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Statutory Regulation of Unfair Business Practices in Saskatchewan: Possibilities and Pitfalls

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I. AN OVERVIEW

A. INTRODUCTION

The introduction in March 1996 of the bill leading to the enactment of the Saskatchewan *Consumer Protection Act*[1] came as something of a surprise, at least to members of the academic legal community and presumably to others as well. The legislation establishes a comprehensive scheme of business practices regulation comprising Part II of the *CPA*, consolidated with the existing consumer protection legislation embodied in what was then the *Consumer Products Warranties Act*[2] and the *Unsolicited Goods and Credit Cards Act*,[3] now appearing as Parts III and IV of the *CPA* respectively. The latter statutes were enacted in the 1970s, the halcyon era of consumer protection law. Although a bill on trade practices was also proposed in 1976,[4] it was never adopted.

Since the 1970s, consumer law activism has waned in most Canadian jurisdictions to the point of virtual invisibility.[5] The renewal of interest in the

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1 S.S. 1996, c. C-30.1 [hereinafter *CPA*].

2 R.S.S. 1978, c. C-30.

3 R.S.S. 1978, c. U-8.

4 See Saskatchewan Department of Consumer Affairs, *Proposal for a Bill on Trade Practices*, 1976.

5 There are two notable exceptions to this observation. One is the relatively recent enactment of a *Business Practices Act* in Manitoba, *infra* note 6. The other is the initiative undertaken in Ontario in the late 1980s to draft and enact a comprehensive new Consumer and Business Practices Code. However, the draft code, which appeared in 1988, appears to have fallen off the Ontario government's legislative agenda. There are no indications that the project will be resurrected in the foreseeable future. See J.S. Zeigel, "Is Canadian Consumer Law Dead?" (1995) 24 Can. Bus. L.J. 417. For an analysis of the draft code itself, see the following companion

Saskatchewan legislature was thus an unexpected aberration from the current trend in this area. In view of the very significant commitment of public funding that would be required to fully realize its comprehensive scheme of consumer protection, it remains to be seen whether the *CPA* will have a significant practical impact. Its administrative remedies and quasi-criminal sanctions depend on direct funding for civil service personnel and support. The private remedies contemplated will rarely be invoked until such time as Saskatchewan consumers are apprised of their statutory rights through a comprehensive public awareness and education campaign. Under the current conditions of government fiscal restraint, meaningful implementation of the new legislation is left largely to the endeavours of an informed bar and bench.

This article is intended to spark the interest and support the efforts of lawyers, judges, and others who may have occasion to consider a legal response to objectionable business activities in the consumer marketplace. It might also be useful to those who are themselves engaged in the business of providing and marketing consumer goods and services, as well as their advisors. To those ends, the structure and effect of the legislation is described in general terms, questions of interpretation and application are discussed, and potential arguments of constitutional vulnerability are addressed. The exercise is practical rather than philosophical, although one would hope that the normative and ethical choices necessarily implicit in the legislation and its application are illuminated in the course of the analysis. This review will focus on Part II of the *Consumer Protection Act* since Parts III and IV do not depart in any substantive way from their statutory precursors.

The unfair business practices provisions embodied in the new legislation reflect the regulatory schemes adopted by similar statutes in other provinces without exactly replicating any of them.[6] Part II appears to represent a fusion of most of the features of those statutes, although some of its provisions are unique to Saskatchewan. The product of this creative synthesis is an extremely broad range of private, administrative, and quasi-criminal remedies. Case law relating to the relatively long-established statutes of other jurisdictions may

commentaries: M.G. Baer, "The Consultation Draft of the Consumer and Business Practices Code" (1993) 21 Can. Bus. L.J. 254 and R.J. Wood, "An Analysis of the Draft Consumer and Business Practices Code as a Project of Consolidation" (1993) 21 Can. Bus. L.J. 274.

6 The regulation of unfair business practices is addressed in the following statutes: the *Trade Practices Act*, R.S.B.C. 1996, c. 457; the *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3; *The Business Practices Act*, S.M. 1990-91, c. 6; *The Trade Practices Inquiry Act*, R.S.M. 1987, c. T110; the *Business Practices Act*, R.S.O. 1990, c. B-18; the *Trade Practices Act*, R.S.N. 1990, c. T-7; the *Business Practices Act*, R.S.P.E.I. 1988, c. B-7; and the *Consumer Protection Act*, R.S.Q. 1981, c. P-40. The structure and approach of the Quebec legislation differs significantly from that of the common-law provinces. No attempt is made to offer comparisons between the Quebec and the Saskatchewan statute, nor to draw upon the Quebec case law.

be useful as an aid to interpretation of Saskatchewan's legislation, but it is relatively scarce. Furthermore, differences in statutory wording and structure demand that care be taken in applying extra-provincial authorities to Saskatchewan cases. Fortunately, the Saskatchewan provisions quite closely resemble those of British Columbia's *Trade Practices Act*,[7] which has generated more reported cases than any other provincial legislation of this kind.[8]

Part II of the *Consumer Protection Act* is directed to the regulation of "unfair practices" engaged in by suppliers in connection with consumer transactions. After the opening definitional provisions, the *CPA* describes the kind of conduct that constitutes an unfair practice within the meaning of the statute. It goes on to lay out a tripartite structure comprised of administrative powers and remedies, private consumer remedies, and quasi-criminal sanctions. These are apparently intended to serve a threefold purpose: to prevent the occurrence or continuation of unfair practices; to compensate consumers injured by such practices; and to penalize their perpetrators, presumably as an inducement to the adoption of virtuous business practices.

B. THE TRIPARTITE STRUCTURE OF PART II

The basic structure of Part II will be briefly outlined as a framework for the discussion that follows. The three kinds of remedial and penal action incorporated in Part II may be designated administrative, private, and quasi-criminal. These offer alternative or, in some circumstances, cumulative responses to identified past, present, or anticipated future "unfair practices" committed by a supplier.

The administrative component of the statutory structure entails action undertaken by the director to be appointed by the minister "to whom for the time being the administration of this Act is assigned."[9] He or she may investigate the occurrence or potential occurrence of unfair business practices falling within the scope of the *CPA*, take a variety of actions or make orders to prevent such practices or their continuation, and institute or defend a court action on behalf of consumers affected by unfair practices. The director's authority and the range of regulatory devices available to him or her under

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7 *Supra* note 6.

8 There are, however, some differences between the British Columbia and Saskatchewan legislation. Most noteworthy are: (a) definitional differences affecting the scope of the *CPA*'s application; (b) the British Columbia *Act*'s structural differentiation between deceptive acts or practices and unconscionable acts or practices; (c) the absence in British Columbia of provision for a mandatory compliance order issued by the Director; and (d) the absence in Saskatchewan of a provision comparable to British Columbia's s. 18, which contemplates applications for an injunction by persons not directly affected by the deceptive or unconscionable practice to be enjoined.

9 *Supra* note 1, s. 3(e). See also ss. 3(c), 9.

the *CPA* are extremely broad, contemplating both independent and judicially-assisted action.

The private component of Part II consists of the cause of action extended to a consumer "who has suffered a loss as a result of an unfair practice."[10] Action against a supplier may be commenced by the consumer directly or, as indicated above, through the agency of the director. An extensive choice of remedial orders is available to the court in such a proceeding.

The quasi-criminal component of Part II hinges on s. 23, which creates a number of offences punishable on summary conviction. Of primary significance is the offence of an "unfair practice" committed by a supplier, his or her employee, agent, salesperson, or representative.[11] Other offenses relate to the failure to furnish information or to comply with orders made under the *CPA*.

Even this cursory overview reveals that Part II embodies a very comprehensive range of preventive, compensatory, and punitive devices. However, the extent to which these devices will actually be invoked by the director, consumers, and justice officials is difficult to predict. Though Part II has been in effect since January 1997, the scarcity of searchable written decisions in which it is mentioned may be an indication of its practical impact.

C. SCOPE AND APPLICATION OF PART II

Part II applies "to any transaction or proposed transaction involving goods or services"[12] other than a transaction prescribed by regulation.[13] "Goods" and "services" are defined respectively as personal property or services ordinarily used or provided for personal, family, or household purposes that have been or may be in any way provided by a supplier to a consumer.[14] A "consumer" is rather circularly defined as "an *individual* that participates or may participate in a transaction involving goods or services."[15] A "supplier" is essentially any person carrying on the business, as principal or agent, of

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10 *Ibid.*, s. 14(2).

11 The wording used to create the offence is circuitous. Section 23(1) provides that no person shall contravene any provision of this Part. Sections 7(1) and 7(2) prohibit the commission of an unfair practice. Thus, the commission of an unfair practice falls within s. 23(1) and is declared an offence by s. 23(2).

12 *Supra* note 1, s. 4.

13 Currently, the regulations exempt only transactions or proposed transactions respecting a security as defined in *The Securities Act, 1988*, and transactions or proposed transactions governed by *The Saskatchewan Insurance Act, The Trust and Loan Corporations Act*, and *The Credit Union Act, 1985*. See *The Consumer Protection Act Regulations*, c. C-30.1, Reg. 1, S. Gaz. 1996.II.967.

14 *Supra* note 1, ss. 3(d) and 3(f).

15 *Ibid.*, s. 3(a) [emphasis added].

providing goods or services on a retail, manufacturing, or distribution level.[16] To summarize, Part II therefore addresses unfair practices committed by a retail level seller, a distributor, or a manufacturer, in connection with a transaction involving the acquisition or potential acquisition of personal or household goods or services by a consumer.

Two features of Part II's scope merit particular comment. First, it applies to transactions involving an individual acquiring or considering the acquisition of goods or services of the kind prescribed. The application of the *CPA* is thus not determined by the actual use to which goods or services will be put by the individual in question, or to the character of that individual, but rather by the character of the goods or services.

The implications of this definitional scheme may be demonstrated by a simple hypothetical. Assume that Jane Doe purchases a computer for use in her unincorporated business. Part II will apply to the transaction if a computer is characterized as something "ordinarily used for personal, family or household purposes." Computers clearly are used for such purposes, notwithstanding that they may also be used in a business. The transaction, therefore, apparently falls within the scope of Part II. This occurs even though the computer is not in this instance intended for personal, or what we would ordinarily consider "consumer", use. Many other goods—automobiles, vacuums, calculators, and other such items—are similarly multi-purpose in nature. A transaction relating to these items will trigger the application of Part II provided that the transaction involves an individual and not a corporation or other legal form of association or organization.[17]

The definitional approach of Part II may be contrasted with Part III of the *CPA*, comprised of a slightly restructured version of the previous *Consumer Products Warranties Act*. That Part applies to the purchase or lease by "consumers" of "consumer products", defined as goods "ordinarily used for personal, family or household purposes,"[18] but specifically excluding the purchase or lease of such products for the purpose of resale, for use in a business, or for predominantly business purposes.[19] The business practices legislation of

16 See the full definition in *ibid.*, s. 3(g).

17 Although this appears to be the clear intent accompanying use of the word "individual", one British Columbia court nevertheless applied the similarly worded British Columbia statute to the purchase of a car where the purchaser was nominally an incorporated ranch, even though the car was clearly intended for the personal use of the corporation's president. The judge took the view that since *Roget's Thesaurus* equated "individual" with "person", the *Act* could be applied to a transaction involving a "person" as defined by the British Columbia *Interpretation Act*. See *Gray* v. *Woodgrove Chevrolet Oldsmobile Ltd.*, [1985] B.C.J. No. 1648 (B.C. Co. Ct.), online: QL (BCJ).

