



Industry Industrie
Canada Canada

Market-driven Consumer Redress

Case Studies

and Legal Issues

Office of Consumer Affairs

Canada

Market-driven Consumer Redress

Case Studies

and Legal Issues



David Clarke
Kernaghan Webb
Office of Consumer Affairs

This publication is also available electronically on the World Wide Web at the following address:
<http://strategis.ic.gc.ca/SSG/ca01643e.html>.

Permission to Reproduce. Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from Industry Canada, provided that due diligence is exercised in ensuring the accuracy of the information reproduced; that Industry Canada is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of, Industry Canada.

For permission to reproduce the information in this publication for commercial redistribution, please e-mail **copyright.droitdauteur@pwgsc.gc.ca**.

Aussi disponible en français sous le titre *Mécanismes privés de règlement de litiges de consommation : études de cas et autres renseignements utiles*.

Printed in Canada on recycled paper.

Foreword

As part of the work that led to the development of *Consumer Complaints Management: A Guide for Canadian Business* (March 2002; available at <http://strategis.ic.gc.ca/SSG/ca01763e.html>), Industry Canada's Office of Consumer Affairs, in cooperation with other government, industry and consumer group partners, commissioned a series of research papers. These papers were discussed at a round-table workshop in January 2001.

This volume, which was authored by David Clarke and Kernaghan Webb of the Office of Consumer Affairs, includes the case studies and a review of some of the legal issues associated with market-driven consumer redress.

Contents

Canadian Motor Vehicle Arbitration Plan 1

Cable Television Standards Council 7

Canadian Banking Ombudsman and Individual Bank Ombudsmen 13

Better Business Bureau 19

Canadian Marketing Association 24

Canadian Automobile Association’s Approved Automobile Repair Service 28

Advertising Standards Canada 31

Alberta New Home Warranty Program 38

Market-Driven Consumer Redress and the Law 47

Canadian Motor Vehicle Arbitration Plan

The manufacture and sale of new automobiles is one of the most significant drivers of the Canadian economy, with well over 100 000 vehicles a month currently being purchased.¹ The Canadian Motor Vehicle Arbitration Plan (CAMVAP), created in 1994, is the largest consumer product arbitration plan in Canada, covering most domestically and internationally manufactured passenger cars, light trucks, sport utility vehicles, vans and multi-purpose passenger vehicles purchased or leased in Canada. It covers both new vehicles and used vehicles from the current and four previous model years.² CAMVAP estimates that about 4.5 million vehicles are eligible for the program at any one time, based on cross-Canada sales.³

CAMVAP is a free (for consumers) arbitration service, paid for by participating auto manufacturers, that helps consumers and manufacturers resolve disputes about alleged manufacturing defects in the vehicle or implementation of the new vehicle warranty. CAMVAP is incorporated as a federally chartered, not-for-profit corporation, with an 11-member Board of Directors comprising representatives from provincial and territorial governments (4 representatives), the Consumers' Association of Canada (2 representatives), automobile manufacturers (4 representatives) and automobile dealers (1 representative).

In the mid-1980s, the Ontario Ministry of Consumer and Commercial Relations undertook a project to coordinate the participation of automobile manufacturers in a dispute resolution program. The Ontario government had been considering mandatory lemon laws similar to those that were increasingly being enacted in several U.S. states. However, a ministry spokesperson quoted in 1984

¹ Preliminary figures for January 2000 were 133 596; revised figures for December 1999 were 143 951; revised figures for November 1999 were 123 517. See "New Motor Vehicle Sales," *The Daily*, Statistics Canada, March 17, 2000.

² The program covers nearly all makes of vehicles sold in Canada except BMW vehicles. Ineligible CAMVAP claims include those related to the following: accidents resulting in personal injury or property damage (including vehicle damage, punitive or consequential damage, lost profits or inconvenience); disputes already resolved through other means; vehicles belonging to non-residents of Canada; disputes between consumers and dealers only; vehicles not built for the Canadian market (unless the manufacturer agrees to the process); previously damaged vehicles written off by an insurance company; third-party warranties or service contracts; and after-market options or accessories. CAMVAP also does not cover cars with more than 160 000 kilometres on the odometer.

³ These figures do not reflect the addition of Quebec to the CAMVAP program. That addition is expected to increase numbers by at least the amount in Ontario, according to Scott James, commenting at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

CANADIAN MOTOR VEHICLE ARBITRATION PLAN

said she thought a voluntary arbitration system would better serve the needs of consumers.⁴ The new system, called the Ontario Motor Vehicle Arbitration Plan (OMVAP), came into effect in 1986. Under OMVAP, Ontario residents having problems with their cars could submit their dispute to an arbitrator. The service was free to the consumer, who had to agree to be bound by the arbitrator's decision and to keep confidential all matters relating to the arbitration, including the results.

In 1994, the process of turning OMVAP into a national program began. While some consumer groups had criticized the confidentiality aspects of the program, all provincial and territorial governments except Quebec saw value in the program and supported its implementation across Canada. By October 1996, CAMVAP was operational everywhere in Canada outside Quebec.

CAMVAP continued to make overtures to Quebec. Changes made to the program in June 1999 removed one major barrier to Quebec's joining. Other changes were agreed to over the following 15 months. This led Quebec's Office de la protection du consommateur to endorse the CAMVAP program in June 2000, and Quebec formally applied to become a member. On January 25, 2001, the Minister responsible for l'Office de la protection du consommateur announced that the Programme d'arbitrage pour les véhicules automobiles du Canada was now operational in Quebec.⁵ The Quebec-based Automobile Protection Association, an organization that had criticized CAMVAP in the past, supported implementation of the program in Quebec.

The Consumer's Rights and Obligations

CAMVAP does not lay out substantive standards that a manufacturer must follow when making the vehicle. Rather, the CAMVAP rules simply lay out a procedure for hearing disputes.

