cabinet table to consisting of a small branch (small in size when compared to its potential importance in the marketplace) within the Department of Industry (Industry Canada) in Ottawa. By 1992, the Consumer Affairs Bureau within the old CCA had a budget of over \$68 million and 968 person years, as one central component of a larger department. In the reorganization, various CCA functions were parceled out to other branches and department. After an operational compromise of the consumer issues in the Canadian economy in the manner described above, the Office of Consumer Affairs today has a minuscule budget of \$5.1 million and 23 person years.<sup>85</sup> And, as will be noted, the department even lacks the word “Consumer” in its name since the 1993 change.

The 1993 “reform” referenced above had been initiated as a reorganization of government economic departments with the aim of cutting a fiscal deficit that had been growing since the 1980s coupled with an ongoing recession. The deficit reduction strategy also included an ideological commitment to a reduction of the size and role of government in the marketplace and the economy with attendant de-emphasis on measures that intervene to protect consumer interests. The belief in the ultimate suitability of unfettered markets to correct for consumer-unfriendly practices provided the rationale for the withdrawal from a more prominent consumer protection profile. In a Canada whose industries had been buffeted by a stubborn recession and the aftermath of the implementation of free trade with the United States, the seeming tilt to favour business rather than consumer interests met little resistance. A rising tide for business prosperity was thought to be able to lift all boats.

This policy approach was reflected in the way the Department of Corporate and Consumer Affairs was re-organized even to the extent that the word ‘consumer’ was eliminated from the department’s name. The once important functions of consumer protection would be carried out under the single department name of “Industry” (Industry Canada). Another significant, as well as symbolic element of this change was the dilution of former consumer responsibilities accompanied by units that were rolled over to or devolved into different ministries. The restructuring plan, in its initial phase, provided for the merger of the Department of Consumer and Corporate Affairs, the Department of Communications, Investment Canada and the Department of Industry, Science and Technology into one department. In 1995, Bill C-46 or the *Department of Industry Act*<sup>86</sup>

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<sup>85</sup> Canadian Consumer Initiative, *Creation of Cabinet Level Position for Consumer Affairs* (Letter to the Right Honourable Stephen Harper, Prime Minister of Canada), 12 November 2008, online: Option-Consommateurs <[http://www.option-consommateurs.org/documents/principal/en/File/cci\\_letter\\_pm\\_conso\\_ministry\\_20081112.pdf](http://www.option-consommateurs.org/documents/principal/en/File/cci_letter_pm_conso_ministry_20081112.pdf)>.

<sup>86</sup> *Department of Industry Act*, S.C. 1995, c. 1.

received Royal Assent under the government of Prime Minister Jean Chretien and the above-mentioned departments and agencies finally became Industry Canada. Thus the changes made by a government of one political stripe were implemented by a government of another.

A strong case can be made that these changes were detrimental to the influence of the Canadian consumer in the making of economic policy over the next decade and a half. The presence of a tiny consumer protection office inside a large ministry devoted to industry producer concerns meant that it was difficult for the consumer viewpoint to hold sway as there were competing interests in play. The new Ministry is almost strictly limited to industrial and commercial activity.<sup>87</sup> The Consumer Affairs responsibility drops to s.4(d) of the statute

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

- (a) industry and technology in Canada;
- (b) trade and commerce in Canada;
- (c) science in Canada;
- (d) consumer affairs;
- (e) corporations and corporate securities;
- (f) competition and restraint of trade, including mergers and monopolies;
- (g) bankruptcy and insolvency;
- (h) patents, copyrights, trade-marks, industrial designs and integrated circuit topographies;
- (i) standards of identity, packaging and performance in relation to consumer products and services, except in relation to the safety of consumer goods;
- (j) legal metrology;
- (k) telecommunications, except in relation to
  - (i) the planning and coordination of telecommunication services for departments, boards and agencies of the Government of Canada, and
  - (ii) broadcasting, other than in relation to spectrum management and the technical aspects of broadcasting;
- (l) the development and utilization generally of communication undertakings, facilities, systems and services for Canada;

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<sup>87</sup> *Department of Industry Act*, S.C. 1995, c. 1, s. 4.

- (m) investment;
- (n) small businesses; and
- (o) tourism.

Thus, in comparing the Pearson government's *Department of Consumer and Corporate Affairs Act* with the Chretien government's *Ministry of Industry Act*, it is obvious that, beyond the fact that the word "consumer" had been struck from the Department's name, consumer issues were also demoted from the top of the Ministry's mandate. As noted previously, the rationale offered for such restructuring of the Consumer and Corporate Affairs portfolio was that instead of compartmentalizing consumer protection in one ministry, the government should ensure that some degree of consumer interest was reflected in all departments. However, the fragmentation of the consumer watchdog function was not an improvement from the more comprehensive attention afforded consumer interests in the former CCA. There was little incentive, in a time of shrinking departmental budgets, to embark upon new consumer protection activities, and where there were some efforts, they were considerably diluted. This result has not gone unnoticed by Canadian consumer associations, organizations and advocates that have seen how the protection of consumer interests in the governing process has waned in priority, and have accordingly demanded corrective action from government officials.<sup>88</sup>

In short, the policy emphasis to stay away from active intervention in markets to assist consumers found expression in a governmental reorganization. This reorganization has been criticized for failing to meet the objective of sustaining meaningful consumer protection. From a governance standpoint, the central consumer protection function of CCA was diminished, together with consumer clout in the making of Canadian economic and industrial policy.

Moreover, many consumer issues are often dealt with only within the mandate of each department, essentially narrowing or overlooking the complex and broad interrelated nature of many consumer issues. For a variety of reasons, individual departments have made varying degrees of effort to seek out the input of consumers in decision-making that affects their interests. The overall lack of a well-resourced agency or department with clear responsibilities for consumer protection headed by a member of the Cabinet has diminished government accountability. It has also meant that consumers' needs and voices end up as tangential concerns within the government super-ministries. As a former Deputy Industry Minister who witnessed first-hand the transformation of CCA into an appendage put it:

Ottawa's structure is overwhelmingly oriented towards the interests of Canadian producers, not consumers. Our sectoral departments, from Industry to Agriculture to Natural Resources to the Space Agency and even

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<sup>88</sup> *Supra* note 84 [Canadian Consumer Initiative].

the granting councils, have producer interests foremost in mind. So do the regional development agencies. So does Human Resources Development, for the most part. Even the Bureau of Competition Policy administers an Act that is as solicitous of producer interests as it is of the basic consumer virtue of fair competition.<sup>89</sup>

There has been a spate of recent consumer health and safety issues that have arisen recently in Canada and across the world, such as food contamination,<sup>90</sup> hazardous materials in toys or baby utensils,<sup>91</sup> or the increasing use of genetically engineered organisms introduced by industry into the human food chain. It seems reasonable to believe that not only are the vital interests of consumers at play in today's complex marketplace, but the importance of looking after those interests is also becoming a matter of public concern.

In the result, to meet the increasing public expectation for protection, there is a critical need to review existing governmental capacity and performance in the field of consumer protection at both the federal and provincial levels. Concurrently, enumerating the position of consumers in deregulated markets would be of assistance in identifying successes and failures. It would be particularly instructive to determine whether the low governmental priority that is operationally given to consumer affairs results in producer ambivalence or consumer unfriendly behaviour.

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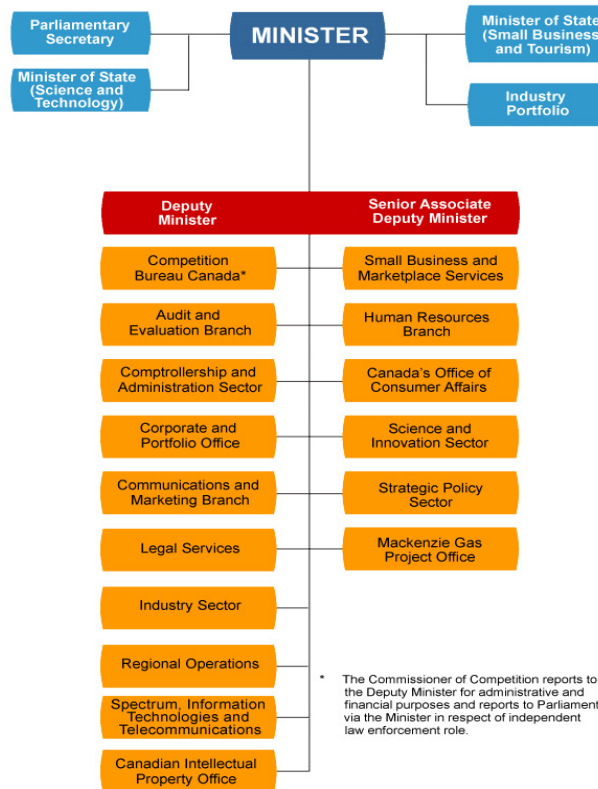
<sup>89</sup> Harry Swain, *Reflections on The Evolution of The Federal Industry Department*, speech presented at the Industry Canada 2003 Executive Conference.

<sup>90</sup> A single listeriosis bacterial infection outbreak linked to contaminated food processed in a single industrial plant resulted in 56 people infected, causing 20 deaths. See: Public Health Agency of Canada, *Listeria Monocytogenes Final Update: December 10, 2008*, online: Public Health Agency of Canada <[http://www.phac-aspc.gc.ca/alert-alerte/listeria/listeria\\_2008-eng.php](http://www.phac-aspc.gc.ca/alert-alerte/listeria/listeria_2008-eng.php)>.

<sup>91</sup> Upon the publication of a journalistic investigative piece reporting high levels of lead in toys being sold at popular retail outlets across the Greater Toronto Area, Health Canada proceeded to order retailers to take the toys off the shelves. See: David Brusser, *Toxic toys, jewellery recalled*, Parentcentral.ca, October 24, 2008, online: Parentcentral.ca <<http://www.parentcentral.ca/parent/article/523696>>.

The Department of Industry (Industry Canada) is currently organized in accordance with the chart set out below:

### Department of Industry (Industry Canada) structure



Source: Industry Canada

Based on this official description of departmental structure, it does not seem readily apparent that consumer interests are placed on the same footing as producer and industry interests in carrying out the department's mandate. To the contrary, notwithstanding the econometric support for the concept that consumers have a central role to play in any free market economy, successive governments have primarily focused on service to industry and supplier economic interests first.

The organizational predominance of industry interests means that intra-departmental weighting of consumer and business interests is inevitably skewed towards the latter. In a department that must look for ways to make Canadian industry stronger and globally competitive, consumer protection is arguably regarded as an imposition or an afterthought.<sup>92</sup>

<sup>92</sup> *Department of Industry Act.*, S.C. 1995, c.1.

According to the *Department of Industry Act*, the Minister's jurisdiction over such issues as consumer welfare and protection is only one among a multitude of jurisdictional responsibilities mainly in areas that are supply-side directed. For the 2008 period, the \$4.5 million Office of Consumer Affairs budget only represents a 0.4% of the \$997.4 million ministry's budget.<sup>93</sup>

From the standpoint of inclusive public policy, the absence of a government department or ministry with a specific mandate and mission to oversee and intervene to correct market failure for the benefit of consumers foretells possible structural market imbalance and the potential for such market failure. This is particularly true in relation to many newly deregulated markets, where the thinning of the guarantees and quality offered to customers has been impervious to reform by the demand side of the market. Where insufficient market discipline or regulatory control exists, suppliers will have a natural incentive to lower internal costs and maximize profit margins, often at the expense of quality, coverage and even safety and citizens' economic welfare.<sup>94</sup> The missing balance may be most noticeable in strategic industries where consumer protection is crucial, such as basic communications, energy, banking, food quality and safety and transportation.

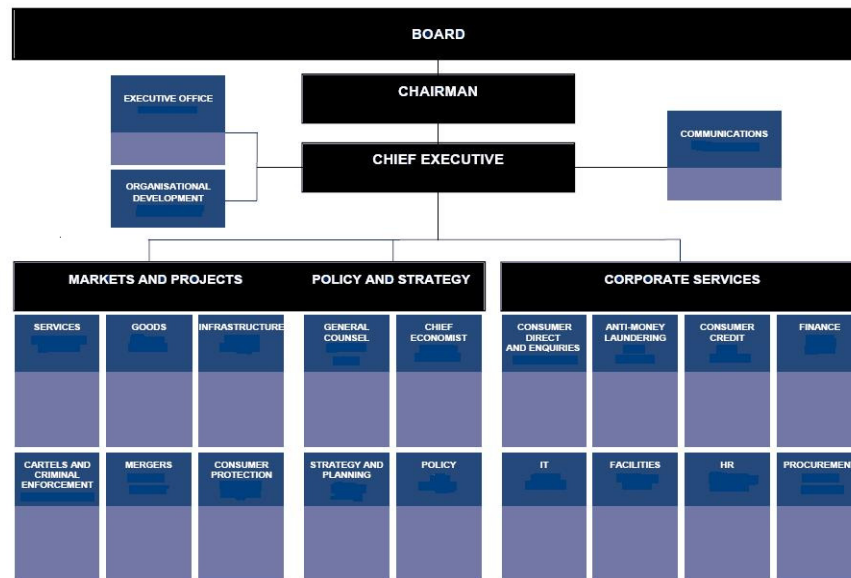
A simple organic comparison of the treatment of consumer affairs in Canada with that in the United Kingdom, an EU jurisdiction with whom Canada shares not only its history but also its parliamentary and governmental system, is instructive. Such a comparison reveals key differences in the importance of the consumer voice at the governmental level between the two jurisdictions:

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<sup>93</sup> Government of Canada, Public Works and Government Services Canada, *Public Accounts of Canada, 2008, Volume II, Details of Expenses and Revenues*, online: Public Works and Government Services Canada <<http://www.tpsgc-pwgsc.gc.ca/recgen/pdf/50-eng.pdf>>.

<sup>94</sup> Examples of the potentially dangerous consequences implied in the process of reducing or eliminating regulatory safeguards (a concept sold to consumers and public opinion as 'streamlining') surface often: from food contamination crises that cause death to consumers, to selling unsound financial products and investment vehicles, to ill-informed or the misleading of consumers by reputable financial institutions.

## Office of Fair Trading OFT (U.K.)



Source: OFT

The Office of Fair Trading (OFT) is the United Kingdom’s competition and consumer affairs authority and exercises some of the important functions that can be found within the jurisdiction of Canada’s Department of Industry. Its approach to those functions provides a useful comparison of approaches.<sup>95</sup> OFT’s stated mission is “to make markets work well for UK consumers”.<sup>96</sup> As an explanation of such an explicit mission, the OFT states that “markets work well for consumers when businesses compete vigorously and fairly to win customers’ business.”<sup>97</sup> In well-functioning markets, consumers have confidence that market processes deliver excellent outcomes for them in terms of price, quality, variety, innovation and service. When markets work well for consumers, efficient businesses are rewarded and productivity growth is higher.<sup>98</sup> *OFT’s Prioritisation Principles* is a document published by the department that lays out the criteria to be followed in all of its work and decision-making processes. The first principle is *impact*, followed by *strategic significance*, *risks and resources*. The *impact* principle is set out in the following way.<sup>99</sup>

<sup>95</sup> While the OFT is the competition authority, its role goes beyond enforcement and it intensively engages in consumer education and research. The U.K.’s Department for Business, Innovation and Skills has, within its ministerial team, a minister who has consumer affairs among other responsibilities. The department’s primary focus is on human resources and skills, a role comparable to that of the Department of Human Resources in Canada.

<sup>96</sup> Office of Fair Trading, *OFT Prioritisation Principles*, October 2008, online: <[http://www.offt.gov.uk/shared\\_offt/about\\_offt/offt953.pdf](http://www.offt.gov.uk/shared_offt/about_offt/offt953.pdf)>.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

## A. Impact

1. What would be the likely **direct effect** on consumer welfare in the market or sector where the intervention takes place? Consumer welfare includes better value for consumers in terms of price, quality, range or service, both static and dynamic, and may also include non-financial detriment such as the avoidance of physical harm or emotional distress.

We may prioritize work because the direct effects would specifically benefit disadvantaged consumers.

2. What would be the likely **indirect effect** on consumer welfare? This principle captures further improvement to consumer welfare and consumer confidence that results from changes in consumer, business or government behaviour which is prompted by the OFT's action. It thus captures deterrence and improved awareness for consumers, business and government.

3. What would be the expected additional economic impact on efficiency/productivity? This captures whether, as a result of our actions, efficiency would be expected to increase.

Thus the OFT's mandate brings together competition and consumer protection principles in an integrated way, with a view to determining the best result for the ultimate goal of pursuing overall consumer welfare.

As we will discuss later, consumer protection in Canada has a provincial dimension as a result of the division of constitutional responsibilities. As of the date of this report, except for Ontario, no province in Canada, had a specifically designated consumer affairs ministry within the provincial cabinet. However in the case of Ontario, consumer protection matters have been dealt with by a department that is also responsible for business promotion. Until 2004, the province had a Ministry of Consumer and Business Services, whose mission was focused on "consumer protection for a fair, safe, dynamic and informed Ontario marketplace".<sup>100</sup> In 2006, consumer issues were shuffled around and attached to "government services" in the new Ministry of Government Services.<sup>101</sup> Again in 2008, there was a re-assignment of the consumer branch to the new Ministry of

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<sup>100</sup> In its annual reports, the Ministry of Consumer and Business Services (MCBS) stated its mission as to provide "a wide range of services, focused on customer service delivery and consumer protection for a fair, safe, dynamic and informed Ontario marketplace". See: Province of Ontario, Ministry of Consumer and Business Services, *Annual Reports 2002-2003/2003-2004*, online: Government of Ontario <<http://www.gov.on.ca/mgs/en/AbtMin/054422.html>>.

<sup>101</sup> Consumer Services is concerned primarily with issues related to the Ontario government's workforce, procurement and technology resources. See: Government of Ontario, Ministry of Government Services, online: <[http://www.gov.on.ca/mgs/en/AbtMin/STEL01\\_045772.html](http://www.gov.on.ca/mgs/en/AbtMin/STEL01_045772.html)>.

Small Business and Consumer Services, a branch concerned primarily with advancing “small business and entrepreneurial success in Ontario” according to its website.<sup>102</sup> By mid-2009, yet another cabinet shuffle was announced but this time the Ontario Government seemed to move in the appropriate direction by acknowledging consumers as the base of the marketplace with the creation of a Ministry of Consumer Affairs.

## 1.9 Consumer protection in Europe today

With the signing of the *Single European Act*<sup>103</sup> which came into force on 1 July 1987, signatory countries set the legal foundation for a geographic area within which there were to be no restrictions on the movement of persons, capital, goods and services. As well, there were some *ad hoc* procedures that were introduced into the *EC Treaty* to achieve such union. The *Single European Act* also deals with the position of the consumer in the *Treaty*: Article 100a entitles the Commission to propose measures designed to protect consumers, taking as a base measure, a “high level of protection”. Although this notion has not been precisely defined, this Article provides the foundation for a substantial legal recognition of the importance of consumer policy and rules. Moreover, the *Single Act* repealed the unanimity rule for the adoption of directives in numerous areas directly or indirectly having to do with consumer protection. Unanimity (with some exceptions such as taxation) was no longer required for measures designed to establish the Single Market. Hence, consumer policy became part and parcel of the more general policy of completing the Single Market, along with social policy, environment, statistics and companies law (the so-called horizontal policies, whose harmonization are considered central to the single market) - a perspective that provided a new impetus on consumer issues. The abolition of frontiers and the completion of the Single Market on January 1, 1993, highlighted the significance of the existence of a market of more than 340 million consumers – 450 million today- and the need for flanking rules (or rules allowing for cooperation on remaining areas such as education, research and development, small and medium-sized enterprises, media, tourism, etc.). For over two decades now, the European Commission has seen consumer confidence as an indispensable ingredient for properly functioning markets.

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<sup>102</sup> Government of Ontario, Ministry of Small Business and Consumer Services, online: <[http://www.ontario-canada.com/ontcan/sbe/en/about\\_main\\_en.jsp](http://www.ontario-canada.com/ontcan/sbe/en/about_main_en.jsp)>.

<sup>103</sup> European Union, *Single European Act*, 25 I.L.M. 506, [O.J. 87 (L 169) 1], 17 February 1986, [an act modifying the basic treaties]. Official Journal of the European Communities (OJEC). 29.06.1987, No L 169, p. 24.

The action programmes prioritized by the *Single European Act* include:

- consumer representation (the Consumers' Consultative Committee was adapted so as to make it more representative);
- consumer information;
- product safety;
- transactions.

In the period shortly following the passage of the *Act*, measures by the EC were taken in the following areas: toy safety,<sup>104</sup> general product safety,<sup>105</sup> cross-border payments, unfair contract terms,<sup>106</sup> distance selling and vacation timeshares.<sup>107</sup> Considerable progress was made during those years followed by additional directives on sensitive areas such as consumer credit, with the result that the EU now has a genuine and substantial corpus of Community consumer protection law.

The positioning of consumer protection at the centre of the European economic policy was confirmed and continued by the *Maastricht Treaty*,<sup>108</sup> which enshrined consumer protection as a full-fledged Community policy. While the Treaty's general principles state that the Community must contribute to the "strengthening of consumer protection", Article 129a sets out an indispensable legal basis for consumer policy. Its adoption led to a new momentum as reflected in several Green Papers on financial services,<sup>109</sup> consumer access to justice,<sup>110</sup> food law,<sup>111</sup>

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<sup>104</sup> European Union, Council Directive 88/378/EEC *on the Approximation of the Laws of the Member States Concerning the Safety of Toys*, 3 May 1988, online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1988/L/01988L0378-19930802-en.pdf>>.

<sup>105</sup> European Union, Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 *on General Product Safety*, online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:011:0004:0017:EN:PDF>>.

