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## A Consumer Protection Perspective on Regulation for Healthier Eating

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Barbara von Tigerstrom\*

A Consumer Protection Perspective  
on Regulation for Healthier Eating

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*This article explores the potential for a consumer protection perspective to complement public health approaches in designing and justifying laws that aim to promote healthier eating, such as food labelling regulations or restrictions on marketing and advertising. Consumer protection and public health are distinct perspectives, but they share the goal of protecting health and both accept the need for regulation to protect important interests. Consumer protection objectives could be used to defend public health measures that are challenged as infringing rights or restricting trade. Insights from consumer law and scholarship could also contribute to discussions about when regulatory intervention to promote healthier eating is justified and the form that intervention should take. Since those working in public health and consumer protection have been engaged in similar debates, they have much to learn from each other and may be able to support each other in pursuit of common goals.*

*L'auteure explore la possibilité qu'une perspective de protection des consommateurs vienne s'ajouter aux approches en matière de santé publique pour ce qui est d'élaborer et de justifier des lois qui visent à promouvoir une alimentation plus saine, par exemple des règlements sur l'étiquetage des denrées alimentaires ou des restrictions sur le marketing et la publicité. La protection des consommateurs et la santé publique sont des sphères distinctes, mais elles ont un objectif commun, protéger la santé, et les deux reconnaissent la nécessité d'une réglementation pour protéger les intérêts importants. Les objectifs de la protection des consommateurs pourraient être utilisés pour défendre des mesures de santé publique contestées comme portant atteinte aux droits ou restreignant le commerce. Les enseignements du droit de la consommation et de l'érudition pourraient aussi enrichir les discussions sur le moment où une intervention réglementaire visant à promouvoir une alimentation plus saine est justifiée et sur la forme que cette intervention devrait prendre. Puisque les travailleurs des domaines de la santé publique et de la protection des consommateurs ont été engagés dans des débats similaires, ils ont beaucoup à apprendre les uns des autres. Ils pourraient aussi être en mesure de s'appuyer mutuellement dans la poursuite d'objectifs communs.*

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*Introduction*

In recent years a range of proposals and new laws have targeted food products in an attempt to mitigate the public health impact of obesity and diet-related chronic diseases. These include reforms to food labelling regulations that would change the way information is presented or extend nutrition disclosure requirements to restaurant foods. Restrictions on marketing and advertising are also promoted as a way of reducing the consumption of unhealthy foods, such as those high in sugar, fat, or sodium. Another potential strategy is to manipulate the price of various foods through special taxes or subsidies, aiming to encourage people to buy less of unhealthy and more of healthier foods and beverages.

All these measures are controversial in that they impose costs or restrictions on both industry and individuals, and their effectiveness in improving health outcomes is very difficult to prove. Proposed measures are often attacked as paternalistic, while supporters counter that industry practices are already distorting the environment to such an extent that it is not accurate to portray regulations as interfering with otherwise “free” choices. Both opponents and supporters make use of various types of empirical data to either question or emphasize the health risks associated with certain products and to argue that measures will or will not be

effective in promoting public health. Important as these debates are, by focusing narrowly on specific health impacts of proposed measures (for example, will menu labelling reduce rates of obesity?) they may neglect other important values, which could be captured by considering broader consumer protection goals.

The purpose of this article is to explore the potential for a consumer protection perspective to complement public health approaches in debates about using law to promote healthier eating. It begins by briefly outlining the history and meanings of consumer protection and comparing a consumer-based approach with public health approaches. It then engages in a critical examination of the ways in which consumer protection law could contribute to efforts to promote healthier eating. Finally, the implications for future regulation will be considered, asking what could be learned from consumer protection law and scholarship in developing regulations to promote access to healthier food.

## I. *Consumer protection and public health*

### 1. *What is consumer protection?*

Defining consumer protection and its boundaries is not an easy task,<sup>1</sup> but we can understand consumer protection broadly as referring to “the extensive accumulation of laws, rules and practice that are ultimately concerned with the protection of citizens in their economic role as consumers.”<sup>2</sup> It focuses on the roles that members of society play as consumers of goods and services.<sup>3</sup> Consumer protection law has a long history and has developed over the centuries to include a diverse range of matters, from regulation of weights and measures to standards for the safety of food and drugs.<sup>4</sup> The development of modern consumer protection law is usually traced back to the thalidomide crisis in the early 1960s, which was the catalyst for significant reforms to pharmaceutical regulation and drew attention to the inadequacy of existing mechanisms to address risks to consumers’ safety.<sup>5</sup> In a landmark speech to the U.S.