Note that the consumer does not commit to using CAMVAP to resolve disputes when purchasing or leasing the vehicle. When seeking redress for a problem with the vehicle that has not been satisfactorily resolved through normal procedures, the consumer can choose to seek redress through the courts or through CAMVAP. In choosing CAMVAP, the consumer gives up the right to use the courts to seek redress and recognizes the arbitrator's decision as final. CAMVAP arbitrations are conducted in accordance with provincial and territorial arbitration acts. The finality of the arbitrator's decision is a cornerstone of this legislation.

⁴ "Ontario studies lemon law for car owners," *The Globe and Mail*, June 20, 1984, p. M1: The spokesperson said the ministry has been looking at U.S.-style lemon laws designed to assist buyers of new-car lemons while the warranty is still in force but thinks the same aims can be accomplished with a voluntary arbitration system rather than legislation.

⁵ Quebec government media release, January 25, 2001.

CANADIAN MOTOR VEHICLE ARBITRATION PLAN

The dispute resolution procedure is set out in an agreement for arbitration that must be signed when the consumer brings the complaint to CAMVAP.⁶ Important highlights of the agreement for arbitration and the CAMVAP process include the following.

- A consumer wishing to bring a complaint — about an alleged manufacturing defect or about the implementation of a new vehicle warranty — to CAMVAP arbitration must first try to resolve the dispute with the manufacturer, and give both the authorized dealer and the manufacturer a reasonable time and opportunity to resolve the problem.⁷ There is no standard for either element of this test.
- The consumer completes the claim form. The CAMVAP administrator in each province or territory checks the application for eligibility and completeness and forwards it to the manufacturer. The manufacturer has 10 days to respond and to file the documents it will use at the hearing. When all the documents have been received, the provincial administrator forwards the complete package to both parties and to the arbitrator.
- The consumer is given a choice of three arbitrators from the CAMVAP roster; the administrator will try to use the consumer's first choice. The arbitrators come from various backgrounds and are independent, impartial and unbiased. Although the arbitrators are not automobile experts, they are trained to make fair, reasoned and honest decisions based on the evidence the parties present.⁸ The manufacturers do not select arbitrators for the roster or train arbitrators for the CAMVAP program.

Before the arbitration starts, the consumer agrees to accept the arbitrator's decision. The manufacturer has agreed to accept the arbitrator's decision through its contractual commitments to the program.

Style of Dispute Resolution

CAMVAP's design and operation allows for several dispute resolution scenarios, including the following.

- The manufacturer and consumer settle the matter following the consumer's initial enquiries to the program.
- The consumer and the manufacturer reach a conciliated settlement after the consumer has applied to the program but before a hearing is convened.
- An arbitrator hears the matter and makes a decision based on the evidence that the consumer and the manufacturer put forward.
- The consumer and manufacturer settle the matter at the hearing, with the settlement becoming the arbitrator's decision.

⁶ See the Agreement for Arbitration at <<http://www.camvap.ca>>.

⁷ *Ibid.*, s. 4.4.7.

⁸ See the CAMVAP Web site at <<http://www.camvap.ca>>.

CANADIAN MOTOR VEHICLE ARBITRATION PLAN

CAMVAP provides a neutral dispute resolution program that puts the consumer and the manufacturer in front of an independent arbitrator who makes a decision after considering their evidence. CAMVAP does not advocate for either party.

CAMVAP publicly states that its process takes approximately 70 days.⁹ Average processing time for all arbitrated and consent cases was 61.6 days in 1999 and 60.65 days in 2000. The CAMVAP provincial administrator arranges for a hearing to take place not more than 50 days after the administrator receives the consumer's properly completed application form. At the hearing, the arbitrator may order the Canadian Automobile Association (CAA) to do an independent technical inspection of the vehicle. Representatives of both the consumer and the manufacturer may be present. CAA licensed technicians prepare a report, which is circulated to the parties and used in the arbitration process. Like the rest of the process, the inspection is free to the consumer.

CAMVAP is relatively informal; legal counsel is optional (to date, industry has never used it and consumers have done so only rarely). Teleconference hearings are encouraged when parties agree to them. The arbitrator's decision will be mailed to the participants within 14 days of the hearing.

CAMVAP arbitrations are governed by provincial and territorial arbitration legislation that sets out the rules of arbitration and the finality of the arbitrator's decision, along with the limited circumstances in which an award may be subject to an appeal or judicial review. The arbitrator must also consider all other applicable laws, including consumer protection legislation.

Possible Outcomes

An arbitrated hearing may have one of several possible outcomes.

- **Buyback:** The arbitrator may order the manufacturer to buy back the vehicle if it has been in service for less than 36 months and driven less than 60 000 kilometres. There may be a reduction for use (based on a formula that accounts for kilometres the vehicle has been driven) if the vehicle has travelled between 25 000 and 60 000 kilometres; there is no reduction for use if the vehicle has travelled less than 25 000 kilometres.
- **Repairs:** The arbitrator may order the manufacturer to reimburse the consumer for an amount up to the full cost of repairs the consumer has paid to complete, and for the cost of further repairs.
- **Out-of-pocket expenses:** The arbitrator may order the manufacturer to reimburse the consumer for out-of-pocket expenses, up to \$500. The arbitrator may also order the manufacturer to pay up to \$100 for the consumer's documented costs related to issuing subpoenas to witnesses for the hearing.
- **No liability:** The arbitrator may find that the manufacturer has no liability in the matter or may refuse to hear the case because it falls outside CAMVAP's jurisdiction.

⁹ The Chair of CAMVAP's Board of Directors, James Savary (also a member of the Consumers' Association of Canada), says the Board feels 70 days is long; it is working to reduce that number by streamlining the process (communication with authors, July 2000).