18 *Supra* note 1, s. 39(e).

19 See definition of "consumer", *ibid.*, s. 39(d).

other provinces similarly applies only to the purchase of consumer goods or services for personal use, with the exception of the British Columbia *Trade Practices Act*, which also extends to the acquisition of personal property by an individual in connection with limited kinds of first-time business opportunity.[20]

Whether the extension of Part II of the Saskatchewan *CPA* to transactions relating to unincorporated businesses was deliberate or unintentional, it is the clear consequence of a literal application of the definitional provisions. As a matter of policy, it may be justified by a concern to shield small business owners who may be as vulnerable to unscrupulous marketplace practices in connection with their business activities as they are in connection with their personal lives. However, the association of the Part II protections with the nature of the goods without regard to their intended use does appear to be rather idiosyncratic. An individual carrying on an unincorporated business would not be protected if the transaction in question relates to an item that is not "ordinarily used for personal, family or household purposes," such as a forklift or dictation equipment. Similarly, an individual acquiring goods for personal use will not be protected if the goods themselves do not fall within that description, although such cases must be rare.

The rather general definition of the terms "goods" and "services" leaves some room for judicial interpretation in delineating the scope of Part II. "Goods" are "personal property, including fixtures". Unlike the corresponding legislation of other provinces, the Saskatchewan *CPA* does not refer specifically to any kind or kinds of intangible personal property, such as those involved in credit or loan transactions.[21] However, since intangibles are "personal property", one must assume that they fall within the *CPA*, even though their identification with "goods" is at best counter-intuitive. The fact that certain transactions involving intangibles are excluded by the regulations[22] supports the view that intangibles must fall within the scope of Part II. Unfortunately, the wording chosen by the statutory drafters might easily mislead an inattentive or legally unsophisticated reader.

While the term "goods" is superficially underinclusive, the term "services" may be regarded by some as being potentially overinclusive. Lawyers might well ponder the probability that professional services are "services ordinarily

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20 *Supra* note 6, s. 1, "consumer transaction". The application of this rather obscure wording was considered in *Tropeano* v. *B.& H. Industries Inc. and Berenbaum* (1979), 10 B.C.L.R. 1 (C.A.).

21 The British Columbia *Trade Practice Act*, for example, specifically encompasses intangible property, including credit. See *supra* note 6, s. 1, "personal property". In contrast, the Newfoundland *Unfair Trade Practices Act* specifically excludes choses in action, money, and securities. *Supra* note 6, s. 2(d).

22 *Supra* note 13.

provided for personal...purposes that have been or may be...provided by a supplier...," the latter being simply a person who carries on the business of providing goods or services on a retail basis. Several other provinces have chosen to explicitly restrict the services covered by their legislation to those relating to goods, recreational facilities, and educational services.[23] Similarly, the warranty protection offered by Part III of the Saskatchewan *CPA* extends only to consumer goods. Nevertheless, one must assume that the unrestricted terminology appearing in Part II is to be read literally, unless grounds can be found for a narrower interpretation.

A second notable feature of the scope of Part II is its application, according to s. 4, to a "transaction or proposed transaction".[24] The term "transaction" is not defined.[25] Both terms are regrettably imprecise. However, they must be intended to indicate that the *CPA* focuses not on the actual contractual or other acquisition of consumer goods or services, but on objectionable conduct engaged in by a supplier in connection with any aspect of marketing, promotion, sale, or disposition of such products. The statutory focus on conduct rather than contract is further confirmed by s. 8, although in terms that unfortunately integrate rather loosely with those of s. 4. Section 8(1) indicates that an unfair practice may occur before, during, or after a transaction or whether or not a transaction takes place. Since s. 4 declares the *CPA* applicable to "transactions" or "proposed transactions", the suggestion that it operates before, after, or in the absence of a "transaction" is technically very ambiguous. However, one who persists in unraveling the semantic tangle created by what seems to be excessive zeal on the part of the drafters must conclude that Part II is intended to apply to any conduct amounting to an unfair practice that occurs in connection with the marketing, distribution, or sale of consumer goods and services, whether or not a sale or acquisition actually occurs in a particular instance.

The inclusion of manufacturers and distributors, as well as retail level vendors, in the definition of "supplier" is consistent with the focus on the conduct in question rather than the occurrence of a sale or other form of acquisition. Privity of contract is simply not an issue, since the operation of Part II is not dependent upon a contractual relationship, though one will

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23 See, for example, the Alberta *Unfair Trade Practices Act*, *supra* note 6, s. 1(g).

24 This wording is mirrored in s. 5, which declares it an unfair practice for a supplier, "in a transaction or proposed transaction," to engage in the specified kinds of misconduct.

25 Contrast the similarly structured British Columbia, Alberta, and Newfoundland statutes, *supra* note 6, which specifically define a "consumer transaction". In British Columbia, for example, a transaction is "(a) sale, lease, rental, assignment, award by chance or other disposition or supply" of consumer goods or services, or "(b) a solicitation or promotion by a supplier with respect to any of the foregoing." See s. 1, "consumer transaction".

often exist. This point is confirmed by s. 8(3), which provides that a supplier may be found liable for conduct amounting to an unfair practice within the meaning of the statute, notwithstanding that it is directed to the public at large and there is no privity of contract between the supplier and any specific consumer.

II. THE MEANING OF "UNFAIR PRACTICE" IN PART II

A. THE STATUTORY DEFINITION

The commission by a supplier of an "unfair practice" can lead to action under any or all of the three remedial streams of Part II. Such conduct may invoke the preventive and restraining devices available to the director, will found an action by a consumer who suffers a loss as a result of it, and constitutes an offence punishable on summary conviction. Even the potential occurrence of an unfair practice justifies intervention by the director.

"Unfair practices" are defined in general terms in s. 5. Section 6 sets out a list of particular kinds of conduct constituting unfair practices. This list is not exhaustive, comprising, as it does, merely an enumeration of instances of unfair practice supplementary to the general definition of such practices in s. 5.[26] The pertinent provisions of s. 5 are reproduced for convenience of reference:

> 5. It is an unfair practice for a supplier, in a transaction or proposed transaction involving goods or services, to:
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> (a) do or say anything, or fail to do or say anything, if as a result a consumer might reasonably be deceived or misled;
>
> (b) make a false claim;
>
> (c) take advantage of a consumer if the person knows or should reasonably be expected to know that the consumer:
>
> (i) is not in a position to protect his or her own interests; or
>
> (ii) is not reasonably able to understand the nature of the transaction or proposed transaction.

The inclusion of both deceptive or misleading and unconscionable conduct within the singular concept of unfair practice is structurally somewhat different from the approach adopted in most other provinces, which categorize the two general kinds of misconduct separately.[27] However, there is little

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26 See *supra* note 1, s. 5(d).

27 See British Columbia *Trade Practices Act*, Ontario *Business Practices Act*, Newfoundland *Trade Practices Act*, *supra* note 6. Contrast the Alberta *Unfair Trade Practices Act*, *supra* note 6, which utilizes the singular concept adopted in the Saskatchewan legislation.

substantive difference in the definition of the kind of conduct regulated by the various provincial statutes.

B. DECEPTIVE OR MISLEADING CONDUCT—THE QUESTION OF KNOWLEDGE

Most of the case authority addressing the interpretation and application of the comparable provisions of unfair business practices legislation emanates from British Columbia. The British Columbia equivalent of s. 5(a) provides:

> 3(1) For the purposes of this Act, a deceptive act or practice includes
>
> (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and
>
> (b) any conduct having the capability, tendency or effect of deceiving or misleading a person.

It is clear that, in British Columbia, a deceptive act or practice under s. 3 can occur notwithstanding the absence of an intention on the part of a supplier to deceive or mislead a consumer. In *Findlay* v. *Couldwell*,[28] Ruttan J. of the British Columbia Supreme Court said, in an *obiter* passage quoted in a number of more recent cases, that:

> [A] deceptive act does not necessarily involve deliberate intention to deceive. Deception need only have the capability of deceiving or misleading and it may be inadvertent yet still sufficient to void the transaction under the statute, which is directed to the welfare of the consumer, not the punishment of the vendor.[29]

Similarly, in *Mikulas* v. *Milo European Cars Specialists Ltd.*,[30] the British Columbia Supreme Court said that a car dealer would have been liable under the Act for making false statements about a car sold to the plaintiff even if he had honestly believed the representations he made.[31]

The view that the supplier's state of mind or knowledge of the facts is irrelevant to the commission of an unfair practice under s. 5(a) is consistent

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28 (1976), 69 D.L.R. (3d) 320.

29 *Ibid.* at 325.

30 (1993), 52 C.P.R. (3d) 1 at 10, aff'd (1995), 60 C.P.R. (3d) 457 (B.C.C.A.).

31 See also *Van Patten* v. *Squamish Ford Sales Ltd.*, [1994] B.C.J. No. 2000 (B.C.S.C.), online: QL (BCJ) and *Alberta (Director of Trade Practices)* v. *Edanver Consulting Ltd.*, [1993] 6 W.W.R. 718 at 723 (Alta. Q.B.). In the latter case, the Court indicated that the vendor's state of mind is relevant only with respect to the question of exemplary or punitive damages.

with the objective quality of the wording that both the British Columbia and Saskatchewan legislation employ. Moreover, the explicit reference to actual or imputed knowledge in s. 5(c) and in some of the categories of particular kinds of unfair conduct contained in s. 6[32] confirms that knowledge or intention is not required under subs. (a). However, the doctrinal waters on this point are muddied by the vaguely worded s. 7(5), which provides that, "In determining whether or not a person has committed an unfair practice, the reasonableness of the actions of that person in those circumstances is to be considered."

There is no equivalent of s. 7(5) in British Columbia or elsewhere. In provinces other than Saskatchewan, a supplier is apparently not excused by acting reasonably if his or her conduct is misleading or deceptive. This is also true in connection with the civil remedy granted under the *Competition Act*[33] to persons who have suffered loss or damage as a result of conduct contrary to provisions of that *Act*, including s. 52(1)(a). The pertinent wording of that section provides that "No person shall, for the purpose of promoting ... the supply or use of a product ... make a representation to the public that is false or misleading in a material respect." In *R.* v. *Wholesale Travel Group Inc.*,[34] the Supreme Court of Canada considered the mental component involved in commission of an offence through violation of that provision (formerly s. 36(1)(a)). It concluded that proof of commission of the act alone establishes the offence, unless the accused can prove that he or she has satisfied the requirements of the "due diligence" defence contained in s. 60(2) (formerly s. 37.3(2)). The Court pointed out that regulatory offences of strict liability are designed to protect the public, rather than to condemn and punish wrongful conduct. The focus is thus on the effect of the conduct, not on the perpetrator's state of mind. Since the "due diligence" provision of the *Competition Act* is available only as a defence to the prosecution of charges under the *Act* and is implicitly not relevant to civil liability, the prohibition

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32 For example, s. 6 uses the following wording [emphasis added] in connection with specified categories of unfair practice:

> (e) representing that goods...have a particular history or use *if the supplier knows it is not so;*
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> ...
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> (g) representing that goods or services are available...*if the supplier knows or can reasonably be expected to know it is not so....*

Other categories of unfair practice are described in s. 6 without wording referable to actual or imputed knowledge, the clear implication being that where no such wording is included, the act itself constitutes an unfair practice, regardless of the supplier's state of mind.

