THE ENFORCEMENT OF CONSUMER PROTECTION LEGISLATION: THE EXPERIENCE WITH NEGOTIATED SETTLEMENTS UNDER TRADE PRACTICES LEGISLATION IN CANADA

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Introduction

The design and employment of discretionary administrative enforcement powers for consumer protection legislation is the subject of this paper. In particular, I wish to review the Canadian experience with negotiated settlements or, as they are more properly called, assurances of voluntary compliance under the market practices legislation in force in six of our ten provinces. Since this enforcement technique was introduced over seven years ago, more than 120 assurances or AVC’s have been signed and the diversity of our experience suggests that it may be timely to raise some questions about approaches to administrative enforcement powers in this area of public legislation. I have written about this topic at greater length elsewhere¹ it is my hope today that these more abbreviated remarks will prompt comments from this distinguished audience on experience in their own jurisdictions.

The Enforcement Context

Let me spend a few moments putting the AVC option in statutory context. Business or trades practices legislation in Canada emanates for constitutional reasons from the provincial legislatures. These Acts have been heavily influenced by the 1978 Uniform Consumer Sales Protection Act from the U.S. and by some provisions found in Australia and United Kingdom legislation. The statutes are designed to prohibit a wide range of deceptive or unfair practices in the marketplace whether or not privity

¹ Neilson, Administrative Remedies: The Canadian experience with assurances of voluntary compliance in provincial trade practices legislation, 19 Osgoode Hall Lawn Jnl. 154-198, 1981.
of contract is involved. In each case, the statute follows the American practice of prohibiting all such acts or practices in general terms and then enumerating a list of specific situations that are deemed to be deceptive or unfair.

By traditional Canadian standards, the range of enforcement options is quite diverse and has gone far beyond the usual division between law suits by aggrieved consumers and prosecutions for statutory offences by the state. Viewed on their own, consumer-initiated enforcement falters with the fortuitous character of the exercise whereas the criminal law approach does nothing for individual redress, lags after the fact and may rank very low in the enforcement priorities of prosecutors.

These factors prompted some fresh thinking about the design of enforcement options and procedures. The range of commercial activity governed by these statutes is immense and the delivery of enforcement services by consumer protection agencies is a very challenging task. It is a fact of life that they are faced with large caseloads and limited resources. The reasons are several but I do not propose to discuss them today.

In this context, the enforcement provisions have been designed to achieve a combination of sanctions and procedures mindful of three overriding design objectives—deterrence, compensation and efficiency. Thus, private, consumer-initiated remedies may include declaratory and injunctive relief, rescission and punitive exemplary damages. Public enforcement options generally include a cease and desist power, substitute actions by the authorities on behalf of consumers, criminal court proceedings and negotiated compliance agreements or AVC's. In design terms, the end result is supposed to be an integrated sanctions network in which public and private law enforcement streams have been recognized and tapped for their respective contributions to the attainment of these objectives.

AVC Roots and Rationale

The concept of negotiated settlements or voluntary undertakings in lieu of more formal proceedings is not unique to consumer protection legislation. The English Poor Law Commissioners in the mid-nineteenth century frequently chose to drop charges against wrong-doers in exchange for assurances of future compliance. Similar choice patterns are often evident in the administration of human rights statutes, labour legislation and occupational health and safety measures. In the case of consumer trade practices statutes, however, the major difference is that the AVC route is expressly provided for as a clear enforcement option and (with the exception of one province) is tied to the maintenance of a public record of all undertakings accepted in lieu of civil or criminal proceedings.

In the U.S., for example, the Federal Trade Commission has been using variations of this theme steadily since 1925. Legislative models for
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Securities statutes have been very influenced by the S.E.C.'s discretionary authority to enter into both formal and informal settlements. At least 80% of all S.E.C. enforcement actions are settled, or consented to, without the need for full adjudication. Similar provisions appear in the U.K. Fair Trading Act of 1973. Under the terms of this statute, the Director General of Fair Trading is expressly authorized to "use his best endeavours" to obtain formal assurances from businesses to refrain from persistent patterns of conduct determined by the statute to be "detrimental to the interests of consumers". This direction has been employed to obtain close to 300 undertakings in the past nine years. Professor Gordon Borrie, the present Director General, has described the procedure of assurances "as a particularly useful and successful measure" with excellent compliance results and a high incidence of redress for aggrieved customers of the business involved.