CANADIAN MOTOR VEHICLE ARBITRATION PLAN

Comparison with the Courts

As the quasi-judicial CAMVAP process is intended, at least in part, to provide an alternative to the courts, it is useful to compare it to the civil court system. The program provides the consumer with certain advantages over a court setting. CAMVAP is free: there are no application fees or other costs to the consumer, and CAMVAP pays the full cost of the arbitration, including the costs of any required technical inspection. Automobile manufacturers fully fund the program through formulas that reflect each company's market share and CAMVAP case experience. The program is speedy and arbitrations take place in the consumer's home community.¹⁰

CAMVAP has disadvantages as well, in comparison to the court system. First, the consumer is not awarded costs for legal representation. Second, punitive or exemplary damages are not awarded. If consumers feel these disadvantages are significant, they may prefer to go to court rather than to CAMVAP. There are no barriers to this. Very few consumers employ legal counsel, and it is unlikely that counsel would be of much benefit to the consumer under the CAMVAP arbitration process. On the contrary, were consumers routinely to employ counsel, manufacturers would undoubtedly do the same, making the entire process more cumbersome and less efficient for no reason. Canadian courts rarely award punitive damages in consumer contract disputes. In fact, only superior courts may award punitive or exemplary damages.

CAMVAP's results are published on its Web site at <<http://www.camvap.ca>>. From 1994 to 1999, the results of all arbitrated and conciliated cases were as follows:

- buyback with reduction for use — 8 percent;
- buyback with no reduction for use — 3 percent;
- reimbursement for repairs — 10 percent;
- repairs to be made to the consumer's vehicle — 26 percent;
- out-of-pocket allowance — 3 percent;
- conciliated settlement between the consumer and the manufacturer — 16 percent;
- consent award settlement (outside the agreement for arbitration) — 5 percent; and
- no liability on behalf of the manufacturer — 29 percent.

In 2000, CAMVAP ordered manufacturers to buy back 83 vehicles at a total cost of \$1.56 million.

Past criticism of CAMVAP centred on the confidentiality (secrecy) requirement, in place until 1999. Since CAMVAP provides a model for other dispute resolution programs in many ways, it is worth discussing the confidentiality issue briefly, even though secrecy is no longer required.

¹⁰ An important point for rural residents who otherwise would have to travel extensive distance to go to [courts in] urban centres, notes Stephen Moody, CAMVAP's General Manager.

CANADIAN MOTOR VEHICLE ARBITRATION PLAN

CAMVAP is unique among alternative dispute resolution programs in using independent quality control methods. First, it contracts an independent research firm to survey consumers who have used CAMVAP. This survey not only measures their overall satisfaction with the process but also solicits their detailed reactions based on numerous parameters; summary results are available on the CAMVAP Web site. Second, every three years, CAMVAP contracts an independent consultant to examine the program in detail, identify problems and recommend improvements. Both the surveys and the last program review noted that the confidentiality issue negatively affected the way the program was perceived. The consultant recommended a number of changes to enhance the program, most of which CAMVAP adopted and implemented in June 1999; paramount among these was removing the confidentiality requirement.

Independently of the consultant, CAMVAP's Board had been searching for ways to remove the confidentiality provision. It had been there for good reason; first, it is a common requirement in private dispute resolution. Second, as part of their commitment to the program, automobile manufacturers had demanded confidentiality for fear that their reputations could be unfairly damaged by only a few high profile cases. However, survey data showed that consumers resented being unable to discuss the arbitration with family, friends and colleagues. Moreover, the confidentiality requirement was seen as one of the main reasons that Quebec elected not to join the program in 1994.

Now that CAMVAP has removed the confidentiality provision, consumers may disclose their views on the CAMVAP program and the outcome of their case. Further, detailed statistics — sorted by manufacturer, model year and model — are now available on CAMVAP's Web site.

Alternative dispute resolution programs are emerging in a number of product areas in which the value of the transaction, the complexity of the product, and the expense of and time required for traditional legal remedies make alternative approaches attractive. CAMVAP breaks new ground in providing a comprehensive, national service that is free to consumers and financed by industry. It may well prove to be a model for similar programs in other sectors.

Cable Television Standards Council¹

Nature of the Industry

The cable television industry plays an important role in the lives of many Canadians, with 8.3 million homes and businesses subscribing to cable television throughout the country, according to 1999 statistics.² Of this figure, 85 percent are served by member companies of a single trade group, the Canadian Cable Television Association (CCTA).³ Individual companies generally have a geographic monopoly, enjoying the exclusive right to provide cable services within a given area. As a general rule, monopoly privileges are accompanied by close government oversight — telephone services being a longstanding example in the Canadian context. The cable industry has been no exception; no company may operate cable services without a licence, which is issued and renewed only if the company adheres to rules set down by the Canadian Radio-television and Telecommunications Commission (CRTC), a federal government agency operating at arm's length from the Department of Heritage.

Events Leading to the Development of a Redress Mechanism

In the late 1980s, the CRTC began a regulatory reform process aimed at “streamlining its regulatory procedures and eliminating all but the essential regulations necessary to achieve the objectives of the *Broadcasting Act*.”⁴ In accordance with the spirit of this process, the CRTC offered the cable television industry the opportunity to self-regulate in certain policy areas, when the industry established standards the CRTC considered acceptable. The industry itself was quite anxious to seize this opportunity, as it had up to that time been quite critical of what it considered an exceedingly

¹ For further information, see the Cable Television Standards Council's Web site at <<http://www.ctsc.ca>> and Allan McChesney, “Voluntary Standards and Dispute Resolution in Canada's Cable Television Industry,” draft paper presented to the Voluntary Codes Project Symposium, Ottawa, September 1996.

² Canadian Cable Television Association, *Annual Report 1998–1999*, p. 1.

³ *Ibid.*

⁴ Canadian Radio-television and Telecommunications Commission, Public Notice CRTC 1987-9, January 9, 1987. Under the *Broadcasting Act*, cable services (“distribution undertakings” in the idiom of the *Act*) (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations; (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost; (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services; and (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities. (R.S.C. 1985, Ch. B-9.01 [1991, c. 11], para. 3(1)(t)).

stringent and detailed regulatory process.⁵ The CRTC nevertheless made it clear that it would closely supervise the development, implementation and ongoing administration of any such standards. It thus issued guidelines⁶ calling on the industry to develop standards that would address the CRTC's concerns; to clearly describe how the public would help establish and amend the standards, how the standards would be administered,⁷ and what sanctions and corrective actions would apply in cases of non-compliance; to submit standards and subsequent amendments to the CRTC for acceptance; and to issue an annual report to the CRTC. However, the CRTC promised to use a light hand in matters relating to the design of the standard, leaving it to the industry to “define the type of standards to be developed, specify to whom the standard will apply, and establish the means and criteria for achieving the standard.”⁸

The Codes

In 1988, the CCTA established the Canadian Television Standards Foundation (CTSF), an arm's-length but entirely industry-funded body that appoints the Cable Television Standards Council (CTSC).⁹ Membership in the Foundation is open to all Canadian cable television companies and is not restricted to the members of the CCTA. As a result, over 7.6 million Canadian cable television customers — 94 percent of all cable customers in the country — have access to the Council through their cable company's membership in the CTSF. The structure of the CTSC is described in more detail later in this section.