33 R.S.C. 1985, c. C-34.

34 [1991] 3 S.C.R. 154.

against misleading advertising clearly operates in the civil context with no requirement of intention or negligence on the part of a supplier.[35]

The implication of the statutory qualification found in s. 7(5) is unclear. While it appears that a supplier is exonerated of responsibility for deceptive or misleading conduct if he or she acted reasonably, the Act offers no guidance as to what is or is not reasonable, nor how reasonableness relates to state of mind. Is a supplier who honestly believes a misrepresentation about her product to be true, but could by making inquiries have determined its falsity, liable under s. 5(a)? Is a supplier whose conduct is consistent with ordinary business practices excused, even though that conduct might reasonably mislead a consumer? Has a supplier committed an unfair practice if she believes that a particular consumer is not being misled, though the conduct in question has the capacity to mislead a reasonable consumer? The unique problems presented by this provision require careful consideration on the part of those charged with its interpretation and application. Although s. 7(5) offers some comfort to suppliers faced with the challenges of the new legislation, the ambiguity it creates exacerbates the already difficult task of determining whether a particular incident or course of conduct does or does not constitute an unfair practice.

Like subs. (a) of s. 5, subs. (b) declares that the commission of an act, namely, the making of a false statement, is an unfair practice. Again, the unqualified nature of the wording implies that knowledge of the falsity of the claim is not a requirement. If the supplier has acted reasonably in making the claim, she may claim exoneration under s. 7(5).

C. THE DUTY OF DISCLOSURE

A second feature of the British Columbia case law worth noting is the judicial view of a seller's obligation to disclose information to a consumer. The Saskatchewan legislation, in terms similar to those of the British Columbia *Act* and others, makes it an unfair practice to "fail to do or say anything, if as a result a consumer might reasonably be deceived or misled."[36] In *Rushak* v. *Henneken*,[37] the British Columbia Court of Appeal concluded that the defendant car dealer had committed an unfair practice, in part by failing to indicate to the consumer buyer that the car in question might possibly be afflicted with rust beneath the undercoating, given its history, although the dealer did not know that it was in fact rusted. That failure was exacerbated by the use of general laudatory language to describe the car (that it was "a

35 Part II extends a comparable due diligence defence to a supplier charged with the commission of an offence under the *Act*. The nature of the offence created by s. 23 is discussed *infra*.

36 *Supra* note 1, s. 5(a).

37 (1991), 84 D.L.R. (4th) 87.

good vehicle", "one of the best of its kind", and "very nice"), and was not excused by the salesman's suggestion that the car be taken to an independent shop for inspection, which it was. In the result, the dealer's conduct fell within the general test articulated earlier—that is, that it had "the capability, tendency or effect of misleading" the consumer into purchasing the car. This involves more than an obligation to disclose known facts that may influence a consumer. The court imposed a positive duty to ascertain pertinent facts, presumably as a step preliminary to their disclosure.[38]

The duty of disclosure contemplated by Part II is the antithesis of the traditional common-law attitude of *caveat emptor*, or "buyer beware". Furthermore, it appears to be significantly broader in scope and application than the obligation contemplated by the developing case law establishing common-law duties of disclosure in some contractual contexts.[39]

A supplier is not, however, required to disclose information that is not likely to affect a consumer's decision regarding the acquisition of goods or services. It was established soon after enactment of the British Columbia legislation in *Director of Trade Practices* v. *Household Finance Corp. of Canada*[40] that:

> Having in mind the examples of deceptive acts given in s. 2(3) [now s. 3(3)], I conclude that an act having the tendency of deceiving or misleading a person is one that tends to lead that person astray into making an error of judgment.[41]

Applied to the facts of that case, the principle so stated meant that the seller's failure to disclose to buyers the assignment of their conditional purchase agreements to a finance company was not an unfair practice. The absence of that information would not have led buyers "into making an error of judgment" with respect to their decision to purchase the products in question.

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38 The imposition of a positive duty of disclosure is also illustrated by *Schryvers* v. *Richport Ford Sales Ltd.*, [1993] B.C.J. No. 1120 (B.C.S.C.), online: QL (BCJ) and *Yuen* v. *Regency Lexus Toyota Inc.* (1994), 30 C.P.C. (3d) 315 (B.C.S.C.). In those cases, the failure of car dealers to explain to the plaintiff purchasers the difference between a cash purchase and the acquisition of a car under a financing lease constituted deceptive and, therefore, unfair practices.

39 For a comprehensive discussion of the pre-contract duty to disclose, see *Opron Construction Co.* v. *Alberta* (1994), 151 A.R. 241 (Q.B.). The failure to disclose information in cases falling within provincial business practices legislation has been declared an unfair practice in a number of cases. For a representative sampling, see *Eby* v. *J.S. Saville Holdings Inc.*, [1997] O.J. No. 4623 (Ont. Gen. Div.), online: QL (OJ); *Arnold* v. *Gen-West Enterprises Ltd.* (1996), 112 Man. R. (2d) 306 (Q.B.); *Schryvers*, *supra* note 38.

40 [1976] 3 W.W.R. 731 (B.C.S.C.).

41 *Ibid.* at 736.

D. THE CREDULOUS CONSUMER AND THE UNCONSCIONABILITY PROVISION

The British Columbia courts have also considered the question of whether the misleading or deceptive quality of a supplier's conduct is to be judged against the standard of the ordinary alert consumer or against that of the unsophisticated consumer. In *Stubbe* v. *P.F. Collier & Son Ltd.*,[42] a case involving the notorious door-to-door encyclopedia salesman, the court said, "In my view, the provisions of the *Act* must be construed so as to protect not only alert, potential customers, but also those who are not alert, are unsuspicious and credulous."[43]

The wording of the Saskatchewan *CPA* differs slightly from the British Columbia provision under consideration in *Stubbe*, in that an unfair practice is committed under s. 5(a) if a consumer might *reasonably* be deceived or misled. This suggests that a supplier should not be found to have committed an unfair practice where only exceptionally unsophisticated consumers might have been deceived or misled by his or her conduct. However, the fact that a consumer could have discerned the truth had he or she been less trusting should not exonerate the supplier. In *Stubbe*, the Court quoted a vintage decision of the United States Supreme Court on this point, as follows:

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.[44]

There is no doubt that where a particular consumer is patently vulnerable, exploitation of that vulnerability will constitute an unfair practice within the third branch of s. 5.[45] Section 5 declares it an unfair practice for a supplier to:

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42 (1977), 74 D.L.R. (3d) 605 (B.C.S.C.).

43 *Ibid.* at 619.

44 *Ibid.* See also *Federal Trade Commission* v. *Standard Educational Society*, 302 U.S. 112 at 116 (1937).

45 *Bank of Montreal* v. *Minshull*, [1994] B.C.J. No. 3189 (Prov. Ct. (Civ. Div.)), online: QL (BCJ), illustrates that a supplier may be found to have committed an unfair practice on the basis of unconscionable conduct under that branch of the definition, even though the consumer was not deceived or misled.

(c) take advantage of a consumer if the person[46] knows or should reasonably be expected to know that the consumer:
  (i) is not in a position to protect his or her own interests; or
  (ii) is not reasonably able to understand the nature of the transaction or proposed transaction.

This branch of s. 5 is in essence a statutory formulation of the principles of unconscionability, although it is somewhat broader in scope than the common-law doctrine. The concept of unconscionability is also much more potent in the statutory context, since it gives rise to a claim for damages and other relief, as well as potentially rendering a contract concluded in such circumstances unenforceable against the disadvantaged party.

Section 5(c) differs notably from subss. (a) and (b), both in its incorporation of a mental component of actual or imputed knowledge on the part of the supplier, and in its requirement that an identifiable consumer has actually been taken advantage of. In contrast, an unfair practice within s. 5(a) is committed if a consumer *might* reasonably be deceived or misled. That wording clearly indicates that a supplier can be found to have committed an unfair practice under s. 5(a) without any evidence that a consumer was actually misled by the supplier's conduct.

E. THE RELEVANCE OF A CONTRACTUAL EXCLUSION OR LIMITATION PROVISION

If a consumer has entered into a contract of purchase under the influence of conduct that can be characterized as an unfair practice; the presence of an exclusionary provision in the contract document should not preclude the award of a remedy under Part II. However, some courts have taken a different view.

The issue will typically arise in a case in which a seller has made oral representations to a buyer about the quality or condition of goods sold or about the warranty coverage that he or she may expect, in the face of a written contract providing that goods are sold "as is", or that there are no warranties or representations affecting the goods other than those specifically acknowledged therein. In *Porelle* v. *Eddie's Auto Sales Ltd.*,[47] the Court considered a case involving the purchase of a used automobile. During the test drive the plaintiff buyer noted that the engine stalled a few times, and when he

46 The use of the word "person" rather than "supplier" here appears to be a lapse in drafting.
47 (1996), 138 Nfld. & P.E.I.R. 66 (P.E.I. S.C. (T.D.)).

mentioned this to the salesman he was told that it probably needed a tune-up. He experienced difficulties with the vehicle very shortly after purchasing it, and within a month had to replace the engine. The judgment of Deroches J. is directed primarily to the issue of whether the contractual exclusion clause, of which the plaintiff was admittedly aware, relieved the seller of responsibility for the engine replacement on the grounds of breach of an implied warranty of fitness. The Court concluded that the written exclusion of all express, statutory, and implied warranties and representations was effective. With respect to the plaintiff's claim under the *Business Practices Act*,[48] Desrochers J. stated without discussion that the *Act* did not advance the plaintiff's claim. The Court referred to and applied the reasoning adopted in several other cases, all of which addressed the common-law principles of "fundamental breach" as they related to the effectiveness of an exclusionary provision.[49]

The conclusion in *Porelle* is clearly wrong. If the seller's suggestion that the car's engine merely needed a tune-up was capable of misleading the plaintiff buyer on a matter likely to influence his purchasing decision, an unfair practice was committed. Had no such representation been made, the plaintiff would very likely have made further investigation of the problem he had observed or simply not purchased the vehicle. The legislation is obviously intended to address just this kind of situation.[50] The seller induced a purchase by implicitly misrepresenting the condition of the vehicle and then purported, through the stratagem of a contractual exclusion, to escape responsibility for any defect, including a defect relating to the very subject matter of the misrepresentation. Though the buyer knew that the contract disclaimed any warranty, it is highly unlikely that he understood it to negate a specific statement about the condition of the engine—a fact highly material to a decision to spend over four thousand dollars on a used vehicle. If the buyer's knowledge of written disclaimer provisions is to be taken into account at all

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48 *Supra* note 6, ss. 2, 3, and 4.