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1. Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge: Cambridge University Press, 2001) at 1.

2. Public Interest Advocacy Centre, *Consumer Protection in Canada and the European Union: A Comparison* (Ottawa: Public Interest Advocacy Centre, 2009), online: <piac.ca/wp-content/uploads/2014/11/piac\_report\_consumer\_protection\_in\_canada\_and\_the\_european\_union\_a\_comparison.pdf> at 9.

3. Cartwright, *supra* note 1 at 3.

4. Gillian K Hadfield, Robert Howse & Michael J Trebilcock, “Information-Based Principles for Rethinking Consumer Protection Policy” (1998) 21 J Consumer Pol’y 131 at 131.

5. Public Interest Advocacy Centre, *supra* note 2 at 14-18; Ross Cranston, *Consumers and the Law* (2nd ed) (London: Weidenfeld & Nicolson, 1984) at 152-155 [Cranston, *Consumers*].

Congress in 1962, John F. Kennedy articulated four fundamental rights of consumers: the right to safety (including protection of life and health), to be informed, to choose, and to be heard.<sup>6</sup> More recent documents have added the protection of consumers' economic interests and access to essential goods and services as important rights or interests to be protected.<sup>7</sup> The link between consumer protection and fundamental rights of citizens has become an important feature of consumer protection law, and consumers' rights have been incorporated into some national constitutions.<sup>8</sup> In Canada, the body of consumer protection law includes specific legislation at both levels of government, as well as a broader collection of laws and policies that serve consumer protection goals. Each province and territory has a consumer protection or business practices statute, which includes matters such as unfair business practices and terms of consumer contracts.<sup>9</sup> The federal *Competition Act* includes some similar provisions, most notably prohibitions on false or misleading representations.<sup>10</sup> In addition, there is federal legislation regulating consumer product safety,<sup>11</sup> packaging and labelling of consumer products,<sup>12</sup> food and drugs,<sup>13</sup> and weights and measures,<sup>14</sup> among other matters. Specialized legislation and agencies also regulate specific areas of concern to consumers, such as broadcasting,<sup>15</sup> telecommunications,<sup>16</sup> and financial services.<sup>17</sup> Comparing public health and consumer protection approaches

Public health and consumer protection have evolved as distinct fields of scholarship and practice with links to different disciplines, which results

6. Public Interest Advocacy Centre, *supra* note 2 at 18-19; Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford: Oxford University Press, 2013) at 2.

7. Public Interest Advocacy Centre, *supra* note 2 at 13 (quoting a 1975 European Economic Community document); UN Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection* (New York: United Nations, 1999), online: <[un.org/esa/sustdev/publications/consumption\\_en.pdf](http://un.org/esa/sustdev/publications/consumption_en.pdf)>.

8. See Benöhr, *supra* note 6 at 45-76.

9. E.g., *Business Practices and Consumer Protection Act*, SBC 2004, c 2; *Fair Trading Act*, RSA 2000, c F-2; *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A; *Consumer Protection Act*, RSNS 1989, c 92.

10. *Competition Act*, RSC 1985, c C-34, s 74.01.

11. *Canada Consumer Product Safety Act*, SC 2010, c 21.

12. *Consumer Packaging and Labelling Act*, RSC 1985, c C-38.

13. *Food and Drugs Act*, RSC 1985, c F-27.

14. *Weights and Measures Act*, RSC 1985, c W-6.

15. *Broadcasting Act*, SC 1991, c 11 and its regulations, administered by the Canadian Radio-television and Telecommunications Commission (CRTC).

16. *Telecommunications Act*, SC 1993, c 38 and its regulations, also administered by the CRTC.

