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## Consumer Law Developments: A Note on the Impact of Recent Federal Legislation in Nova Scotia

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Hugh M. Kindred\*

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Two years have passed since the previous comment on consumer law in this journal but surprisingly little provincial development has taken place. Consequently, this note will chiefly highlight the particular impact of changes in federal law for Nova Scotians:

*Provincial Activity*

In 1975 important additions were made to the Consumer Protection Act that were the subject of comment at the time.<sup>1</sup> This impression of momentum created by the new department responsible for consumer affairs has disappointingly been lost. In the interim the minister has been raised to full cabinet rank and his responsibilities widened, but little reformatory legislation has been introduced. To his power to protect consumers in the marketplace was added an obligation to administer Nova Scotia's part in the fight against inflation.<sup>2</sup> In the name of the same struggle a Rent Review Act was passed.<sup>3</sup> The statute controls increases in rents on residential properties and subjects landlords to regulation by a newly established Rent Review Commission. Responsibility for the administration of this semi-autonomous agency also lies with the Minister for Consumer Affairs.

The single piece of legislation since 1975 affecting consumer transactions was passed at the spring session of the Legislature last year.<sup>4</sup> It makes two minor but not insignificant changes to the Consumer Protection Act. The bulk of the amending statute is directed to regulating, if not discouraging, discounters of income

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1. Kindred, *New Consumer Legislation in Nova Scotia* (1976), 2 Dal.L.J. 683

2. *Anti-Inflation (Nova Scotia) Act*, S.N.S. 1975, c.54

3. S.N.S. 1975, c.56

4. *An Act to Amend Chapter 53 of the Revised Statutes, 1967, The Consumer Protection Act*, S.N.S. 1977, c. 24. The *Statute Law Amendment Act, 1977*, S.N.S. 1977, c.18, s.9 also added section 8A to the Consumer Protection Act to confirm that no lender or seller may discriminate in his business against a woman, married or not.

tax refunds and other anticipated government payments by a system of registration, residence, and disclosure requirements. The legislation is not different from other licensing acts and appears to have served its purpose during the last income tax year while it was still in bill form.

The final subsection of the amending act<sup>5</sup> grants power to the Governor-in-Council to prescribe a code of conduct for credit grantors in both their lending and collecting capacities. At present both money lenders and collectors have to be licensed,<sup>6</sup> but only collectors are specifically regulated in their conduct. Even then the code of conduct included in the Collection Agencies Act<sup>7</sup> applies only to professional collectors and not to creditors in their own right. The new power to regulate the conduct of all creditors in all stages of their financial dealings has slipped very quietly into the Consumer Protection Act. Its impact is potentially very great on the trade practices of the credit end of the consumer market, but it will remain innocuous until the form and content of the authorized regulations are known.

### *Federal Activity*

Meanwhile there has been considerable activity by the federal government in enacting or implementing a number of pieces of consumer legislation. These measures consequently add to the body of consumer law obtaining in Nova Scotia. Their legal impact has been of three kinds.

One group of enactments are instruments for setting national standards affecting consumer goods. They are penal in character and have no provincial counterparts. A second group regulate the marketing practices of suppliers of consumer goods. These are chiefly penal but also purport to grant civil remedies, even though they have been more thoroughly developed already by several provincial legislatures. They were enacted apparently, though not in fact, oblivious to provincial legislative activity. The third and last group of federal provisions attack certain specific problems with conscious awareness of provincial interest and action. They are

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5. S.3(c)

6. Under the Consumer Protection Act, R.S.N.S. 1967, c. 53 as amended and the Collection Agencies Act, S.N.S. 1975, c. 7 respectively.

7. This inference arises from the fact that only agents, not creditors themselves, are regulated by the Act.

designed to operate in conjunction with, rather than oblivious to, local regulation.

The merits of each federal consumer provision have already been the subject of considerable scrutiny in a number of both local and national conferences and journals.<sup>8</sup> This note will not elaborate them once more, but will review their particular impact for Nova Scotia. The three-fold categorisation will help to elucidate their significance.

### *Standards of Consumer Goods*

The first group of provisions has been directed chiefly to manufacturers of consumer products. They are intended to establish national standards of safety both in the design and use of goods. The main vehicles for design control have been the Hazardous Products Act<sup>9</sup> and the Motor Vehicle Safety Act,<sup>10</sup> to which has been added the Motor Vehicle Tire Safety Act.<sup>11</sup> The legislators' technique is to schedule items or their components that must meet exact specifications or tests elaborated by regulation. The schedules and regulations have been rapidly growing recently: new additions include such diverse goods as playpens, liquid coatings, and metric odometers. Failures are not saleable on pain of prosecution. National health is similarly protected by regulating the production and sale of edible products under the Food and Drugs Act.<sup>12</sup> The recent ban on saccharin is but one example of a continuous surveying of foods, cosmetics, patent medicines, and drugs.