<sup>106</sup> European Union, Council Directive 93/13/EEC *on Unfair Terms in Consumer Contracts*, 5 April 1993. Online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML>>.

<sup>107</sup> European Union, Directive 94/47/EC of the European Parliament and the Council of *on the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis*, 26 October 1994, online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994L0047:EN:HTML>>.

<sup>108</sup> European Union, *Treaty on the European Union Together with the Complete Text of the Treaty Establishing the European Community*, 7 February 1992. [OJ 92/C 224/01 Treaty of Maastricht], online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>>.

<sup>109</sup> European Union, *Commission Green Paper on Retail Financial Services in the Single Market*, 2 May 2007, online: Europa.eu <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/160&format=HTML&aged=0&language=EN>>.

<sup>110</sup> European Union, *Commission Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, 16 November 1993, online: Europa.eu <<http://europa.eu/scadplus/leg/en/lvb/l32023.htm>>.

sale of consumer goods and associated guarantees,<sup>112</sup> as well as in legislative initiatives concerning injunctions,<sup>113</sup> contracts negotiated at a distance,<sup>114</sup> comparative advertising<sup>115</sup> and cross-border transfers.<sup>116</sup>

The consumer protection policies put in place in the European Union constitute an essential way of meeting the stated objective of the Union of improving the quality of life for all of its citizens. The policy has developed extensively since the first programme for consumer information and protection was adopted in 1975.<sup>117</sup> Some of the most important policy directives that have served as developmental mileposts of Community consumer protection have been issued to deal with the following sensitive marketplace issues:

- fair business practices;
- misleading and comparative advertising;
- price indicators;
- unfair contract terms;
- distance and doorstep selling;
- timeshares and package travel.

As the Community became larger, a broader consensus was built around the need for more uniform rules and their application together with effective appeal mechanisms, more accessible product information and consumer education measures. In consideration of these needs, the Commission's consumer policy strategy for 2002-2006 set three objectives:

- a high common level of consumer protection;
- the effective enforcement of consumer protection rules; and
- the involvement of consumer organizations in EU policies.

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<sup>111</sup> European Union, *Commission Green Paper on European Food Law*, 30 April 1997, online: Europa.eu <<http://europa.eu/bulletin/en/9704/p103042.htm>>.

<sup>112</sup> European Union, *Commission Green Paper on Guarantees for Consumer Goods and After-Sales Services*. 15 November 1993, online: Europa.eu <<http://europa.eu/scadplus/leg/en/lvb/l32018.htm>>.

<sup>113</sup> European Union, *Directive 98/27/EC of the European Parliament and Council on Injunctions for the Protection of Consumer Interests*, 19 May 1998, online: Europa.eu <[http://ec.europa.eu/consumers/policy/developments/acce\\_just/acce\\_just09\\_en.pdf](http://ec.europa.eu/consumers/policy/developments/acce_just/acce_just09_en.pdf)>.

<sup>114</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 *On the Protection of Consumers in Respect of Distance Contracts*, 20 May 1997, Article 6, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML>>.

<sup>115</sup> European Union, *Council Directive 84/450/EEC on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising*, 10 September 1984 [Repealed by Directive 2006/114/EC with effect from 12 December 2007], online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML>>.

<sup>116</sup> European Union, *European Parliament and Council Directive 97/5/EC on cross-border credit transfers*, 27 January 1997, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0005:EN:HTML>>.

<sup>117</sup> [OJ 1975 C92/1].

### **1.9.1 Interaction between Member States' laws and EU-Level consumer Protection laws**

EU Member States are responsible for the “transposition” of EU law into their internal regimes. Transposition means that individual nations within the Community must incorporate and enforce EU law in their own national context. In this exercise, the content of Commission Directives and Resolutions must constitute a minimum legal standard for implementation. Individual country members are free to take more detailed or stricter measures (through the so-called ‘minimum clauses’), in this case, to protect consumers. More commonly, EU countries maintain existing rules, but where they do not afford the protection in their own statutes as directed by EU law, they must bring them into line or exceed the Community standard. Not unexpectedly, some divergence arises between national laws and EU consumer protection law beyond a simple failure to harmonize with relevant EU provisions. These differences may arise from specific regulations, differences in general principles or from different jurisprudence. For example, the treatment of advertising through national rules on “fair advertising”, differs across EU nations, as does the treatment of advertising claims for health (i.e. miracle products), environmental or social benefits and advertising to children, including sponsorship for educational programmes, sports events and marketing in schools.

Marketing practices, such as sales promotions (i.e. discounts, simple reductions, rebates, joint-offers, free gifts, coupons, vouchers and commercial contests and games), lotteries and gambling, mock auctions, pyramid selling, multi-level marketing and ‘bait and switch’ marketing, appear to be subject to different national rules. Commercial practices related to payment, the subject matter of the contract, price estimates, execution, performance, delivery, complaint-handling and after-sales service (e.g. premium rate help-lines, commercial guarantees, substitution, repair) also differ. While the bulk of the differences in national rules concern information requirements, some practices are wholly or partially prohibited in some Member States but permitted in others.

## **1.10 Trade relationship between Canada - European Union**

Canada and the European Union are two major global trade partners. In the period 1999 to 2007, EU exports into Canada have grown at a 6.7% rate, outpacing imports and totaling \$26.6 billion Euros in 2006. In 2008, Canadian imports from the EU amounted to \$54 billion.<sup>118</sup> Canadian exports to the EU, on the other hand, amounted to \$36 billion in 2008. The EU is the second largest market for Canadian exports after the United States.

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<sup>118</sup> Government of Canada, Foreign Affairs and International Trade, *Canada-EU Commercial Relations - factsheet*, online: Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/CanadaEUfactsheet-eng.pdf>>.

The fastest growing EU exports to Canada have been in the area of oil extraction products and other supplies to Canada's booming energy sector. Chemical products and pharmaceuticals along with gas turbines for aircraft and motor vehicles are also among the most important segments.<sup>119</sup> Canada's main exports to the Eurozone are precious metals and stones, along with machinery and electrical equipment. Sales of vehicles, aircraft and vessels averaged annual growth rates of 8.1% in the same time-period of 1999 - 2006. The strongest performing Canadian exporting sector to the EU in terms of growth from 1999 to 2006 was chemical and allied industries with average growth rate of 19.4% reflecting a strong component of uranium-related and radioactive elements. Base metal products also increased at a rate of 10.3% mainly due to the increase in global prices caused by Chinese demand.

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<sup>119</sup> Eurostat, Statistics in Focus, *EU-27 External Trade with the United States, EFTA countries, China, Russia, Japan, South Korea, Canada and Australia, 2006 data*, online: Statistical Office of the European Communities Eurostat <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-08-004/EN/KS-SF-08-004-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-004/EN/KS-SF-08-004-EN.PDF)>.

## Part II: Comparing Canada's Consumer Protection to Europe's Ten Principles of Consumer Protection

Notwithstanding the significant differences between Canada and the EU with regards to the profile that consumer affairs and consumer protection command at the governmental level in both jurisdictions, the principles that inform European consumer protection policies are also of general application in Canada. However and in general terms, while the policies are similar, their application to marketplace concerns is different in terms of effectiveness. As has been noted elsewhere, the EU consumer protection regime places a priority on consumers as the basis for healthy markets. The Canadian equivalent regime appears to have more muted goals with respect to consumers and seems to possess less vigor in enforcement.

Returning to this report's stated task, the key EU document elaborating Ten Principles of Consumer Protection will be used to compare the equivalent regime associated with each principle in Canada. While the legislation listed and described is not exhaustive, it provides a general overview for the application of the Principles for the purpose of comparison. It also underlines those areas where, in the view of the report's authors, the Canadian level of protection does not measure up to the level that European consumers enjoy.

### 2.1. Buy what you want, where you want.

EU law allows consumers to shop in another EU country without imposing custom duties. Authorities cannot stop EU consumers from importing a product that was legally purchased from another EU country, with the exception of firearms and morally offensive items.

Canadian legislation containing this principle:

The Constitution Act, 1867

Consumers in Canada enjoy a common market across the provinces that make up the Canadian federal system created under *The Constitution Act, 1867*, Canada's constitution.<sup>120</sup> Section 121 of the *Act*, also referred to as the "common market clause", establishes that all articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.<sup>121</sup> Section 91(2) of the *Act* gives the federal Parliament jurisdiction over trade and commerce matters, but these powers are limited to trade in the

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<sup>120</sup> *British North America Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.).

<sup>121</sup> *Ibid*, s. 121.

international and interprovincial sense and not in a local, intra-provincial sense.<sup>122</sup> Instead, pursuant to sections 92 (13), (14), and (15) of the *Act*, provincial legislatures have the power to enact laws related to property and civil rights matters, the administration of justice in the province and the respective judicial remedies for such matters.

## The Agreement on Internal Trade (AIT)

The AIT is a national free trade agreement signed by both the provinces and the federal government subscribed in 1994 and in force since 1995. All Canadian provinces and the Federal Government of Canada are parties to the agreement.<sup>123</sup> Its stated objective is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market.<sup>124</sup> All parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal. The Agreement incorporates six general rules.<sup>125</sup>

They are:

- Reciprocal non-discrimination: establish the obligation of the parties (provinces and Federal Government) to treat all Canadian persons, goods, services and investments in a manner not less favourable than those of their own or any other party to the agreement
- Right of entry and exit: prohibits measures that restrict the movement of persons, goods, services or investments across provincial or territorial boundaries.
- No obstacles: ensures provincial/territorial government policies and practices do not create obstacles to trade.
- Legitimate objectives: establishes a restriction to provincial/territorial parties from adopting measures which that could cause an unjustified deviation from the AIT guidelines.

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<sup>122</sup> *Citizens Insurance Co. v. Parsons*, (1881) 7 App. Cas. 96; *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.

<sup>123</sup> The provinces and territories party to the agreement are Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and Yukon. Nunavut is not a signatory of the agreement and has an “observer” status.

<sup>124</sup> *Agreement on Internal Trade*, Article 100, online: Agreement on Internal Trade <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)>.

<sup>125</sup> *Ibid*, Chapter Four.

- Reconciliation: establishes a duty for the parties to reconcile their standards and standards-related measures by harmonization, mutual recognition and other means.
- Transparency: ensuring information is fully accessible to interested businesses, individuals and governments.

## North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement makes it possible for Canadian consumers to have direct access to an enhanced market shared with the United States and Mexico, an economic area with a population of 450 million. The trade agreement removes tariff barriers between the Canada, the United States and Mexico and allows consumers to be able to *buy what they want, where they want* within the borders of the countries party to the agreement. The objectives of the agreement, as set out in its Section 102 are:<sup>126</sup>

- eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- promote conditions of fair competition in the free trade area;
- increase substantially the investment opportunities in the territories of the Parties;
- provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

It is important to note that the NAFTA creates a structure that is of a different nature than that of the European Union in that it does not entail the creation of a common market or a common currency and certainly not a political union in any form. It only removes barriers to trade, investment and professional mobility between the three countries. It also includes a

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<sup>126</sup> *North American Free Trade Agreement*, Chapter Two, online: North American Free Trade Agreement Secretariat <[http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=84](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=84)>.

set of rules designed to reconcile trade policies and rules for dispute settlement, environmental cooperation and dispute resolution between member countries.

## 2.2 If it doesn't work, send it back.

A company must replace or repair any product sold in the EU that does not perform the intended use for which it was sold by the seller at the time of purchase.

Canadian legislation containing this principle:

### Sales of Goods Act (Ontario)

In Canadian law, consumer sales are under the legislative jurisdiction of the provinces. *The Sale of Goods Act* (SGA), enacted by the provinces across Canada incorporate the common law right of the buyer to reject the goods when there is a breach of a condition in the contract of sale in that the goods delivered by the seller are non-conforming goods or goods that the purchaser did not contract for.<sup>127</sup> Section 33 of the Ontario SGA deems the buyer not to have accepted the goods until there has been a reasonable opportunity to examine them and ascertain whether they are in conformity with the contract.<sup>128</sup> Section 34 states that goods are deemed to have been accepted when a reasonable amount of time has passed since the buyer received the goods or intimated to the seller that they were accepted.<sup>129</sup>

It is important to note that, both at common law and under the SGA, a breach of a warranty by the seller does not automatically give the purchaser the right to reject the goods.<sup>130</sup> Instead, the purchaser may have an action for damages.<sup>131</sup> Buyers have the right to reject the goods only when there is a breach of a condition (such as a misrepresentation by the seller or mistake in the goods contracted for). In general, the SGA does not draw distinctions between commercial and consumer transactions, the character of the parties, or the purpose for which the goods are intended.<sup>132</sup>

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<sup>127</sup> *Hardy & Company v. Hillerns and Fowler* [1923] 2 KB 490, [1923] A11 ER Rep. 275 (CA).

<sup>128</sup> *Sales of Goods Act*, R.S.O. 1990, c. S.1, s. 33.

<sup>129</sup> *Ibid*, s. 34.

<sup>130</sup> *Home Gas v. Streeter*, [1953] 2 DLR 842, 8 WWR (NS) 689 (Sask. CA).

<sup>131</sup> *Supra* note 127, s. 51. [*Sales of Goods Act*].

<sup>132</sup> Jacob S. Ziegel & Anthony J. Duggan, *Commercial and Consumer Sales Transactions*, 4<sup>th</sup> Ed. Edmond Montgomery Publications Limited, Toronto, 2002 at 31.

## Consumer Protection Act (Ontario)

Most consumer transactions in Canada, particularly consumer retail purchases and contracts for services, fall under the legislative jurisdiction of the provinces and their constitutional power to regulate matters related to property rights of a local and private nature.<sup>133</sup> When a consumer in Canada purchases a good or service, she is afforded the property and civil rights legal protections enacted by provincial legislatures. In cases where merchants do not honour their commitment to deliver a product or service as stipulated and represented to the purchaser, the *Consumer Protection Act* prescribe the remedies that grieved consumers can pursue.

Both the CPA and the SGA expressly refer to the right of consumers to return or reject non-conforming goods. Section 9 of the CPA incorporates the implied conditions and warranties of the SGA and deems void any term or acknowledgement that has the objective to vary or negate any conditions or warranties set out by both statutes.<sup>134</sup> Furthermore, section 6 of the CPA expressly indicates that no part of the *Act* should be interpreted to limit any right or remedy that a consumer may have in law.<sup>135</sup>

## Le Code civil du Québec

In Quebec, the Civil Code (C.C.Q.) is not explicit as to the right of the purchaser to return goods that do not conform to the goods specified in the contract, although it sets out the right of resolution of the sale. However, the remedy is only available if serious prejudice ensues to the buyer.<sup>136</sup>

**1737.** Where the seller is bound to deliver the area, contents or quantity specified in the contract and is unable to do so, the buyer may obtain a reduction of the price or, if the difference causes him serious prejudice, resolution of the sale.

Where the area, contents or quantity exceeds that specified in the contract, the buyer is bound to pay for the excess or to restore it to the seller.

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<sup>133</sup> *British North America Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.), s. 92(13).

<sup>134</sup> *Consumer Protection Act, 2002*, s.o. 2002, c. 30, Sched. A, s. 9 (2), (3).

<sup>135</sup> *Ibid*, s.6.

<sup>136</sup> *Code civil du Québec*, S.Q., 1991, c. 64, s. 1737.

A consumer in Quebec can, however, invoke Arts. 1416 to 1421 of the C.C.Q. to nullify the contract of sale entered into through the purchase if the contract does not meet the necessary conditions of its formation. For example, this might occur when the goods that the consumer agreed to purchase do not correspond to those received.<sup>137</sup> The effect of nullity is that the contract is deemed to never have existed and each party is bound to restore to the other the consideration received. Additionally, the C.C.Q. explicitly establishes the duty of the seller to offer a warranty if the property perishes due to a latent defect that existed at the time of the sale. In such cases, the loss is borne by the seller. If the seller was aware of the defect or could not have been unaware of the defect at the time of the sale, it is bound, not only to bear the loss by restoring the price, but by paying all damages to the buyer:

**1726.** The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent buyer without any need of expert assistance.

**1727.** If the property perishes by reason of a latent defect that existed at the time of the sale, the loss is borne by the seller, who is bound to restore the price; if the loss results from superior force or is due to the fault of the buyer, the buyer shall deduct from his claim the value of the property in the state it was in at the time of the loss.

**1728.** If the seller was aware or could not have been unaware of the latent defect, he is bound not only to restore the price, but to pay all damages suffered by the buyer.

**1729.** A defect is presumed to have existed at the time of a sale by a professional seller if the property malfunctions or deteriorates prematurely in comparison with identical items of property or items of the same type; such a presumption is not made,

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<sup>137</sup> *Ibid*; Articles 1416 to 1421.

however, where the defect is due to improper use of the property by the buyer.

## Loi sur la protection au consommateur (Quebec)

Quebec's *Consumer Protection Act* or *Loi sur la protection au consommateur*, goes somewhat further in spelling out remedial action to protect consumer purchases and their contractual rights. Section 272 of the Act provides several remedies that range from price abatement to return of the goods and annulment:<sup>138</sup>

**272.** If the merchant or the manufacturer fails to fulfill an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

- (a) the specific performance of the obligation;
- (b) the authorization to execute it at the merchant's or manufacturer's expense;
- (c) that his obligations be reduced;
- (d) that the contract be rescinded;
- (e) that the contract be set aside; or
- (f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

Quebec's CPA also imposes an obligation on manufacturers and sellers that the goods must be fit for the purposes for which goods of that kind are ordinarily used,<sup>139</sup> must be durable for normal use for a reasonable length of time,<sup>140</sup> and must conform to the description made of them in the contract<sup>141</sup> or any advertisement. Claims made in advertisements are invariably binding on the seller.

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<sup>138</sup> *Loi sur la protection au consommateur*, R.S.Q., 1999 c.40.1; 1978, c. 9, s. 272.

<sup>139</sup> *Loi sur la protection au consommateur*, R.S.Q., 1978, c. 9, s. 37.

<sup>140</sup> *Loi sur la protection au consommateur*, R.S.Q., 1978, c. 9, s. 38.

<sup>141</sup> *Loi sur la protection au consommateur*, R.S.Q., 1978, c. 9, s. 40.

## 2.3 High safety standards for food and other consumer goods.

There are strict safety laws that govern the sale of consumer goods in the EU. A company that determines it has placed an unsafe product on the market must inform the authorities of all the EU countries involved. A product recall must take place if the product poses considerable danger.

### Canadian legislation containing this principle:

#### The Hazardous Products Act (HPA)

The sale, advertising or importing into Canada of certain products containing a formula, composition or chemical ingredient that has hazardous properties is prohibited and regulated under the authority of the *Hazardous Products Act*,<sup>142</sup> a federal law. Hazardous products are those that are or are likely to be a danger to the health or safety of the public. It imposes on the manufactures or sellers the obligation to ensure that their product meets any general safety guidelines set out in industry standards that may exist. It establishes criminal sanctions and monetary penalties to a maximum of one million dollars.<sup>143</sup> The HPA is however in the process of overhaul by the new *Canada Consumer and Product Safety Act (CCPS)*, also known as Bill C-52, currently in the process of legislative review by the Parliament of Canada. Bill C-52 died on the order paper of the 39<sup>th</sup> Parliament, 2<sup>nd</sup> session, but was re-introduced and passed by the House of Commons' in the 40<sup>th</sup> Parliament, 2<sup>nd</sup> session on June 12, 2009 as Bill C-6. The Bill is currently at the Senate and should be approved by the end of 2009.

#### Canada Consumer and Product Safety Act (Bill C-52 now Bill C-6)

The new CCPS, as proposed and tabled in the House of Commons for Parliamentary approval, constitutes a significant reform of Canadian federal legislation related to the regulation or prohibition of unsafe products and their presence or availability in the consumer market. The stated purpose of the *Act* is “to protect the public by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada, including those that circulate within Canada and those that are imported.”<sup>144</sup> Similar to the HPA, the CCPS establishes a general prohibition against the manufacture, importation, advertisement or sale of consumer products that are a danger to human health or safety

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<sup>142</sup> *The Hazardous Products Act*, R.S., 1985 c. H-3. s.4.

<sup>143</sup> *The Hazardous Products Act*, R.S., 1985 c. H-3. s.28.

<sup>144</sup> An Act Respecting the Safety of Consumer Products (Bill C-52), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3397415&Language=e&Mode=1&File=29>>.

and a requirement of mandatory reporting by suppliers of serious product-related incidents – including narrowly avoided calamities and defects. CCPS also increases fines for violations to a maximum of five million dollars, a large step up from the maximum fine under the predecessor legislation, the HPA. Another important feature of CCPS is that it gives new powers to the federal government to order recalls of unsafe consumer products.

## The Food and Drugs Act

The advertising and sale of food, drugs, cosmetics and therapeutic devices in Canada are subject to compliance with the *Food and Drugs Act*,<sup>145</sup> a federal law. It also prohibits the sale of any article or food that is poisonous, harmful, adulterated and unfit for human consumption or decomposing, as well as products manufactured, prepared, preserved, packaged or stored under unsanitary conditions.<sup>146</sup> The legislation prescribes similar prohibitions for the sale of drugs and cosmetics<sup>147</sup> and the sale of devices that when used according to directions or under conditions that are customary or usual, may cause injury to the health of the user.<sup>148</sup>

## The Radiation Emitting Devices Act (RED Act)

The *Radiation Emitting Devices (RED) Act* governs the sale, lease and import of certain radiation emitting devices used for medical and industrial purposes or by consumers. Radiation is defined in this federal *Act* as “energy in the form of electromagnetic waves or acoustical waves”.<sup>149</sup> The *Act* sets safety performance standards for the sale, lease, import, labelling, packaging and advertising of radiation emitting devices to ensure that the health of workers and the general public is not placed at risk. Manufacturers and importers are required to notify the Minister of Health if a device does not comply with the regulations or creates a risk to any person. While a vast number of radiation emitting devices may be destined for use in the medical and industrial sectors, many classes of radiation emitting products are sold in the consumer market. Examples of popular consumer products that must be in compliance with the *Act* are the following (the list is not exhaustive):

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<sup>145</sup> *The Food and Drugs Act*, R.S., 1985, c. F-27, s. 3.