17. At the federal level, e.g. *Bank Act*, SC 1991, c 46; *Financial Consumer Agency of Canada Act*, SC 2001, c 9. At the provincial level, e.g. *Financial Institutions Act*, RSBC 1996, c 141; *Payday Loans Act, 2008*, SO 2008, c 9; *Disclosure of the Cost of Consumer Credit Regulation*, BC Reg 273/2004; *The Cost of Credit Disclosure Act, 2002*, SS 2002, c C-41.01.

in some differences in their approaches. However, there are significant areas of commonality between public health and consumer protection, including, most obviously, their shared goal of protecting health and safety. Both can be seen as helping to protect and promote the right to health, albeit in different ways.<sup>18</sup> Whereas health protection and promotion is the primary objective of public health, consumer protection addresses a broader range of objectives, although some of these, such as protecting consumers' economic interests or rights to information and choice, can indirectly protect health. This means that, for example, providing information to consumers would be more likely to be viewed in public health as a means to an end (allowing or encouraging healthier behaviour), while it could be seen as both a means and an end in itself in consumer protection, given that the right to be informed is considered a basic right or interest of consumers. Public health initiatives are also more likely to try to encourage particular choices—those that best protect or promote health—whereas consumer protection laws have traditionally been more neutral, aiming to ensure that consumers are able to make choices that match their preferences, without “making normative judgments about what it is that consumers should want.”<sup>19</sup> Efforts to further these objectives have landed both public health and consumer protection squarely in the middle of debates about government intervention. Calls for regulation by public health and consumer advocates reveal a shared skepticism about the ability of free market approaches to adequately protect important interests. Regulatory measures in both areas have been criticized as paternalistic, so they have been equally involved in debates about when the government is justified in limiting people's free choices in order to protect their health or other interests. More recently, scholars in both fields have shared an interest in the implications of research in cognitive psychology and behavioural economics, seeking to better understand how people process information and make decisions. Since those working in public health and consumer protection have been engaged in debating similar issues, they have much to learn from each other and may be able to support each other in pursuit of common goals.

## II. *Potential contributions of consumer protection law*

There are sufficient potential synergies between public health and consumer protection that it seems to be worth exploring the contribution that a more explicit focus on consumer protection might make, bearing in mind the

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18. On consumer protection and the right to health, see Benöhr, *supra* note 6 at 49-50, 74.

19. Hadfield, Howse & Trebilcock, *supra* note 4 at 132.

limitations of this approach. This section will discuss some ways in which the use of existing legal frameworks for consumer protection and reference to consumer protection objectives could help to support the pursuit of public health objectives relating to healthy eating. The following section will then explore ways in which we could draw on consumer protection law and scholarship to inform debates about the future directions of food regulation.

1. *Using consumer protection law in support of public health objectives*

Several commentators have considered the potential for legal action against allegedly deceptive marketing as a means of addressing concerns about food labelling and advertising.<sup>20</sup> Existing federal and provincial/territorial legislation in Canada prohibits consumer products, including food and beverage products, from being marketed in ways that are false, misleading, or deceptive.<sup>21</sup> The Supreme Court of Canada has articulated a fairly liberal test to be applied in this context: whether a representation is deceptive is to be determined by the general impression on first contact on the average consumer, who is credulous and inexperienced, taking into account not only the text itself but how it is displayed.<sup>22</sup> Using this approach, a representation could be found to be deceptive even if it contains information that is literally accurate and the truth of the claims could be determined by a careful reading.<sup>23</sup> So, for example, one could argue that a food advertisement or label is deceptive if it creates a general impression that the product is healthy, even if a diligent consumer could discover its actual nutritional characteristics by looking carefully at other information such as nutrition facts or ingredients. However, it is still necessary to establish that the general impression is not one that matches reality,<sup>24</sup> which may be difficult when the claim is a relative or subjective one, such as a food's being "healthy."

20. See, e.g., Jennifer L Pomeranz, "Litigation to Address Misleading Food claims and the Role of the State Attorneys General" (2013–14) 26 Regent U L Rev 421; Lainie Rutkow et al, "Legal Action Against Health Claims on Foods and Beverages Marketed to Youth" (2015) 105 Am J Public Health 450.

21. E.g., *Food and Drugs Act*, supra note 13, c F-27, s 5; *Consumer Packaging and Labelling Act*, supra note 12, s 7; *Competition Act*, supra note 10, ss 52, 74.01; *Business Practices and Consumer Protection Act*, supra note 9, ss 4-5; *Fair Trading Act*, supra note 9, s 6(4); *Consumer Protection Act, 2002*, supra note 9, ss 14, 17.

22. *Richard v Time Inc.*, 2012 SCC 8 at paras 57, 72, 78, 1 SCR 265. This characterization of the consumer has been adopted, with slight modification, in the context of *Competition Act* proceedings: *Canada (Commissioner of Competition) v Chatr Wireless Inc.*, 2013 ONSC 5315 at paras 126-132, 288 CRR (2d) 297.

23. *Richard v Time Inc.*, supra note 22 at paras 55-58.