None of these statutes, or the host of other similar ones directed to particular products, create legal issues for the consumer or his lawyer. On the contrary, they are designed to prevent the sale of faulty or dangerous products that otherwise would cause injuries

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8. *E.g.* Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada: First Stage (1973)*, being background materials to a series of explanatory conferences across the country; Cohen, *Bill C-7: Its Proposed Amendments to the Law of False Advertising (1974)*, 13 *Can. Patent Reporter (2d)* 197; Kaiser, *The New Competition Law: Stage One (1975-76)*, 1 *Can. Bus. L. Jo.* 147; Kindred, *Misleading Advertising (1976)*, 3 *N.S. Law News* no.3, p.3; Ziegel, *Legal and Managerial Problems in Implementing the Consumer Aspects of the Combines Amendment Bill, Bill C-7 (1975)*, 17 *Can. Patent Reporter (2d)* 182

9. R.S.C. 1970, c. H-3

10. R.S.C. 1970, 1st supp., c.26

11. S.C. 1974-75-76, c.96 as amended by S. C. 1976-77, c. 28, s. 27. Proclaimed to come into force January 1, 1978.

12. R.S.C. 1970, c.F-27

and give rise to litigation.

Against the misuse of goods, as opposed to their unsafe design, a certain amount of prevention can and is required to be inbuilt during production. But the chief guard against accident must be sensible handling by the consumer. To this end the federal government has been implementing the Consumer Packaging and Labelling Act.<sup>13</sup> As its name suggests, the Act is aimed at proper packaging and labelling in the production and sale of consumer goods. The technique is to require manufacturers to supply all necessary details about the product so that an averagely literate consumer may be fully informed in its purchase and use.

For instance, labels must be of specified proportions to the size of the package and placed on the most obvious surface, as well as be written in both official languages. The now mandatory practice of listing components and "best before" dates on food products are other examples of disclosure requirements affecting the use of goods. Such consumer protection cannot, however, go further than informing the Nova Scotia public. A careless consumer may still suffer injury but now he will generally only have himself to blame.

### *Marketing Practices*

While the burden of product standards lays on manufacturers, the federal controls on marketing practices fall most frequently on retailers as the immediate suppliers of consumers. The controls themselves are contained in the lingering amendments to the Combines Investigation Act<sup>14</sup> finally passed into law and enforced as of January 1, 1976.<sup>15</sup> The essence of these changes, so far as they affect consumers personally, is to expand the scope of the older proscriptions against misleading advertising and to begin prohibiting certain trade practices.

The expansion of the concept of misleading advertisement has been sweeping. In the words of the Combines Investigation Act:<sup>16</sup>

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, make a representation to the public that is false or misleading in a material respect; . . .

13. S.C. 1970-71-72, c. 41

14. R.S.C. 1970, c.C-23 as amended

15. S.C. 1974-75-76, c.76, s.18

16. S.36(1) (a)

The apparent intention is to cast a net of prohibition over all misleading assertions whether made visually, as on labels and warranties as well as advertisements, or orally by sales clerks. Hence now in Nova Scotia by federal action, unlike some other provinces that have already moved legislatively themselves, there is a general outlawry of all inaccurate representations made in the course of consumer transactions.

The other prohibitions in the Combines Act are in large measure particular examples of well known misleading techniques already included in the general provision. While each of them is important for the protection of consumers, one is significant by its tendency to reinforce existing provincial law. The Combines Act contains a new requirement that warranties or repair and replacement services must be backed by reasonable prospects of performance.<sup>17</sup> Though durability of products is required under the Nova Scotia Consumer Protection Act,<sup>18</sup> stocks of spare parts and after sales services are not otherwise demanded of sellers. Although the new federal provision will not grant such services either, it will help to ensure that where they are offered they may be relied on.

Unlike the generality of the attack upon misleading advertising, the federal foray against deceptive trade practices is patchy. In substance, misleading advertising is but one technique in a range of unfair sales practices. In practice, while the federal Parliament had for some time regulated advertising only, some provinces built up their own comprehensive legislation against deceptive and unconscionable business practices. Not so Nova Scotia, so that once again the federal initiative provides welcome if meagre additions to the legal protection of consumers in this province. They include prohibitions against double ticketing and bait and switch selling, and controls on promotional contests.

For consumers personally perhaps the single most important amendment to the Combines Act is the introduction of a civil remedy.<sup>19</sup> Injured purchasers may now sue for damages for breach of any of these penal proscriptions, provided, of course, they can prove that the misleading advertisement or deceptive practice in complaint was the cause of their loss.