The Council administers five sets of standards set by the CCTA:¹⁰ the Cable Television Community Channel Standards; the Canadian Code of Advertising Standards;¹¹ the Action Plan on Cable Services to Blind and Vision-Restricted Customers; the Cable Industry Privacy Code; and the Cable Television Customer Service Standards. The Customer Service Standards (hereafter the “Standards” — the plural is used, although it is a single document) shall be the focus of this discussion, because

⁵ According to Gérald Lavallée, Secretary General of the Canadian Television Standards Council, who spoke to the authors in April 2000. Mr. Lavallée was working with the CCTA when the above events took place.

⁶ Canadian Radio-television and Telecommunications Commission, Public Notice CRTC 1988-13, January 29, 1988.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See the CTSC's Web site at <<http://www.ctsc.ca>>.

¹⁰ Canadian Television Standards Council, *Standards, Codes and Guidelines*.

¹¹ Broadcasters also subscribe to the Code of Advertising Standards; the Code does not apply solely to cable companies.

they are the most closely related to consumer redress issues and because they are the most frequent basis of complaints (as discussed later).

The CCTA's Task Force on Industry Standards developed the first draft of the Standards. The CCTA then circulated drafts to member companies throughout the country. Companies occasionally objected to certain provisions. The CCTA expected such objections, since the Task Force deliberately devised a draft that was tougher than the final document was expected to be.¹² When the CCTA Board approved a document in principle, public consultations were held. The Council advertised widely in newspapers across the country, inviting comments from all interested parties. (Known interested parties automatically received drafts for comment.) The Council considered the submissions and made follow-up recommendations to the CCTA. Once finalized, the Standards were submitted to the CRTC.¹³ After the CRTC accepted them, the Standards were officially implemented on January 1, 1992.¹⁴ They were revised in September 1994 and in 2000; the latter revision included the addition of a Privacy Code, which took effect in January 2001. When they were implemented, the Standards effectively became the rules with which industry members had to comply.

If the Standards or their enforcement prove ineffective, the CRTC retains the power under the *Broadcast Act* to regulate the industry again. Because the industry found that the old system of close command-and-control regulation resulted in long, unwieldy processes, it is motivated to ensure that the Standards are effective.

The Standards cover a number of topics, including the following.

- *Privacy and security*: Consumers' personal data are kept confidential; consumers may inspect their records and have their name removed from marketing lists; and cable company employees show photo identification when making house calls. In conformance with the *Personal Information Protection and Electronic Documents Act*, the Council developed guidelines for member companies to protect employees' and customers' privacy. The Code includes mandatory and suggested actions for each of the 10 principles of the Act, relating to the collection, storage and use of personal information. The principles also detail how a person can challenge a company's compliance.¹⁵
- *Commencement of service*: This article provides a vague promise of selection of services, "consistent with prudent consideration of regulatory, financial and marketing requirements," as well as a commitment to provide service when it is paid for.

¹² According to Gérald Lavallée, who represented the Task Force in the cross-country discussions, the hope was that by starting with a very tough Code, a stringent set of rules would remain after the inevitable negotiations.

¹³ "Cable TV to Adopt National Customer Service Standards," CTSC press release, November 5, 1990.

¹⁴ See CTSC, *Standards, Codes and Guidelines*, *op. cit.*, go to <<http://www.ctsc.ca>>, then click on "Customer Service Standards" link.

¹⁵ Paraphrased from the CTSC Web site.

CABLE TELEVISION STANDARDS COUNCIL

- *Continuation of service*: Companies promise, among other things, to refrain from demanding deposits from customers with good credit histories; to provide high-quality signals; to give good maintenance and repair service; to make convenient payment methods available; and to inform customers 30 days in advance of rate and channel lineup changes.
- *Termination of service*: Companies must refund money owed to customers who have terminated service within 45 days of termination; companies must also provide notice of termination for non-payment.

In addition, companies must follow specific rules related to minimum business hours; “specific indicators” for service; and the marketing of “unscrambled discretionary tiers” (packages that are beyond the basic service but are not “pay TV”).

Complaints

The CTSC welcomes consumer complaints — indeed, they are the reason for its existence — and seeks to ensure that they are handled fairly.¹⁶ The Council immediately forwards complaints to the company in question, asking the company to reply directly to the customer within 10 days. If the customer is unsatisfied with the company’s response, then the Council will take the matter up directly with the company (see the following section on dispute resolution).

A recent innovation at the CTSC is a call-back system. Council representatives make follow-up calls to a random sample of complaining consumers to confirm that their complaints were handled to their satisfaction.

Dispute Resolution

If the customer is not satisfied with the company’s response to the complaint, the Council may intervene. The first level of intervention is informal mediation. Here, Council staff (as opposed to members) attempt to mediate the dispute by telephone.

If the consumer is dissatisfied with the result, the next level is an adjudication hearing, heard by the Council itself. The Council consists of a Chairperson with some judicial or quasi-judicial experience (who is not, before being appointed, involved in the cable industry);¹⁷ the Chairperson of the CTSF’s Board, who serves as the industry’s representative; and a consumer/public interest representative. The Council’s decision is binding on the company, while the customer can appeal to the CRTC or

¹⁶ Complaints may relate to cable installation, service quality, programming, billing or other matters. The CTSC Web site clearly explains the process for hearing complaints and resolving disputes: “We’ll forward your complaint to the cable TV company immediately, asking it to respond directly to you within 10 days. If you remain dissatisfied, write to us and we will pursue the matter with your cable company. If the complaint remains unresolved, the Council will review the case to decide whether the company has breached a Standard, Code or Commitment. We will promptly provide you and the company with the decision in writing.”