<sup>146</sup> *The Food and Drugs Act*, R.S., 1985, c. F-27, s. 8.

<sup>147</sup> *The Food and Drugs Act*, R.S., 1985, c. F-27, s. 16.

<sup>148</sup> *The Food and Drugs Act*, R.S., 1985, c. F-27, s. 19.

<sup>149</sup> *Radiation Emitting Devices Act*, R.S., 1985, c. R-1, s. 2.

- television receivers
- microwave ovens
- laser scanners
- demonstration lasers
- baggage and security inspection x-ray devices
- low energy electron microscopes
- high intensity mercury vapour discharge lamps
- sunlamps and light-bulbs

While the *Act* explicitly applies to all radiation emitting devices to be used by consumers, the most popular radiation emitting consumer products are not listed in the schedule of The *Radiation Emitting Devices Regulations* and therefore subject to emission standards under those regulations.<sup>150</sup> The *Regulations* prescribe safety performance and labelling that must be present in the design, construction and functioning of certain classes of radiation emitting devices. All radiation emitting devices must meet the general provisions of the *Act*, irrespective of whether or not they are subject to specific regulations.

### Safety Code 6 (Health Canada's Limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 kHz to 300 GHz)

The development of *Code 6* is a federal responsibility of Health Canada,<sup>151</sup> who can exercise the power to effect the recall of products that do not comply with the safety standards for human exposure to radiation prescribed by the *Code*. Health Canada defines a recall as “the removal from distribution, sale, or consumer use of a product that does not comply with legislation in Canada, or poses an unacceptable risk to the health and safety of consumers or users of the product”.<sup>152</sup> A large number of consumer electronics and wireless communications equipment are radiation emitting devices. Such products include mobile phones, cordless phones, Wi-Fi networks, wireless routers, DVD and CD players and laser printers. Currently, Health Canada conducts radiation tests on devices such as mobile phones and publishes a list of recalled models as part of a

<sup>150</sup> Government of Canada, *Radiation Emitting Devices Regulations*, C.R.C., c. 1370, Schedule I.

<sup>151</sup> Health Canada, *Health Canada's Limits of Human exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 kHz to 300 GHz – Safety Code 6*, 1999. online: Health Canada <[http://www.hc-sc.gc.ca/ewh-sem/alt\\_formats/hecs-sesc/pdf/pubs/radiation/99ehd-dhm237/99ehd-dhm237-eng.pdf](http://www.hc-sc.gc.ca/ewh-sem/alt_formats/hecs-sesc/pdf/pubs/radiation/99ehd-dhm237/99ehd-dhm237-eng.pdf)>.

<sup>152</sup> Health Canada, *Recalling Consumer Products, A Guide for Industry*, April 2005, online: Health Canada <[http://www.hc-sc.gc.ca/cps-spc/alt\\_formats/hecs-sesc/pdf/advisories-avis/child-enfant/recalling-guide-2005-04-rappel-eng.pdf](http://www.hc-sc.gc.ca/cps-spc/alt_formats/hecs-sesc/pdf/advisories-avis/child-enfant/recalling-guide-2005-04-rappel-eng.pdf)>.

long list of consumer products recalled from the market due to the risks they pose to consumers.<sup>153</sup>

## 2.4 Know what you're eating.

A requirement for detailed labelling and adequate disclosure as to the exact nature and characteristics of the ingredients used in the preparation of foods enables consumers to make appropriate choices with full knowledge of the facts. This standard is applied to food labelling across the EU and facilitates and maximizes free trade among member countries. Specific requirements are placed upon the labelling and disclosure of genetically modified organisms, and/or products that are used as food ingredients for human consumption.

Canadian legislation containing this principle:

### The Food and Drugs Act (FDA)

Subsection 5(1) of the *Food and Drugs Act* prohibits the labelling, packaging, treating, processing, selling or advertising of any food (at all levels of trade) in a manner that is false, misleading or deceptive to consumers, or is likely to convey an erroneous message regarding the character, value, quantity, composition, merit or safety of the product.<sup>154</sup> Subsections 3(1) and (2) prohibit health claims that might suggest that a food is a treatment, preventative or cure for specified diseases or health conditions unless provided for in the regulations.<sup>155</sup> The FDA is a federal law with application across Canada.

### The Food and Drug Regulations (FDR)

The FDR implement the specifics of the labelling obligations as they relate to food and therefore prescribe, among other things, the labelling of all prepackaged foods, including requirements for ingredient labelling, nutrition labelling, durable life dates, nutrient content claims, diet-related health claims and foods for special dietary use. It also sets out bilingual labelling requirements.<sup>156</sup>

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<sup>153</sup> Health Canada, Consumer Product Safety, *Advisories, Warnings and Recalls*, online: Health Canada <<http://www.hc-sc.gc.ca/cps-spc/advisories-avis/index-eng.php>>.

<sup>154</sup> *Food and Drugs Act*, R.S. 1985, c. F-27, s. 5.

<sup>155</sup> *Food and Drugs Act*, R.S. 1985, c. F-27, s. 3.

<sup>156</sup> Government of Canada, *Food and Drug Regulations*, C.R.C., c. 870.

## The Consumer Packaging and Labelling Act (CPLA)<sup>157</sup>

The *CPLA* is federal legislation that provides for a uniform method of labelling and packaging of prepackaged consumer goods (products sold at retail).<sup>158</sup> It contains provisions regarding the prevention of fraud and provides for mandatory label information with which consumers can make informed choices. It also requires the use of metric units of measurement and bilingual labelling.

The Canadian Food Inspection Agency (CFIA) is responsible for the administration of food labelling policies related to misrepresentation and fraud with respect to food labelling, packaging and advertising as mandated by *FDA* and the general agri-food and fish labelling provisions respecting grade, quality and composition specified in the *Canada Agricultural Products Act (CAPA)*, the *Meat Inspection Act (MIA)* and the *Fish Inspection Act (FIA)*. In addition, the CFIA has responsibility for the administration of the food-related provisions of the (*CPLA*), including basic food label information, net quantity, metrication and bilingual labelling.

### Voluntary labelling and advertising of foods that are and are not products of genetic engineering (non-binding, industry voluntary code)

According to public polls, nine out of ten Canadians across the country support mandatory labelling for food products that contain genetically modified (or engineered) ingredients.<sup>159</sup> However, despite the wishes of their constituents, Canada's Parliament has not enacted such requirements in legislation. Canada has only a voluntary, non-binding code for the labelling of genetically engineered foods.<sup>160</sup>

The area of food labelling, and particularly the labelling treatment of genetically modified foods, shows significant differences between the European Union and Canada, in terms of the each jurisdiction's applicable consumer protection model. While the European Union has issued directives that have made labelling of genetically modified food and

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<sup>157</sup> *The Consumer Packaging and Labelling Act*, R.S., 1985, c.C-38.

<sup>158</sup> Canadian Food Inspection Agency, *2003 Guide to Food Labelling and Advertising*, online: Canadian Food Inspection Agency <<http://www.inspection.gc.ca/english/fssa/labelti/guide/ch1e.pdf>>.

<sup>159</sup> Steven Chase, *Canadians Want GM Foods Labelled, Poll Finds*, *The Globe and Mail*, December 4, 2003; Oliver Moore, *Poll Shows Huge Support for GMO Labelling*, *Globe and Mail*, December 3, 2003, online: Canadian Health Coalition <<http://www.healthcoalition.ca/cac-dec2003.pdf>> CNW Group, *Canadians going Green in the Grocery Store*, survey finds, 24 April 2007, online: <<http://www.newswire.ca/en/releases/archive/April2007/24/c8310.html>>.

<sup>160</sup> Government of Canada, *Voluntary Labelling And Advertising of Foods That Are and Are Not Products of Genetic Engineering*, April 2004, online: Canadian General Standards Board CGSB <[http://www.tpsgc-pwgsc.gc.ca/cgsb/on\\_the\\_net/032\\_0315/032\\_0315\\_1995-e.pdf](http://www.tpsgc-pwgsc.gc.ca/cgsb/on_the_net/032_0315/032_0315_1995-e.pdf)>.

ingredients compulsory in the consumer market,<sup>161</sup> Canadian consumers are not afforded such protection and producers are not required to disclose this material fact to the end consumer. As well, the Canadian voluntary code has proved largely ineffective both by its structure and its actual use by producers. This fact raises reasonable questions as to how can such a difference in approach can arise if consumers in both jurisdictions view genetically engineered food with overall distrust.<sup>162</sup> Do the differences in Canadian and European Union policy approaches to genetically engineered foods go beyond just a dispute about the effectiveness of transparent labelling for consumer markets?<sup>163</sup>

While in the European Union, the policy approach has been focused on the means to guarantee safety for the environment, human health and animal health needs in the face of lack of substantial evidence to the contrary, Canadian parliamentarians have seemingly been more concerned with the profitability of the agro-industrial and biotechnology sectors than their duty to proactively address public health and environmental concerns that have a direct effect on the public.<sup>164</sup> Canadian legislators and government cannot claim that they are uninformed on this issue. For example, the recommendations of a comprehensive report by the Royal Society of Canada prepared by leading Canadian scientists<sup>165</sup> has largely been ignored. The Royal

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<sup>161</sup> Official Journal Of the European Union, *Regulation (EC) No. 1829/2003 Of The European Parliament And Of The Council of 22 September 2003 On Genetically Modified Food and Feed*, Art. 12, published 18 October 2003, L 268/1, online: Access to European Union Law <[http://eur-lex.europa.eu/pri/en/oj/dat/2003/l\\_268/l\\_26820031018en00010023.pdf](http://eur-lex.europa.eu/pri/en/oj/dat/2003/l_268/l_26820031018en00010023.pdf)>.

<sup>162</sup> *Supra* note 159.

<sup>163</sup> European Union, *Europeans and Biotechnology in 2005: Patterns and Trends* (Eurobarometer 64.3) A Report to the European Commission's Directorate-General for Research, May 2006, online: European Union <[http://ec.europa.eu/research/press/2006/pdf/pr1906\\_eb\\_64\\_3\\_final\\_report-may2006\\_en.pdf](http://ec.europa.eu/research/press/2006/pdf/pr1906_eb_64_3_final_report-may2006_en.pdf)>.

<sup>164</sup> On May 5, 2008 at a second reading of Bill C-157 (An Act to amend the Food and Drugs Act, mandatory labelling for genetically modified foods), Liberal Member of Parliament Wayne Easter, opposing the bill along with members of the Conservative Party, listed the organizations opposed to the bill citing their significant "investments" in Canada: CropLife Canada; Food and Consumer Products of Canada; Maple Leaf Foods; Canadian Egg Marketing Agency; Casco; Canadian Seed Trade Association; Canadian Horticulture Council; Quebec's food processors association; Le Conseil de la transformation agroalimentaire et des produits de consommation (CTAC); l'Union des producteurs agricoles (UPA); Canadian Federation of Independent Grocers; Food Processors of Canada; Canadian Meat Council; Saskatchewan Association of Rural Municipalities; Canola Council of Canada; Canadian Canola Growers Association; BIOTEC Canada; and the Canadian Federation of Agriculture (CFA). See: Parliament of Canada, *Private Members' Business, Official Report (Hansard) Food and Drugs Act*, 5 May 2008, 39<sup>th</sup> Parliament, 2<sup>nd</sup> Session, online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Pub=hansard&Ses=2&DocId=3465829&File=0#OOB-2450476>>.

<sup>165</sup> The Royal Society of Canada, *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada: An Expert Panel Report on the Future of Food Biotechnology in Canada Prepared by the Royal Society of Canada at the Request of Health Canada, Canadian Food Inspection Agency and Environment Canada*, January, 2001, online: Royal Society of

Society's report called, since 2001, for the adoption of a strict precautionary principle, absent specific knowledge as to risks posed by engineered organisms in the food chain for human consumption:

**8.1** In general, those who are responsible for the regulation of new technology should not presume its safety unless there is a reliable scientific basis for considering it safe. This approach is especially appropriate for those who are responsible for the protection of health and the environment on behalf of the Canadian people. Any regulatory mechanism which assumes that a new product is safe on less than fully scientifically substantiated basis violates this fundamental tenet of precaution. The Expert Panel rejected the use of “substantial equivalence” as a decision threshold to exempt new GM products from rigorous safety assessments on the basis of superficial similarities (Chapter 7), because such a regulatory procedure is not a precautionary assignment of the burden of proof.<sup>166</sup>

According to the report, if there are scientific data (even though the data might be incomplete, contested, or preliminary), plausible scientific hypotheses or models (even though contested), together with significant levels of uncertainty, precautionary action is justified. In the view of the authors of the report, a reasonable *prima facie* case for the *possibility* of serious harm caused by these technologies and foods (with respect to reversibility, remediation, spatial and temporal scale, complexity and connectivity) has been established with these parameters.<sup>167</sup>

To illustrate the kind of risks executed by government and industry overconfidence as to safety issues and “remoteness” of risks, the Royal Society report goes on to elaborate the link between BSE (*bovine spongiform encephalopathy* or “mad cow disease”) and human nvCJD (new variant Creutzfeldt-Jacob disease) and the devastating consequences that it left in the United Kingdom in a tragedy that killed 164 people in the UK and some 40 people in other countries:<sup>168</sup>

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Canada

<[http://www.rsc.ca/files/publications/expert\\_panels/foodbiotechnology/GMreportEN.pdf](http://www.rsc.ca/files/publications/expert_panels/foodbiotechnology/GMreportEN.pdf)>.

<sup>166</sup> *Ibid.* at 206.

<sup>167</sup> *Ibid.* at 202.

<sup>168</sup> University of Edinburgh, The National Creutzfeldt-Jacob Disease Surveillance Unit (NCJDSU), *The Variant Creutzfeldt-Jacob Disease –Current Data (February 2009)*, online: The National Creutzfeldt-Jacob Disease Surveillance Unit <<http://www.cjd.ed.ac.uk/vcjdworld.htm>>.

What disturbed the BSE Inquiry most was the way the British MAFF (Ministry of Agriculture, Fisheries, and Food) responded to the preliminary assessment of the scientific work group. The Inquiry concluded that, rather than acting in an appropriately precautionary way, by taking steps to protect the British public against the potential “extremely serious” risks, the government became “preoccupied with preventing an alarmist over-reaction to BSE because it believed that the risk was remote.... The possibility of a risk to humans was not communicated to the public or to those whose job it was to implement and enforce the precautionary measures” (BSE Inquiry, 2000, Executive Summary). The implications of the BSE Inquiry Report are, therefore, clear: even when the available scientific evidence fails to establish a risk as anything other than “remote”, where there is a *prima facie* case of serious risk, significant (in this case highly costly) precautionary action is warranted. Because the British government did not act early enough upon the growing evidence of human health risks, public confidence in both government and science was seriously eroded.<sup>169</sup>

The Royal Society recommends caution with the enhanced allergenic risks when genetically engineered and modified seeds and crops are mixed with foods that have not been genetically modified. Since the engineering of biotech seeds includes the insertion of proteins or toxins often between entirely unrelated species, repeated exposure to such proteins may pose an allergenic risk in itself. There is, apparently, a dearth of scientific research conducted in this particular area. The Society warns against the current scientific unsoundness of the concept “substantial equivalency”. This is the threshold for regulatory approvals of these modified organisms which is, to date, based on unsubstantiated assumptions as to their safety. The Society recommends instead a safety standard for the basis of substantial equivalence based on rigorous scientific analysis to ensure that a modified organism does not pose health or environmental risks.

Another significant issue identified was the risk of regulatory conflict of interest entailed by placing the Canadian Food Inspection Agency (CFIA) under the jurisdiction of the Department of Agriculture and Agri-Food.<sup>170</sup>

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<sup>169</sup> *Supra* note 165 at 203. See also: The BSE Inquiry, *The Inquiry into BSE and variant CJD in the United Kingdom*, October, 2000, online: The BSE Inquiry <<http://www.bseinquiry.gov.uk/>>.

<sup>170</sup> Government of Canada, *Canada Food Inspection Agency Act*, 1997 c.6, online: Department of Justice Canada <<http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-16.5//20090609/en>>.

The concern is based on the fact that the same government agency charged with the responsibility to protect public health and environmental safety from risks posed by technologies is also charged with the promotion of safety claims about that same technology. Additionally, the CFIA's safety assessments are, by official policy, balanced against the economic interests of the industries that develop them. In Canada, the Minister of Agriculture is responsible for all matters relating to supporting agricultural productivity and trade, stabilizing farm incomes, encouraging research and development and being responsible for the inspection and regulation of animals and plant-life forms.<sup>171</sup> Nowhere in the Department of Agriculture and Agri-Food Act are there specific stipulations as to the protection of public health or guarding against potential health risks to consumers.<sup>172</sup>

In the European Union, on the other hand, the European Food Safety Authority (EFSA) is an agency of the Directorate General for Health and Consumers. The EFSA is governed by an independent Management Board whose members are appointed to act in the public interest and do not represent any government, organization or economic sector. The 15-member Board sets EFSA's budget, approves the annual work programme and is responsible for ensuring that the agency works effectively and co-operates successfully with partner organizations across the EU and beyond. Representatives from European consumer associations sit at the Management Board of the agency. The agency is entirely separate from the Directorate of Agriculture and Rural Development and the Directorate General of Enterprise and Business.

In Canada, the Royal Society's report recommends that all the regulatory departments involved in the regulation of food biotechnology should seek to institutionally separate, as much as possible, the role of promoter from the role of regulator.

Genetically engineered foods have been a contentious subject for the European Union and Canada in the context of the World Trade Organization (WTO). The United States, with Canada and Argentina, the worlds largest producers of genetically engineered crops respectfully challenged the EU labelling rules for approval of these products for import into the European market. Neither Canada nor the United States have mandatory consumer labelling for genetically modified foods in their internal consumer markets. Furthermore, neither country has ratified the

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<sup>171</sup> Department of Agriculture and Agri-Food, *Mandate and Summary*, online: Agriculture and Agri-Food Canada, online: <<http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1173965157543&lang=eng>>.

<sup>172</sup> Government of Canada, *Department of Agriculture and Agri-Food Act*, R.S., 1985, c. A-9, online: Department of Justice Canada < <http://laws.justice.gc.ca/en/ShowFullDoc/cs/A-9/20090609/en>>.

*Cartagena Protocol on Biosafety*,<sup>173</sup> which expressly incorporates and reaffirms the precautionary principle adopted by the *Rio Declaration on Environment and Development*.<sup>174</sup>

### *Principle 15*

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

While the *Rio Declaration* is a document that is non-binding upon signatory countries, it sets out the principles that later informed *The Cartagena Protocol*, a binding multilateral document that constitutes international law. The *Protocol* provides an international forum for the international governance of genetically modified organisms (GMOs). Although the *Protocol* has been ratified or acceded to by 150 countries, including all EU countries,<sup>175</sup> Canada did not ratify it when it was open for signature in Montreal in 2000 and<sup>176</sup> to date, has refused to accede to its provisions. Thus, Canada is not being bound by the *Protocol*.

It is important to note that mandatory labelling standards for genetically modified organisms are in place in 40 countries around the world, including the European Union, Australia, New Zealand, Russia and China. Despite the fact that the Chinese market has admittedly shown significant

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<sup>173</sup> The *Cartagena Protocol* was drafted in Cartagena, Colombia, host of the extraordinary Conference of the parties to the Convention on Biological Diversity (CBD) in 1999. The Cartagena Convention, which became international law when it came into force in 2003, was adopted and ratified in Montreal by more than 130 countries in 2000, but neither the United States nor Canada signed the Protocol. See: United Nations, *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, Montreal, 2000, online: Convention on Biological Diversity <<http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>>.

<sup>174</sup> While the *Rio Declaration* sets out the main principles on which the Cartagena Convention is based, the declaration in itself is not binding. However, the Cartagena Protocol, its successor instrument, is binding international law. See: United Nations, *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992 (as reported to the United Nations Conference on Environment and Development, UN General Assembly, 12 August 1992), online: United Nations <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>.

<sup>175</sup> Only States that have signed a treaty when it is open for signature can proceed to ratify it but a signature itself does not establish consent to be bound, only the further act of ratification makes the treaty binding. States that have not signed a treaty during the time when it is open for signature can only "accede" to it.

<sup>176</sup> The *Cartagena Protocol* was open for signature in Montreal, Canada, in the context of an extraordinary meeting of the Conference of the Parties. See: *Supra* note 170 [*Cartagena Protocol*].

failures in the enforcement of food safety standards, the existence of labelling requirements in this area in China and not in Canada is a matter that should cause some degree of reputational concern to Canadian authorities.

### Organic Products Regulations (Canada Agricultural Products Act)

After several years of study, Canada has finally implemented minimum standards for the growing market of organic food. The *Organic Products Regulations*<sup>177</sup> were drafted for first time in 2006 and were intended to come into force by year-end 2008. However after a determination that a final review had to be conducted, they will now go into force June 30, 2009.

According to the regulatory impact assessment by the Canadian Food Inspection Agency, the *Regulations* are consistent with the regulatory treatment and standards applied in other international jurisdictions such as the EU and the United States. The Regulations provide a much needed regulatory framework to ensure consumer protection across provinces in Canada and facilitate interprovincial trade of organic foods. To the date of this report, and prior to the new federal regulation, only Quebec and British Columbia have provincial labelling and certification requirements for organic foods. An important feature of the regulations is that Canadian organic products will be required to meet the standards set for both the domestic and the export markets. This constitutes an important step that assures that Canadian organic exports will meet international standards, and that foreign commercial partners will not seek reciprocity and attempt to introduce organic products into the Canadian market that do not meet minimum international standards.