24. *Ibid* at para 78.

There are several different enforcement mechanisms that could be used against false, misleading, or deceptive representations. The federal Commissioner of Competition can refer these matters to a court or the Competition Tribunal,<sup>25</sup> and in some circumstances, they can be prosecuted under federal or provincial legislation.<sup>26</sup> This legislation also provides for a right of action by or on behalf of consumers who have suffered loss or damage as a result of such practices.<sup>27</sup> In theory, this could be a powerful mechanism for enforcement; in practice, potential plaintiffs have encountered a number of obstacles in attempting to bring claims that could have addressed health concerns about the marketing of food and beverage products. Three recent attempts to bring class proceedings for deceptive marketing of beverages (two involving “Vitaminwater,” allegedly marketed as healthy despite its sugar content,<sup>28</sup> and one involving a line of soft drinks marketed as low sodium<sup>29</sup>) illustrate some of the challenges plaintiffs face. All were dismissed for lack of sufficient evidence to support the claims, for example evidence that the plaintiff (or other purchasers) had suffered any damage<sup>30</sup> or that the representations were false.<sup>31</sup> A number of commentators have noted the legal, procedural, and practical hurdles that confront litigants attempting to assert consumers’ rights.<sup>32</sup> In addition, recent decades have witnessed a reduction in enforcement activities by relevant government agencies.<sup>33</sup> Enforcement of consumer protection laws therefore holds some promise as a strategy to further public health goals in relation to healthy food, but faces significant limitations.

## 2. *Consumer protection objectives as alternative justifications for regulation*

Consumer protection is recognized as a valid objective in national and international law. Where the goals of public health and consumer

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25. *Competition Act*, *supra* note 10, ss 74.01.

26. E.g., *ibid*, s 52; *Business Practices and Consumer Protection Act*, *supra* note 9, s 189; *Fair Trading Act*, *supra* note 9, s 161; *Consumer Protection Act, 2002*, *supra* note 9, s 116.

27. E.g., *Business Practices and Consumer Protection Act*, *supra* note 9, s 171; *Fair Trading Act*, *supra* note 9, ss 13-15.

28. *Clark v Energy Brands Inc (cob Glaceau)*, 2014 BCSC 1891, 72 BCLR (5th) 383 [*Clark*]; *Wilkinson v Coca-Cola Ltd*, 2014 QCCS 2631, QJ No 5680 [*Wilkinson*].

29. *Sandoff v Loblaw Cos*, 2015 SKQB 345, SJ No 589 [*Sandoff*].

30. *Ibid* at paras 41, 49, 51; *Wilkinson*, *supra* note 28 at paras 76-81; *Clark*, *supra* note 28 at para 113.

31. *Wilkinson*, *supra* note 28 at paras 44, 47, 51; *Sandoff*, *supra* note 29 at paras 41, 46, 49, 51.

32. AJ Duggan, “Consumer Redress and the Legal System” in AJ Duggan & LW Darvall, eds, *Consumer Protection Law and Theory* (Sydney: Law Book Company, 1980) 200; Jasminka Kalajdzic, “Consumer (In)justice: Reflections on Canadian Consumer Class Actions” (2010) 50 Can Bus L J 356; Pomeranz, *supra* note 20 at 435-437.

33. Jacob Ziegel, “Canadian Consumer Law and Policy 40 Years Later: A Mixed Report Card” (2010) 50 Can Bus L J 259 at 261, 264.



protection overlap, it may therefore be possible to use consumer protection as an alternative justification for measures that are believed to be useful for public health but for which the evidence of health impact is weak or equivocal.

A number of measures that are used or proposed to promote healthier eating are vulnerable to challenges under the *Canadian Charter of Rights and Freedoms*<sup>34</sup> (particularly advertising and labelling regulations that interfere with freedom of expression) or trade agreements. The public health goals underlying these measures are compelling and likely to be accepted as legitimate objectives under the *Charter*<sup>35</sup> and trade agreements like the *General Agreement on Tariffs and Trade (GATT)*<sup>36</sup> and the *Agreement on Technical Barriers to Trade (TBT Agreement)*.<sup>37</sup> However, if the evidence supporting the potential health impact of these measures is weak, there is a significant risk that they will be found not to be justified notwithstanding their valid objectives. For example, if the evidence base for a measure is weak it may be difficult to justify choosing that measure over another that impairs rights or restricts trade less, leading the decision maker to conclude that it is not a minimal impairment (under the *Charter*) or that it restricts trade more than necessary.<sup>38</sup> Where public health measures also serve consumer protection objectives, this can provide governments with an alternative basis on which to support these measures if they are challenged. Preventing the deception of consumers has been recognized by Canadian courts as a pressing and substantial objective that could justify limiting freedom of expression under the *Charter*.<sup>39</sup> It is also among the objectives that can be invoked to justify restrictions on trade.<sup>40</sup> Consumer protection, and specifically ensuring that consumers receive information that is accurate and not misleading, has been recognized as a legitimate objective in several disputes about food standards and labelling

34. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

35. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 61, 144-146; *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 38, 2 SCR 610.

36. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, art XX(d) (entered into force 1 January 1948) [*GATT 1947*].

37. *Agreement on Technical Barriers to Trade*, 15 April 1994, 1868 UNTS 120, art 2.2 (entered into force 1 January 1995) [*TBT Agreement*].

38. E.g., *TBT Agreement*, *supra* note 37, art 2.2.

39. *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at paras 36-38; *Bratt v British Columbia Veterinary Medical Assn* (1999), 19 Admin LR (3d) 81 at para 73-74, [1999] BCJ No 2442; *Assie v Institute of Chartered Accountants of Saskatchewan*, 2001 SKQB 396 at para 35, 210 Sask R 16; *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 at para 492, 288 CRR (2d) 297.

40. E.g., *GATT 1947*, *supra* note 36, art XX(d); *TBT Agreement*, *supra* note 37, art 2.2.

decided under the *TBT Agreement*.<sup>41</sup> This is no guarantee that the measures can be successfully defended, since it still has to be determined that the restriction of rights or of international trade is justified in pursuit of that objective. However, the evidence and arguments supporting a consumer protection justification will be distinct from those for public health, so having alternative bases for a measure will increase the likelihood that it can be defended, and it could be important to fully articulate and support both objectives. This strategy will be most useful where the measure (e.g., regulation of marketing or labelling) helps to inform or prevent deception of consumers, which has been recognized specifically as a valid objective, and potentially also where it furthers other consumer protection objectives, which could be argued on a case by case basis.

### III. *Implications for the future of regulation*

Looking forward, insights from consumer protection law and scholarship could inform discussions of the future development of regulatory strategies to promote healthier eating. Specifically, they could contribute to discussions about when regulatory intervention is justified, and then about the form that intervention should take.

#### 1. *Deciding when to intervene*

As noted, both public health and consumer protection have been deeply engaged in similar debates about justifying government intervention, particularly given that intervention will impose burdens and restrictions on suppliers, consumers, or both. We could draw insights from the work that has been done on this question from a consumer protection perspective to help in determining when and how intervention for public health purposes can be justified. Reference to consumer protection objectives might also help with difficult decisions about when to move forward in face of uncertain evidence and competing priorities.

One of the central preoccupations of consumer protection scholarship has been questioning the assumptions and policy prescriptions of free market economists. Based on classical economic theory, a free market approach would suggest that consumers' preferences are revealed in the choices they make, and if the market is left to operate freely suppliers will respond to those choices by offering goods and services that consumers

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41. *European Communities—Trade Description of Sardines (Complaint by Peru)* (2002) WTO Doc WT/DS231/AB/R (Appellate Body Report); *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)* (2012) WTO Doc WT/DS381/AB/R (Appellate Body Report); *United States—Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada and Mexico)* (2012) WTO Doc WT/DS384/AB/R (Appellate Body Report).

want.<sup>42</sup> So, for example, if people really do want to eat a healthy diet, they will make purchasing decisions accordingly, and food producers and sellers will respond by offering goods that meet those preferences. If this is true, government intervention could be seen as unnecessary and even potentially harmful.<sup>43</sup> Virtually every form of consumer protection regulation challenges this free market approach, requiring its proponents to explain why such regulation is justified. Some of the answers can be found within economic theory itself: the assumptions of the free market economists only hold true in a perfectly competitive market, not where some form of market failure is present, so market failure can provide a justification for regulation.<sup>44</sup> One form of market failure is the existence of a monopoly or other concentration of market power, so competition law is often associated with consumer protection.<sup>45</sup> Another is information deficits or asymmetry, where consumers cannot choose according to their preferences because it is difficult or impossible for them to inform themselves adequately. A third form of market failure is the presence of externalities, that is, where the full cost of the activity is not borne by those who are engaged in it, but by some other person or by society. Where one or more of these market failures exists, some form of government intervention can be justified, either to directly address the source of the failure or to mitigate its consequences.