Both the U.S. and the U.K. have adopted a similar 3-step procedural approach. Once the enforcement authority has the initial grounds for believing that the business in question has contravened the statute, the company is given an opportunity to give an undertaking to refrain from engaging in the acts or practices in question. Depending upon the circumstances of the case, other elements may be included in the assurance, including redress, return of deposits, modification of contract forms, full performance, corrective advertising and compliance reporting to a future date.

The failure to enter into an undertaking satisfactory to the enforcement authority or a subsequent breach of an undertaking will usually result in court proceedings where the question of liability is directly addressed. In both countries, this recourse is taken only in a small minority of cases.

An Overview of the Canadian Experience

Any time that an enforcement authority is permitted to substitute an administrative or non-adjudicative proceeding for a more formal civil or criminal action, the potential for over-using the internal choice to avoid contested, more public proceedings is created. This was an accusation levelled at the Federal Trade Commission in the late 1960s. When we remember that the basic reason behind much consumer legislation is to repair information and disclosure failures in the market, there is supreme, if not bitter, irony in the realization that much of this same legislation is administered and enforced in an atmosphere of stealth and near-secrecy. Let me explain in more detail, for this lack of accountability must be reckoned with if we are to learn from our experience in designing enforcement systems.

At first blush, the trade practices statutes appear to mandate and open an accountable regime of administrative enforcement. Five of the six statutes establish a public record for the details of the negotiated settlements and for other enforcement proceedings as well. But there are two...
difficulties—only formal undertakings or compliance agreements are placed on the record; and secondly, details of the AVC's are not regularly published, are usually kept on file at one central location and in one jurisdiction, photocopying of the agreements even at personal expense, is not allowed.

The distinction between informal and formal undertakings is interesting. According to interviews, informal agreements to comply in the future are commonplace and are viewed as an efficient and effective discretionary remedy. Compliance is made possible, it is said, because more serious enforcement steps are always in the wings. But the legal format of a public undertaking is not followed and the details are to be found nowhere on the public record. The matter is handled privately and without legal effect. Factors that may influence its adoption include the gravity of the violation, whether the activity has ceased, the cooperative behavior of the business involved and the absence of improper intent. All of this may well be true and the individual results may, or may not, be, quite suitable for the parties involved. Since comparisons with formal settlements are difficult, if not impossible to make, who is to know? In the longer run, however, one may argue that the objectives of the legislation are thwarted by these sub rosa intercessions when they become the primary application of the statute, a process accelerated by inadequate staff recourses and the absence of either published enforcement guidelines or case reports at regular intervals. Trade practices legislation, we would argue, was intended to be more than a tool for negotiating ad hoc settlements to close consumer complaint files.

This is not to argue that informal settlement procedures ought not to be considered in designing consumer legislation enforcement options. Rather, it may be argued that the process should be more fully recognized and publicized as a viable choice for enforcement proceedings provided that the framework for its exercise is known and more certain. Suggestions have been made along these lines for the S.E.C. proceedings in the U.S. and deserve further comment in our discussions.

The second difficulty, as I have suggested, is in the restrictive interpretation of "public record" of government enforcement activities, including AVC's. No jurisdiction publishes at regular intervals a detailed and up-to-date account of the civil, criminal or administrative proceedings in which it is involved. In some cases, it is suspected that there might be little in the way of enforcement to acknowledge. But in the three leading provinces in this study—Ontario, Alberta and British Columbia, the common thread appears to be a political aversion to the regular publication of enforcement proceedings against business firms particularly in recent years. This commitment to non-disclosure stands in some contrast to our experience with both court and administrative proceedings against business firms under environmental, human rights, job safety and labour legislation.
All of this goes to suggest that research into administrative remedies under consumer statutes might present some interesting difficulties for scholars and other commentators. In my own case, through interviews and personal visits to central registries for such records, I was able to put together a detailed picture of the nearly 100 AVC’s signed between 1975-80 in the three provinces where the remedy has been used as part of the enforcement choices available to the authorities. I have also updated the record of the present for the two most prolific provinces—Alberta and British Columbia.

First Impressions

I noted above that deterrence, compensation and efficiency were the principal objectives in designing the AVC remedy. Neither criminal sanctions nor civil litigation, particularly in the absence of comprehensive class action legislation, was felt to satisfy all of these enforcement goals. It was thought that the imaginative and vigorous employment of the AVC would fill the gaps, that helpful precedents would be placed on the public record and collective consumer redress would take on a meaning unknown in case-by-case adjudication. AVC’s, while not the panacea, if intelligently employed, would be an essential part of the enforcement choices available to the authorities.