## **2.5 Contracts should be fair to consumers.**

Unfair contractual terms are prohibited in the European Union. Such terms may include provisions in small print that a purchase of a product is non-refundable, even if the company fails to comply with the agreement. The enforcement of such terms is prohibited by EU law, irrespective of where within the EU zone the contract was actually signed.

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<sup>177</sup> Government of Canada, *Organic Products Regulations, 2009*, online: Canada Gazette <<http://www.gazette.gc.ca/rp-pr/p1/2009/2009-02-14/html/reg1-eng.html>>.

Canadian legislation containing this principle:

Consumer Protection Act (CPA) - Ontario

Provincial legislatures in Canada have jurisdiction over contracts associated with consumer transactions and therefore, in most transactions, provincial consumer protection legislation must be first considered when assessing the validity and effect of contractual terms. Provincial consumer protection regimes in Canada contain provisions that incorporate certain standard basic rules for the purpose of guaranteeing that sellers and producers do not profit from unfair contractual practices. Similar to the prohibition on misleading actions (Article 6) and misleading omissions (Article 7) contained in the EU's *Unfair Commercial Practices Directive*,<sup>178</sup> Chapter III of Ontario's *Consumer Protection Act*, for example, contains specific provisions that prohibit false, misleading, deceptive and unconscionable representations:<sup>179</sup>

False, misleading or deceptive representation

**14.** (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
2. A representation that the person who is to supply the goods or services has sponsorship, approval, status, affiliation or connection the person does not have.

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<sup>178</sup> European Parliament and Council, *Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council*, 11 May 2005, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>>.

<sup>179</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 14.

3. A representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.

4. A representation that the goods are new, or unused, if they are not or are reconditioned or reclaimed, but the reasonable use of goods to enable the person to service, prepare, test and deliver the goods does not result in the goods being deemed to be used for the purposes of this paragraph.

5. A representation that the goods have been used to an extent that is materially different from the fact.

6. A representation that the goods or services are available for a reason that does not exist.

7. A representation that the goods or services have been supplied in accordance with a previous representation, if they have not.

8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.

10. A representation that a service, part, replacement or repair is needed or advisable, if it is not.

11. A representation that a specific price advantage exists, if it does not.

12. A representation that misrepresents the authority of a salesperson, representative, employee or agent to negotiate the final terms of the agreement.

13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.

14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

15. A representation that misrepresents the purpose or intent of any solicitation of or any communication with a consumer.

16. A representation that misrepresents the purpose of any charge or proposed charge.

17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers.

#### Unconscionable representation

**15.** (1) It is an unfair practice to make an unconscionable representation.

(2) Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,

(a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, and illiteracy, inability to understand the language of an agreement or similar factors;

(b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers;

(c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;

(d) that there is no reasonable probability of payment of the obligation in full by the consumer;

(e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;

(f) that the terms of the consumer transactions are so adverse to the consumer as to be inequitable;

(g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or

(h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

Europe's *Unfair Commercial Practices Directive* goes somewhat further in terms of form, since it includes as "Annex I" thirty one specific commercial practices that are deemed unfair in all circumstances.<sup>180</sup>

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<sup>180</sup> Specific practices deemed unfair include:

- passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions;
- falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
- presenting rights given to consumers in law as a distinctive feature of the trader's offer;
- using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer;
- describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item;

## Criminal Code of Canada

Some misleading and deceptive commercial and trade practices may, depending on the gravity and the circumstances, be classified as criminal behaviour as described by the federal *Criminal Code* which applies across Canada.<sup>181</sup> Section 361 of the *Code* refers to false representations made with fraudulent intent as “false pretence”, an offense punishable by fines and imprisonment.<sup>182</sup>

**361.** (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

### Exaggeration

(2) Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

### Question of fact

(3) For the purposes of subsection (2), it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact.

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- including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not;
  - falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer;
  - requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights;
  - including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them;
  - creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

<sup>181</sup> *Criminal Code*, R.S. 1985, c. C-46.

<sup>182</sup> *Criminal Code*, R.S. 1985, c. C-46, s. 361.

Although section 361 is normally used to prosecute individuals who, by means of fraudulent misrepresentation, seek to obtain an advantage from lenders,<sup>183</sup> it can also be used to prosecute criminal behaviour in situations where firms knowingly mislead consumers or clients to fraudulently extract a financial benefit from them.

Sections 380 to 382 of the Code specifically refer to the use of deceit, falsehood, or other fraudulent means, in the context of stock and financial markets to “defraud the public or any person” of money or property as an offense:

#### Affecting public market

380.(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

It is important to note that although the prosecution of financial and lending firms is not common in Canada, section 380(2) specifically contemplates cases of fraud committed in the sale of securities or financial instruments to the investor market.<sup>184</sup> Given the large number of Canadians who manage their investment portfolios personally, the word “investor” may need to be used interchangeably with the word “consumer”. Even in cases where an investment firm is acting as agent of the investor consumer, the final consequence of the defrauding of such firms is borne by the consumer, the party who has advanced the capital for such investments.

### Le Code civil du Québec

Article 1437 of Quebec’s Civil Code establishes a prohibition on abusive clauses included in consumer contracts. Abusive clauses are those that result in an excessive burden or unreasonable detriment to the consumer in situations where negotiations and the agreement itself have not been conducted in good faith.<sup>185</sup>

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<sup>183</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 362.

<sup>184</sup> *Criminal Code*, R.S., 1985, c. C-46, s. 380(2).

<sup>185</sup> *Code civil du Québec*, S.Q., 1991, c. 64, s. 1437.

## 2.6 Sometimes consumers can change their mind.

Consumers are granted protection under EU law for any purchases, whether the transaction was concluded by mail order, Internet, or telesales. Consumers have the ability to cancel any of these transactions within seven working days with no questions asked. Some financial services allow up to fourteen calendar days to cancel. Scams where the supplier sends goods that were not ordered and then demands payment, which is otherwise known as “inertia selling,” are prohibited by EU law.

Canadian legislation containing this principle:

### Consumer Protection Act

The *CPA* in Ontario stipulates that consumers have the right to cancel purchases and obtain a refund but only as a remedy that emerges when the seller does not fulfill procedural requirements, such as providing the consumer with a copy of the agreement. This is applicable in the case of future performance agreements, direct agreements and timeshare agreements, where failure by the seller to deliver the agreement in writing to the consumer gives the latter the right to cancel the agreement within one year of having entered into the agreement.<sup>186</sup> For time-share agreements, direct agreements and personal development agreements, the *CPA* affords consumers a “cooling off” period of 10 days after having received a copy of the agreement to withdraw from the agreement irrespective of the reason to so.<sup>187</sup> In the case of an agreement concluded over the internet however, consumers are not afforded a cooling off period at all unless the seller fails to provide an opportunity to the buyer to obtain information relevant to the agreement, express consent and print or retain such information.<sup>188</sup>

#### Cancellation of internet agreement

**40.** (1) A consumer may cancel an internet agreement at any time from the date the agreement is entered into until seven days after the consumer receives a copy of the agreement if,

(a) the supplier did not disclose to the consumer the information required under subsection 38 (1); or

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<sup>186</sup> *Consumer Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 23.

<sup>187</sup> *Consumer Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 28.

<sup>188</sup> *Consumer Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 40.

(b) the supplier did not provide to the consumer an express opportunity to accept or decline the agreement or to correct errors immediately before entering into it.

(2) A consumer may cancel an internet agreement within 30 days after the date the agreement is entered into, if the supplier does not comply with a requirement under section 39.

In the European Union, the *Directive 97/7/EC on the protection of consumers in respect of distance contracts* sets the legislative guidelines for European consumer protection provisions that pertain to cancellation rights and cooling off periods for consumer contracts entered into by means of distance communications.<sup>189</sup> The Directive prescribes a longer period of a minimum of seven working days as a “cooling off” period for distance purchases made over a means of communication.<sup>190</sup> The seven working day period applies even in cases where the consumer has no particular reason for the cancellation and the seller is obliged to refund the buyer any sum advanced as consideration for the contract. However, there are important exceptions to this cancellation right in the case of certain contracts.

Excepted from the seven-day right of withdrawal are contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace. Also excepted are contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract term is included, to provide these services on a specific date or within a specific period.<sup>191</sup>

According to the Directive, “means of communications” include: unaddressed printed matter; addressed printed matter; standard letter; press advertising with order form catalogue; telephone with human intervention; telephone without human intervention (automatic calling machine, audiotext); radio; videophone (telephone with screen); videotext (microcomputer and television screen) with keyboard or touch screen; electronic mail; facsimile machine (fax); and television (tele shopping).<sup>192</sup>

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<sup>189</sup> European Union, *Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts*, 20 May 1997, Article 6, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML>>.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, Annex I.

## 2.7 Making it easier to compare prices.

Products and services commercialized in the EU must comply with a requirement to stipulate a selling price and the price per unit of measurement of products offered by traders to consumers. The objective of the provision is to improve information to consumers and facilitate comparison of prices.

Canadian legislation containing this principle:

Loi sur la protection au consommateur (Quebec)

Quebec's *Consumer Protection Act* sets out the requirement for retail merchants to explicitly indicate the price on all wrapped goods for sale in retail outlets.<sup>193</sup>

**223.** Un commerçant doit indiquer clairement et lisiblement sur chaque bien offert en vente dans son établissement ou, dans le cas d'un bien emballé, sur son emballage, le prix de vente de ce bien, sous réserve de ce qui est prévu par règlement.

*(A merchant must indicate the sale price clearly and legibly on all the goods or, if the goods are wrapped, on the wrapping of all the goods offered for sale in his establishment, subject to the regulations.)*

However, the *Règlement d'Application de la Loi sur la protection au consommateur* or *Consumer Protection Act Regulations*,<sup>194</sup> establishes a number of exceptions for item-per-item pricing in cases that include when items are too small to be tagged, frozen foods, products on consignment, trees and plants, or items not exceeding a price of \$0.60 cents.<sup>195</sup> Another exception is established for retail outlets that make use of a bar code reader system, in which case the seller must nevertheless place a tag or sign next to the items indicating their retail price.<sup>196</sup>

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<sup>193</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s.223.

<sup>194</sup> *Règlement d'Application de la Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, r.1, s. 91.1.

<sup>195</sup> *Règlement d'Application de la Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, r.1, s. 91.1.

<sup>196</sup> *Règlement d'Application de la Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, r.1, s. 91.4.

## Farm Products Grades and Sales Act, Regulation 378 (Ontario)

Section 15 of the *Farm Products Grades and Sales Act's Regulation 378* imposes upon produce retailers the obligation to place price indicators:<sup>197</sup>

15. No person shall sell, offer for sale or have in possession for sale at retail any produce unless a sign appears on the display stating,

...

(c) the price per unit of weight if sold by weight;

...

However, no other price indication requirement is imposed upon retailers in the province of Ontario. The province's CPA does not contain requirements as to price marking similar to Quebec's CPA.

Consumers in the EU, on the other hand, benefit from national laws that implement the *Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers*,<sup>198</sup> which establishes a blanket requirement on national authorities within the common market to adopt the Directive by transposition except in cases where such indication would not be useful because of the products' nature or purpose or where such indication would be liable to create confusion.<sup>199</sup>

### 2.8 Consumers should not be misled.

Advertising that misleads or deceives consumers is prohibited under EU law. On-line representations and telemarketers must be open and honest at all times. Full details that must be disclosed include: who the seller is; what is the seller selling; how much it will cost; and how long the delivery will take. In the case of loan and credit card companies, they must give complete details in writing of any credit agreement that consumers enter into, including interest rates, duration of the agreement and cancellation possibilities.

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<sup>197</sup> *Regulation 378*, R.R.O. 1990, s.15.

<sup>198</sup> European Union, *Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumer*, 16 February 1998, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0006:EN:HTML>>.

<sup>199</sup> *Ibid.*, Art. 5.

## Canadian legislation containing this principle:

### Consumer Protection Act

In addition to the provisions of Part III of Ontario's CPA ("unfair practices") discussed above in the context of the fifth EU principle, *Contracts should be fair to consumers*, the *Act* refers specifically to other areas that have proved to be consistent sources of misleading seller practices that negatively affect consumers, namely repair to motor vehicles, consumer credit agreements, internet and distance sales or telesales. For motor vehicle repairs, the *CPA* requires that an estimate of the cost of repairs must be given in writing to the consumer, no work can be done without express authorization, and such authorization must be received in writing.<sup>200</sup> The total cost of repairs must not exceed 10% of the estimate. In case of a faulty repair that makes the vehicle unsafe to drive, and if the consumer does not have a reasonable opportunity to bring the vehicle to the repairer's garage but to another garage, the consumer is entitled to recover the bill of the other garage from the original repairer.<sup>201</sup>

The *Act* also establishes a statutory warranty for reconditioned parts or parts replaced in the repair of 90 days or 5,000 kms.<sup>202</sup> For consumer credit, the *CPA* imposes requirements for disclosure of the terms and the credit agreement to lenders, creditors and loan brokers to borrowers.<sup>203</sup>

### Loi sur la protection au consommateur

Quebec's *Consumer Protection Act (Loi sur la protection au consommateur)* contains important protections to consumers in the context of telesales and doorstep sales as it establishes a comprehensive list of mandatory disclosures,<sup>204</sup> written requirements and the opportunity for buyers to accept or decline these kinds of agreements,<sup>205</sup> while also providing a seven-day period for cancellation by the buyer.<sup>206</sup> However, the seven day cancellation period provided by the *CPA* in Quebec is not equivalent to the unconditional "cooling off period" seven day period provided to European consumers, since the cancellation right in Quebec is conditional on the failure of the seller to fulfill requirements of form and a non-commencement on the part of the seller of the performance of the main obligation.<sup>207</sup> In other words, consumers in Quebec (and in Ontario,

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<sup>200</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 56.

<sup>201</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 63 (3).

<sup>202</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 63(1).

<sup>203</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 72 (2).

<sup>204</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s.54.4.

<sup>205</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s. 54.5.

<sup>206</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s. 54.8.

<sup>207</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s. 54.10.

for that matter) are not afforded an unconditional opportunity to reflect and change their mind after they have entered a sales agreement, even in cases where they may have been subject to pressure tactics by sellers or entered the agreement under some circumstances that may have affected the nature of their consent.

## Competition Act

The *Competition Act* is federal legislation of application across Canada. Section 52(1) of the *Act* refers to false or misleading representations as a criminal offense when such representation is made with 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 and knowingly or recklessly make such representation to the public on the knowledge that it is false or misleading in a material respect.<sup>208</sup>

Part VII.1 of the *Act* lists a number of deceptive marketing practices<sup>209</sup> as “reviewable matters” but does not impose criminal liability in the event of culpability. Among those practices are misrepresentations associated with the transaction made to the public,<sup>210</sup> bait and switch selling,<sup>211</sup> and selling at a price above that advertised.<sup>212</sup> The review of these practices under Section VII.1 is at the discretion of the Commissioner of Competition, who may apply to the Federal Court to determine whether or not the person (which may be a firm) is engaged or not in such activities. This section provides for administrative penalties for a maximum amount of \$50,000 in the case of individuals and \$100,000 in the case of corporations.<sup>213</sup>

## Food and Drugs Act

The *Food and Drugs Act*<sup>214</sup> is federal legislation that applies to food, drugs, cosmetics and medical devices and prohibits deception in the sale and advertising of these products:

### Deception, etc., regarding food

**5. (1)** No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an

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<sup>208</sup> *Competition Act*, R.S. 1985, c. C-34, s. 52(1).

<sup>209</sup> Bill C-10 passed by the Canadian Parliament and given royal assent in the spring of 2009 abolished criminal sanctions for price maintenance.

<sup>210</sup> *Competition Act*, R.S. 1985, c. C-34, s. 74.01.

<sup>211</sup> *Competition Act*, R.S. 1985, c. C-34, s. 74.04(2).

<sup>212</sup> *Competition Act*, R.S. 1985, c. C-34, s. 74.05(1).

<sup>213</sup> *Competition Act*, R.S. 1985, c. C-34, s. 74.1(1). Bill C-10 amended this section, increasing the ceiling for an administrative penalty to \$1 million for individuals and \$15 million for corporations.

<sup>214</sup> *Food and Drugs Act*, R.S. 1985, c. F-27.

erroneous impression regarding its character, value, quantity, composition, merit or safety.

The *Act* sets out an inspection and enforcement framework that includes special powers for search, seizure, analysis and even destruction of seized items, as well as the characterization of such offenses as criminal offenses.

## **2.9 Protection while you are on holiday.**

EU law attempts to ensure that vacation packages accurately describe the holiday that is to be delivered. Without the agreement of the consumer, prices cannot be raised and the advertised resort may not be changed.

By law, consumers are entitled to compensation if the tour operator or airline overbooks the flight. EU law also protects against sellers of timeshare property schemes that use high pressure tactics to sell. In the time share industry, tourists are often targeted and pressured into signing contracts that they do not fully understand. For this reason, under EU law, they are entitled to a copy of the timeshare brochure and a translation of it in their own language. Those who sign a contract have a 10 day “cooling off period” during which they may cancel the contract with no questions asked.

Canadian legislation containing this principle:

### Consumer Protection Act

A section of Part V of the Ontario *CPA* lays out specific statutory requirements for the validity of time-share agreements as well as the conditions for cancellation and the “cooling-off period”:<sup>215</sup>

#### Requirements for time share agreements

**27.** Every time share agreement shall be in writing, shall be delivered to the consumer and shall be made in accordance with the prescribed requirements.

#### Cancellation: cooling-off period

**28.** (1) A consumer may, without any reason, cancel a time share agreement at any time from the date of entering into the agreement until 10 days after receiving the written copy of the agreement.

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<sup>215</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 27.

### Cancellation: failure to meet requirements

(2) In addition to the right under subsection (1), a consumer may cancel a time share agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section.

As set out in section 28(1), the ten day cooling off period operates to afford a meaningful opportunity for the consumer to make the decision of subscribing to the time-share program without potential interference by a seller.

### Ontario Regulation 26/05 (Travel Industry Act)

The *Ontario Regulation 26/05*,<sup>216</sup> a regulation under the *Travel Industry Act*,<sup>217</sup> establishes a compensation regime for consumers who contract travel services from a registered travel agent or a travel wholesaler. Registrants must contribute to a fund that is set up and administered by a Board of Directors, composed of representatives from the industry and government appointees. The Board hears claims for reimbursement for services not rendered not only to consumers but also to travel agents and travel wholesalers. While the Regulations set out the criteria for reimbursement to consumers, only consumers who have purchased their travel services from a registered and contributing travel agent or travel wholesaler are protected. The substance of the regime is the insurance of those services that have not been received, although paid for. Regulations set out form of advertising, price disclosure, and information required for customers specify form. Consumers who do not buy travel services from registered travel agents are not afforded with any other protection than that provided by the *CPA* or any other contractual remedy under the common law. The Travel Industry Council of Ontario (TICO) administers the fund.

### Loi sur les agents de voyages (Quebec)

Similar to the *Travel Industry Act* in Ontario, the *Travel Agents Act (Loi sur les agents de voyages)* governs the activities of travel agents in the province.<sup>218</sup> According to the *Travel Agents Act*, of Quebec no person can act as travel agent without a license, while the Ontario Act provides a requirement for registration.

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<sup>216</sup> *Ontario Regulation 26/05*, O. Reg. 278/07.

<sup>217</sup> *Travel Industry Act* 2002, S.O. 2002, c. 30, Sched. D, s. 2 (1).

<sup>218</sup> *Loi sur les agents de voyages*, R.S.Q. Chapter A-10.

Travel agents in Quebec are required to contribute to the Travel Agents Compensation Fund (Fonds d'indemnisation des clients des agents de voyages) which is administered by the Consumer Protection Office (Bureau de la Protection au Consommateur). Compensation to consumers is limited to cases where the travel agent cannot provide the services contracted due to closing or bankruptcy. Additionally, for consumers to be entitled to this protection, they must have purchased their services through the travel agent and not directly from the provider of the services.

## 2.10 Effective redress for cross-border disputes.

The size of the European commercial market is continuously increasing due to the phenomenon of e-commerce and increased intra-European mobility. The EU policy is that shoppers should be empowered to make informed choices about the goods and services they purchase. Consumers are seen as essential, responsible economic agents. The European Consumer Centres Network (ECC-Net) promotes consumer confidence by advising them of their rights and providing help with any disputes that may arise.

### Canadian legislation containing this principle:

#### Consumer Protection Act Ontario

A trend has developed in recent years for suppliers and sellers to introduce mandatory arbitration clauses in consumer contracts in the same way that such clauses are in common usage for contracts between commercial parties. In addition to mandatory arbitration, firms engaged in high volume consumer transactions, particularly online consumer transactions, have also adopted clauses requiring consumers to waive their right to pursue or join class action litigation against the seller.<sup>219</sup> Ontario introduced an amendment to its CPA to guarantee the right of consumers to participate in class actions notwithstanding any clause prohibiting participation in an agreement that the consumer may have entered into:<sup>220</sup>

8. (1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute

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<sup>219</sup> Geneviève Saumier, *Consumer Dispute Resolution: The Evolving Canadian Landscape*, Class Action Defence Quarterly, Vol.1, Number 4, 2007, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1291960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291960)>.