49 The cases relied upon were: *Gafco Enterprises Ltd.* v. *Schofield*, [1983] 4 W.W.R. 135 (Alta. C.A.); *Peters* v. *Parkway Mercury Sales Ltd.* (1975), 58 D.L.R. (3d) 128 (N.B. S.C. (A.D.)); and *Feucht* v. *Paccar of Canada Ltd.* (1985), 61 A.R. 328 (Alta. Q.B.). In *Gafco*, the *Unfair Trade Practices Act* of Alberta, *supra* note 6, was pleaded, but not pursued at trial or raised on the appeal. In *Peters* and *Feucht*, there was no reference at all to unfair business practices legislation. The court also quoted from Lord Denning's judgment, directed towards the statutory warranty of fitness for purpose, in *Bartlett* v. *Sydney Marcus Ltd.*, [1965] 2 All E.R. 753 (C.A.), another case involving the purchase of a used vehicle. He said at 755 that "[a] buyer should realize that, when he buys a secondhand car, defects may appear sooner or later; and, in the absence of an express warranty, he has no redress." Assuming that this is generally true, the buyer's realization that a used car dealer has no responsibility for defects in a used vehicle presupposes that the dealer has not given any indication that the defect that in fact materializes is unlikely.

50 Like the statutes of the other provinces, the Saskatchewan *CPA*, in s. 32, invalidates any attempt to contract out of the protections it offers.

in such circumstances, it must be only in connection with the court's decision regarding the appropriate remedy.

The correct result was reached by the British Columbia Supreme Court on the materially similar facts of *Findlay* v. *Couldwell*.[51] The Court granted damages under the British Columbia *Trade Practices Act*[52] on the grounds of a salesman's misleading representation that the motor of a vehicle purchased by the plaintiff was in "A-1" condition. The motor blew up shortly after the purchase. The Court apparently did not view the exclusionary provision in the contract as relevant to the claim for breach of statute, imposing liability even in the absence of evidence of an intention on the salesman's part to deceive the buyer.[53]

F. SUPPLIER BEWARE

The breadth of ss. 5 and 6 may be applauded from a consumer protection perspective but will no doubt trouble the Saskatchewan business community. The line between acceptable promotional conduct and culpable unfair practices may be difficult to draw, and its demarcation in particular cases invites the exercise of considerable judicial subjectivity. The relatively broad exposure of suppliers to liability under the *CPA* will be particularly disturbing to those managing large enterprises, since suppliers are liable for the conduct of their employees, agents, and representatives,[54] whose activities may be difficult to monitor. The potency of the provisions already discussed is amplified by the additional statutory stipulations that the general impression given by an alleged unfair practice may be considered in determining whether a violation of the *CPA* has occurred[55] and that an unfair practice may consist of a single act or omission.[56] These plainly oblige Saskatchewan suppliers to develop and implement consistently supervised ethical sales and marketing practices.

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51 *Supra* note 28.

52 *Supra* note 6.

53 A similar result was reached in *Sandilands* v. *Guelph Datson (1980) Ltd.* (1981), 35 O.R. (2d) 25 (Co. Ct.). The seller's failure to fulfil a promise to safety check the car was a breach of the Ontario statute, and rescission of the contract was awarded, in spite of the existence of a contractual exclusion. The question of whether the contractual provision might affect either the finding of breach or the remedy granted was not discussed.

54 *Supra* note 1, ss. 7(2), 7(3). In *Stubbe*, *supra* note 42, the court held that the defendant corporation was responsible for misrepresentations made by its employees even if they were not authorized and were not consistent with the defendant's sales protocol.

55 *CPA*, *supra* note 1, s. 7(4).

56 *Ibid.*, s. 8(2).

III. THE CONSUMER'S REMEDIES FOR LOSS CAUSED BY AN UNFAIR PRACTICE

Part II of the *Consumer Protection Act* is most likely to engage the attention of Saskatchewan lawyers through the invocation of the provisions conferring a right of action upon "[a] consumer who has suffered a loss as a result of an unfair practice".[57] Pursuant to s. 14, a consumer may institute an action against a supplier in a court, or under s. 15, the director may do so on a consumer's behalf. Section 16 enables the court to make a broad range of remedial orders where an unfair practice is found to have been committed.

The "court" generally referred to in Part II is the Court of Queen's Bench.[58] However, for purposes of the civil action created by sections 14 through 16, the term includes the Provincial Court of Saskatchewan "where the action or relief sought is within the jurisdiction of that court pursuant to *The Small Claims Act*."[59]

The cause of action created by s. 14 is established simply by proof that the consumer commencing the action has suffered a loss as a result of an unfair practice committed by a supplier. Since "loss" is not defined, it remains for the court to determine whether an economic loss is required or whether injured dignity or other intangible losses alone may suffice. Though contract law has traditionally awarded damages for such injuries as hurt feelings and emotional disappointment only where the expectation of emotional satisfaction is part of the benefit contracted for,[60] Part II's general departure from contract-based liability may justify a different approach. Notably, s. 25(1), providing for a compensatory order auxiliary to conviction of a supplier of an offence under Part II, refers to "compensation for *pecuniary* loss suffered by the aggrieved consumer as a result of the commission of the offence" [emphasis added]. Whether the omission in s. 14 of a similarly restricted reference to pecuniary loss implies that the section contemplates action for non-pecuniary losses alone is unclear. It is, however, clear that emotional outrage and humiliation may be recognized in an award of punitive or exemplary damages, provided for in s. 16(1)(b), once the cause of action is established.

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57 *Ibid.*, s. 14(2).

58 *Ibid.*, s. 3(b).

59 *Ibid.*, s. 14(1).

60 For a recent summary of the development of the common law on this point, see *Warrington* v. *Great-West Life Assurance Co.*, [1996] 10 W.W.R. 691 (B.C.C.A.). See also *Wallace* v. *United Grain Growers* (1997), 152 D.L.R. (4th) 1 (S.C.C.).

Although the *CPA* does not state that the commission of an unfair practice constitutes a defence to an action by a supplier against a consumer in connection with a contract arising from the circumstances in which the unfair practice occurred, that is the implicit corollary of the consumer's right to commence an action. Section 15(1)(c) expressly, if rather awkwardly, contemplates the defence by the director, on a consumer's behalf, of "any court action brought by the supplier against the consumer for any transaction." Further, s. 16(1) confers jurisdiction on the court to make a variety of remedial orders against a supplier "[w]here the court finds that a supplier has committed an unfair practice." Since that jurisdiction is not by its terms limited to actions commenced by a consumer, it would appear to extend to any proceeding before the court in which the commission of an unfair practice is established and would mandate relief in favour of a consumer.

The remedies that may be granted by the court under s. 16 include: an order for restitution; an order for damages (including punitive or exemplary damages); an injunction against continuance of an unfair practice; an order of specific performance; an order to comply with a voluntary compliance agreement (to be discussed later); or "any other order the court considers appropriate."

Exemplary or punitive damages have been awarded by the courts of other provinces in a number of cases, primarily on the ground that the supplier's misleading or deceptive conduct was intentional.[61] This is consistent with s. 16(2) of Part II which provides, rather superfluously, that an order for exemplary or punitive damages may not be made where the supplier took reasonable precautions and exercised due diligence to avoid the unfair practice.[62]

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61 See *Starinovich* v. *Zephyr Mercury Sales Ltd.*, [1994] B.C.J. No. 1585 (Prov. Ct.), online: QL (BCJ); and *Shryvers*, *supra* note 38. In both cases punitive damages were awarded where car salesmen failed to disclose to prospective purchasers material differences between financing the acquisition of a car by sale or by lease. Ontario courts have also awarded exemplary damages for intentionally and flagrantly misleading conduct and high pressure sales tactics. See *Eby* v. *J.S. Saville Holdings Inc.*, [1997] O.J. No. 4623 (Gen. Div.), online: QL (OJ), in which $1,000 was awarded for deliberate lies about the history of an automobile; and *Moore* v. *Capital Cyclonic Systems*, [1996] O.J. No. 966 (Gen. Div. (Sm. Cl.)), in which $2,000 was awarded for the thoroughly obnoxious sales tactics of a door-to-door vacuum salesman.

62 This provision also appears to contemplate that an unfair practice can occur, and warrants a compensatory remedial order of the court, even in the absence of any intention to deceive or mislead, and notwithstanding the supplier's having taken reasonable precautions and exercised due diligence. See the discussion of the requirement of knowledge in connection with the analysis of the definition of unfair practice.

Unlike the legislation of several other provinces, the Saskatchewan *CPA* makes no specific reference to rescission of a contract induced by an unfair practice, but the provision for "any other order..." presumably encompasses such a remedy.[63]

An order for rescission under the statute is not necessarily constrained by the common-law bars. In *Alberta (Director of Trade Practices)* v. *Edanver Consulting Ltd.*, the Alberta Court of Queen's Bench ordered "a form of rescission which will put the parties back into their original position so much as possibly can be achieved," even though the subject of the contract of sale was a vehicle that was, at the date of judgment, several years older than at the time of purchase, and had been driven approximately 28,000 kilometers over a period of one year by the consumer purchasers before they "parked" it.[64] The court ordered return of the vehicle to the vendor and refund of the purchase price to the consumer purchasers, deducting a sum for use of the vehicle, and also awarded damages for repairs paid for by the purchasers, interest paid on the loan acquired to make the purchase, and insurance premiums paid while the vehicle was not in use. Similarly, in *Moore* v. *Capital Cyclonic Systems*,[65] the court held that a contract for purchase of a vacuum was rescinded and thus void *ab initio*, although the purchaser's used vacuum, which was taken by the salesman in trade on the purchase, could not be located and returned. The court ordered that the purchaser was entitled to keep the new vacuum without any obligation to pay for it. This entailed the return of her down payment on the purchase price. The remedy embodied in the court's orders approximates traditional "recission" in only the most tenuous way, illustrating the remedial flexibility some courts have felt entitled to wield in appropriate cases.

In contrast, strict compliance with the traditional condition of *restitutio in integrum* was required by the Ontario County Court in *Hillis* v. *Ross Wemp Motors Ltd.*[66] as a pre-requisite of rescission. The court concluded that a contract for purchase of an automobile could not be rescinded where restitution was no longer possible due to the plaintiff's continued use of the vehicle after he had become aware of its deficiencies. In *Van Patten* v. *Squamish Ford Sales Ltd.*,[67] a British Columbia court decided that rescission was not the appropriate remedy where the vehicle in question, which had

63 Rescission is the primary civil remedy under the Ontario *Business Practices Act*, *supra* note 6, ss. 4(1), 4(2), being supplanted by a defined monetary award only where rescission is not possible, though exemplary or punitive damages may accompany rescission.

64 *Supra* note 31 at 724.

65 *Supra* note 61.

66 (1984), 47 O.R. (2d) 445.