¹⁷ Commentary by Gérald Lavallée at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

CABLE TELEVISION STANDARDS COUNCIL

to the Privacy Commissioner on matters regarding the Cable Industry Privacy Code which mirrors the *Personal Information Protection and Electronic Documents Act*. A company refusing to comply with the Tribunal's decision may be forced to resign from the Foundation, and as a consequence will be subject to the direct regulatory authority of the CRTC in those matters for which the Foundation assumes responsibility.

Thus, the regulatory framework always looms in the background, encouraging companies to commit to the success of the Council's dispute resolution system. As Keith Spicer, then Chairman of the CRTC, said in welcoming the Cable Television Customer Service Standards: "The CRTC is confident that cable television subscribers will increasingly rely on the ... Council... . However, the Commission will continue to retain all of its authority and will, as necessary, deal with any complaint itself."¹⁸

The Council can review and reach decisions on alleged non-compliance of cable television companies with industry standards and guidelines. While a Council decision that a company has breached a standard is considered binding, the Council may also make *non-binding* recommendations when a company has not breached a standard but could improve its service. On occasion, the Council has also pointed out areas where it considers the Standards to be lacking.¹⁹

Any complaints handling or adjudication process is free to the consumer. The Council is funded entirely by the cable television industry.

The Council logs and publicly reports on the number and nature of complaints. In practice, while the Council receives many complaints — 17 346 complaints from 10 326 individual contacts from September 1, 1993, to August 31, 2000²⁰ (certain customers having more than one complaint) — formal Council adjudications are rare, with only 13 having occurred over the entire history of the Council.²¹ This seems to indicate a fairly high success rate in satisfying consumers' concerns using less formal approaches. The Council's call-back policy, mentioned above, allows Council staff to find out whether complainants were truly satisfied with responses or whether they had just given up.

¹⁸ "CRTC Welcomes Enhanced Role of Cable Television Standards Council," CRTC press release, March 16, 1992.

¹⁹ See *Cyril White v. Regional Cablesystems Inc. – Atlantic Division*, Council Report, file 1999050009.

²⁰ CTSC statistics, March 1, 2001.

²¹ From information supplied by CTSC representatives.

CABLE TELEVISION STANDARDS COUNCIL

Thus, the Council offers a complete range of consumer redress mechanisms. Through the Customer Service Standards and through regular site visits of members' operations to ensure ongoing compliance, the Council actively seeks to prevent complaints. When complaints do arise, a consistent system — complete with deadlines and subsequent consumer satisfaction checks — ensures they are handled fairly. Finally, as a backup, the more formal adjudication process is available. The rare use of this last process appears to indicate the effectiveness of the first two.

The extent to which the cable television industry's redress mechanisms are likely to be replicated in other contexts is a point worthy of further consideration. There are several aspects of the cable television industry and the way it is regulated that are distinctive and, arguably, played an instrumental role in creating a climate conducive to the development of a sophisticated approach to market-driven consumer complaints management. First, the cable industry is regulated by an agency (the CRTC) that has signalled its desire to allow the industry to devise its own approaches to complaints management, subject to approval and pursuant to an approach set out by the regulatory agency. Second, each of the cable industry participants in the Cable Television Standards Council has a monopoly in its particular geographic area of service, so that there is, in fact, no competition among cable industry players in any designated service area. While it is probably true that the market-driven redress mechanisms in place for the cable television industry are the product of a distinctive regulatory environment, this does not take away from the fact that other industry sectors could adopt similar redress approaches (particularly those operating in similar regulatory conditions, when stimulated to do so by their associated regulatory agencies).

Canadian Banking Ombudsman and Individual Bank Ombudsmen

Canada's banks operate in an environment of extensive and complex regulation and close oversight by the federal government. This environment reflects the important role that banks play in the financial lives of individual Canadians. The ombudsman system was established in recognition of that vital role, and of the perception — of some consumers, small businesspeople and politicians — that banks were not adequately fulfilling that role.¹

During the early 1990s, Canada's banks faced a torrent of criticism from small businesses and consumers.² Small businesses generally complained about what they saw as unfair refusals of loans, while consumers had more wide-ranging complaints.³ Politicians, too, were listening to these complaints, and some MPs were pressing the government to tighten regulation to their constituents' satisfaction.⁴

In response to these concerns, a number of banks — CIBC in 1995, followed by others in early 1996 — established ombudsmen's offices to hear complaints that could not be resolved through a bank's normal processes. Also in early 1996, the Canadian Bankers Association established yet another office — the office of the Canadian Banking Ombudsman (CBO) — to hear appeals of individual bank ombudsman decisions. At first, the CBO (also referred to here as “the Ombudsman”) and the individual bank ombudsmen heard only small business complaints, but by March 1997 they had expanded their scope to encompass consumer complaints as well.

The Ombudsman's mandate is “to provide an independent and prompt resolution of complaints using the criteria of good business and banking practice and fairness in all circumstances.”⁵ The CBO was established with much media fanfare and the first Ombudsman, Michael Lauber, announced that he

¹ The extensive regulation referred to in this paragraph does not extend to market conduct, where there is actually little government oversight. In some senses, the ombudsmen fill this regulatory gap.

² Many newspaper accounts describe the dissatisfaction of consumers and small businesspeople, and their relationship to the ombudsman system. See, for instance, Brad Evenson, “Ombudsman says banks will listen, but clients aren't so sure,” *Ottawa Citizen*, May 7, 1996, p. C3.

³ The bank ombudsmen have received much media coverage over the years. For a good history of their role, especially that of the CBO, see Tracy LeMay, “Beef with your banker? Try this: Industry says ombudsman objectively resolves disputes between clients and institutions,” *National Post*, February 22, 1999, p. C10.