Obviously consumer protection is not the only area in which economic analysis is used to inform discussions about regulation,<sup>46</sup> but analysis that attempts to identify and correct market failures that have a particular impact on consumers' rights to health, information, and choice could be highly relevant in the context of food regulation. Food consumption fits most of the criteria for the type of consumer decision where intervention may be justified: when the purchases are small, so that each individual consumer has little incentive to seek redress, though the aggregate consequences may be substantial;<sup>47</sup> when the adverse consequences of inadequate information are serious or irreversible;<sup>48</sup> and

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42. See, e.g., Cartwright, *supra* note 1 at 34; Cranston, *Consumers*, *supra* note 5 at 21-22.

43. Cartwright, *supra* note 1 at 6; Cranston, *Consumers*, *supra* note 5 at 22-23.

44. Cartwright, *supra* note 1 at 18-27; Peter D Lunn, "Are Consumer Decision-Making Phenomena a Fourth Market Failure?" (2015) 38 *J Consumer Pol'y* 315 at 316, 318-319; Cranston, *Consumers*, *supra* note 5 at 23-25.

45. Cranston, *Consumers*, *supra* note 5 at 17-19.

46. See, e.g., Cento Veljanovski, "Economic Approaches to Regulation" in Robert Baldwin, Martin Cave & Martin Lodge, eds, *Oxford Handbook of Regulation* (Oxford: Oxford University Press, 2010) 17.

47. Hadfield, Howse & Trebilcock, *supra* note 4 at 164; Cranston, *Consumers*, *supra* note 5 at 25.

48. Hadfield, Howse & Trebilcock, *supra* note 4 at 164.

when “there is no obvious reason for consumers to doubt their general expectation of safety, and so their expectation can easily be exploited.”<sup>49</sup> Several recognized forms of market failure would apply in this context. Information asymmetry is directly applicable to food products. Without mandated disclosure, it would be extremely difficult for most consumers to obtain accurate information about the contents and nutritional value of their food. Even when information is available, the volume and variety of food purchases made by the average consumer make the burden of obtaining and processing information overwhelming. The externalities of unhealthy food products could also provide a strong justification for various forms of regulation. The burden of disease and economic costs associated with unhealthy eating are borne to some extent by consumers, but as long-term consequences, and largely by society. Thus they are externalized rather than being reflected in the immediate costs to either the supplier or purchaser.

In addition to using economic analyses developed within consumer protection, decisions about when to regulate could be informed by consumer protection objectives. As discussed above, consumer protection can play a role as a secondary objective to which we could refer in defending measures intended to promote healthier eating. In developing future regulations, more explicit reference to consumer protection objectives may also help policy makers choose and prioritize among strategies whose public health benefits are uncertain according to current evidence. It is widely recognized that the evidence base supporting some proposed measures, such as taxes on unhealthy foods or new food labelling requirements, is contested and fairly thin. There is general support for evidence-based public health measures, but given the complexity of causes and risk factors in chronic disease and obesity, there are intractable difficulties in predicting effectiveness. This leaves policy makers in the difficult position of having to wait for more evidence, thereby missing opportunities to prevent death and disease, or move forward based on incomplete evidence, risking opposition and unintended consequences.<sup>50</sup> In the midst of this uncertainty, consumer protection objectives could inform choices about which strategies to implement. If the public health benefits of a particular measure are uncertain according to available evidence, but the measure can also be supported by a strong consumer

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49. *Ibid* at 154.

50. See, e.g., Nicholas Freudenberg et al, “The State of Evaluation Research on Food Policies to Reduce Obesity and Diabetes Among Adults in the United States, 2000–2011” (2015) 12 *Preventing Chronic Disease* E182 at 2.

protection rationale (e.g., consumers' rights to information), that measure could be justified more easily than one that does not seem to serve any other objective.