67 *Supra* note 31.

been damaged in an accident, had not been returned to the vendor and the parties could not be returned to their original position. However, the judgment effectively placed the purchaser in the same position as an order for rescission would have done. He was awarded damages representing the difference between the amount paid for the vehicle and its salvage value.[68]

The remedial provisions of s. 16 are subject to an unusual qualification, directing the court in awarding a remedy to take into consideration whether or not the consumer made a reasonable effort:

> (a) to minimize any loss resulting from the unfair practice; and
> (b) to resolve the dispute with the supplier before commencing the action.[69]

Although subs. (a) simply reflects the common-law duty to mitigate, subs. (b) represents a significant departure from recognized legal principles. Reduction of a damage award in an amount commensurate with the amount of loss a consumer might have avoided involves a relatively straightforward calculation. However, the monetary relationship between the vigour of a consumer's attempts at resolution of the dispute and the quantum of an award of compensatory damages is not obvious. There appears to be no counterpart of this provision in the legislation of other provinces.

A few other general provisions of Part II are relevant to the civil action under ss. 14, 15, and 16. Most significant is the provision in s. 33 that the private right of action is extended to an individual who, as heir or assignee, receives consumer goods from a consumer other than in the course of business. Such an individual "has the same rights as the consumer to seek and obtain redress from the supplier pursuant to this Part."

Relevant procedural provisions include the limitation of action period established by s. 30, which is two years "from the date of the occurrence of the last material event on which the proceedings are based", and the abolition of the parol evidence rule by s. 37. Section 36 provides for an appeal to the Court of Appeal, with leave, "from any order of the court made pursuant to this Part...on a question of law".

It may be noted in closing that the private action under Part II may overlap with a consumer's right to sue for breach of a statutory or express

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68 See also *Gray* v. *Woodgrove Chevrolet Oldsmobile Ltd.*, *supra* note 17, where the court awarded damages rather than rescission where rescission was "made impossible by the actions of the defendant vendors," by which the court apparently meant their refusal to accept return of the vehicle when tendered by the purchaser.

69 *Supra* note 1, s. 16(3).

contractual warranty under Part III, which contains the old *Consumer Products Warranties Act* provisions. A court faced with a case involving breach of a contractual warranty as well as an unfair practice will be required to observe the remedial provisions of both Parts in rendering judgment. The most manageable approach may be to first consider the remedy to which the consumer is entitled under Part III, since those provisions are much more specific than the Part II provisions, and then make whatever additional order may be required, if any, to address the unfair trade practice. However, one could make the converse argument, that the remedy granted under Part III is subject to that granted under Part II, since s. 40(2) of Part III provides:

> No provisions of this Part are to be construed as repealing, invalidating or superseding the provisions of any other law in force in Saskatchewan unless this Part by express provision or by necessary implication clearly intends those provisions to be so construed.

Part II simply contains the standard provision that:

> 34. Nothing in this Part restricts, limits or derogates from any remedy that a consumer may have under any other law.

Since these provisions offer no clear guidance, it appears to be open to the courts to devise the approach that best suits the circumstances of the cases coming before them.

IV. ADMINISTRATIVE ACTION UNDER PART II

The breadth of consumer rights and remedies under Part II is more than matched by the extent of the powers granted to the director. His or her primary responsibilities include, in summary form, the following:

(i) *Investigation*: The director may investigate the occurrence or potential occurrence of unfair marketplace practices and related misfeasance falling within the *CPA*, and is granted significant investigative powers for those purposes.[70] Section 13 provides that where a person has refused to comply with the director's demand for records, the director may apply *ex parte* to a justice of the peace or to a judge of the Provincial Court for a warrant authorizing the director or other named person to enter and search premises

70 *Ibid.*, ss. 10-12.

and seize the record in question.[71] The warrant may be issued if the judge is satisfied on oath of the director that the director has required production of the record and the person from whom it was required has neglected or refused to provide it.[72] There is apparently no requirement that the judge be satisfied that production of the record is necessary for the investigation of an unfair practice, or that there is any reasonable basis upon which to conclude that such a practice is being, has been, or may be committed.

(ii) *Voluntary Compliance Agreements*: The director may enter into a written voluntary compliance agreement with a supplier who the director, on reasonable grounds, believes has committed, is committing, or is about to commit an unfair practice. The terms of such an agreement must include an undertaking not to engage in such practices, and may include a variety of compensatory and other provisions.[73]

(iii) *Immediate Compliance Orders*: The director may make an order for immediate compliance with Part II where he or she is of the opinion that there are reasonable grounds to believe that a supplier has committed, is committing, or is about to commit an unfair practice, and that such an order is in the public interest.[74] A supplier may appeal such an order to the Court of Queen's Bench, which may set it aside, vary it, or make any other order it considers appropriate.

(iv) *Actions for Compensation on Behalf of Consumers*: Where the director believes it is in the public interest, he or she may, with the written approval of the minister and on behalf of any consumer affected by an unfair practice, commence any court action against a supplier that the consumer might have brought pursuant to s. 14, maintain an action already commenced by the consumer, and defend any court action brought by a supplier against the consumer.[75]

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71 Section 23(1)(b) makes either refusal or failure to furnish information required by the director, or provision of false information, an offence.

72 *Supra* note 1, s. 13(2).

73 *Ibid.*, s. 17. Note that one of the remedies available in a civil action by a consumer or by the director on a consumer's behalf is an order that the supplier comply with a voluntary compliance agreement. See s. 16(1)(e). Section 23(1)(a) makes it an offence to fail to comply with a voluntary compliance agreement.

74 *Ibid.*, s. 18. Contravention of an order of the director is an offence under s. 23(1)(a).

75 *Ibid.*, s. 15.

(v) *Application for Injunctions and Orders to Preserve Assets*: The director may apply to the Court of Queen's Bench *ex parte* for orders effectively freezing the assets of a supplier who he or she, on reasonable grounds, believes has committed, is about to commit, or is committing an unfair practice,[76] as well as for interim or permanent injunctions against the commission of unfair practices by a supplier.[77]

(vi) *Mediation*: The director is obliged, where appropriate, to "make every attempt to direct disputes between consumers and suppliers pursuant to this Part to mediation."[78]

In addition to his or her jurisdiction over unfair practices occurring in Saskatchewan, the director may take any action authorized by Part II against a supplier in Saskatchewan on behalf of a consumer where the unfair practice occurred outside Saskatchewan.[79] It seems that this provision is intended to include any kind of action contemplated by the *CPA*, though only court action is elsewhere qualified as an action undertaken on behalf of a consumer. Administrative actions are undertaken by the director on his or her own behalf, though obviously for the benefit of a consumer or group of consumers.

The authority of the director under Part II is remarkable both for the magnitude of its scope and for the relative absence of limiting principles or other devices restricting its exercise. However, while the potential power of the director is significant, his or her effectiveness depends on the availability of substantial administrative support and funding. The likelihood that budgetary allocations will be made to support an activist approach to the exercise of these directorial powers is rather slight. Whether the director currently is or will in the foreseeable future be in a position to take significant action under Part II thus remains to be seen.

V. PART II OFFENSES

Part II creates a number of summary conviction offences, triable by the Provincial Court under the *Summary Offences Procedure Act*.[80] However, as with the administrative authority of the director discussed above, it is unlikely that prosecutorial authority will frequently be exercised in favour of the preferment of charges under the *CPA* by public officials labouring under

76 *Ibid.*, ss. 19-21.
77 *Ibid.*, s. 22. Failure to comply with an order of the court is an offence under s. 23(1)(c).
78 *Ibid.*, s. 27(1).
79 *Ibid.*, s. 29.
80 S.S. 1990-91, c. S-63.1.

significant budgetary limitations. One may reasonably speculate that prosecutions will be undertaken, if at all, in only the most egregious cases of supplier misconduct. Nevertheless, the expansive nature of the provisions supporting imposition of quasi-criminal sanctions for deficient business practices is worthy of comment.

Section 23 creates four broad categories of offence, in the following terms:

> (1) No person shall:
>
> (a) contravene any provision of this Part, the regulations made pursuant to this Part or an order of the director pursuant to this Part;
>
> (b) refuse or fail to furnish information as required by this Part, or furnish false information to a person acting pursuant to this Part;
>
> (c) fail to comply with an order of the court; or
>
> (d) fail to comply with a voluntary compliance agreement entered into pursuant to this Part unless the agreement has been rescinded by written consent of the director or by the court.

Part II imposes liability on both individual and incorporated suppliers,[81] and on officers, directors, and agents of a corporation who direct, authorize, or participate in an act or omission by a corporation, whether or not the corporation is itself prosecuted or convicted.[82]

Subsection 23(1)(a) effectively makes the commission of an unfair practice an offence since conduct constituting such a practice is prohibited under s. 7(1). In view of the breadth of the definition of conduct constituting an unfair practice, the exposure of Saskatchewan suppliers to penal sanctions for what might otherwise be regarded as relatively trivial misconduct is significant. Furthermore, a supplier apprised of the uncertainty inherent in the determination of whether a given act or course of conduct violates the *CPA* has cause to dread the careless or misplaced word or deed of an employee.[83] In fact, the scope of s. 23(1)(a), combined with the extent and

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81 *Supra* note 1, ss. 23(2), 23(3).

82 *Ibid.*, s. 24. This provision supersedes the principle underlying the decision of the British Columbia Provincial Court in *R. v. Sumner* (1977), 4 B.C.L.R. 272, in which the Court held that where a supplier company had not been convicted of an offence, individual defendants could not be found guilty as officers or connected persons under the *Trade Practices Act*, *supra* note 6.

83 The question of whether the definition of conduct constituting an unfair practice is so vague as to render the offence unconstitutional is discussed below under the heading "*The Void for Vagueness Doctrine*".

nature of the ancillary offences created by paragraphs (b) through (d), might inspire in a champion of civil liberties a measure of anxiety.[84] This is particularly so since the offences contemplated are offences of strict liability. A supplier may be convicted for engaging in conduct that *may* have the effect of misleading a consumer, whether or not anyone is actually misled and regardless of the absence of an intention to mislead or a reckless disregard of the possibility that someone might be misled.[85]

An individual convicted of an offence under Part II is subject to a substantial fine or up to a year of imprisonment or both, while a corporation may, for a first offence, be fined up to $100,000 and for a second offence up to $500,000.[86] In addition, s. 25 provides for an order for compensation supplementary to the conviction of a supplier of an offence, on application of a consumer or the Crown prosecutor on a consumer's request.[87]

Although the Saskatchewan provisions appear to be extremely wide, it must be recognized that the statutes of other provinces create a similarly broad range of offenses.[88] In fact, all provinces have made various forms of prohibited conduct an offence, though some differ slightly in scope from the offences created by the Saskatchewan *CPA*. As long as practical and professional constraints avert overzealous prosecution, it would seem that these provisions are likely to generate little opposition in the business community.

VI. CONSTITUTIONAL ISSUES

The objective of this paper is primarily to evaluate the potential application and effect of Part II as a device for regulation of business practices in the

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84 Violation of an immediate compliance order issued without judicial sanction by the director is similarly an offence, as is refusal to provide information demanded by the director, and failure to comply with a voluntary compliance agreement entered into with the director. See *supra* note 1, ss. 23(a), 23(b), and 23(d). The extent to which the action of the director can give rise to quasi-criminal liability on the part of a supplier is quite remarkable.