<sup>220</sup> *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 8.

arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

This practice of attempting to divert contentious proceedings from courts through the use of mandatory arbitration clauses is highly questionable from the standpoint of the relative position of the contracting parties. While such clauses have resonance in commercial transactions, the position of the ordinary consumer is hardly as resourced as that of commercial parties in the event of a dispute.<sup>221</sup>

### Loi sur la protection au consommateur (Quebec) and *Code Civil du Quebec*

Similar concerns arose in Quebec that the widespread use of obligatory arbitration clauses were likely to have the effect of precluding consumers from being able to access their rights to due process in courts of competent jurisdiction. Quebec's *Consumer Protection Act* was recently amended to explicitly prohibit stipulations in consumer contracts that attempt to circumvent the consumer right to obtain redress via class action:<sup>222</sup>

#### Stipulation interdite.

**11.1.** Est interdite la stipulation ayant pour effet soit d'imposer au consommateur l'obligation de soumettre un litige éventuel à l'arbitrage, soit de restreindre son droit d'ester en justice, notamment en lui interdisant d'exercer un recours collectif, soit de le priver du droit d'être membre d'un groupe visé par un tel recours.

#### Arbitrage.

Le consommateur peut, s'il survient un litige après la conclusion du contrat, convenir alors de soumettre ce litige à l'arbitrage.

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<sup>221</sup> Geneviève Saumier, *Consumer Dispute Resolution: The Evolving Canadian Landscape*, Class Action Defence Quarterly, Vol.1, Number 4, 2007, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1291960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291960)>.

<sup>222</sup> *Loi sur la protection au consommateur*, L.R.Q. c. P-40.1, s.11.1

Stipulation prohibited.

**11.1.** Any stipulation that obliges the consumer to refer a dispute to arbitration that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

#### Arbitration.

If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.

For consumers who have already consented to arbitration where disputes arise in the context of a transaction with a commercial supplier, the arbitration provisions contained in the *Civil Code of Quebec* seem to provide a minimum protection to the consumer in the choice of arbitrators.<sup>223</sup>

**2641.** A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is null.

However, the problem persists in determining specifically, what would constitute a disadvantaged position once a consumer has consented to arbitration, and what is the evidence would be required to arrive at such a finding. As one Canadian commentator put it:

The contractualist justifications for legislative and judicial deference to arbitration are considerably weaker in the consumer context than in arbitration's traditional commercial context. Deference to Arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking.<sup>224</sup>

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<sup>223</sup> *Le Code civil du Québec*, S.Q1991, c. 64, s. 2641.

<sup>224</sup> Jonette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access To Justice?* McGill Law Journal, 2006, Vol. 51 No. 4, online: <[http://lawjournal.mcgill.ca/documents/1224864711\\_Watson\\_Hamilton.pdf](http://lawjournal.mcgill.ca/documents/1224864711_Watson_Hamilton.pdf)>.

While in Canada, the provinces of Ontario and Quebec have legislated that mandatory arbitration clauses are not enforceable against consumers especially when they seek to preclude access to class actions, these kinds of clauses may still be enforceable in other provinces where there is no legislative protection for consumers. In the recent case *Dell Computer Corp. v. Union des Consommateurs*, the Supreme Court of Canada reaffirmed that the nature of a class action as a means of dispute resolution is procedural and not a consumer right.<sup>225</sup>

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<sup>225</sup> *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34.

## **Part III: Consumer protection in Europe and Canada applicable to basis services and sensitive areas of the consumer economy**

In the previous discussion of Canadian consumer protection matched up with the European Community's "Ten Principles", the report attempted to deal with the breadth of the approach of each jurisdiction to key consumer transaction occurrences. In this section, the report will examine key products and services available in each market and the specific set of principles that govern the transactions involving those products and services. This exercise should provide insight into the differences of approach and important initiatives in the individual subject areas.

### **3.1 Organic food labelling and safety standards**

*Relevant EU principles:*

Principle No. 3 High safety standards for food and other consumer goods

Principle No. 4 Know what you are eating

Principle No. 5 Contracts should be fair to consumers

#### Labelling of organics foods in Europe

To meet EU requirements for a listed country, Canada would have to demonstrate that the recently developed "Canadian Standard for Organic Agriculture" [ratified in 1999 by the Standards Council of Canada (SCC)] meets EU or equivalent organic production standards and that Canada has an accredited certification body for organic agriculture. Canada should be able to meet the first EU requirement as the Canadian Standard for Organic Agriculture is consistent with international standards (ISO 65 standard and Codex *alimentarius*). The second requirement, however, is not yet met as the Canadian Organic Advisory Board (COAB), a non-profit advisory body representing the interests of organic production and certification groups in Canada, only recently submitted an application for accreditation to become the first Standards Council of Canada accredited certification body for Canadian organic products. The accreditation process is expected to be time-consuming, taking up two to five years to complete.<sup>226</sup>

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<sup>226</sup> Government of Canada, Foreign Affairs and International Trade Canada, *Opening Doors to the World: Canada's International Markets' Access 2001*, online: Foreign Affairs and International Trade Canada <[http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2001/2001\\_5.aspx?lang=en](http://www.international.gc.ca/trade-agreements-accords-commerciaux/cimar-rcami/2001/2001_5.aspx?lang=en)>.

## Labelling of organic foods in Canada

Canada introduced regulations to create “Canada Organic”<sup>227</sup> standards in 2006 meet the EU standard<sup>228</sup> and is going through a phase-in period ending December 2008. These regulations will have the effect of creating a national standard not only for organic products to be exported from Canada but also for organic products from non-EU countries to be imported and consumed in Canada.

A substantial issue that is yet to be decided in Canada is the design of an appropriate system to determine the criteria for organic certification. There are many problems that arise in the certification process in Canada that act as a deterrent for small organic growers. In addition, countries of origin labelling (COOL) regulations are currently deemed a must for consumer informed choice and to meet the greater need for an increasingly diverse marketplace.<sup>229</sup> Consumer protection for poultry products treated with chemical washes and their consequent contamination levels are of high public concern in Europe just as much as they are in the U.S. and Canada, but only European policymakers have been, to date, sensitive and responsive to the interests of consumers.<sup>230</sup>

### 3.2 Electronic commerce

#### *Relevant EU principles*

- Principle No. 1 Buy what you want, where you want
- Principle No. 2 If it doesn't work, send it back
- Principle No. 5 Contracts should be fair to consumers
- Principle No. 6 Sometimes consumers can change their mind
- Principle No. 8 Consumers should not be misled
- Principle No. 10 Effective redress for cross-border disputes

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<sup>227</sup> Government of Canada, *Organic Products Regulations* (SOR/2006-338) 14 December 2006, online: Department of Justice <<http://laws.justice.gc.ca/en/ShowFullDoc/cr/SOR-2006-338//en>>.

<sup>228</sup> European Union, *Council Regulation (EC) No. 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) 2092/91*, online: Eur-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:189:0001:0023:EN:PDF>>.

<sup>229</sup> Trans Atlantic Consumer Dialogue, *Resolution on Country of Origin Labelling*, March 2008, online: Trans Atlantic Consumer Dialogue TACD <[http://www.tacd.org/db\\_files/files/files-446-filetag.pdf](http://www.tacd.org/db_files/files/files-446-filetag.pdf)>.

<sup>230</sup> Trans Atlantic Consumer Dialogue, *Statement to the EU-U.S. Summit Ljubljana*, June 2008, online: <<http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=337>>.

## Electronic commerce in the EU

The European Union has been engaged with issues arising from internet enabled electronic commerce since its inception. EU directives have set the groundwork for internal regulatory activity for member countries. The directives do not apply to private citizens directly but are intended as mandatory guidelines for member countries to enact their own laws apply to their citizens.

The effort to unify e-commerce rules across the EU originated with a document drafted in 1997 called “A European Initiative in Electronic Commerce”<sup>231</sup> In 2000 the *Directive on Electronic Commerce* introduced the Internal Market clause,<sup>232</sup> a main element of the electronic commerce policy for the EU. The provisions on the liability of intermediaries create legal certainty for intermediary service providers, and thus help to ensure the provision of basic intermediary services on the internet. At the same time, the Directive’s provisions on information and transparency requirements, its rules on commercial communications and the basic principles regarding electronic contracts provide for high standards in the conduct of online business in all Member States, thus also contributing to increased consumer confidence in online transactions.<sup>233</sup>

## Firms and consumers in the EU

Firms around the world rely heavily on contract law in their regular course of business. The UNCITRAL Model Law on Electronic Commerce serves as a model for contractual guidelines on business to business relationships on the one hand, and on the other, companies can rely on contract law to settle differences or conflicts with business parties. However, access to contract law remedies for consumers is not available to the same extent as it is available to enterprises. The reason for this may be the prevalence of “contrats d’adhesion” or single form contracts that do not allow consumers to negotiate their own terms and clauses.<sup>234</sup> An additional issue that is currently being subject to some degree of discussion (at least within the EU) is the distinction between a consumer and a small business, when a particular consumer is a self-employed entrepreneur.

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<sup>231</sup> European Union, *A European Initiative in Electronic Commerce* COM(97) 157 final, 18 April 1997, online: Europa.eu <<http://europa.eu/scadplus/leg/en/lvb/l32101.htm>>.

<sup>232</sup> European Union, *Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* (Directive on electronic commerce), 8 June 2000, online: Eur-Lex Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>>.

<sup>233</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *First Report on the Application of Directive 2000/31/EC (Directive on Electronic Commerce)*, COM(2003) 702 final, 21 November 2003, online: Eur-Lex Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0702:FIN:EN:PDF>>.

<sup>234</sup> European Informatics Markets, *Electronic Commerce and the Law. Eurim Briefing No. 15*, May 1997, online: European Informatics Markets Eurim <<http://www.eurim.org.uk/resources/briefings/br15.pdf>>.

These definitions will have a direct impact in contractual agreements and the kind of legal protections that could flow to small businesses if some degree of consumer protection were to be recognized. As the new economy progresses and evolves, it will be clear that there may be some room for redefinition of the concept of consumer. It is clear that there are benefits to be gained by small businesses but there is a risk of diluting the need for stronger protection to consumers under the classic non-business definition.

## Electronic commerce in Canada

The United Nations' *Model Law on Electronic Commerce*<sup>235</sup> served as the basis for the *Canadian Uniform Electronic Commerce Act*,<sup>236</sup> UECA, a non-binding model law intended to set the baseline for provincial legislation within Canada in the area of electronic commerce. By 2004, all provinces in Canada had implemented the core of UECA's provisions within their electronic commerce legislative frameworks. The UECA's main purpose is to provide for the recognition of the legal validity of electronic agreements and documents that equal that of traditional paper-based documents. It introduces a "non-discrimination provision establishing that information shall not be denied legal effect or enforceability solely by reason that it is in electronic form. However, the model law does exempt from its application certain classes of legal documents, including wills and codicils, trusts created by wills or codicils, powers of attorney (to the extent that they are in respect of the financial affairs or personal care of an individual), documents that create or transfer interests in land and that require registration to be effective against third parties, and negotiable instruments (including negotiable instruments of title).

## Differences regarding data protection in Canada and the EU

Canada relies primarily on industry self-regulatory codes as a means to protect individuals' personal information, whereas the European Union has drafted directives envisioning the implementation of comprehensive regulatory frameworks that are uniform across the Euro zone. In October 1998, the EU drafted the Data Protection Directive, which only permits the transfer of personal information from Europe to "third countries that provide 'adequate' data protection".<sup>237</sup>

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<sup>235</sup> United Nations Commission on International Trade Law UNCITRAL, *Model Law on Electronic Commerce with Guide to Enactment*, 1996, online: United Nations Commission on International Trade Law <[http://www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)>.

<sup>236</sup> Uniform Law Conference of Canada, *Canadian Uniform Electronic Commerce Act, 1999*, online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/poam2/index.cfm?sec=1999&sub=1999ia>>.

<sup>237</sup> United States General Accounting Office, *Trade with the European Union, Recent Trends and Electronic Commerce Issues*, 13 October 1999, online: U.S. General Accounting Office <<http://www.gao.gov/archive/2000/ns00046t.pdf>>.

In Canada, PIPEDA focuses not so much on the protection of citizen's personal information, but instead grants private enterprises the ability to handle personal information according to their particular interpretation of what constitutes "reasonable in the circumstances", as set out in its purpose:

### *Purpose*

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

It is aligned in its substance with the *Directive on Data Protection*, issued by the Internal Market Directorate. The *Directive on Data Protection* uses Article 1 to recognize the right of privacy but prohibits actions by national authorities to initiate further restrictions or prohibitions provided that the protections afforded by subsection 1 are implemented. Article 12 provides a more comprehensive and meaningful right of access than PIPEDA. Article 14 establishes a much more stringent standard, as it requires specific consent for direct marketing use.<sup>238</sup> The Canadian Internet Policy and Public Interest Clinic (CIPPIC) conducted a study on the compliance of Canadian merchants' practices with PIPEDA in the realm of electronic commerce. Its findings include substantial problems or contraventions in the areas of accountability, openness, consent and privacy.<sup>239</sup>

Electronic transactions in Canada are subject to consumer protection laws enacted by provincial legislatures binding in each provincial jurisdiction. At the federal level, *the Personal Information Protection and Electronic Documents Act* (PIPEDA)<sup>240</sup> prescribes the protection of personal information collected from individuals and used or disclosed by private enterprises. PIPEDA defines "personal information" as:

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<sup>238</sup> European Union, *Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regards to the Processing of personal data and on the Free Movement of such data*, 24 October 1995, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>>.

<sup>239</sup> Canadian Internet Policy and Public Interest Clinic, *Compliance with Data Protection Laws: Are Retailers Measuring Up?* April 2006, online: <[http://www.cippic.ca/documents/bulletins/compliance\\_report\\_06-07-06\\_\(color\)\\_\(cover-english\).pdf](http://www.cippic.ca/documents/bulletins/compliance_report_06-07-06_(color)_(cover-english).pdf)>.

<sup>240</sup> *Personal Information Protection and Electronic Documents Act* (PIPEDA) S.C. 2000, c.5.

...means of information about an identifiable individual but does not include the name, title or business address or telephone number of an employee of an organization.

## Unfair terms in consumer contracts in electronic commerce

Another area of application of this fairness principle is related to *End User License Agreements* (EULAs) also known as “click-wrap” contracts that allow consumers the use of software products through a license granted at little or no charge. These agreements are of widespread use on the internet and include blanket clauses requiring the user to waive her or his rights to legal claims against the supplier of the particular application or tool, including liability for negligence.

These clauses seek to exclude the supplier’s product liability for the software, product or service they provide as a condition of the download. The difficulty that arises for consumers is that many of these applications are necessary in order to access sources of information, such as word processing documents, text documents, images, data sheets, technical information and other sources of information essential to meaningful and productive access to online resources. Therefore, consumers are compelled to accept the provision and waive their rights. In so doing, they must blindly trust the level of quality of the product and its compliance with statutory requirements (privacy, technical standards, security, etc.). As a consequence, consumer consent to such contractual terms is suspect or, at least, reflective of an inequality in bargaining power. The typical liability exclusion clause normally reads, in substance, along the following terms:

### **WARRANTIES AND DISCLAIMER:**

*TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SOFTWARE IS PROVIDED "AS IS". THERE ARE NO WARRANTIES UNDER THIS EULA, AND LICENSOR DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE, OR THE WARRANTY OF NON-INFRINGEMENT.*

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Such clauses are prohibited in the EU under the authority of the *Products Liability Directive*, which precludes any attempt by a producer to exclude or reduce its liability for damages caused to a consumer by a defective product.<sup>241</sup>

### Article 12

*The liability of the producer arising from this Directive may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.*

The vast majority of these software products are available for download from the web but the download cannot be completed if the user does not accept the terms and conditions of the contract that he or she is presented with on the screen. Only Ontario and Quebec have enacted statutory prohibitions in their consumer protection legislation to prohibit clauses that force consumers to waive their right to have a claim heard in court by submitting to mandatory arbitration. However, Canadian consumers are at a disadvantage in relation to European consumers in terms of product liability protection for software products, since blanket liability exclusion clauses in “click-wrap” contracts continue to be used by providers of products and services that are distributed online (software products in the majority of cases). The difference in treatment can be noted in many of these contracts that include clauses advising European consumers that the exclusion of liability may not operate if prohibited by national and local laws.

## **3.3 Consumer Energy Market**

### *Relevant EU principles*

- Principle No. 5 Contracts should be fair to consumers
- Principle No. 7 Making it easier to compare prices
- Principle No. 8 Consumers should not be misled

### The opening of the energy market in the European Union

Individual residential consumers represent 27 percent of consumption in the European energy market. Without proper safeguards, consumer interests might be overlooked as a result of their relative minority position in the energy market. The European Union (EU) has acknowledged the need for greater consumer protection in the energy markets where market forces are intended to prevail and has established such protection concurrent with the full opening of internal

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<sup>241</sup> European Union, Council Directive 85/374/EEC *on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, 25 July 1985, online: EUR-Lex, Access to European Union Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0374:EN:HTML>>.

energy market across the EU. This has been done through two directives in 2003: *Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (Energy Directive)* and *Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (Gas Directive)*

The Energy and Gas Directives mandate the full opening of the EU energy markets on July 1, 2007. Thirteen of the twenty-seven Member States have opened their electricity and/or gas markets before the deadline. Others opened their markets on July 1, 2007 for specific reasons. The remainder, with the permission (derogation) of the Commission, would open their markets upon a near future date.

Member State	Electricity Market Opened before July 1, 2007	Gas Market Opened before July 1, 2007	Electricity Market Opened on July 1, 2007	Gas Market Opened on July 1, 2007	Derogations on market opening (deadline)
Austria	X	X			
Belgium	X	X			
Bulgaria			X	X	
Czech Republic	X	X			
Cyprus		N/A			Electricity (2013)
Denmark	X	X			
Estonia				X	Electricity (2013)
Finland	X				Gas
France			X	X	
Germany	X	X			
Great Britain	X	X			
Greece			X		Gas
Hungary			X	X	
Italy		X	X		
Ireland	X	X			
Latvia			X		Gas (2010)
Lithuania			X	X	
Luxembourg			X	X	
Malta		N/A			Electricity
The Netherlands	X	X			
Poland			X	X	
Portugal	X				Gas (2010)
Romania			X	X	
Slovakia			X	X	
Slovenia			X	X	
Spain	X	X			
Sweden	X			X	

## Rationale for opening the energy market

The European Council is of the view that full opening of the gas and electricity markets is an appropriate opportunity to reiterate the need for adequate consumer rights.<sup>242</sup> As individual consumers may lack influence in the energy market, the directives require public authorities to safeguard consumer rights, in particular the right to receive electricity at reasonable, clearly comparable and transparent prices and mandate the creation of conditions for consumers to have confidence in the market and choose the most advantageous offer.

Although consumers are not obliged to change their energy suppliers as a result of these directives, the Council was of the view that open energy markets can help to achieve a truly competitive single European electricity and gas market. The expectation was that lower prices would result from genuine competition among suppliers, which would ultimately benefit consumers.

Under the directives, each Member State must take appropriate measures to ensure that all consumers have access to safe and secure electricity and gas services. In particular, vulnerable consumers must have access to reasonable, easily comparable and transparent prices.

### Who are these vulnerable consumers in the energy market?

Member States are required to identify vulnerable citizens. Citizens with specific characteristics such as reduced mobility, low income and residents in rural areas are generally considered more susceptible to suffer in an open competitive energy market and to become victims of misleading and aggressive commercial practices.

Member States are expected to establish schemes such as social aids and reduced tariffs to ensure continuous and sufficient access to the electricity and gas services for their vulnerable consumers.

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<sup>242</sup> European Union, *All EU Citizens free to choose their electricity and gas suppliers as of July 1*” Press Release, 29 June 2007, online: Europe.eu <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/983&format=HTML&aged=1&language=EN&guiLanguage=en>>.

## Examples of Practices: Vulnerable Customers Protection<sup>243</sup>

<p><i>United Kingdom</i></p> <p>EDF Energy, the UK branch of the French energy company, committed in February 2008 to provide a long-term social tariff for its most vulnerable customers through to 2012 as part of its commitment to support vulnerable customers.</p> <p>As part of this commitment, the company announced that it will initially extend its existing Energy Assist Tariff which gives a 15% discount to its 55,000 most vulnerable customers for a further year until 31 March 2009.</p>	<p><i>France</i></p> <p>EDF Energy has implemented various measures to help vulnerable customers to reduce their energy bills.</p> <p>For example, it has distributed energy efficiency kits including energy-efficient light bulbs, training social workers and building custodians on how to reduce energy use and a partnership with the association Envie for educating sellers of household electrical goods.</p>
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### Information campaigns

As an effort to raise consumer awareness of the benefits of open electricity and gas markets and to ensure consumer confidences for their rights to be protected, the European Commission launched a major information and awareness-raising campaign in July 2007. In this information campaign, European consumers are informed of:

- the benefits of alternative offers that are created by open electricity and gas markets (including prices, dispute settlement, etc.);
- the ability to switch electricity or gas suppliers without cost;
- the right to switch electricity or gas suppliers without contractual barriers,<sup>244</sup> such as excessive paperwork and disproportionate waiting time for switching;
- the right to be properly informed before signing a contract; and
- the right of withdrawal upon the imposition of new conditions in the agreement.

<sup>243</sup> European Commission, *You Choose! The Newsletter for Energy Consumer Rights and the Opening of EU Energy Markets*, May 2008, online: European Commission – Energy Area, [Agathe Power] <[http://ec.europa.eu/energy/agathe\\_power/site\\_en.html](http://ec.europa.eu/energy/agathe_power/site_en.html)>.

<sup>244</sup> The *Unfair Commercial Practices Directive* prohibits and protects consumers against aggressive or misleading selling practices. See: European Union, *Unfair Commercial Practices Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council*, 11 May 2005, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>>.