Parliament has proceeded upon this course of consumer

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17. S.36(1) (c)

18. R.S.N.S. 1967, c.53, s.20C(3) (j), as added by S.N.S. 1975, c.19

19. S.31.1

protection apparently heedless of provincial legislative activity but to the general advantage of Nova Scotians, whose legislature has taken no action. Other provinces, however, have responded unthankfully to what they consider trespass upon their jurisdiction. Consequently, the constitutional validity of the Combines Act, as the sole source of controls on marketing practices in this province, is of the utmost importance to Nova Scotians.

Two aspects of constitutionality occur: first, whether Parliament may regulate the field of market practices at all and, secondly, if so then more particularly whether it may grant a civil remedy for breach of its controls. The constitutionality of the amendments to the Combines Act as a whole has been cogently discussed by Professors Hogg and Grover.<sup>20</sup> They conclude that the amending legislation is within Parliamentary authority over trade and commerce and criminal law, as well as to provide peace, order and good government.

If the courts subsequently agree with Professors Hogg and Grover, then the validity of the new civil remedy will also be assured. The trade and commerce power and the provision for peace, order and good government are plainly both broad enough to sustain civil as well as criminal remedies for breach of the Combines law. But if, as has traditionally been assumed, Parliament's consumer controls are based on criminal law powers then there is much less certainty that a civil remedy may legitimately be appended. Professors Hogg and Grover still think, on balance, that the civil remedy can be upheld;<sup>21</sup> however, the issue may be decided definitively by the Federal Court, where several pending private, inter-corporate actions raise it incidentally in their pleadings.<sup>22</sup>

### *Specific Problems: Pyramid and Referral Selling*

The last group of federal provisions are distinctive for the way they are designed to dovetail with existing provincial controls. The marketing practices governed are specifically pyramid and referral selling. In each case the Combines Act prohibits the activity

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20. Hogg & Grover, *The Constitutionality of the Competition Bill (1975-76)*, 1 *Can.Bus.L.Jo.* 197

21. *Id.*, at pp. 207-209

22. *E.g. Eli Lilly v. Marzone Chemicals*; and *Cablesat Ltd. v. Bell Canada and Telesat Canada*.

outright, unless it is otherwise licensed or permitted provincially.<sup>23</sup> Since pyramid selling is not regulated by legislation in Nova Scotia, the effect of the federal statute is once more to outlaw the practice. It is to be hoped that the new prohibition under the administration of the Bureau of Competition Policy will be more efficient than the older proscription in the Criminal Code.<sup>24</sup>

The regulation of referral selling is not so easily explained, for two conflicting pieces of Nova Scotia legislation exist. While the Consumer Protection Act<sup>25</sup> clearly makes referral sales voidable at the option of the purchaser where contingent inducements are offered, it stops short of prohibiting such transactions altogether. On the other hand, the Direct Sellers' Licensing and Regulation Act<sup>26</sup> absolutely prohibits direct salesmen from making contingent inducements, but does nothing for the purchaser, victim of his unlawful blandishments. Although the Direct Sellers' legislation does not cover every consumer transaction, the statutory definition of direct selling is so broad<sup>27</sup> and the occasion for contingent inducements so common, that practically all referral sales must be caught by it. As a result there is a direct conflict in the provincial regulation of referral selling which only legislative amendment can solve. So far as the Combines law is concerned, since there is some, albeit confused, provincial permission for referral sales, the federal prohibition is not operative in Nova Scotia.

### *Postscript*

The brevity of this note updating consumer developments in Nova Scotia is due to the lack of legislative activity. Commentary was intended on two important enactments that were expected to have been passed by this time. However, though they are off schedule, they are still on the track. One is comprehensive provincial legislation to regulate the automobile trade that has yet to be introduced. The other is the federal Borrowers' and Depositors' Protection Bill<sup>28</sup> that has bogged down in the committee stage for

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23. Ss. 36.3(2) & (4), 36.4(2) & (4)

24. S. 189(1)(e)

25. R.S.N.S. 1967, c.53, s.20D(1) as added by S.N.S. 1975, c.19

26. S.N.S. 1975, c.9, s.24(2)

27. For a discussion of the scope and application of the Act see Kindred, *New Consumer Legislation in Nova Scotia* (1976), 2 Dal. L. J. 683 at 691, and Kindred, *The Licensing of Direct Sellers* (1977), 3 Nova Scotia Law News no. 4, p. 4.

28. 1976 Bill no. C-16



several months. Whatever its final form, it will have great impact in Nova Scotia as it both changes the federal controls on interest rates and intervenes in the current provincial licensing of credit grantors. In addition the Ministers of Consumer Affairs for the Atlantic Provinces, including Nova Scotia, have recently announced in joint meeting that a concerted effort will be made to introduce comprehensive trade practices legislation throughout the region.