85 Section 26(1) provides a due diligence defence to a supplier who can establish, on a balance of probabilities, that he or she committed the offence due to a mistake, misinformation, or accident *and* that he or she took all reasonable precautions to avoid the commission of the offence. This, however, means that a supplier who cannot satisfy the onus of proof may be convicted on the grounds of commission of the objectionable conduct alone. For a discussion of this point, see the judgment of Lamer C.J. in the Supreme Court of Canada decision in *Wholesale Travel Group Inc.*, *supra* note 34 at 196-98.

86 *Supra* note 1, ss. 23(2), 23(3).

87 Under s. 25(1), an order for payment "for pecuniary loss suffered by the aggrieved consumer as a result of the commission of the offence" may be made in an amount not exceeding the monetary jurisdiction specified in *The Small Claims Act*, S.S. 1997, c. S-50.11, provided the consumer, as noted in s. 25(3), has not commenced a civil action respecting the transaction giving rise to the offence.

88 See *e.g.* British Columbia *Trade Practice Act*, s. 25, Newfoundland *Trade Practices Act*, s. 20, both *supra* note 6.

consumer marketplace. It is essentially a functional analysis of the regulation of commercial relationships, an approach mandated both by the overall purpose of the legislation, and by this writer's expertise and interests. One cannot, however, ignore the issues of statutory validity raised by some of the features and specific provisions of Part II. In spite of its length, the following discussion does not purport to be an exhaustive critique of the several constitutional issues addressed. It does, however, identify those elements of the statutory scheme that might be viewed as contestable on constitutional grounds. The relevant constitutional principles and arguments are advanced and summarily evaluated as a basis for further debate either within or outside the courtroom.

A. INVASION OF THE FEDERAL CRIMINAL LAW POWER

The provincial legislatures engage in regulation of a wide range of social conduct through the imposition of penalties, including fines and imprisonment, by way of the power conferred by s. 92(15) of the *Constitution Act, 1867*.[89] The exercise of this authority has frequently been the subject of constitutional challenge, on the ground that the provincial legislation in question is in "pith and substance" criminal law and thus an invalid incursion into federal jurisdiction. However, provincial penal legislation is routinely upheld if its provisions can be characterized as primarily relating to a matter within provincial jurisdiction, such that the penal sanctions attached are merely ancillary.[90]

In *Re Clarke and Clarke and The Queen*,[91] the Newfoundland Court of Appeal summarily dismissed a constitutional challenge to the Newfoundland *Trade Practices Act*'s[92] provisions making it an offence to commit an unfair practice through deceptive or misleading conduct. The first ground of attack was that the provisions invaded the federal jurisdiction over criminal law.[93] On this point, the Court said:

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89 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

90 For a discussion of the leading cases, see P. W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 1997) at 18-27 to 18-29.

91 (1983), 147 D.L.R. (3d) 763, dismissing an appeal from (1982), 137 D.L.R. (3d) 464 (Nfld. S.C. (T.D.)).

92 N.S. 1978, c.10.

93 The provisions in issue were ss. 5, 7, and 20, which were virtually identical to the current Newfoundland *Trade Practices Act, supra* note 6. Section 5 defines unfair trade practices as comprised of deceptive or misleading conduct, s. 7 prohibits the commission of an unfair trade practice and s. 20 makes contravention of, or failure to comply with, the *Act* an offence.

> The primary purpose and effect of the *Trade Practices Act* is to provide remedies to individual consumers who might be the victims of unfair trade practices as defined in s. 5 and unconscionable acts or practices as defined in s. 6 by suppliers of goods and services, and to provide penalties against offenders for contravention of the *Act* ... the *Act* is directed at transactions solely within the province. It clearly comes within s. 92(13) of *The Constitution Act, 1867*—property and civil rights within the province. The *Act*, in our view, is regulatory and not penal in nature. The province has the power to provide penalties for infractions of provincial laws, and that is what s. 20 does.
>
> The Act does not constitute "criminal law" within the meaning of s. 91(27) of *The Constitution Act, 1867*.[94]

This view is consistent with the position taken in the Ontario County Court by Marin J. in the 1979 case of *R. v. F.A.D.S. of Ottawa Ltd. and Kester*.[95] The case involved a constitutional challenge to the Ontario *Business Practices Act*[96] provision that:

> [e]very person who engages in an unfair practice other than an unfair practice prescribed by a regulation..., knowing it to be an unfair practice is guilty of an offence and on summary conviction is liable to a fine...or to imprisonment...or to both.[97]

After a considerable and rather discursive discussion of the case law, the Court decided that the legislation was constitutional. It found that the dominant feature of the provision is consumer protection, a matter within provincial jurisdiction, and that the penal consequences it prescribes are merely incidental and thus not an incursion into the federal criminal law jurisdiction.[98]

Though they constitute a very small pool of authority, these decisions appear to offer an accurate assessment of the *prima facie* validity of the quasi-criminal provisions of unfair business practices legislation.[99] However, even

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94 *Supra* note 89.

95 (1980), 49 C.C.C. (2d) 441.

96 O.S. 1974, c. 131, now *Business Practices Act* (1990), *supra* note 6.

97 *Supra* note 96, at s. 17(2).

98 *Supra* note 95 at 460-61.

99 See also Hogg, *supra* note 90 at 18-29 as follows: "In all the decisions in which provincial laws were upheld, the penalties were imposed in respect of matters over which the provinces ordinarily have legislative jurisdiction, such as property, streets, parks, *business activity* or corporate securities" [emphasis added].

if the legislation falls within the constitutional jurisdiction of the province, it will be invalid under the doctrine of paramountcy to the extent of any inconsistency with federal criminal law.

A constitutional challenge resting on a different division of powers argument was presented in the 1977 case of *Stubbe* v. *P.F. Collier & Son Ltd.*[100] In that case, the British Columbia Supreme Court rejected the argument of the defendant encyclopedia company, which carried on business across Canada, that the province's *Trade Practices Act*[101] trenched upon the federal jurisdiction over interprovincial trade and commerce. One of the bases of the Court's decision was its finding that the *Trade Practices Act* did not purport to regulate trade outside the province.

The decision was referred to with approval and quoted by Lambert J.A. of the British Columbia Court of Appeal in the recent case of *British Columbia (Director of Trade Practices)* v. *Ideal Credit Referral Services Ltd.*[102] The Court decided that the *Trade Practices Act*[103] extended to deceptive or unconscionable conduct occurring within the province where the consumers affected by that conduct were resident in the United States. The Court's reference to *Stubbe* was cast in terms implicitly approving the view that federal jurisdiction over interprovincial trade is not impeached so long as the prohibited activity takes place in the province in whole or in part, and its regulation otherwise falls within provincial constitutional authority. Therefore, while Part II of the current Saskatchewan *Consumer Protection Act* would for the most part meet the view of constitutionality represented by *Stubbe*, s. 29 might be vulnerable to a challenge.[104]

In *Attorney General of Quebec* v. *Kellogg's of Canada Ltd.*,[105] the Supreme Court of Canada addressed a constitutional challenge to provisions of the Quebec *Consumer Protection Act*[106] prohibiting the publication or broadcasting of cartoons in advertising directed at children. The challenge was based on the alleged infringement of federal jurisdiction over broadcasting. The Court rejected the challenge, characterizing the purpose of the legislation as "the

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100 *Supra* note 42.

101 B.C.S. 1974, c. 96, now *Trade Practices Act* (1996), *supra* note 6.

102 (1997), 145 D.L.R. (4th) 20.

103 R.S.B.C. 1979, c. 406, now *Trade Practices Act* (1996), *supra* note 6.

104 Section 29 provides that the director may take action against a supplier in Saskatchewan on behalf of a consumer where the unfair practice occurred outside Saskatchewan.

105 [1978] 2 S.C.R. 211. Portions of the judgment characterizing the provincial legislation were quoted with approval by the Saskatchewan Court of Appeal in *Saskatchewan (Human Rights Commission)* v. *Engineering Students' Society* (1989), 56 D.L.R. (4th) 604, leave to appeal to S.C.C. refused (1989), 57 D.L.R. (4th) viii.

106 S.Q. 1971, c. 74.

protection of consumers in Quebec by regulating the commercial conduct of persons engaged in the sale of goods in that province."[107] The legislation accordingly fell within the power of the provincial legislature to regulate and control the conduct of a commercial enterprise in respect of its business activities within the province.

There is, therefore, little doubt that Part II of the Saskatchewan *CPA* would be upheld as a valid exercise of provincial legislative authority, subject to questions of paramountcy or infringement of *Charter*[108] rights discussed below.[109]

B. OVERLAPPING LEGISLATION AND FEDERAL PARAMOUNTCY

A paramountcy argument may be advanced in the criminal law context on the ground that conduct prohibited as an unfair practice might also involve commission of the offence of fraud or false pretenses under the *Criminal Code*.[110] The case law on issues of paramountcy involving the overlap or duplication of federal and provincial legislation is extensive and, to this writer's mind, full of subtle nuance. While a definitive opinion on this point is thus beyond the reach of this analysis, an overview of the trends and values manifested by the jurisprudence of the Supreme Court of Canada supports the preliminary conclusion that Part II is constitutionally sound.

Overlap with a federal statute or duplication of statutory coverage in itself will not affect the validity of provincial legislation.[111] If, however, the provincial statute is inconsistent with its federal counterpart, it may be judged inoperative to the extent of the inconsistency.[112] The offence of committing an unfair practice created by Part II does not duplicate the crimes of fraud and false pretenses. They differ on at least one essential point, namely, their respective *mens rea* requirements. The provincial offence is one of strict liability, as that term has been defined by the Supreme Court.[113] The designation "strict liability" connotes that commission of the *actus reus* renders the accused guilty, unless she can establish that she exercised "due diligence," that is, took all reasonable precautions to avoid breaching the statutory prohibition. In contrast, both fraud and false pretenses involve an active

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107 *Supra* note 105 at 224.

108 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

109 This is also subject to possible attack on grounds of the extra-territorial operation of s. 29: see *supra* note 104 and accompanying text.

110 R.S.C. 1985, c. C-46, ss. 380 and 361 respectively.

111 *Multiple Access* v. *McCutcheon*, [1982] 2 S.C.R. 161.

112 Hogg, *supra* note 90 at 16-17.

113 *Wholesale Travel Group Inc.*, *supra* note 34.

mens rea, though the *mens rea* associated with fraud has been notoriously difficult to define.[114] Applied to a specific transaction, this means that a person may be guilty of an unfair practice under Part II if her conduct, objectively evaluated, might mislead a consumer even though there was no intention to do so. While the conduct might constitute the *actus reus* of fraud or false pretenses, those offences would not have been committed in the absence of intention or culpable recklessness.