The European Commission is planning to reinforce these rights of EU energy consumers by means of establishing a charter, which would set out all consumers' rights in areas of electricity and gas supply as means to help consumers make more informed decisions when choosing suppliers.

Examples of Practices: Information & Transparency <sup>245</sup>	
<p><i>Italy</i></p> <p>European Commission Representation in Italy and the Italian energy regulator have produced a guide (<a href="http://www.autorita.energia.it/com_stamp/in dex.htm">http://www.autorita.energia.it/com_stamp/in dex.htm</a>) on liberalization of the energy market to explain to consumers the opportunities and benefits of open electricity and gas markets, answering questions like what does liberalization mean for consumers, what has change, how can consumers change supplier and is it easy.</p>	<p><i>France</i></p> <p>The French National Federation for local public services launched a new labelling scheme (<a href="http://www.fnccr.asso.fr/">http://www.fnccr.asso.fr/</a>) to help consumers choose their energy supplier by categorizing suppliers according to their general sales conditions and the level of consumer friendliness of their marketing procedures.</p>

### 3.4 Consumer energy markets in Canada

Public utilities have been considered “natural monopolies” due in part to the centralized model of power generation, transmission and retail or delivery to households. As an essential service, energy and gas utilities have been subject to various degrees of regulation in the last century. However, the de-regulation ideology that caught fire in the 1980s started to have an effect in the energy sector in North America by the 1990s, with California as one of the first markets with forced divestitures of large public utilities and opened the residential market to competition between newly constituted retail energy companies.

In Canada, large markets, such as Ontario, British Columbia and Alberta have followed suit in opening the distribution side of the energy market along with the metering and billing functions. An important feature of the energy markets in Canada is the fact that in many provinces, energy-regulated prices are the result of public hearings as decision making processes allow consumers and industry stakeholders to participate as interested parties, provide evidence and make submissions to regulatory bodies.

<sup>245</sup> Information Campaign on Consumers' Rights in the Internal Energy Market, April 2008, online: <[http://www.managenergy.net/download/factsheet\\_EN\\_070917.pdf](http://www.managenergy.net/download/factsheet_EN_070917.pdf)>.

The province of Quebec remains served by one single provincially-owned public electrical utility and presents a generally favourable arrangement for electricity consumers in comparison with the rest of Canada. As compared with rates in effect in other large jurisdictions, such as Alberta and Ontario, consumers in Quebec pay significantly lower prices per 1000 kWh/month than the average residential user in both Ontario and Alberta. Using the same consumption average and excluding taxes, a household in Edmonton pays nearly twice as much for the same amount of electricity as a household in Montreal, and for a similar household in Toronto, the bill is 70% higher according Hydro-Québec, the provincial power public utility.<sup>246</sup>

In Alberta, since 2001 households can buy electricity from a “Regulated Rate Option” (RRO) retailer subject to some form of price regulation by the Alberta Utilities Commission (AUC) or from a Competitive Retailer operating in the open market, and therefore not subject to regulated price control. When a customer chooses a Competitive Retailer, they may be required to sign a contract agreeing to a set price per kilowatt hour of electricity for a set period of time. It is the AUC’s responsibility to review the RRO provider’s energy charges to make sure that they are being passed along accurately to customers. The AUC thus does not regulate the rates or the service of competitive retailers.

In Ontario, the Ontario Energy Board (OEB) regulates the province's electricity and natural gas markets. For the residential market, the Board created a Regulated Price Plan (RPP) for a consumer that sets out prices per kWh for electricity utilities distributed and charged for electricity consumption. The RPP is the default plan for all consumers unless they choose to buy their electricity from a registered retailer. In the deregulated market, residential users must normally choose between either long-term fixed-rate contracts or “spot-price” plans, which charges consumers at the market wholesale price, which changes every hour and are intrinsically volatile.

British Columbia’s electricity and natural gas industries are regulated by the British Columbia Utilities Commission (BCUC). Natural gas commodity may be provided by the distribution utility or by a gas marketer using the utility distribution system. In the latter case, the BCUC will approve rates for residential customers exclusive of the price paid to the marketer for delivery of the gas into the local distribution network. Electricity is delivered pursuant to rates and policies approved by the BCUC.

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<sup>246</sup> Hydro-Québec, North American Comparison of Electricity Prices, *Comparative Index of Electricity Prices for Residential Consumers*, online: Hydro-Québec <<http://www.hydroquebec.com/residential/comparaison/index.html>>.

## The EU ‘Minimum Information Requirement’

Currently, European legislation requires that any contract an electricity or gas supplier submits to consumers should contain the following information:

- the identity and address of the supplier;
- the services provided, the service quality levels offered, and the time for establishing the initial connection;
- the tariffs requested and conditions attached to it like parameters for calculating the tariffs and possible indexation mechanism;
- available payment parameters and facilities;
- the types of maintenance service offered;
- the means by which up- to-date information on all applicable tariffs and maintenance charges may be obtained;
- the duration of the contract, the conditions for renewal and termination of services and of the contract, the conditions of right of withdrawal;
- any compensation and refund arrangements which apply if contracted service quality levels are not met; and the method of initiating procedures for settlement of disputes;
- a (Potential) European Charter on the Rights of Energy Consumers

In July 2007, the European Commission proposed a *European Charter on the Rights of Energy Consumers* which would focus on four major issues:

- assist in establishing schemes to help the most vulnerable EU citizens deal with increases in energy price;
- improve the minimum level of information available to citizens to help them choose between suppliers and supply options;
- reduce paperwork when consumers change supplier,
- protect consumers from unfair selling practices.

The *Charter* is not intended to be a legal document. Rather, it is to become an easily comprehensible way for consumers to understand their rights in the open energy and gas markets and as a guide for regulation by Member States. In

particular, the Charter is expected to outline action in relation to each of the following issues:

- **Connection** – to provide universal service of specified quality at reasonable, easily and clearly comparable and transparent prices;
- **Contracts** – to provide all necessary information in advance and in a fair manner;
- **Prices, tariffs, and monitoring** – prices should be transparent, reasonable, and comparable, consumers should be given variety of choices to make payment, and consumers should have the right to know their actual energy/gas consumption;
- **Free choice of supplier** – consumers should not be charged for switching suppliers;
- **Information** – transparent and accurate information on prices, tariffs, quality of service, contractual conditions, and the rules governing the electricity and gas markets should be easily and universally accessible;
- **Complaints** – there should be transparent, simple and inexpensive complaint procedures available and accessible by all consumers;
- **Representation** – consumer organizations are given the power by Member States to bring actions for an injunction in the courts or administrative authorities that Member States designate;
- **Social measures** – Member States shall ensure that there are adequate safeguards to protect vulnerable consumers, including measures to help them avoid disconnection; and
- **Unfair commercial practices** – Member States shall ensure that the Unfair Commercial Practices directive is followed and enforced.

### Further developments in Europe and Canada

In September 2007 as part of the “third package” of legislative proposals to liberalize energy and gas markets, the European Commission launched a new EU instrument:<sup>247</sup>

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<sup>247</sup> European Commission [Energy], *Energising Europe – A Secure Market with Secure Supply* (Third Legislative Package), 19 September 2007. online: European Commission [Energy], <[http://ec.europa.eu/energy/gas\\_electricity/third\\_legislative\\_package\\_en.htm](http://ec.europa.eu/energy/gas_electricity/third_legislative_package_en.htm)>.

- to investigate markets from a consumer perspective to assess if they are functioning effectively for consumers or if further investigative or corrective actions are necessary;
- to ensure that all national regulators monitor household prices, switching rates, disconnection rates and household complaints;
- to separate the production and supply from transmission network operation (“unbundling”) to encourage investment and create a level playing field for all market operators

In Ontario, gas and electricity marketers are subject to codes of conduct that provide rules associated with representations to consumers, cooling off periods and conditions for renewal.<sup>248</sup> Both codes, issued by the Ontario Energy Board (OEB) are enforced through a licensing requirement for marketers. In British Columbia, gas marketers must abide by a code of conduct that sets out the rules regarding the formation and rules of the energy supply contract,<sup>249</sup> the means by which an agent can interact with a consumer and the duty to disclose all information relevant to the transaction. It also establishes the seller’s duties of fairness, honesty and veracity and the duty to respect the privacy of the consumer. Similarly, in Alberta, gas and electricity retailers are bound by the *Fair Trading Act*<sup>250</sup> and the *Code of Conduct Regulation* under the *Electric Utilities Act*,<sup>251</sup> which sets out the contractual rules that govern the sale, such as identity of the parties, disclosures, rate transparency, renewals, cancellation rights and time limits. In Quebec, electricity retail operations are governed by *Hydro Québec’s Conditions of Electricity Service*. The Régie de l’Énergie du Québec is the power and gas authority of the province and the tribunal with jurisdiction to adjudicate gas and electricity consumer complaints.

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<sup>248</sup> Ontario Energy Board, *Code of Conduct for Gas Marketers*, 20 December 2004, online: Ontario Energy Board, online: <[http://www.oeb.gov.on.ca/documents/cc\\_gcodeconduct\\_201204.pdf](http://www.oeb.gov.on.ca/documents/cc_gcodeconduct_201204.pdf)>; Ontario Energy Board, *Electricity Retailer Code of Conduct*, 20 December 2004, online: Ontario Energy Board <[http://www.oeb.gov.on.ca/documents/cc\\_ecodeconduct\\_201204.pdf](http://www.oeb.gov.on.ca/documents/cc_ecodeconduct_201204.pdf)>.

<sup>249</sup> British Columbia Utilities Commission, *Code of Conduct for Gas Marketers*, online: British Columbia Utilities Commission <[http://www.bcuc.com/Documents/GasMarketers/Code\\_of\\_Conduct\\_April\\_2009.pdf](http://www.bcuc.com/Documents/GasMarketers/Code_of_Conduct_April_2009.pdf)>.

<sup>250</sup> Government of Alberta, *Fair Trading Act*, Chapter F-2, online: Government of Alberta Queen’s Printer

<[http://www.qp.alberta.ca/574.cfm?page=F02.cfm&leg\\_type=Acts&isbncln=9780779737963](http://www.qp.alberta.ca/574.cfm?page=F02.cfm&leg_type=Acts&isbncln=9780779737963)>.

<sup>251</sup> Government of Alberta, Alberta Regulation 160/2003 (*Code of Conduct Regulation*), online: Alberta Utilities Commission <<http://www.auc.ab.ca/acts-regulations-and-auc-rules/acts-and-regulations/Documents/EUA/AR160-2003.pdf>>.

### 3.5 Consumer Credit

*Relevant EU principles:*

Principle No. 1 Buy what you want, where you want

Principle No. 5 Contracts should be fair to consumers

Principle No. 8 Consumers should not be misled

#### Background

The EU consumer credit market is one of the most important global credit markets and generates the extension of credit worth approximately €800 billion annually.<sup>252</sup> The existing *Consumer Credit Directive (87/102/ECC)* is based on minimum harmonization. Since its adoption, Member States have adopted measures exceeding the Directive's provisions by differing degrees according to the needs at national level, making it difficult for consumers to compare products provided from financial institutions across Member States.

For example, credit rates ranged from 6% in Finland to 12% in Portugal.<sup>253</sup> The size of the consumer credit market also varies significantly across the EU, with the UK's being as large as €230 billion and Italy's worth just €40 billion.<sup>254</sup> As a result, consumer credit remains a local business, with less than 1% of transactions currently being made across borders.<sup>255</sup>

Also, new ways of obtaining credit such as installment loans, cards with deferred payment/credit cards, cash credit and overdraft facilities have developed since the existing legislation and are not sufficiently covered.<sup>256</sup> The objective of the revised Directive is to harmonize certain aspects of the laws, regulations and administrative procedures of the Member States concerning agreements covering credit for consumers, and thereby enhance competitiveness and consumer protection within the internal market.<sup>257</sup>

As barriers to the credit markets are lowered, fewer dominant players will exist and consumers should enjoy a broader range of offers and improved products. Enhancing competition and opening of national markets to foreign creditors should also lead to lower interest rates for consumers, making prices of

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<sup>252</sup> EurActiv Network, *EU Harmonises Consumer-Credit Rules*, 22 May 2007, online: Euractive.com <<http://www.euractiv.com/en/financial-services/eu-harmonises-consumer-credit-rules/article-163889>>.

<sup>253</sup> *Ibid.*

<sup>254</sup> European Commission, *Modified Proposal for a Directive of the European Parliament and of the Council on Credit Agreements for Consumers Amending Council Directive 93/13/EC (Revised Directive)*, 10 July 2005, online: Europa.eu <[http://ec.europa.eu/consumers/cons\\_int/fina\\_serv/cons\\_directive/2ndproposal\\_en.pdf](http://ec.europa.eu/consumers/cons_int/fina_serv/cons_directive/2ndproposal_en.pdf)>.

<sup>255</sup> *Supra*, note 252 [EurActive].

<sup>256</sup> *Supra*, note 252 [EurActive].

<sup>257</sup> *Supra*, note 254 [Revised Directive] at 2.

consumer credit more advantageous. Harmonization of certain key elements of the consumer credit agreement should improve consumer confidence and encourage consumers to buy credit across borders in the EU.

### Scope of the revised Directive

The proposed Directive applies to most types of consumer credits up to €50,000. Credit agreements that are not covered by the proposed directive include<sup>258</sup>:

- agreements above €50,000;
- credit agreements where the consumer is required to repay within 3 months free of charge;
- overdrafts; and
- loans secured on property (dealt with separately in the Mortgage Credit Links Dossier).

### Key features of the revised Directive<sup>259</sup>

#### **Pre-contractual and contractual information (Articles 4-10)**

Pre-contractual information is to be provided in standard form in all EU Member States to facilitate comparison by consumers of different offers. Consumers must receive specified information prior to execution of the contract regarding fees, monthly repayments and annual percentage interest rate (APR). Provisions dealing with contractual information require information already provided at the pre-contractual stage plus information on how to exercise the right of withdrawal and the right of early repayment. Consumers should be informed periodically and on a timely basis regarding significant changes to rates. There should be mutual access to existing private and public databases on a non-discriminatory basis to allow lenders to identify consumers who are already financially overstretched.

#### **Right of withdrawal (Article 13)**

Consumers will have a period of 14 calendar days to withdraw from the credit agreement without the necessity of giving a reason. This allows consumers to shop around after the conclusion of the agreement and possibly find a better offer. The length of the withdrawal period corresponds to the Distance Marketing Financial Services Directive (2002/65/EC).

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<sup>258</sup> *Ibid.* at 5.

<sup>259</sup> *Ibid.*

## **Early repayment (Article 15)**

Consumers have the right to repay the credit earlier than initially agreed upon. There is a new limited right of compensation to the creditor in case of early repayment for up to 0.5% to 1% of the amount of credit repaid early. The right of compensation is limited to fixed interest rate credits. The right to compensation must be exercised by the creditor within 12 months of the loan becoming due and must not exceed €10,000.

## **Indication of the annual percentage rate of charge (Article 4, 9, 18)**

In Article 9 (contractual information) the creditors are now obliged to indicate the annual percentage rate of charge. Articles 4 (advertising information) and 6 (pre-contractual information) require that both the borrowing rate plus charges and the annual percentage rate of charge (on the basis of the assumption that the duration of the overdraft is 7 days and 3 months respectively) are indicated.

## **Information to the Commission about national measures (Article 24)**

Member States are obliged to inform the Commission about national measures that are put in place that may reflect particular choices allowed for in the Directive. The Commission makes such information public.

## **Implementation and enforcement (Articles 21-22)**

Member States must ensure that consumers can not waive their rights conferred on them by this Directive. For the purpose of harmonization, Member States may not maintain or introduce provisions other than those laid down in this Directive. Member States can decide on the measures “necessary to ensure that [the rules] are implemented” and choose penalties that are “effective, proportionate and dissuasive.”

A very significant issue and perhaps the most important one for users of consumer credit is related to the average percentage rate (APR) of interest they can be charged and whether local authorities establish limits and ceilings to the cost of borrowing. Many governments in the Euro zone do limit interest rates charged to consumers. Germany and France, the two largest economies in the Union cap consumer credit interest rates at 21% and 22% respectively. Some examples of consumer credit interest rate ceilings in Europe are: Germany at 21%, Italy at 15%, France at 22%, Austria at 20%, Switzerland at 15%, Belgium at 7%, Finland at 9%, and Greece at 15%.

Authorities in the United Kingdom and Spain do not cap consumer credit interest rates. In the UK, this policy discussion has taken a renewed impetus especially in the context of the country's current economic recession, the credit crisis and the high levels of household indebtedness which are among the highest of the G7

countries.<sup>260</sup> Interestingly enough, both the United Kingdom and Spain, where the household consumer sector cannot count on protections such as interest rate ceilings for consumer and short-term lending, have been among the hardest hit economies in the current recession.

#### Consumer credit in Canada:

Section 347 of the Criminal Code of Canada establishes the limit for effective annual rate of interest at 60% on the credit advanced under any lending agreement or arrangement and it is binding on federally regulated banks. Lending by a federally incorporated deposit taking exceeding this interest rate will attract criminal prosecution. For consumers with established and unblemished credit records, consumer credit is generally available at interest rates that are established by every financial institution allowing for some spread between the cost of borrowing for the institution from the central bank and the interest rate charged to consumers.

For consumers who do not have access to credit provided by a bank or have had financial difficulties and therefore lower credit scores, payday and predatory-interest lenders have become a widespread option. Consumer lending at predatory interest rates has recently been authorized in several provinces, with the notable exception of Québec, where a cap imposed on maximum interest rates charged to consumers has prevented payday and predatory-rate lenders from opening shop in the province.

In October 6, 2006, the Federal Government through its Minister of Justice and Attorney General, Vic Toews, introduced Bill C-26, *An Act to amend the Criminal Code (criminal interest rate)*, in the House of Commons. The Act made it possible for payday loan enterprises to avoid criminal prosecution and in the result acquire legitimacy. Bill C-26, in force since May 2007, has a main feature the amendment of section 347 through section 347.1(2), which delegates powers to the provinces to create a licensing and regulatory framework to exert oversight over the fledgling payday loan industry. Section 347.1(2) therefore exempts a person who makes a payday loan from criminal prosecution if:

- the loan is for \$1,500 or less and the term of the agreement lasts for 62 days or less;
- the person is licensed by the province to enter into the agreement; and

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<sup>260</sup> Edmund Conway, The Daily Telegraph, *British Household Debt is Highest in History*, 27 June 2008, online: The Daily Telegraph <<http://www.telegraph.co.uk/finance/2792372/British-household-debt-is-highest-in-history.html>>.

- the province has been designated by the Governor in Council (Cabinet) under new Section 347.1(3).

The provinces of Alberta, Manitoba, Nova Scotia, British Columbia, Saskatchewan and Ontario have established licensing and cap schemes for payday lenders but interest rates continue to be excessive, ranging from \$17 to \$31 for every \$100 on loans that have a maximum of term 60 days, meaning that the effective annual interest rate for such loans is at least 440% for a standard 2-week loan. While provincial payday regulations in Canada provide for an interest rate cap, there are no provisions that specifically prohibit additional fees for late payments, which may effectively undermine the purpose of the legislation and invite excess charges by lenders.

In May 2009, the federal minister of Finance Jim Flaherty announced two sets of regulations designed to improve the position of credit card users in Canada. The first set of regulations, the Credit Business Practices Regulations introduce the following changes into the market to mandate:

- a) a 21 day interest-free period since the date of purchase for consumers who pay their balances in full each month;
- b) a requirement on credit card issuers to allocate payments to high-interest items first, or proportionally, to the benefit of the consumer;
- c) a requirement of consent to raise consumer's credit limits;
- d) restriction on credit collection practices deemed unfair; and
- e) the elimination of fees for reaching credit limit based solely on merchant holds.<sup>261</sup>

A second set of measures, the Regulations Amending the Cost of Borrowing Regulations, directs issuers to make additional disclosures to users. One important measure is the requirement of notice for increasing interest rates upon the exhaustion of time term for promotional introductory rates, as well as the requirement to disclose to consumers the calculation of the amount of time necessary to pay down the debt based on the minimum payment only.<sup>262</sup>

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<sup>261</sup> Government of Canada, *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations*, 21 May 2009, online: Department of Finance Canada <[http://www.fin.gc.ca/n08/data/09-048\\_1.pdf](http://www.fin.gc.ca/n08/data/09-048_1.pdf)>.

<sup>262</sup> Government of Canada, *Regulations Amending the Cost of Borrowing Regulations*, 21 May 2009, online: Department of Finance Canada <[http://www.fin.gc.ca/n08/data/09-048\\_2.pdf](http://www.fin.gc.ca/n08/data/09-048_2.pdf)>.