⁴ See, for example, “MPs back businesses' beefs on bank lending,” *Financial Post*, April 20, 1994.

⁵ CBO Terms of Reference. See the CBO Web site at <<http://www.bankingombudsman.com>>.

expected 10 000 telephone calls in the first year.⁶ A year later, however, the office was criticized for keeping a low profile, as the Ombudsman reported that only 200 people had called during the previous six months.⁷ However, according to CBO Board member James Savary, the low number likely reflects the fact that consumers have been able to complain to the individual banks' ombudsmen before the need to consult the CBO even arises.⁸ As for the public profile of the office, a March 1998 poll found that 39 percent of Canadians were at least somewhat aware of the CBO.⁹ Michael Lauber estimates that the figure is closer to 60 percent now.

Complaints Process

Thirteen chartered banks currently participate in the CBO program, including all of the five largest: Bank of Montreal, Royal Bank, Scotiabank, TD and CIBC. The ombudsmen hear complaints from customers regarding most issues, other than pricing policies, lending and other risk management policies, matters before the courts, matters best handled elsewhere and matters considered unresolvable.¹⁰ This leaves quite a wide scope, however, especially considering that the ombudsmen's mandates cover all of their respective institutions' subsidiaries, including banks, trust companies and securities brokerages.¹¹

The process for hearing complaints is relatively informal. The first step is to follow the specific bank's internal processes. The TD Bank, for instance, asks customers to progress through a chain from the bank branch's customer service representatives to the branch manager, representatives at a central 1-800 number and, finally, TD Bank's ombudsman.

Such processes vary slightly from bank to bank. For instance, CIBC asks customers to bring unresolved disputes from their branch manager to a district or regional manager before moving up the line. Scotiabank, in contrast, states that customers should go from the branch manager straight to the Office of the President, then to the internal ombudsman. However, the number of steps a customer must take to reach the ombudsman seems to vary by no more than one among the largest chartered banks. A complaint may proceed to the CBO if the internal bank ombudsman has done the following:

⁶ Brad Evenson, "Ombudsman says banks will listen, but clients aren't so sure," *op. cit.*

⁷ Valerie Lawton, "Few customers bank on industry ombudsman," *Ottawa Citizen*, July 31, 1997, p. C5.

⁸ Communication with James Savary, August 2000.

⁹ The figure comes from a 1998 Ekos Public Opinion research poll commissioned by the Task Force on the Future of the Canadian Financial Services Industry.

¹⁰ See <<http://www.bankingombudsman.com/ombud/english/pages/areports/archive/99/what.html>>.

¹¹ Case studies on a variety of complaints heard are available in the 1999 Annual Report, *ibid.*

CANADIAN BANKING OMBUDSMAN AND INDIVIDUAL BANK OMBUDSMEN

- “rendered a decision on, or completed a review of, the complaint, but the complainant has not accepted any observations made or conditions of settlement or satisfaction offered by the bank or the internal bank ombudsman; or
- “failed to achieve a resolution within a specific time period to be determined by the [CBO] Board of Directors in conjunction with the Ombudsman.”¹²

An example of a matter best handled elsewhere would be one that involves third parties: since the Ombudsman has no power to compel information from a third party, such a case would be best left to the courts. An example of an unresolvable matter would be one that the Ombudsman considers frivolous or vexatious, or one involving old transactions for which the institutions are no longer required to keep records.

Interestingly, for brokerages, ombudsmen provide a redress function that is in addition to the service provided by the professional governing body, the Investment Dealers Association (IDA). The IDA is able to discipline members, but it cannot compensate an aggrieved consumer; moreover, fees for using its arbitration services can be substantial. Therefore, the banks arguably enjoy something of a competitive advantage over non-bank-affiliated brokers, by offering consumers additional protection against broker error or misconduct.¹³

The CBO requests written submissions from both parties. Then, if necessary, it investigates further through personal conversations with the parties. (Incidentally, obtaining information from the institutions poses no problem, as they have all agreed to provide any non-privileged material requested by the Ombudsman that is relevant to a complaint under investigation.)¹⁴ The Ombudsman gives both parties a written “recommendation,” including reasons. The recommendation is not binding on either party, though no bank has ever refused to comply with a recommendation — a predictable result, since the Ombudsman is required to publicly report any such refusal.

Elements of Complaints Prevention

In a secondary role, banking ombudsmen help banks continually improve overall customer service. CIBC’s ombudsman puts it this way: “While our primary mandate is to resolve particular customer complaints or disputes, we also use those situations to identify areas, products, services, training, and other aspects of CIBC which should be changed.”¹⁵ The Royal Bank’s ombudsman’s office is more specific in the recommendations for improvement that have resulted from disputes. In its

¹² CBO Terms of Reference, *op. cit.*

¹³ These issues are discussed in more detail in Rob Carrick, “Personal Finance: Have a dispute with your discount broker?” *The Globe and Mail*, May 27, 2000, p. N2.

¹⁴ CBO Terms of Reference, *op. cit.*

¹⁵ *CIBC Ombudsman Annual Report*, for year ended October 31, 1999, available at <http://www.cibc.com/english/about_cibc/to_our_customers/ombudsman_main.html>.

1999 annual report, the office lists 10 recommendations it made that year. The list includes changes to ensure better communication and disclosure, as well as some changes to policies and procedures.¹⁶

Costs and Questions of Independence

Complainants pay no fees. Internal bank ombudsmen are paid by their banks, and each reports to the bank's Chair and meets periodically with a committee of the Board of Directors. Nevertheless, the ombudsmen claim to be impartial.¹⁷ The Canadian Banking Ombudsman Inc. is a non-profit corporation financed by CBA member banks based on their size.¹⁸ A Board of Directors consisting of six independent members and five high-level bank executives appoints the Ombudsman.