Some risks and limitations of this approach should be acknowledged. The first is that reference to a broader set of objectives could actually make policy makers' tasks more difficult, particularly if it becomes necessary to decide which should take priority. Perhaps more seriously from a public health perspective, an approach that generally takes a neutral view of consumers' preferences might be problematic; if consumers do indeed prefer less healthy food (for example, because other values are more important to them, such as price or taste), then an approach that aims mostly at ensuring they can make choices consistent with those preferences may not be particularly helpful. Finally, it will be necessary to guard against the risk of consumer protection arguments being co-opted by industry or other opponents of regulation, who have used "putatively pro-consumer organizations"<sup>51</sup> and the rhetoric of personal responsibility to resist regulation.<sup>52</sup> Deciding how to intervene

Once a decision is made that there is sufficient justification to move forward with some form of regulation, analysis from a consumer protection perspective can also be useful in determining what type of regulatory strategy should be used and how regulations should be designed. Consumer protection law and policy have dealt with many questions that parallel debates in public health, such as whether mandatory disclosure of information will adequately serve people's needs or when direct regulation of product characteristics is needed.

Remedying information failures has traditionally been a central role for consumer policy.<sup>53</sup> Consumer protection law serves as a countervailing force against suppliers' motivation to withhold information or provide misleading information.<sup>54</sup> This can take the form of restrictions (such as prohibiting misleading or deceptive claims), mandated disclosure of information, or both.<sup>55</sup> Information-based strategies tend to be the least controversial, even among

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51. David M Studdert, Jordan Flanders & Michelle M Mello, "Searching for Public Health Law's Sweet Spot: The Regulation of Sugar-Sweetened Beverages" (2015) 12 PLoS Medicine e1001848 at 5.

52. Kelly D Brownell et al, "Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue" (2010) 29 Health Affairs 379 at 379-380.

53. Cartwright, *supra* note 1 at 21.

54. M Neil Browne et al, "Protecting Consumers from Themselves: Consumer Law and the Vulnerable Consumer" (2015) 63 Drake L Rev 157 at 159.

55. Cartwright, *supra* note 1 at 48-53.

proponents of a free market approach, since they can be linked directly to information asymmetry as a form of market failure and are consistent with the classical view of consumers as rational economic actors who make choices according to their preferences (so long as they are informed).<sup>56</sup> In order for these strategies to be effective, however, they must be implemented in a way that will meaningfully promote consumers' rights to make fully informed choices. A simple example of this, which could provide an analogy for nutrition disclosure, is unit pricing: proponents argue that the price per unit (as well as the total price) should be disclosed to consumers, so that they can easily compare prices across products and brands.<sup>57</sup> Consumer protection scholarship has also grappled with more complex issues, looking at the different needs of various groups of consumers and making use of research that seeks to understand how consumers perceive and process information. Increasingly, it is recognized that simply requiring the disclosure of more information is not sufficient, and in fact may be counterproductive.<sup>58</sup> Other mechanisms, like warnings, might be needed where mere disclosure of information is not adequate but we want to avoid unduly restricting consumers' choices by banning certain products.<sup>59</sup> More fundamental questions are raised by research examining cognitive biases and other behavioural phenomena that call into question the model of consumers as rational decision makers. Past efforts to identify particular groups of "vulnerable" consumers, based on age, education, or income, are now joined by the realization that *all* consumers are vulnerable given the inherent limits of their ability to process information and resist manipulation.<sup>60</sup> The challenges that these insights present for policy makers are far more fundamental and complex than addressing market failures.<sup>61</sup> Efforts to understand how consumer protection policy should respond to these challenges are highly relevant as public health policy confronts similar questions.<sup>62</sup> Regulating the provision of information is the first traditional response to challenges faced by consumers; a second

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56. *Ibid* at 49. See also Cranston, *Consumers*, *supra* note 5 at 19.

57. PM Holt, "Food Packaging and Labelling" in Duggan & Darvall, *supra* note 32, 57 at 63-64; François Decary-Gilardeau, *Unit Pricing: An Effective Tool?* (Montreal: Option consommateurs, 2010).

58. Hadfield, Howse & Trebilcock, *supra* note 4 at 158.

59. *Ibid* at 159.