### 3.6 Consumer Credit – Alternative Dispute Resolution:

*Relevant EU principles:*

Principle No. 5 Contracts should be fair to consumers

Principle No. 8 Consumers should not be misled

Principle No. 10 Effective redress for cross-border disputes

Consumer financial dispute resolution in the EU: FIN-NET

FIN-NET<sup>263</sup>, which was launched by the European Commission in 2001, is a financial dispute resolution network of national alternative dispute resolution (ADR) schemes in the European Economic Area countries (the European Union Member States plus Iceland, Liechtenstein and Norway) that are responsible for handling disputes between consumers and financial services providers, such as banks, insurance companies, and investment brokers, etc. By the end of 2007, it linked 46 national ADR schemes from 21 countries, including:

Country	FIN-NET Membership (FN), Non-FIN-NET Scheme (Y), No Scheme (N)			
	Banking	Payments	Insurance	Securities
Austria	N	FN	N	N
Belgium	FN	FN	FN	FN
Bulgaria	N	Y	N	N
Cyprus	N	N	N	N
Czech Republic	N	FN	N	N
Denmark	FN	FN	FN	Y
Estonia	Y	Y	Y	Y
Finland	FN	FN	FN	FN
France	Y	Y	FN	FN
Germany	FN	FN	FN	N
Greece	FN	FN	FN	FN
Hungary	Y	Y	Y	Y
Iceland	FN	FN	FN	FN
Ireland	FN	FN	FN	FN
Italy	FN	FN	FN	FN
Latvia	Y	Y	Y	Y
Liechtenstein	FN	FN	N	N
Lithuania	FN	FN	Y	FN
Luxembourg	FN	FN	FN	FN
Malta	Y	Y	Y	Y
Netherlands	FN	FN	FN	FN
Norway	FN	FN	FN	Y
Poland	FN	FN	FN	FN
Portugal	FN	FN	FN	FN
Romania	N	Y	Y	Y
Slovenia	Y	N	Y	Y
Slovakia	Y	Y	Y	Y
Spain	FN	FN	Y	Y
Sweden	FN	FN	FN	FN
United Kingdom	FN	FN	FN	FN

<sup>263</sup> European Commission, *FIN-NET – Financial Dispute Resolution Network*, online: Europe.eu <[http://ec.europa.eu/internal\\_market/fin-net/](http://ec.europa.eu/internal_market/fin-net/)>.

FIN-NET operates as a cooperative network between national out-of-court dispute settlement bodies. While the complaints procedures vary from one country to another and complaints are normally handled by the complaint body of the country in which the financial provider operates, FIN-NET serves to assist consumers to effectively complain about a foreign financial services provider. If a consumer in one country has a dispute with a financial services provider from another country, FIN-NET members will put the consumer in touch with the relevant ADR scheme and provide the necessary information in the language of the consumer or the language in which the consumer manages his or her financial dealings. If the FIN-NET member of the consumer's home country does not deal with the complaint itself, it would be transferred to the relevant scheme in the service providers' country.

Most FIN-NET procedures are provided free of charge or at a moderate cost.<sup>264</sup> Once the relevant regime has received the complaint, it will try to resolve the dispute according to its rules and taking into account the *Commission Recommendation 98/257/EC* (see below) on principles applicable to bodies responsible for out-of-court settlement of consumer disputes.

FIN-NET does not operate to replace direct contracts between consumers and financial services providers and the results do not substitute for court procedures. Despite the non-enforceable nature of the decisions, FIN-NET members typically have good knowledge of the particular financial services sector and businesses usually follow their decisions. If consumers are not satisfied with the results, they may reserve the right to go to court afterwards. All consumers, however, must first try to resolve the dispute with the services providers before seeking a FIN-NET member.

The 7 principles applicable to bodies responsible for alternative dispute resolution and out-of-court settlement of consumer disputes

On 30 March 1998, the European Commission published a Recommendation concerning the procedures for a third party responsible for providing a resolution for a dispute between the parties and, whether the result is binding or not on the parties. This Recommendation also governs the conduct of arbitration in consumer disputes. It contains seven basic principles: independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation. Member States are asked to produce an inventory of bodies responsible for the out-of-court resolution of consumer disputes that they regard as compliant with the Commission Recommendation. Recommendations,

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<sup>264</sup> European Commission, *FIN-NET Settling Cross-Border Financial Disputes Out of Court: Consumer Guide*, online: <[http://ec.europa.eu/youreurope/nav/en/citizens/services/eu-guide/finnet/finnet\\_en.pdf](http://ec.europa.eu/youreurope/nav/en/citizens/services/eu-guide/finnet/finnet_en.pdf)>.

although non-binding, constitute legal documents that set the European guidelines for dispute resolution in the Euro area.<sup>265</sup>

### Principle of independence

The independence of the decision-making body is ensured in order to guarantee the impartiality of its actions. When the decision is made by an individual this independence is in particular guaranteed by the following measures:

- the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his or her function;
- the person appointed is granted a period of office of sufficient duration to ensure the independence of his or her action and shall not be liable to be relieved of his duties without just cause;
- if the person concerned is appointed or remunerated by a professional association or an enterprise, he or she must not, during the three years prior to assuming his present function, have worked for this professional association or for one of its members or for the enterprise concerned.

When the decision is taken by a collegial body, the independence of the body responsible for making the decision must be ensured by giving equal representation to consumers and professionals, or by complying with the criteria set out above.

### Principle of transparency

Appropriate measures must be taken to ensure the transparency of the resolution procedure. These include provision of the following information, in writing or any other suitable form, to any persons requesting it:

- a precise description of the types of dispute which may be referred to the body concerned, as well as any existing restrictions in regard to territorial coverage and the value of the dispute, the rules governing the referral of the matter to the body, including any preliminary requirements that the consumer may have to meet, as well as other procedural rules, notably those concerning the written or oral nature of the procedure, attendance in person and the languages of the procedure;

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<sup>265</sup> European Union, *Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out of Court Settlement of Consumer Disputes*, 30 May 1998, [98/257/EC], online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>>.

- the possible cost of the procedure for the parties, including rules on the award of costs at the end of the procedure;
- the type of rules serving as the basis for the body's decisions (legal provisions, considerations of equity, codes of conduct, etc.);
- the decision-making arrangements within the body;
- the legal force of the decision taken, whereby it shall be stated clearly whether it is binding on the professional or on both parties. If the decision is binding, the penalties to be imposed in the event of non-compliance shall be stated, as shall the means of obtaining redress available to the losing party; and
- publication by the competent body of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.

### Adversarial principle

The procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party and any experts' statements.

### Principle of effectiveness

The effectiveness of the procedure is ensured through measures guaranteeing:

- that the consumer has access to the procedure without being obliged to use a legal representative;
- that the procedure is free of charges or has moderate cost;
- that only short periods elapse between the referral of a matter and the decision;
- that the competent body is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute.

### Principle of legality

The decision taken by the body engaged in alternate dispute resolution may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

All decisions are communicated to the parties concerned as soon as possible, in writing or any other suitable form, stating the grounds on which they are based.

### Principle of liberty

The decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance, and specifically accepted that they would be bound. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialization of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

### Principle of representation

The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

### Consumer financial dispute resolution in Canada: ombudsman for banking services and investments

In Canada, financial institutions and federally incorporated deposit-taking institutions are largely responsible for handling consumer complaints internationally through the figure of the bank's Ombudsman. The Financial Consumer Agency of Canada (FCAC) is the federal agency in charge of ensuring consumer protection for financial consumers. While it can take action when a financial institution is in actual breach of the law, it has a limited role in advancing their interests and therefore focuses on ensuring that financial institutions have a complaint-handling process in place and informing consumers of the availability of the process. When consumers cannot obtain effective resolution to their complaints through the bank itself, they are directed by the FCAC to contact the Ombudsman for Banking Services and Investments (OBSI).

The OBSI reviews unresolved complaints from consumers about banking and investment services and products, such as errors in accounts, poor disclosure and inappropriate advice. However, the office is a private entity funded by the financial organizations for which it provides dispute resolution services. It therefore does not have any regulatory powers and only provides services to its close to 600 affiliated financial institutions.

If, after a review, there is a finding of loss to the consumer, the OBSI can only go so far as to recommend a settlement that aims to restore the loss to the consumer and if warranted, financial compensation for inconvenience as well as the correction of a credit record. When the review shows that the institution has acted appropriately, the OBSI provides the consumer with the reasons for such finding. Alternatively, when the file merits alternative dispute resolution, the resolution mechanism is that are only binding if the parties agree to. When the

consumer is not satisfied with the OBSI's intervention, he or she can pursue legal remedies through the court system.

For alternative dispute resolution in general in Canada, an institute organized by alternative dispute resolution (ADR) practitioners has established codes of rules for arbitration and mediation proceedings. The rules provide a recommended set of procedures that can be agreed upon or modified by the parties. Such rules may be applicable to the resolution of a consumer/seller dispute.<sup>266</sup>

### **3.7 Mobile and fixed communications services**

*Relevant EU principles:*

- Principle No. 1 Buy what you want, where you want
- Principle No. 5 Contracts should be fair to consumers
- Principle No. 8 Consumers should not be misled

Communications consumers' rights in Europe

Relevant EU Directive:

*Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*

The Universal Service Directive is a wide-ranging legal instrument that lays out the basis not only for the protection of the electronic communications services consumer but also the standard of service to which European users are entitled. The main purposes of the directive are to ensure the availability throughout the Community of good quality publicly available services through effective competition and choice while providing alternatives for the needs of end-users are not satisfactorily met by the market; establish the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services; define the minimum set of services of specified quality to which all end-users have access, at an affordable price; and set out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines.<sup>267</sup> In particular, the Directive establishes, for consumers, the following rights:

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<sup>266</sup> ADR Canada, *Rules and Codes*, online: ADR Canada <<http://www.adrcanada.ca/rules/arbitration.cfm>>.

<sup>267</sup> European Commission, *Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*, 7 March 2002, online: Eur-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0022:EN:NOT>>.

- the right to have a contract where consumers subscribe to services providing connection and/or access to the public telephone network. The contract must contain a minimum set of information (the identity and address of the supplier, the types of services provided, the duration of the contract and renewal conditions, the arrangements for procedures for settling disputes, etc.) which must be included in the contracts concluded between the users and suppliers of connections to a telephone network;
- the provision by operators of transparent, up-to-date information on applicable prices and tariffs;
- the publication by undertakings which offer publicly accessible electronic communications services of comparable, adequate and up-to-date information on the quality of their services;
- the guarantee that, in the event of catastrophic network breakdown or in cases of force majeure, access to the public telephone network remains available to users;
- the provision of operator assistance and directory enquiry services.

A significant feature of the Universal Service Directive is that it introduces an affordability requirement and lays out the basis for its framework. In light of national conditions, the Directive requires that designated operators provide tariff options or packages to consumers which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or with special social needs are not prevented from accessing essential telephone services. The Directive mandates that the European emergency call number remain free of charge including when the call is originated from a pay phone and number portability between telephone operators and a requirement to national regulatory authorities to take account of the views of end-users, consumers, manufacturers and undertakings with regard to end-users' rights.<sup>268</sup>

When consumer complaints arise they are to be dealt with by the service provider and avenues for out-of-court resolution must be provided to consumers. Where appropriate and warranted, the Directive stipulates that Member States may adopt a system mandating reimbursement and/or compensation to consumers.

### Communications consumers' rights in Canada

The strength of consumers' rights for users of essential telecommunications services in Canada has been progressively weakened in the last decade as a result of an aggressive policy of deregulation of the telecommunications market

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<sup>268</sup> *Ibid.*

in the area of local telephony. In August 29, 2006 the Canadian Radio-television and Telecommunications Commission (CRTC) issued a *Statement of Consumer Rights*,<sup>269</sup> that were only to be communicated but not enforced on the incumbent local exchange carrier in deregulated or forborne local markets. As a consequence of the government's decision to override the (CRTC) and lower the bar with respect to the appropriate competitive conditions for forbearance, the Consumer Rights are not enforced in the greater part of residential local telephone service market. The entire set of non-price obligations to subscribers that were imposed upon incumbent local exchange providers has been ordered to be reviewed by Government Directive has been considerably watered down in the process.

The Canadian approach to deregulation has been to tie the requirement of consumer rights and protections to the position of the incumbent local exchange carrier (ILEC) in the relevant market. As the market becomes more competitive, the regulatory approach has been to reduce protections. This is in contrast to the European approach which is to make rules that are horizontal and apply across the board to all providers. In the case of dominant players, special obligations guarantee access and interconnection. The Universal Service Directive, which applies to all European telecommunications consumers, does not assume that an operator's contract in liberalized markets will always contain terms that will be fair to consumers. This insistence that market liberalization should not replace the superintendence of consumer protection in telecommunications has been a common theme in EC actions. In laying the foundation for an initial Interconnection Directive, the Commission noted in 1995:

Today's proposal for a directive on the application of open network provision to voice telephony concerns harmonization of access to public telephone networks and

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<sup>269</sup> The rights stated in the decision are:

- right to local telephone service;
- right to choose a phone company;
- rights regarding deposits for service;
- rights when the phone company wants to cut off your phone service;
- rights when you want to discontinue your phone service;
- right to block outgoing long distance and 900 and 976 calls;
- rights additional for persons with a disability;
- right to keep your information confidential;
- rights regarding unsolicited telephone calls;
- right to protect your privacy when calling or being called;
- right to control access to your home;
- rights regarding the wiring and equipment inside your home;
- right to refunds;
- right to detailed monthly billing information;
- right to register a dispute or complaint; and
- right to participate in CRTC proceedings;

See: Canadian Radio-television and Telecommunications Commission CRTC, *Telecom Decision 2006-52 Statement of Consumer Rights*, 29 August 2006, online: Canadian Radio-television and Telecommunications Commission <<http://www.crtc.gc.ca/eng/archive/2006/dt2006-52.htm>>.

services, for both individual consumers and commercial companies. This means guaranteeing all European citizens access to basic, affordable telephone services, improving consumer protection, paving the way for new telecommunications-based services in Europe by improving the conditions for access to the public telephone network infrastructure.<sup>270</sup>

On the other hand, the Canadian regulator have been confident in market outcomes for the purpose of consumer protection. Issuing its 2006 Decision (later altered by the Government to favour the ILECs) regarding conditions of forbearance from regulation, the CRTC noted:

The Commission expects that with deregulation, market forces will be sufficient to protect the interests of most customers. Where an incumbent telephone company has met the criteria for deregulation, the Commission will no longer regulate rates for local telephone services in the relevant geographic market. Other regulatory requirements, such as retail quality of service, will also no longer apply.<sup>271</sup>

It seems clear that European policy makers and stakeholders see little inconsistency in a strategy designed to open up markets for investment as well as protect consumers within those markets. The European Economic and Social Committee (EESC) the European Commission's consultative committee with civil society, noted in 2008:

The EESC welcomes the goal of enabling users to derive maximum benefit from the electronic communications market, without distortion or restriction of competition, but whilst encouraging efficient investment in infrastructure and fostering innovation. Nevertheless, in our opinion we also highlight the need to improve legislative consistency, reinforce protection of consumer rights and privacy, and introduce binding measures for disabled end-users in terms of universal service.<sup>272</sup>

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<sup>270</sup> European Union, The Commission Proposes Common Rules of the Game for Telephone Services, , Press Release P/95/3, February 1, 1995, online: Europa Press Releases Rapid: <<http://europa.eu/rapid/pressReleasesAction.do?reference=P/95/3&format=HTML&aged=1&language=EN&guiLanguage=en>>..

<sup>271</sup> Canadian Radio-television and Telecommunications Commission CRTC, *Backgrounder on Local Forbearance Decision*, 6 April 2006, online: Canadian Radio-television and Telecommunications Commission <<http://www.crtc.gc.ca/eng/news/RELEASES/2006/i060406.htm>>.

<sup>272</sup> European Union, *The EESC welcomes European Commission's proposals but asks for strengthened protection of consumer rights and privacy and for more civil society participation in consultation and adoption processes*, Press Release CES/08/64, 22 July, 2008, online: Europa

## Commissioner for Complaints for Telecommunications Services (CCTS)

When the government later embarked upon its override of the CRTC local competition framework, it committed to the establishment of an agency with ombudsman-like powers for deregulated markets. The agency was established with much industry grumbling under the aegis of the CRTC.

A precedent for the need to establish consumer dispute resolution avenues can be found in Europe within the *Framework Directive*,<sup>273</sup> issued at the same time as the *Universal Services Directive*. The *Framework Directive* set out, inter alia, the duties of National Regulatory Authorities (NRAs) within the EU:

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia:

...(b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;<sup>274</sup>

In Canada, the need for a dispute resolution procedure between the industry operators and consumers was gradually recognized in tandem with the efforts to swiftly deregulate all telecommunication services. The government-appointed Telecommunications Policy Review Panel Final Report stated in 2006:

Telecommunications services are becoming more pervasive and increasingly complex for consumers, whether they involve wireline or wireless voice communications, or Internet services. The Panel believes a new agency, to be called the Telecommunications Consumer Agency (TCA), should be established to protect the interests of Canadian consumers in this new environment.<sup>275</sup>

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Press Releases Rapid

<<http://europa.eu/rapid/pressReleasesAction.do?reference=CES/08/64&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>273</sup> European Union, *Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive)*, 7 March 2002, online: Eur-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>>.

<sup>274</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) Chapter III Article 9.

<sup>275</sup> Government of Canada, Telecommunications Policy Review Panel, *Final Report*, 2006 Chapter 6, online: Telecom Review <<http://www.telecomreview.ca/eic/site/tprp-gecrt.nsf/eng/rx00060.html>>.

As noted earlier, in the current context of the Canadian telephony market, most local residential consumers are now in forborne markets along with customers of internet services, mobile phones and television broadcast distribution services. Most Canadian telecommunications customers can now complain to an independent resolution service concerning problems with their deregulated telecom provider. If the dispute is not solved by the service provider, consumers can lodge their complaint with the Canadian Commissioner Telecommunications Services (CCTS). The CCTS is an industry-funded private agency created with the authorization of the CRTC to provide out-of-court alternative dispute resolution to disputes between consumers and mobile or fixed telephony operators. While it is funded by those telecommunications operators with a minimum annual revenue stream of \$10 million, the agency does have a Board of Directors composed of four independent directors (two of them nominated by consumer groups), and three directors nominated by industry members. The Commissioner sits as a non-voting director.<sup>276</sup>

As indicated above, the CCTS can only facilitate dispute resolution between operators and customers that are consumers and small businesses in deregulated telephone local exchanges which are now the vast majority of local exchanges in Canada. Wireless and Internet complaints are also dealt with. The CCTS accepts complaints about installation, disconnection or other service problems as well as billing errors. The CCTS does not accept complaints about prices (for example the price of long-distance) or complaints about misleading advertisement. If the complaint is justified, a customer may receive one or more of the following: an apology from the telecommunications service provider (TSP), an end to specific activities, an order for compensation not exceeding \$5000, or a refund or credit for amounts paid (these amounts are not limited to \$5000).

### **3.8 Banking access and deposit guarantee schemes:**

*Relevant EU principles:*

- Principle No. 1 Buy what you want, where you want
- Principle No. 5 Contracts should be fair to consumers
- Principle No. 8 Consumers should not be misled

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<sup>276</sup> Commissioner for Complaints for Telecommunications Services, *2007-2008 Annual Report*, October 2008, online: Commissioner for Complaints for Telecommunications Services <<http://www.ccts-cprst.ca/en/attach/AnnualReport/CCTS%20Annual%20Report%202007-2008.pdf>>.

## Banking access and limitations in the European Union

Citizens of the European Union (EU) may open a bank account in any Member State of the European Union and make bank transfers to or from that account.

The opening of the account must be done in accordance with rules of the Member State in which the account is opened, as vary from one Member State to another. Currently, the rules concerning the opening of a bank account remain governed by national provisions that have not been harmonized.<sup>277</sup>

Generally, if a consumer wishes to open an account in a certain Member State but he or she neither lives there nor is registered there for tax purposes, he or she would have to prove residency in another Member State.

### Depositor's protection: the Deposit Guarantee Schemes (harmonization)

The Deposit Guarantee Schemes (DGS) are provided for by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on Deposit Guarantee Schemes.<sup>278</sup> DGS are harmonized at a minimum level and (normally) cover the aggregate deposits of each depositor up to EUR 20,000 in the event of deposits being unavailable.<sup>279</sup> Member States may, however, vary the amount to be guaranteed as it may be increased, decreased or excluded in specific cases, such as on social considerations.

It is important to note that the DGS only creates a minimum deposit insurance coverage across EU member countries and most of its largest economies far exceed the Directive's requirements. Some examples of national deposit insurance coverage ceilings are Belgium, Italy and Spain with up to €100,000 coverage; France with €70,000; United Kingdom with £50,000 and Germany, whose system covers up to 30% of the financial institution liabilities to the consumer beyond savings or checking accounts.

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<sup>277</sup> European Commission, *Opening a Bank Account*, online: Europa.eu

<<http://ec.europa.eu/youreurope/nav/en/citizens/consumer-protection/bank-account/index.html>>.

<sup>278</sup> Amended in 2005. The amendment replaced the words "Banking Advisory Committee" in Article 3(1) of Directive 94/19/EC with the words "European Banking Committee". See: *Directive 2005/1/EC of the European Parliament and of the Council amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organizational structure for financial services committees*, 9 March 2005, online: Eur-Lex Access to European Law <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:079:0009:0017:EN:PDF>>.

<sup>279</sup> This upper limit was set at EUR 15,000 until 31 December 1999.

It is normally the person who is absolutely entitled to the sums on deposit who is covered by the guarantee. If several persons are absolutely entitled to the guarantee (e.g. joint accounts), the share of each depositor is taken into account.<sup>280</sup>

## Obligations on credit institutions and the Member States

Directive 94/19/EC requires every credit institution to join a deposit-guarantee scheme (Article 4) and requires every Member State to ensure that within its territory one or more DGS are introduced and officially recognized. Certain credit institutions may be exempt if the Member State is satisfied that an equivalent protection is provided for depositors (e.g. where the credit institution already belongs to a scheme to ensure its continued operation).

The Directive lays down the procedure to be followed where a credit institution does not comply with the obligations incumbent on it as a member of a deposit-guarantee scheme. In such circumstances, the competent authorities would take appropriate measures, including sanctions that might go as far as withdrawal of the credit institution's authorization to ensure it complies with its obligations (as per Article 14), such as:

- All DGS must cover the aggregate deposits of each depositor up to ECU 20,000 in the event of deposits being unavailable. (Article 7)
- All necessary information must be made available to actual and intending depositors. (Article 9)
- Duly verified claims must be paid within three months of the date on which the competent authorities establish that deposits are unavailable. In exceptional cases, an extension of the time limit of not more than three months may be applied for. (Article 10)

Deposit-guarantee schemes introduced and officially recognized in a Member State must cover the depositors at branches set up by credit institutions in other Member States. Branches established by a credit institution which has its head office outside the Community must have cover (and be given information) equivalent to that prescribed by the Directive. Failing that, host Member States may require them to join deposit-guarantee schemes in operation within their territory. (Article 6)

### *Definitions provided by the Article 1 of the Directive*

*Deposit* means any credit balance which results from funds left in an account, or from temporary situations deriving from normal banking transactions, and which a credit institution must repay under the legal and contractual conditions applicable, and any debt evidenced by a certificate issued by a credit institution.