The overall results in the 129 analyzed cases, in general, bear out these hopes. Part of the measure is to relate the terms of the recorded Assurances to the allowable scope of undertakings provided for in the legislation. The terms and conditions agreed upon may include any or all of the following, depending upon the particular circumstances:

— in all cases, an undertaking to comply with the requirements of the Act and to refrain from engaging in the questioned acts or practices;
— reimbursements to the consumer or class of consumers designated in the undertaking, including the costs of pursuing their complaints;
— proper performance of the contracts in question;
— the furnishing of a good conduct bond;
— reimbursement of all or part of the investigation cost incurred by the authorities;
— modification of contract forms, records or other documents; and
— corrective advertising.

As I noted earlier, my study concentrated on three provinces in which the AVC has been available as an administrative enforcement option since the mid-1970s. Over 90% of the Assurances signed have been in the two most Western provinces—Alberta and British Columbia. Ontario, with
twice the population of the other two provinces combined, has lagged far behind. On the basis of the available record for the past eight years, here are some overall impressions about the prevailing tone, direction and scope of the AVCs entered into:

- direct reimbursement to consumers is involved in over half of the cases and may range from single complainant situations to class or collective recoveries involving up to 1,000 consumers;
- commitments to the re-writing of contract forms, repossession notices, interest rate calculations statements and other form documents are commonplace but there is little evidence that the Plain English movement is yet a force in Canadian standard form contracts imposed on consumers;
- firms giving Undertakings frequently agree to provide information and data for one or two years on their practices to be used for monitoring purposes by the enforcement authorities; but some evidence suggests that little monitoring on a systematic basis takes place;
- only one jurisdiction regularly recovers any of its investigation costs through its AVC's;
- on the other hand, corrective advertising terms are included in appropriate cases.

Unlike some U.S. experiences, the range of business acts or practices that can be the subject of an AVC in Canada is interpreted very broadly. Our experience establishes that they may include allegations of both technical and major violations and include predatory conduct, and conduct amounting to fraud or serious deception. Depending on the jurisdiction, an AVC may be chosen as an alternative to a formal cease and desist order, to declaratory or injunctive proceedings or to prosecution. In other words, the AVC may be shaped to the circumstances at hand, as a clear alternative to several kinds of court proceedings.

Some Further Observations

This is not to suggest, however, that the enforcement authority is permitted to choose the AVC option because he does not have the evidence to stand up in court. In all cases, the Director must believe on reasonable and probable grounds that the supplier in question is engaged or has engaged in an unfair practice. In such cases, he may accept an AVC "in such form and containing such terms and conditions as [he] may determine" instead of ordering an investigation, if he is satisfied that the practices have stopped. Similarly, he may terminate any investigation or declaratory an injunctive proceeding brought against the supplier upon acceptance of insatisfactory AVC.
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In these cases, as in every case in which an AVC is given consideration as an enforcement option, a legal opinion is on file confirming the sufficiency of evidence to support a judicial proceeding. The legislation does not distinguish between minor and major violations or suggest an order for enforcement options.

The choice is up to the Director and his counsel. The model is controversial however because the subject of negotiated settlements as an enforcement option invariably leads to comments about the potential for abuse of discretionary powers by enforcement staff. Part of the reality with AVCs is that the businesses involved must make some tough decisions fairly quickly about the expense, delay, individual law suits and adverse publicity from court proceedings on the one hand and on the other, consider the potential for more onerous remedial and redress provisions and more immediate adverse publicity associated with an AVC. The AVC approach, as we have seen, depends very heavily on the quality of the legal expertise and negotiating skills available to the enforcement authority. The test of the endeavour is in the completeness of the Director's preparation, the prior disclosure of the procedures governing the format of, and time available for, any negotiations and a constant readiness to let the courts settle the matter if negotiation should be unsuccessful. In this situation, weak, imprecise and counter-productive Assurances will go on the public record along with the more creative, imaginative and comprehensive products. The total experience is open to scrutiny even in our peculiar system of quasi-public records. Compared to a static reliance on standard prosecutions and quiet moral suasion, it may be argued that the AVC is one of the best barometers of resilient and imaginative administration of consumer legislation.

The record does not support any suggestion that the enforcement authorities in Canada have acted in a zealous or arbitrary fashion in negotiating and singing AVCs. Indeed, with the possible exception of the Alberta experience, the available evidence would suggest that the Directors have been quite conservative, even unimaginative in many cases, in employing the AVC option. Where the courts has been involved in Director-initiated proceedings, there has never been the slightest suggestion that the cases have been brought in bad faith or mounted on frivolous or vexatious grounds. In the circumstances, the picture or the prospect of unprincipled zealots utilizing AVC's to vanquish bewildered traders does not correspond with Canadian practice or experience.