In *R.* v. *F.A.D.S. of Ottawa Ltd. and Kester*,[115] the constitutional validity of the Ontario *Business Practices Act* provisions referred to was challenged on grounds relating to both invasion of the federal criminal law jurisdiction and conflict with existing federal criminal law. Having first held that the provincial provisions did not invade the criminal law jurisdiction, the Court concluded that the provisions did not conflict with the *Criminal Code* provisions relating to fraud and false pretenses. In his closing remarks on the constitutional issue, Marin J. adopted the following words of Ritchie J., directed to the constitutionality of Nova Scotia film censorship legislation, in *Re Nova Scotia Board of Censors and McNeil*:

> The areas of operation of the two statutes are therefore fundamentally different on dual grounds. In the first place, one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is penal.[116]

A new trial was ordered by the Ontario High Court of Justice on the appeal of Marin J.'s decision, on the ground that he had improperly characterized the offence created by the *Trade Practices Act* as one of strict liability and thus failed to properly determine whether the necessary *mens rea* had been proven.[117] There is no reference in the appeal decision to a constitutional issue. However, the Ontario *Act* differs from that of Saskatchewan and other provinces in terms of the *mens rea* requirement in this respect, since it explicitly requires knowledge that the conduct in question is an unfair practice and thus implicitly an intention to commit the offence.

Though *R.* v. *F.A.D.S.* is not directly relevant to the constitutionality of Part II of the Saskatchewan *CPA*, it is consistent with the general reluctance

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114 For a comprehensive analysis of this question, see B. Nightingale, *The Law of Fraud and Related Offences* (Toronto: Carswell, 1996).

115 *Supra* note 95.

116 (1978), 44 C.C.C. (2d) 316 at 339-40 (S.C.C.).

117 (1981), 32 O.R. (2d) 231 (Div. Ct.), aff'd. (1982), 38 O.R. (2d) 294 (C.A.).

of courts to invalidate or declare inoperative provincial legislation that may operate concurrently with federal law, but to different effect. The Supreme Court's views on the validity of provincial highway traffic legislation in *O'Grady* v. *Sparling*[118] appear apt to the present question. The case involved a challenge to the provision of the Manitoba *Highway Traffic Act*[119] creating the offence of driving without due care and attention, characterized by the Court as an offence of "inadvertent negligence". Referring to the alleged conflict between that provision and the *Criminal Code* offence of criminal negligence in the operation of a motor vehicle, an offence requiring "advertent negligence", Judson J. concluded:

> [T]he two pieces of legislation differ...both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide provincial ends not otherwise secured and in no way conflicting with s. 221(2) of the *Criminal Code*.[120]

Approaching the question from the perspective suggested by Peter Hogg, it would seem that Part II and the pertinent *Criminal Code* provisions not only serve different purposes, thereby falling within appropriate spheres of legislative jurisdiction, but are also compatible in operation.[121] The fact that conduct of a supplier constituting an offence under Part II would not constitute a crime under the *Criminal Code* does not entail a conflict between the statutes or their operation. Rather, it simply demonstrates that the respective provisions operate differently and lead to different, not inconsistent, outcomes.[122]

Provincial business practices legislation has also been challenged on the grounds of overlap between its provisions and those of the federal *Competition Act*.[123] The pertinent provisions of that *Act* are those prohibiting

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118 [1960] S.C.R. 804.

119 R.S.M. 1954, c. 112, s. 55(1).

120 *Supra* note 118 at 812. See also *Mann* v. *The Queen*, [1966] S.C.R. 238.

121 Hogg, *supra* note 90 at 16-16.

122 This view is consistent with the decision of the Saskatchewan Court of Appeal in *Saskatchewan (Human Rights Commission)* v. *Engineering Students' Society*, *supra* note 105 at 650-51. The Court found no operative conflict between the provincial *Human Rights Code* provisions prohibiting forms of expression tending to discriminate against, demean, or expose people to hatred and ridicule on the basis of identified characteristics and *Criminal Code* provisions creating the offences of defamatory libel and inciting hatred against an identifiable group through communication of statements in a public place. The fact that the federal and provincial statutes might cover the same course of conduct did not constitute an operational conflict. The provincial law was therefore not invalid under the doctrine of paramountcy.

123 R.S.C. 1985, c. C-34.

misleading advertising, particularly s. 52(1), the violation of which is an offence rendering its perpetrator liable to conviction on indictment or summary conviction. The provision is as follows:

> s. 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
> (a) make a representation to the public that is false or misleading in a material respect....[124]

In *Re Clarke*,[125] the Newfoundland Court of Appeal rejected a paramountcy argument leveled against the Newfoundland *Trade Practices Act*. The disputed provisions prohibited the commission by a supplier of an unfair trade practice, defined essentially as conduct, representations, or failure to disclose material facts having the actual or likely effect of deceiving or misleading a consumer.[126] The Court said that the operation of what was then s. 36 (now s. 52) of the *Combines Investigation Act*[127] is dissimilar to that of the provisions of the *Trade Practices Act*:

> Unlike *The Trade Practices Act*, s. 36 does not provide a remedy to individual consumers but simply provides penalties on suppliers for purposeful misrepresentation of their products to the public...(T)here is no essential conflict between that section and ss. 5, 7 and 20 of the *Trade Practices Act*. The doctrine of paramountcy, therefore, does not arise. The questioned sections of both Acts can exist side by side. Rather than conflicting with each other, it could be said that they complement each other.[128]

The Court's statement that the *Combines Investigation Act* "does not provide a remedy to individual consumers but simply provides penalties on suppliers" is inaccurate. The *Combines Investigation Act* in fact provided then,

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124 *Ibid.*, s. 52(1). Subsections (b) through (d) of s. 52 prohibit other specified forms of misleading representations. Conduct falling within those provisions might also constitute a violation of Part II of the Saskatchewan *CPA*, *supra* note 1.

125 *Supra* note 91.

126 *Supra* note 6, s. 5. In addition to the general definition, the Act enumerates a number of kinds of conduct constituting unfair practice. The approach is very similar to that adopted in ss. 5 and 6 of Part II of the *CPA*.

127 R.S.C. 1970, c. C-23, s. 36(1).

128 *Supra* note 91 at 765.

as the current *Competition Act* provides now, that any person who has suffered loss or damage as a result of conduct contrary to Part IV, which includes the provisions referred to in *Re Clarke*, may sue for and recover from the person who engaged in such conduct monetary compensation for that loss. Although the civil remedy was not present in the original *Combines Investigation Act*, it was added by way of an amendment several years before the *Clarke* case was decided.[129]

Acknowledgment of the federal civil remedy renders the Court of Appeal's attempt to differentiate the operation of the provincial legislation from the comparable provisions of the *Combines Investigation Act* doubtful. A legitimate distinction may, however, be drawn on other grounds. The objectives of the respective statutory provisions, considered in the context of the statutes as a whole, may be defined in very different terms.

The Supreme Court has addressed the objective of the *Competition Act* and its precursor, the *Combines Investigation Act*, in at least three cases, the most recent of which is *Wholesale Travel Group Inc.*[130] In that case, Cory J. summarized and adopted the views expressed by the Court in previous cases:

> In *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, Dickson C.J. held that the Act embodied a complex scheme of economic regulation, the purpose of which is to eliminate activities that reduce competition in the marketplace.
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> The nature and purpose of the Act was considered in greater detail in *Thomson Newspapers Ltd., supra*. La Forest J. pointed out that the Act is aimed at regulating the economy and business with a view to preserving competitive conditions which are crucial to the operation of a free market economy.[131]

Part II of the *CPA* clearly has a much less ambitious objective. It is not directed primarily at the general regulation of economic or market activity. Rather, Part II is designed to protect individual consumers from losses suffered as a result of representations or conduct on the part of the suppliers of consumer products inducing purchasing choices made or contemplated on the grounds of a misimpression of the value or attributes of the products offered. While the civil remedies have a direct compensatory function, the

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129 S.C. 1974-75-76, c. 76, s. 12.

130 *Supra* note 34.

131 *Ibid.* at 222. The second case referred to is *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

penal sanctions are intended to discourage business practices that might have potentially harmful consequences in the sense indicated.

Addressed in the context of the broad objective described by the Supreme Court, the false advertising provisions of the *Competition Act* can be seen as having a purpose quite different from the more limited purpose of Part II of the *CPA*. However, considered on their own terms, the objective of the *Competition Act* provisions may have been more accurately described by Lamer C.J.C. in *Wholesale Travel Group Inc.* He said that the dual objectives of s. 36(1)(a), as qualified by the due diligence defence in s. 37.3(2), are to protect consumers from the effects of false or misleading advertising and to prevent false or misleading advertisers from reaping the benefits of their false or misleading advertisements. So stated, the objectives of the federal and provincial provisions are much alike.[132]

If provincial legislation may be invalidated or declared inoperative on the ground that it duplicates federal provisions in terms of object and effect, central provisions of Part II are in jeopardy. The approach of the Newfoundland Court of Appeal in *Re Clarke*[133] suggests that differentiation of the objectives and operation of the respective statutes was the basis upon which the provincial law was upheld. However, Hogg has argued that in a more general context, the duplication or near duplication of the federal offence and its civil remedies does not invalidate provincial provisions in the absence of conflict in the operation of the federal and provincial laws.[134] This seems the appropriate conclusion, particularly where the parallel provisions are an integral part of larger schemes designed to promote broad policy objectives that differ in important respects.

In sum, one can conclude with some justification that Part II of the *CPA*, including its penal provisions, is unlikely to succumb to a constitutional challenge founded on a division of powers argument.

C. STRICT LIABILITY, REVERSE ONUS, AND THE *CHARTER*

The question of whether the strict liability offence of committing an unfair practice created by s. 23(1) of Part II of the *CPA* is subject to attack under the *Charter of Rights and Freedoms*[135] has been effectively settled by the Supreme Court decision in *Wholesale Travel Group Inc.*[136] In that case, the

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132 *Ibid.* at 191-92.
133 *Supra* note 91.
134 Hogg, *supra* note 90 at 16-14.
135 *Supra* note 108.
136 *Supra* note 34.

Court concluded that ss. 36(1)(a),[137] and 37.3(2)(a), and 37.3(2)(b)[138] of the *Competition Act* gave rise to a strict liability offence of false or misleading advertising. The provisions were upheld in the face of a *Charter* challenge resting on ss. 7 and 11(d).[139]

The s. 7 *Charter* argument was based on the premise that a conviction under s. 36(1)(a) of the *Competition Act* could result in a person being deprived of liberty contrary to the principles of fundamental justice. However, the court rejected the contention that the principles of fundamental justice were contravened by conviction and imprisonment for a strict liability offence of the kind under consideration. As was mentioned earlier, a strict liability offence is committed by commission of the prohibited conduct alone without a requirement of subjective *mens rea* or culpable intent. The court emphasized the regulatory nature of the *Competition Act* and the public protection values that provided the context within which the constitutional issue was to be addressed. In such cases, the fault requirement of negligence established by the due diligence defence in ss. 37.3(2)(a) and 37.3(2)(b) is sufficient to satisfy s. 7 of the *Charter*. Like those provisions, s. 26(1) of Part II appears to meet the standard articulated by Lamer C.J.C.,[140] namely, that they operate so as to provide a defence to an accused who has taken reasonable precautions to avoid or prevent prohibited conduct and who has been duly diligent in ensuring that her conduct does not constitute a contravention of the *CPA*.

The s. 11(d) argument was that the reverse onus created by the opening words of ss. 37.3(2)(a) and 37.3(2)(b) of the *Competition Act* violated the right of an accused person to be presumed innocent until proven guilty according to law. Once commission of the conduct prohibited by s. 36(1)(a) is proved by the Crown, the impugned phrase obliges the defendant to prove on a balance of probabilities that she exercised due diligence within the meaning of subss. (a) and (b) to escape conviction. Four members of the Court accepted the argument, on the ground that the provision can operate such that an accused may be convicted of the offence where there is a reasonable doubt as to his guilt.[141] That is, he may be convicted if he cannot prove

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137 This provision is reproduced above at note 124 under its new numbering.