60. See Hadfield, Howse & Trebilcock, *supra* note 4 at 144-145; Browne et al, *supra* note 54 at 176-190.

61. Lunn, *supra* note 44 at 323-327.

62. See e.g. Lunn, *supra* note 44; Karen Bradshaw Shulz, "Information Flooding" (2015) 48 *Ind L Rev* 755; Hans-W Micklitz, Lucia A Reisch & Kornelia Hagen, "An Introduction to the Special Issue on 'Behavioural Economics, Consumer Policy, and Consumer Law'" (2011) 34 *J Consumer Pol'y* 271.

is directly regulating the substance of transactions.<sup>63</sup> Examples of this can be found in consumer product safety standards and mandatory terms of consumer contracts, both of which are typical features of modern consumer protection laws. This type of response is more controversial, because it restricts freedom of contract to a much greater degree and can be perceived as paternalistic, since it removes options from consumers for their own benefit.<sup>64</sup> However, such measures can sometimes be justified as a response to market failure, by the need to correct the power imbalance between suppliers and consumers, or by appealing to community values and interests.<sup>65</sup> Where the consequences of consumers making a “bad” choice are sufficiently serious, mandatory standards and banning products that do not comply may be seen as the best response.<sup>66</sup> Growing recognition of the limits of regulating information disclosure may strengthen the case for other forms of regulation. If “as a class consumers are systematically unable to adequately process the information they need to make good decisions,” the law may need to provide more direct substantive protections instead.<sup>67</sup> Product bans are more likely to be considered appropriate if “consumers are unable to consciously accept the risks associated with a product,”<sup>68</sup> which it now seems might be the norm rather than the exception. All of these considerations are important for food regulation. In addition, it is important to recognize the limits of information-based strategies (e.g., regulation of food labelling), which provide the greatest benefits to “health-conscious, wealthier constituents” without addressing the needs of those who “must select foods based entirely on availability and affordability” and therefore “derive few, if any, benefits from transparency.”<sup>69</sup> Past examples could be used as models for potential new regulations in the food context, although criticisms of these approaches should also be kept in mind.<sup>70</sup> Historically, prescriptive standards for food products played a larger role than information disclosure: “legislative policy has reflected

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63. Hadfield, Howse & Trebilcock, *supra* note 4 at 134.

64. Cartwright, *supra* note 1 at 32-33. For example, if a consumer might have preferred buying a slightly less safe or lower quality product because it is cheaper, product standards may remove that option, for the consumer’s own protection.

65. *Ibid* at 36-37; Cranston, *Consumers*, *supra* note 5 at 27-28; Ziegel, *supra* note 33 at 269-270.

66. Ross Cranston, “Consumer Protection and Economic Theory” in Duggan & Darvall, *supra* note 32, 243 at 251.

67. Hadfield, Howse & Trebilcock, *supra* note 4 at 144-145.

68. James G Hodge & Megan Scanlon, “The Legal Anatomy of Product Bans to Protect the Public’s Health” (2014) 23 *Annals H L* 20 at 30.

69. Andrea Freeman, “Transparency for Food Consumers: Nutrition Labeling and Food Oppression” (2015) 41 *Am J L & Med* 315 at 316.

70. See, e.g., Ross Parish, “Consumer Protection and the Ideology of Consumer Protectionists” in Duggan & Darvall, *supra* note 32, 229 at 230-234.

a belief that the best way to look after the consumer was to control what goes into certain standard foods rather than leave judgments about the suitability of ingredients to the consumer.<sup>71</sup> Regulating package size or weight has been considered an acceptable way of ensuring consumers can understand price information.<sup>72</sup> It has also been suggested that there may be a place for laws to make it easier for vulnerable consumers to access products that are necessities, including “the creation of new products or means of supply.”<sup>73</sup> Applying these regulatory strategies to the context of healthy food would be controversial and face many challenges—not least of which would be the perennial question of how to evaluate the health risks of various products and ingredients. However, the fact that these strategies are considered reasonable in pursuit of other goals suggests that they ought not to be rejected out of hand as ways to better protect consumers’ health.

### *Conclusion*

This preliminary exploration of potential connections between consumer protection and public health has identified several ways in which these connections might be fruitful. In order to make best use of the synergies between consumer protection and public health, efforts to strengthen consumer protection laws and their enforcement should be accepted as a priority that would also benefit public health. Careful attention to the consumer protection objectives that are served by some food regulation measures would also allow health and consumer advocates to support each other’s initiatives. The contributions that consumer protection law and scholarship could make to the future development of regulatory strategies for healthier eating is a larger project that will require further analysis. The discussion here is intended to lay the foundation for a research agenda exploring the ways in which insights from consumer protection could be used to develop laws and policies enabling access to information and healthy options for all Canadians.

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71. Holt, *supra* note 57 at 68. Existing regulations already contain detailed prescriptions of the content of certain foods (though generally not for health-related purposes): *Food and Drug Regulations*, CRC, c 870, Part B.

72. See Holt, *supra* note 57 at 63-64.

73. Cartwright, *supra* note 1 at 31.