If there is an air of mystery surrounding the remedy which feeds suspicions about the excesses of regulatory entrepreneurs, then much of the problem has been created by the bureaucracy. Informal, off-the-record private settlements are commonplace in the absence of pre-complaint procedure. Opportunities for public comment on proposed Undertakings are unavailable. The details of formal enforcement are frequently sketchy, untimely and relatively inaccessible. If steps were taken to shed light
on the exercise of discretionary powers and the procedures or guidelines
governing their employment, then the suggestions of manipulation would
lose much of their force.

Some Concluding Observations

I noted at the outset that every business practices statute in Canada
contained the AVC enforcement option. Of the six generations involved,
however, only two use the remedy on any regular basis. Several of the
others dabble with it occasionally. A study of available records and inter-
views with officials in each province suggest in large part that the reluctance
to use the option is really part of a general pattern of administration which
prefers, for reasons of limited resources and political attitudes, to reach
informal settlements and use moral suasion with businesses.

In those jurisdictions where AVC's are employed more regularly, the
available evidence suggests that the objectives of improved redress, deter-
rrence and efficiency are being realized. The evidence is incomplete — for
instance, the absence of repeat offenders may support the deterrence finding
but is undercut by the admission of inadequate post-AVC monitoring by
the enforcement authorities. Interviews tend to support the argument
that undertakings are a more expeditious and less costly alternative to
court proceedings but the absence of disclosed negotiating procedures
combined with the lack of experienced counsel in most Ministries is leading
to longer delays in the system. Our experience, in addition, suggests that
the AVC option is viable only if the senior enforcement personnel are
trained in negotiating skills and have experienced, committed, counsel
close at hand. Traditionally, most administrators in this area have come
from police or investigative backgrounds and prefer to gather the facts,
mount an investigation and package their findings for delivery to a prose-
cutor who is employed by the Ministry of the Attorney General to go to
court for a number of agencies and Ministries. To employ the AVC option
on a regular basis involves a number of steps alien to these more customary
and familiar routines. It is not surprising in these circumstances that one
encounters a certain institutional lethargy in employing an enforcement
option of the AVC type.

The visible mix of private and enforcement options in our trade prac-
tices legislation constitutes a rather marked departure from the established
design pattern of Canadian consumer protection legislation. Here, perhaps
for the first time, a range of adjudicative and negotiated choices for en-
forcement and remedial adjustment are presented to the administrators of
the statutes. To this point in time, most provincial legislation for the
protection of consumers has been tied to the prosecution model with an
occasional opening for a court claim by aggrieved consumers. The trade
practices statutes have fundamentally altered that chemistry. But as one
jurisdiction copies the other's legislation, the gap between institutional
design and administrative practice has become more and more apparent. Established practices have tended to be severely limited in terms of openness, participation and accountability. Theirs is the managerial model which tends to work behind the scenes, and prefers unpublicized warnings, mediation, moral suasion and *in-camera* meetings with affected businesses and trade associations. Complaint mediation tends to be confused for the separate public task of law enforcement, opportunities for clarification and on-going interpretation of the law are downplayed and undisclosed, informal settlements become the norm instead of merely being one factor in an enforcement strategy.

The managerial model on occasion does link up with the adjudicative system but normally only in a criminal law sense unconnected to redress or other remedial considerations. Our trade practices statutes add many complexities to these established relationships and the rather erratic and uneven experience in Canada with AVCs for the past eight years suggests that the assimilation of the sanctions package has not been easy. In many cases, implementation of the legislation has been thwarted by governments’ refusal to provide trained staff resources and other supporting services. In some situations, governments would appear to have urged the adoption of this legislation without having the slightest idea of how or by whom it was to be administered.

On the other hand, the introduction of the bargaining model of administration which is implicit in opting for negotiated settlements has been used to considerable advantage in two of the provincial jurisdictions. Compared to previous experience, the practice here has been one of openness and some innovation and imagination. Our experience in Canada confirms the necessity of monitoring and analyzing the design of legislative models through to their actual administration. In this case, our division into provincial jurisdictions has provided a rich comparative base for studying the vital link between the theory of administrative design and the practice of its enforcement. For the Canadian systems, we must generally conclude that the formal negotiated settlement is regarded by many as an enforcement option slightly ahead of its time.