138 These provisions are currently numbered ss. 52(1)(a), 60(2)(a), and 60(2)(b) respectively. What were then ss. 37.3(2)(a) and 37.3(2)(b) create a "due diligence" defence analogous to that created by s. 26(1) of Part II of the *CPA*, *supra* note 1.

139 Note that subss. (c) and (d) of s. 37.3 were struck down. The remaining two subsections, (a) and (b), create a "due diligence" defence very similar in substance to that contained in s. 26(1) of Part II of the *CPA*.

140 *Wholesale Travel Group Inc.*, *supra* note 34 at 188.

141 Lamer C.J.C., La Forest, Sopinka, and McLachlin JJ. would have struck down the reverse onus provision.

on a balance of probabilities that he exercised due diligence or was not negligent, in spite of the existence of evidence raising a reasonable doubt as to whether he in fact was negligent, or failed to exercise due diligence. Since the existence of negligence is a requirement of the offence, a reasonable doubt as to the existence of negligence should, in the view of those members of the court, lead to the accused's acquittal. While three other justices concurred that the reverse onus infringed s. 11(d) of the *Charter*, they concluded that the infringement was justified under s. 1.[142] Two members of the Court found that there was no infringement of s. 11(d) and would in any event have found an infringement justified under s. 1.[143] In the result, the reverse onus was upheld by a five to four majority of the Court. Without elaboration of the reasoning supporting that outcome, it suffices to say that its application to the reverse onus similarly accompanying the due diligence defence in s. 26(1) of Part II renders that provision constitutionally valid.

D. THE "VOID FOR VAGUENESS" DOCTRINE

We have already seen that the breadth of the statutory definition of an "unfair practice" in s. 5(a), combined with the additional qualifications contained in ss. 7(4) and 8, makes it difficult to determine whether a given incident or course of conduct constitutes a violation of the s. 7(1) prohibition against the commission of an unfair practice. Since s. 23 makes contravention of s. 7(1) an offence, this ambiguity might raise the argument that the language creating the offence of committing an unfair practice is void for vagueness. However, the statutory terminology is likely to satisfy the very broad test established by the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society*,[144] in spite of its imprecision. In that case, the Court considered a *Combines Investigation Act*[145] provision, the essence of which is that every person who conspires, combines, agrees to, or arranges with another person to prevent or lessen, unduly, competition in the supply of a product is guilty of an offence.[146] It was the qualification that "undue" restriction of competition constitutes an offence that gave rise to the argument that the provision was so vague as to violate ss. 7 and 1 of the *Charter*.

The Court exhaustively reviewed its previous decisions on the issue of vagueness and discussed the role of that concept in *Charter* jurisprudence. The rationales for the doctrine were stated by Gonthier J. as being fair notice

142 Gonthier, Stevenson, and Iacobucci JJ.
143 L'Heureux-Dubé and Cory JJ.
144 [1992] 2 S.C.R. 606.
145 Now the *Competition Act*, *supra* note 33.
146 *Combines Investigation Act*, *supra* note 127, s. 32(1)(c).

to the citizen and limitation of enforcement discretion.[147] Following his analysis of those rationales and the standards they demand, he concluded, "The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate."[148]

Though that test in itself might not appear to advance the resolution of the issue in a particular case, its meaning is informed by the two articulated rationales, assessed in the statutory context in which the words appear, and taking into account the factual context in which they apply. In other words, it appears that a provision is sufficiently clear if it delineates in general terms the boundaries of permissible and impermissible conduct in such a way as to provide criteria upon which to evaluate competing characterizations of the legality of a particular act or sequence of events. Applied to the term "unduly", the Court concluded that the provision was valid, in spite of the fluidity of the standard established by the term. Similarly, though one might not be able to define in advance rules determining the precise limits of "unfair" business practices, it is arguably possible to characterize impugned conduct by evaluating it in the context of the wording and objectives of the statutory scheme, taking into account the conventions of the particular kind of business or transaction under consideration. In any event, the Court in *Nova Scotia Pharmaceutical Society* emphasized that legislation will not readily be found unconstitutional on grounds of vagueness, and a pragmatic evaluation of what is an "unfair" business practice is as likely to yield as clear an answer as will a similar evaluation of what is an "undue" lessening of competition.

E. THE REMEDIAL JURISDICTION OF THE PROVINCIAL COURT—s. 96 OF THE *CONSTITUTION ACT, 1867*

The broad range of remedies available to a court in the exercise of its civil jurisdiction over commission of an unfair practice includes, along with restitutionary orders and damages, the grant of an injunction or an order for specific performance. The remedial devices of injunction and specific performance originated in the courts of Chancery and are still frequently referred to as "equitable". With the amalgamation of the courts of Common Law and Chancery, the equitable jurisdiction of the latter was vested in the courts of superior jurisdiction falling within s. 96 of the *Constitution Act, 1867*. That jurisdiction is reflected in s. 12 of the Saskatchewan *Queen's Bench*

147 *Supra* note 144 at 631-32.
148 *Ibid.* at 643.

Act,[149] as it is in the comparable legislation of the other provinces. However, the authority to grant such orders under s.16(1) of Part II purportedly extends to the Provincial Court in cases falling within its monetary jurisdiction.[150] Since orders of this kind are traditionally viewed as falling exclusively within the jurisdiction of superior courts, ss. 16(1)(c) and 16(1)(d) of Part II of the *CPA* might be viewed as an infringement of s. 96 of the *Constitution Act, 1867*, and thus unconstitutional in so far as that authority extends to the Provincial Court.[151]

The Supreme Court of Canada has repeatedly acknowledged the need to preserve the unitary nature of the Canadian judicial system by maintaining the integrity of the jurisdiction of s. 96 courts. However, the Court's recent jurisprudence confirms that the statutory conferral on inferior courts of a jurisdiction ordinarily reserved to s. 96 courts is valid in some contexts. In *Reference Re Residential Tenancies Act*,[152] the Court laid out the classic three-level test to be applied in determining the constitutional validity of legislation vesting contested powers or jurisdiction in an administrative tribunal. That test was more recently applied to federal legislation purporting to vest in an inferior court a power falling within the traditional jurisdiction of a superior court.

In *MacMillan Bloedel Ltd.* v. *Simpson*,[153] the Supreme Court addressed the jurisdiction of the Youth Court created under the *Young Offenders Act*[154] (an inferior court), thereby establishing the relevance of the *Residential Tenancies* test to the pertinent provisions of Part II of the *CPA* as they relate to the Provincial Court of Saskatchewan.[155] It is clear that the award of an injunction

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149 R.S.S. 1978, c. Q-1.

150 Section 14(1) provides that in ss. 14, 15, and 16, "court" includes the Provincial Court of Saskatchewan where the action or relief sought is within its jurisdiction pursuant to *The Small Claims Act*, S.S. 1997, c. S-50.11.

151 In *Tomko* v. *Labour Relations Board (Nova Scotia)* (1975), 69 D.L.R. (3d) 250 at 256, the analysis of the Supreme Court of Canada proceeds on the assumption that the power to grant an injunction has traditionally been regarded as a power of a Superior Court.

152 (1981), 123 D.L.R. (3d) 554 at 568-72 (S.C.C.).

153 (1995), 130 D.L.R. (4th) 385 (S.C.C.).

154 R.S.C. 1985, c. Y-1.

155 This view is confirmed by Hogg, *supra* note 90 at 7-29 in the following terms:

> Before the *MacMillan Bloedel* case, the jurisprudence on the application of s. 96 to inferior courts had proceeded on a different track from the cases dealing with administrative tribunals...As we shall see...the Supreme Court of Canada in *Re Residential Tenancies Act* (1981) developed a rule (involving a three-step test) for the validity of a conferral of jurisdiction on administrative tribunals, but did not generally use that test in cases involving inferior courts. In the *MacMillan Bloedel* case, both the majority and the minority assumed that the *Residential Tenancies* rule was the appropriate one to test the validity of the jurisdiction of the youth court.

See also Hogg, *ibid.* at 7-3.

or specific performance by the Provincial Court would "fail" the first two elements of the test. First, the jurisdiction to grant such orders clearly replicates the jurisdiction exercised by the superior courts at the time of Confederation. Second, the function is clearly "judicial" in its institutional setting. However, the power to award these remedies is arguably "subsidiary or ancillary" to the general functions assigned to the Provincial Court under Part II of the *CPA*, in the way that the Youth Court's power to punish youths for contempt of superior courts was regarded by the Supreme Court as ancillary to its primary function of establishing an appropriate system for treatment of youths accused of criminal offences. The function of the Provincial Court in the context of Part II might be viewed as being to ensure the integrity and effectiveness of a statutory regulatory system designed to prevent unfair business practices in the Saskatchewan consumer marketplace. The jurisdiction to grant an injunction prohibiting continuance of conduct prescribed by the statute in this connection may be regarded as an integral component of that function, though the context in which an order of specific performance would similarly operate is rather less obvious.

Since the forum within which the Provincial Court might grant an injunction or specific performance is quite limited, ss. 16(1)(c) and 16(1)(d) may not be regarded as a substantial incursion into the jurisdiction of the superior courts, nor one threatening the general integrity of their equitable jurisdiction. The current emphasis of the Supreme Court on contextual analysis of questions of constitutional validity is consistent with a conclusion in favour of the legality of these provisions.[156] We should not, however, expect an early determination of this or any other constitutional issue, in view of the infrequency of legal representation in Small Claims Court, the apparent paucity of litigation under legislation of this kind, and the correspondingly low degree of probability that the issue will be presented to a court soon.

VII. CONCLUSION

Part II of the new *Consumer Protection Act* significantly enhances the arsenal of those doing battle against deceptive, misleading, and unconscionable practices in Saskatchewan's consumer marketplace. Some will view it as an inexact and ill-advised "everything but the kitchen sink" approach to consumer protection, while others will applaud the scope of the protective devices it offers. On either view, the imprecision inherent in the foundational concept of "unfair practice" will challenge the interpretive skills of Saskatchewan

156 *Wholesale Travel Group Inc., supra* note 34.

courts, assuming that they are called upon with some frequency to apply the *CPA*. While the scarcity of case authority emanating from other jurisdictions suggests that legislation of this kind has inspired limited litigation, the truth may be that many cases are decided but not reported at the Provincial Court level.[157] Since most cases involving less substantial claims may be expected to be highly fact-dependent and to raise few issues of law, consumer advocates may hope that legislation of this kind will have a significant, if largely invisible, impact.

157 In *Rushak* v. *Henneken*, *supra* note 37, the British Columbia Court of Appeal commented on the failure of counsel to direct the Court to cases decided under similar legislation in other provinces and elsewhere. However, this writer's research indicates that that failure may have been justified by the paucity of Canadian case authority, though a greater body of case law may exist in the international jurisdictions suggested by the Court, namely, the United Kingdom, Australia, and the United States.