The independent directors come from a variety of backgrounds and different parts of the country; they currently consist of a Vancouver psychologist, a university chancellor (and former lieutenant-governor of Ontario), the director of an agro-biotech company, a lawyer, a business professor and an economics professor (James Savary), who also chairs CAMVAP's Board of Directors.¹⁹ These independent directors are said to safeguard the Ombudsman's independence: "Independent directors constitute a majority of the Board....The Board may not dismiss the Ombudsman without the unanimous approval of the independent directors. They review and recommend candidates for Ombudsman; act as the nominating committee putting forward candidates for independent directors; review and make recommendations to the Board regarding the budget; and act as the audit committee. Independent directors are elected for a three-year term and may be re-elected."²⁰

In a discussion at the Market-Driven Redress Workshop, the Ombudsman described the role of the independent directors as being there to oversee the Ombudsman and to publicly resign if they are dissatisfied.²¹

In addition, the Ombudsman does not report to the Board on specific complaints, nor does the Board hear appeals of the Ombudsman's recommendations.²² Despite these safeguards, the CBO has been

¹⁶ See *Royal Bank Ombudsman Annual Report 1999*, "Recommendations," available at <<http://www.royalbank.com/ombudsman/>>.

¹⁷ As the Scotiabank Ombudsman said in an interview in February 1998, "We [i.e., his office] are not Scotiabank."

¹⁸ *CBO Annual Report, 1999*, p. 12. According to Michael Lauber, the CBO's annual budget is currently \$1.4 million, which amounts to about \$1000 per billion dollars in assets.

¹⁹ *CBO Annual Report, 1999*, p. 14.

²⁰ *Ibid.*, p. 12.

²¹ Michael Lauber, commentary at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

²² *Ibid.*

CANADIAN BANKING OMBUDSMAN AND INDIVIDUAL BANK OMBUDSMEN

criticized by one group, the Canadian Community Reinvestment Coalition (CCRC), for an alleged lack of independence from the industry.²³ However, the CCRC's position paper on the issue does not point to any concrete evidence of bias arising from the relationship between the banking industry and the CBO. In its 1998 report, the Task Force on the Future of the Canadian Financial Service Sector took a more positive view of the CBO, stating: "There has been some criticism of the CBO as being a public relations exercise, without bank commitment. That is not our view. We are impressed with the spirit behind, and the structure of, the CBO, and we believe that it compares well in most respects with similar initiatives in other countries and industries."²⁴

However, the Task Force felt that the CBO, "because it is industry-sponsored...is not *perceived* as independent"²⁵ (emphasis added). In part because of the issue of perception, the Task Force recommended that the federal government establish an ombudsman's office. This office would cover the entire financial sector, not just banks.

In response to this recommendation, the federal Minister of Finance tabled a bill which, if enacted, would empower him to establish an agency to deal with complaints from bank customers.²⁶ (At the time of publication [July 2002], the federal government was participating with provincial regulators and members of the financial services industry in discussions concerning the creation of a comprehensive financial services ombudsman to include all financial services sectors. This undoubtedly will affect future operations of the CBO.)

The individual bank ombudsmen, as direct employees of the institutions in question, are potentially subject to similar criticisms about lack of independence. John Mould, who is both chief financial officer of HSBC Bank Canada and its ombudsman, has recently defended his dual role, stating that "the mandate of the office of the ombudsperson and the manner through which it is exercised together with the prominence of the position of the CFO in the bank's executive structure"²⁷ combine well to the benefit of both the customers and the bank. He notes that he has a set of procedures to follow in resolving complaints — "practices that are designed to ensure that customer considerations are fully represented in the complaint resolution process, regardless of whatever other duties [he]

²³ See *Banking Ombudsmen: Why they must be independent*, Canadian Community Reinvestment Coalition, Position Paper #1, September 1997.

²⁴ *Report of the Task Force on the Future of the Canadian Financial Services Sector*, September 1998, pp. 137–138.

²⁵ *Ibid.*, p. 138.

²⁶ See Bill C-38: *An Act to Establish the Financial Consumer Agency of Canada and to Amend Certain Acts in Relation to Financial Institutions*, ss. 114–115 (since passed). See also *Reforming Canada's Financial Services Sector*, Department of Finance, Ottawa, June 25, 1999.

²⁷ John Mold and Victor Korompai, "Reconcilable Differences," *CMA Management*, June 2000, pp. 29–31.

may have.”²⁸ In addition, he says, the ombudsman’s high-level position in the corporate hierarchy ensures that other units in the bank cooperate with his inquiries and respect his decisions; it also means that the ombudsman will have the knowledge and expertise to deal with the complaints received.²⁹

Public Disclosure of Results

In the year that ended October 31, 1999, the CBO began handling 141 personal banking-related investigations and completed 159 such cases (some cases crossed over fiscal years). Of the investigations concluded, 25 percent resulted in favour of the customer. In addition, the CBO has assessed complainants’ reaction to the CBO’s recommendations. In 22 percent of cases, agreement was reached; that is to say, the bank and customer were “substantially in agreement.” In 15 percent of cases, the complaint was partially resolved; in other words, positions were modified or parties reached a better understanding of the other side. In 63 percent of cases, the customer went away unhappy; that is, no agreement at all was reached.³⁰

If the numbers seem unfavourable to consumers, it is worth remembering that these are the results of a process that occurs only at the end of a long chain of earlier attempts to resolve the complaint. The more clear the case, the more likely the problem has been resolved before reaching the CBO. The numbers are understandably more favourable when an observer moves back a chronological step, to the individual bank ombudsman level. For instance, CIBC recorded full agreement in 47 percent of consumer complaints during the same period.³¹ The Royal Bank saw full agreement in 146 out of 334 cases (numbers that include small business disputes as well). Similarly, Bank of Montreal saw agreement 52 percent of the time in personal banking disputes.³² A brief survey of bank Web sites shows that not all banks publish general statistics on the outcomes of their complaints processes, however.

²⁸ *Ibid.*

²⁹ Within the “Big Five” banks, two ombudsmen are retired senior employees brought back into their respective banks to take on the position, while three are senior employees who have moved into the position after accumulating a great deal of experience with their banks.

³⁰ *CBO Annual Report*, 1999, p. 10.