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<sup>280</sup> This rule does not apply to collective investment undertakings.

Shares in UK and Irish building societies apart from those of a capital nature are treated as deposits. Bonds which satisfy the conditions prescribed in Article 22(3) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities are not considered deposits.

For the purpose of calculating a credit balance, Member States must apply the rules and regulations relating to setoff and counterclaims according to the legal and contractual conditions applicable to a deposit.

*Credit Institution* means an undertaking the business of which is to receive deposits or other repayable funds from the public and to grant credits for its own account.

*Branch* means a place of business which forms a legally dependent part of a credit institution and which conducts directly all or some of the operations inherent in the business of credit institutions. Any number of branches set up in the same Member States by a credit institution which has its head office in another Member State are regarded as a single branch.

Deposit guarantee insurance in Canada:

The Canada Deposit Insurance Corporation (CDIC) is a Crown corporation created to provide insurance against the loss of part or all of deposits and for the benefit of persons having deposits with member institutions. The CDIC insures consumers' savings in most banks, financial and trust companies with some exceptions. If a consumer's savings and eligible investments are in a CDIC member institution, the consumer is entitled to up to \$100,000 protection. In the case of savings with credit unions, all Canadian provinces have established various insurance schemes and funds, to protect these savings. Saskatchewan, British Columbia, Alberta and Manitoba consumers' deposits with credit unions are guaranteed by 100% of the savings balance. Nova Scotia, New Brunswick and Newfoundland schemes guarantee up to \$250,000; Prince Edward Island guarantees \$125,000 and Ontario and Quebec coverage is up to \$100,000.

### **3.9 Air travel:**

*Relevant EU principles:*

- Principle No. 1 Buy what you want, where you want
- Principle No. 5 Contracts should be fair to consumers
- Principle No. 6 Sometimes consumers can change their mind
- Principle No. 8 Consumers should not be misled
- Principle No. 9 Protection while you are on holiday
- Principle No. 10 Effective redress for cross-border disputes

## Current passenger protection in the European Union

### Background

On February 17, 2005, the European Parliament established airline passenger rights legislation and common rules on compensation and assistance to passengers in the event of denied boarding, cancellation, long delays of flights or involuntary downgrading. This Regulation replaced an earlier regulation of 1991 which gave rights to passengers only in the event of being denied boarding.

*Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 repealing Regulation (EEC) No. 295/91*<sup>281</sup>

Depending on the circumstances, the Regulation requires airlines to:

- provide passengers with assistance such as accommodation, refreshments, meals and communication facilities;
- offer re-routing and refunds;
- pay compensation of up to €600 per passenger; and
- proactively inform passengers about their rights under the Regulation.

The Regulation also requires Member States to set up enforcement bodies with the ability to impose dissuasive sanctions and to deal with complaints that may arise from the rules (including air carriers' refusal to oblige). These national control organizations are especially established to provide passengers with less expensive and quicker alternatives to legal procedures.

In the majority of the Member States, the organization responsible for complaint handling and enforcement of the Regulation is the Civil Aviation Authority (CAA). British travelers can complain to the Air Transport Users' Council (AUC). A full list of responsible organizations is available on the European Commission's transport website.<sup>282</sup>

Any rights established by this Regulation are minimum rights for passengers.

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<sup>281</sup> European Union, *Regulation (EC) No. 261/2004 of the European Parliament and of the Council, 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing regulation (EEC) No. 295 /91*, online: European Union <[http://europa.eu/eur-lex/pri/en/oj/dat/2004/l\\_046/l\\_04620040217en00010007.pdf](http://europa.eu/eur-lex/pri/en/oj/dat/2004/l_046/l_04620040217en00010007.pdf)>.

<sup>282</sup> European Union, *National Enforcement Bodies, Regulation [EC1107/2006]*, online: Europa.eu <[http://ec.europa.eu/transport/air\\_portal/passenger\\_rights/prm/doc/2006\\_07\\_05\\_national\\_enforcement\\_bodies\\_en.pdf](http://ec.europa.eu/transport/air_portal/passenger_rights/prm/doc/2006_07_05_national_enforcement_bodies_en.pdf)>.

## Application

The Regulation applies to all flights (domestic and international) from and within the European Union (EU) and to flights from outside the EU to an airport situated in the EU operated by EU-registered carriers. This means not only EU citizens are to benefit from the Regulation, but the Regulation affects all passengers flying into the EU, so long they travel on a European-based airline. Those who fly with a non-EU airline must depart from an EU airport in order to benefit from this Regulation. As such, foreign-based airlines are also subject to the *European Airline Passenger Bill of Rights* whenever they depart from an EU airport.

The Regulation also extends coverage to all types of flights, including charter and scheduled services, and those purchased with discounted fares, or as part of a vacation package or under fidelity or other commercial programs (such as frequent flyer programs). It does not, however, apply to helicopter services or private aircrafts.

## Exceptions

Airlines would not be obliged to compensate for any delays or flight cancellations in accordance with Article 7 (see below) that are a result of “extraordinary event”. Extraordinary events are those that could not have been avoided even if all reasonable measures are taken by the airlines. Passengers, however, are still entitled to assistance and information in the event of exceptional circumstances. The “extraordinary event” exception does not apply to a case of denied boarding.

The Regulation itself does not define the criteria for “extraordinary event” and is assessed on a case-by-case basis. Factors including weather conditions, technical deficiencies, safety and security of the aircraft operation and even a labor strike are to be taken into account. The burden of proof concerning a cancellation and whether it is caused by extraordinary circumstances rests with the operating air carrier.<sup>283</sup>

The National Enforcement Body (NEB) is responsible to determine the “reasonableness” of the delay or flight cancellation based on information provided by the airlines at the time of the disruption.

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<sup>283</sup> European Union, *Information Document of Directorate-General for Energy and Transport: Answers to Questions on the Application of Regulation 261/2004*, 17 February 2008, online: Europa.eu < Information Document of Directorate-General for Energy and Transport: Answers to Questions on the Application of Regulation 261/2004> at 7.

## Available compensation

It is the responsibility of air carriers to clearly inform their passengers of the rights provided by this Regulation. Any obligations established by this Regulation may not be waived or limited by derogation or restrictive clause in the contract of carriage.

### ***Denied boarding***

In the event a passenger is denied boarding, the airline must pay compensation according to the following schedule (Article 7):

- €250 for flights up to 1500 km (originally €150);
- €400 for flights between 1500 km and 3500 km (originally €150);  
and
- €600 for flights longer than 3500km (originally €300).

This compensation may be decreased by half if the passenger is not delayed by more than 2, 3 or 4 hours respectively.

### ***Flight cancellation***

Passengers enjoy the same right to the same compensation in the event of over-booking under certain conditions to assistance (meals, and accommodation if the alternative flight proposed is the following day) and to the possibility of refunding or of rebooking to the final destination following the choice of the passenger. Refunds may be paid in cash, by bank transfer or cheque within seven days of the disruption. If the passenger decides not to travel, he or she can claim reimbursement of the entire ticket.

An airline is not required to pay compensation if it is in a position to prove that cancellation was due to extraordinary circumstances which could not have been avoided.

### ***Long delays***

In the event of long delays, the airline has to offer meals, refreshments, hotel accommodation if necessary, and means of communication. If the delay exceeds 5 hours, it has to propose refunding the ticket (with, if necessary or relevant, a free flight to the passenger's point of departure).

### ***Involuntary downgrading (or upgrading)***

If a passenger is downgraded as a result of overbooking, the air carrier must compensate the passenger within seven days, proportionate to the type of ticket: 30% of the price of the ticket for all flights of 1500 km or less; 50% of the price of the ticket for all intra-Community flights of more than 1500 km, except flights between the European territory of the Member States and the French overseas departments; and for all other flights between 1500 and 3500 km; or 75% of the price of the ticket for all flights not falling under the above criteria, including flights between the European territory of the Member States and the French overseas departments.

If the air carrier upgrades the passenger to a higher class than that for which the ticket was purchased, it may not request any supplementary payment.

### ***Other problems***

The Regulation does not apply to instances of baggage problems, or an injury or death resulting from an accident. Passengers would be protected under other EU legislation which provides rights for passengers in the event of problems with baggage and in the event of injury or death following an accident. International legislation also provides some other rights which can apply to passengers of non-EU airlines.

In particular, in the event of damage or loss of baggage, the responsibility of an airline is limited to 1000 SDR (1 SDR = € 1.18 as of September 30, 2004).<sup>284</sup>

### ***Additional compensation***

The rights recognized under this Regulation do not exclude the possibility of a passenger or third person claiming complementary compensation or compensation for damages (except in the case of passengers who voluntarily gave up their reservation following denied boarding) under applicable national law. Compensation granted under the Regulation may nevertheless be deducted from any such compensation granted for damages.

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<sup>284</sup> European Union, Air Transport: *Europe Reinforces Passenger Rights* [Press Release 16 February 2005], online: Europa.eu <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/181&format=HTML&aged=0&language=EN&guiLanguage=en>>.

## Current passenger protection in Canada

### Background

There is currently no general legislation in Canada equivalent to that of the European Union providing compensation and other rights to airline passengers in the case of denied boarding, cancellation and flight delays.

Terms and conditions of carriage are left for each air carrier operating in Canada to determine in accordance with the *Canada Transportation Act* (the Act).<sup>285</sup> The specific tariff requirements which require air carriers to set out their fares, rates and charges and their terms and conditions of carriage are spelled out in the *Air Transportation Regulations* made under the authority of the Act.<sup>286</sup> Such terms and conditions of carriage are generally stated as the air carrier's policy and thus vary from one air carrier to another. In other words, there is no standard minimum protection or compensation provided for passengers in the event of lost/delayed/damaged baggage, denied boarding, involuntary downgrading, and extensive delays.

The only requirements provided for by the Act and its regulations are that any terms and conditions of carriage must be clear, reasonable, applied properly on the date of an incident, and not unduly discriminatory. Passengers who are not satisfied with the airline's failure to fulfill the terms and conditions of carriage may file a complaint with the Canadian Transportation Agency, which would investigate and render a decision on the matter if it falls within its jurisdiction.

### The complaint process

In October 2001, CBC News reported major problems with the existing complaint system with the Canadian air travel industry.<sup>287</sup> Firstly, there are seven different agencies to which passengers may turn depending on the nature of the complaint, making the process confusing and frustrating. These agencies include the local airport authorities, the RCMP, NavCanada, Transport Canada, the Transportation Safety Board, the airlines, and the Air Travel Complaints Commissioner.

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<sup>285</sup> *Canada Transportation Act*, S.C. 1996, c. 10.

<sup>286</sup> Government of Canada, Canada Gazette, *Regulations amending the Air Transportation Regulations and the Canada Transportation Agency Designated Provisions Regulations*, 27 September 2008, online: Canada Gazette  
<<http://canadagazette.gc.ca/part1/2008/20080927/html/regle1-e.html>>.

<sup>287</sup> Erica Johnson and Michael Gruzuk, *Where do you turn when you have a complaint about air travel?*, CBC News, 17 October 2001, online:  
<[http://www.cbc.ca/consumers/market/files/travel/air\\_complaints/index/html](http://www.cbc.ca/consumers/market/files/travel/air_complaints/index/html)>.

The process of identifying the appropriate agency to file the complaint itself is difficult for even experienced passengers. Even if they successfully file the complaint to the right agency, the complaint typically takes anywhere from three months to several years to be resolved. According to CBC News, almost half of the complaints issued to the Commissioner in the year 2000 remained unresolved at the time of reporting. In essence, the complaint process operates to deter passenger complaints.

## The Air Travel Complaints Program

Currently, the Air Travel Complaints Program is an informal process and the main tool for passenger complaints under the Canadian Transportation Agency (the Agency). The Agency, however, urges all passengers to try to resolve their complaint with the air carrier prior to approaching the Agency. Only if the passenger has already complained to the air carrier and/or the latter has failed to reply in at least 30 days will the Agency process the complaint.

All complaints are evaluated against the carrier's legal obligations only. In the event that the carrier failed to live up to its legal obligations, the Complaints Officer may try to facilitate a settlement with the carrier. There is no charge to file a complaint under the Air Travel Complaints Program.

If the settlement cannot be reached, the passenger may proceed to file a formal complaint to the Agency. The Agency is a quasi-judicial administrative tribunal responsible for a wide range of adjudicative and regulatory economic matters pertaining to federally regulated air, rail and marine transportation.

The quasi-judicial decision-making process of the Agency for complaints is governed by rules of procedural fairness and natural justice. The formal process (also free of charge) typically involves pleadings between the complainant and the air carrier and the Agency has the power to conduct public hearing if it determines the issue is of public interest.

A panel then considers and weighs all evidence submitted by the parties and renders a formal decision. If the Agency finds that a carrier has failed to apply its tariff, it could order the carrier to apply its tariff as written and order the carrier to pay compensation for out-of-pocket expenses incurred as a direct result of the carrier's failure to apply its tariff. If the Agency finds that a term or condition of carriage in a carrier's tariff is unreasonable or unduly discriminatory, it could prohibit the carrier from applying that term or condition and/or order the carrier to substitute a new term or condition in its place. If the Agency finds that a fare, rate or increase offered on a route within Canada served by only one carrier or on where there is limited competition is unreasonable, then the Agency could disallow the rate, rate or price increase, direct the carrier to reduce the fare, rate or increase, and order the payment of refunds, if practical, to passengers who are found to have been overcharged.

If the complaint involves a carrier discontinuing or reducing its service to a community with limited air service without giving proper notice, the Agency could order the carrier to resume service for up to 60 days or could impose a fine. In some circumstances, the Agency can find against a carrier for specified violation of the *Act*.

Once a formal Agency decision is made, it is binding on all parties. The decision may only be overturned if: (1) there is a change in the facts or circumstances pertaining to the decision subsequent to the issuance of the decision; (2) the passenger file a request for leave to appeal (on a matter of law or jurisdiction) to the Federal Court of Appeal within one month after the date of the decision; or (3) the Governor-in-Council (Cabinet) varies or rescinds the decision made by the Agency.

### Jurisdiction of the Canadian Transportation Agency

The following are examples of issues in which the Agency has or does not have jurisdiction in:

<b>The Agency can deal with:</b>	<b>The Agency cannot deal with:</b>
Baggage Flight disruptions Tickets and reservations Denied boarding Refusal to transport Fares, rates and charges Cargo Carrier-operated loyalty programs	Customer service issues (quality of service) Tour operators and travel agents Consequential damages Aircraft safety and security Aircraft cabin standards Problems with airport terminals and airport security Non-carrier operated loyalty programs Unfair competitive practices Bilingual services

### Looking ahead: A Canadian airline passenger bill of rights?

On June 12, 2008, a private member's motion calling for an airline passenger bill of rights, modeled after the *European Passenger Bill of Rights* (which is also being considered in the United States), received a 249-0 vote of unanimous support in the House of Commons as a response to improving consumer protection related to air travel. If implemented, the *Canadian Airline Passenger Bill of Rights* would provide a means of ensuring adequate compensation offered by the airline industry to airline passengers who experience inconveniences such as flight interruptions, delays, cancellations, issues with checked baggage and other inconveniences incurred while travelling on commercial passenger airline services originating from anywhere in Canada.

In September 5, 2008, the Canada Transportation Agency (CTA) published the *Flight Rights* and the *Code of Conduct of Canada's Airlines*, two policy statements that have been criticized due to their lack of enforceability in protecting Canadians' passengers' rights. And while many of the provisions could potentially be enforced against airlines by the CTA, the language of the provisions, generally state the obvious in the sense that they refer to terms that the common law already deems as implied terms in sales contracts. These include such matters as disclosure of terms, refund of purchase price and specific performance (performance of the obligation through a different carrier). It does not stipulate financial compensation for passengers of cancelled flights (as passengers are entitled in the EU) or whose flights have been overbooked. For overbooking, the threshold protection is in fact extremely low and nowhere does it contemplate compensation as remedy:<sup>288</sup>

2. Passengers have a right to take the flight they paid for. If the plane is over-booked or cancelled, the airline must:
  - a) find the passenger a seat on another flight operated by that airline;
  - b) buy the passenger a seat on another carrier with whom it has a mutual interline traffic agreement; or
  - c) refund the unused portion of the passenger's ticket.

To this date, as mentioned above, the only recourse Canadians have when they are subject to unjustified delays, cancellations or loss of baggage is to initiate a protracted process of complaint-filing with the airline first, and, if no resolution is arrived at, with the Canadian Transportation Agency.

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<sup>288</sup> Government of Canada, Canada Transportation Agency, and Government of Canada announces *Flight Rights Canada for Air Travelers*, September 5, 2008, online: Transport Canada <<http://www.tc.gc.ca/mediaroom/releases/nat/2008/08-h207e.htm#bg>>.

### 3.10 Conclusion

When markets are successful, consumer demand for products and services create the conditions for industrial and commercial concerns to provide those goods and services through a process that allows them to compete for the trade. Conversely, suppliers may anticipate needs for certain products through the process of innovation. In the process of satisfying consumer needs, roles of both suppliers and users have become more specialized with the passage of time. The vast majority of goods and services needed by the average household in Europe and Canada today cannot be produced by the household itself, and requires the participation of those who have developed the means to produce them.

When political actors prioritize the interests of favoured private industry groups and producers over the interests of their consumer constituents, the result skews the operation of markets. The net effect is to create a detriment to the economic stability of consumers and their households. It is the very economic stability of the market that is put at risk when policy makers try to favour supplier interests over consumers in the market place.

While the ultimate goal of consumer welfare in the European Union is in furtherance of a commercially borderless competitive Europe, such a goal can only be attained through market stability that, in turn helps achieve civil society through economic development. The drafters of the EU framework documents embraced the concept of consumer welfare at the heart of these concepts and ultimately the successful achievement of treaty objectives. These ideas continue to be valid.

The core task of this project was to engage in a general examination of legal protections to consumers in the Canadian marketplace using the Ten Principles of Consumer Protection in Europe as a comparative framework. PIAC submits that the differences that have been discussed herein have shown gaps in Canadian consumer protection strategies that may serve as a road map for reform. At a minimum, the report's authors would suggest that there is a need for greater dialogue between Canadian stakeholders and their European counterparts, particularly in relation to the strengthening of the position of the consumer in the marketplace. In the view of the report's authors, there are some differences between the consumer protection schemes in the two jurisdictions that appear to present a distinct disadvantage to Canadian consumers and militate for a thorough Canadian review of marketplace rules and government objectives.

## Part IV: Recommendations

1. The European Union has recognized the centrality of consumers in the stability and maintenance of an efficient marketplace. There is less certainty about that proposition from a Canadian standpoint. Canada lags behind its major trading partners in its treatment of the importance of consumer affairs. In the UK, for example, the Office of Fair Trading (OFT), a non-ministerial government department, is described as the “consumer and competition authority” whose stated mission is “to make markets work for consumers”. Outside Europe and closer geographically to Canada, the United States relies upon a proactive Federal Trade Commission (FTC) that has as a stated mission the “protection of America’s consumers”. The European Union Directorate General of Health and Consumer Affairs empowers a Commissioner that is prominently engaged in correcting marketplace abuse.

A first step to increasing the importance of Canadian consumers’ interests would be for the Government of Canada to reinstate a cabinet-level position responsible for consumer affairs.

2. Canadian food labelling standards should be brought in line with standards in the European Union, particularly as they relate to food that contains ingredients that have been genetically modified. This reform appears to be supported by the overwhelming majority of Canadians.

3. The Canadian Food Inspection Agency’s first and foremost objective should be public health. As the Royal Society of Canada suggested in 2001, the CFIA’s current role in the protection of the agricultural economy should be reviewed in light of possible conflict with the public health objective.

PIAC submits that such risk of conflict could be avoided with structural separation of CFIA from Agriculture Canada. The CFIA would more properly fall under the aegis of the Minister of Health.

4. In the highly sensitive area of consumer credit, the federal and provincial levels of government in Canada must act to guarantee fair, adequate and competitive access to credit to consumers. Canada’s governments, both federal and provincial, have an obligation to protect the purchasing power and the financial stability of Canadians, especially financially vulnerable Canadians, from contractual abuses in consumer lending.

5. The Canadian government both at the federal and provincial levels should not tolerate lending practices that are abusive or detrimental to consumers. It must be concerned with access to credit on economically sustainable terms for both business and consumers who require it.

6. While some Canadian provinces have taken steps to regulate and cap “payday” lending, interest rates charged to consumers by this modality of lending continues to be very high. The payday lending industry currently charges its users rates that increase household financial risk and promote household economic instability. The government should review the reforms in this area made earlier in the decade.

7. Air transportation is an essential service for the Canadian economy and a necessity for many Canadians who have limited access to other means of long distance transportation. While Canadians are among the highest users of air travel in the world, Canada does not have minimum levels of consumer protection for air travelers in the form of an enforceable set of traveler rights and carrier obligations toward every passenger that must be respected by all airlines licensed for passenger carriage.

Ignoring poor levels of airline service do not serve the long-term interests of the airline industry or the consumers they serve. PIAC recommends a comprehensive regime of passenger rights in Canada with appropriate enforcement remedies that would contribute to making Canadian air carriers responsive to customer needs and competitive in the global context.

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