³¹ *CIBC Annual Report*, 1999,
<http://www.cibc.com/english/about_cibc/to_our_customers/ombudsman_main.html>.

³² *Bank of Montreal Ombudsman Annual Report* 1999, p. 4,
<http://www.bmo.com/ombudsman/content_people.html>.

Better Business Bureau

The name of the Better Business Bureau (BBB) is so well known in Canada and the United States that consumers seldom stop to consider what the organization is.¹ For the typical consumer, the face of BBB is the local Bureau, of which there are 15 in Canada. Each serves a distinct geographical area, so most Canadians are served by a local Bureau. Each local Bureau is a non-profit organization supported by membership fees of the local businesses that choose to join it (though some BBBs have other sources of funding, as discussed later in this section). Each local chapter enters into a tripartite licensing agreement for the use of the BBB name and torch logo with the non-profit umbrella groups, the U.S.-based Council of Better Business Bureaus and its subsidiary, the Canadian Council of Better Business Bureaus. The central governing bodies provide quite a wide scope to the local BBBs — one result being that the quality of service has been said to vary from chapter to chapter.² However, the Councils own the BBB name and torch logo — arguably the most valuable assets, given their high recognition value — and thus can maintain the reputation associated with them by retaining the power to revoke the licensing rights of local chapters.³

BBB membership is not limited to a single sector. Virtually any type of business can join the BBB, though none is obliged to do so.

The earliest BBBs date from the early 20th century, when government, the public and some businesses in the United States became increasingly concerned about the growth of abusive advertising practices. Such practices inspired both the first legislation governing misleading advertising and business-led self-regulatory initiatives. Among the most prominent examples of the latter were “vigilance committees”: business groups that adhered to ethical advertising principles and exposed fraudulent marketers. As the Southern Alberta BBB puts it: “Rapid expansion of these committees prompted a search for a more appropriate name...one for this self-regulatory effort

¹ Much information in this case study was provided by Al Searle, then President of the Canadian Council of Better Business Bureaus, interviewed in July 1999 and March 2000.

² This observation was made in a study of U.S. BBBs in the mid-1990s. See Leslie M. Marable, “Better Business Bureaus are a Bust,” *Money*, October 1995, p. 106.

³ Current CCBBB President Bob Whitelaw notes that he considers himself responsible for the integrity of the logo and name in Canada. Interview with Mr. Whitelaw, August 2000.

effecting changes not only in advertising, but also in other business practices. Thus in 1912, the Better Business Bureau was born.”⁴ The first Canadian chapter opened in Toronto in 1928.

In general, there seem to be few specific substantive standards of business conduct to which a BBB member must adhere. While each local BBB may draw up its own requirements, the Uniform Standards of Membership for Local Bureaus outline a minimum set:⁵ applicants must have been in business for at least six months in the area served by the local BBB before applying, and fulfil any applicable legal requirements for operating the business, such as bonding and licensing; “respond to any and all complaints forwarded by the Bureau”;⁶ and “be free from governmental action concerning the marketplace and its customers that demonstrates a significant failure of the company to support the principles and purposes of the Better Business Bureau.”⁷ Perhaps the most important requirement is a procedural one: it is that businesses “[m]ake a good faith effort to resolve all such complaints in accordance with generally accepted good business practices.”⁸

Consumers know that local BBBs provide information and handle complaints.

Information Provision

Consumers may ask the BBB for a reliability report on a local company, whether the company is a BBB member or not. Ideally, the report will include information on how long a company has been in business, and how well the company has handled complaints forwarded by the BBB in the past. Some BBBs may also provide other relevant information, such as whether the company is a member of the BBB, or whether it is a member of such programs as the BBBO nLine Reliability program, may also be provided.⁹ The quality of BBB reports has been criticized over the years, either because the reports lack important information for a given company (such as the complete history of complaints)

⁴ From the Southern Alberta BBB Web site <<http://www.betterbusiness.ca>>.

⁵ See “Uniform Standards of Membership for Local Bureaus” on the Council of Better Business Bureaus’ Web site, <<http://www.bbb.org/bnd/joininfo.asp>>.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See the BBB Web site, <<http://www.bbbonline.org/reliability/index.asp>>.

or because reports simply do not exist for the vast majority of companies in a specific area.¹⁰ Eight of the fourteen Canadian BBBs now provide free online access to their reliability reports on members and non-members. The remaining six will provide this service by September 2003.¹¹

Complaints Handling

A consumer may file a complaint with the local BBB about any company in the area covered by the BBB. Complaints may be sent by mail, by telephone or over the Internet (via the central CBBB Web site¹² or the Web sites of local BBBs). A BBB representative may contact the company to see whether the firm can reach a satisfactory agreement with the consumer. This is an informal process that the BBB calls “conciliation.” If the company is a BBB member, the terms of the membership agreement require it to deal with the complaint in good faith. If the company is not a member, no such requirement exists, but an unsatisfactory mark may be placed in the company’s file.

Conciliation is generally described as the BBB’s first, and least interventionist, level of “dispute resolution.” Arguably, however, it is perhaps best described as “complaints handling.” It is really the only level that is common to all local BBBs. More interventionist levels, discussed in the next section, are available only to varying degrees throughout the network.

Dispute Resolution

Local BBBs offer both mediation and arbitration dispute resolution services.

Complaints do not often reach the dispute resolution stage: in 1999, BBBs or their affiliated bodies mediated or arbitrated 2069 cases, out of 49 247 verbal complaints and 15 500 written complaints.¹³

The BBB literature describes mediation as follows: “In BBB mediation, a professionally trained mediator meets with the parties and guides them in working out their own mutually agreeable solutions. During the confidential mediation session, the BBB mediator clarifies and reframes problems and helps the two sides talk with each other and discuss solutions. Mediators don’t decide who is right or wrong.”¹⁴

¹⁰ See Marable, *ibid*, for a discussion of this problem in the U.S. See also Peter Verburg, “Better or Worse,” *Canadian Business*, June 12, 1998, pp. 56–62, which says that Calgary’s BBB has reports on only half of the companies in its jurisdiction.

¹¹ Interview with Bob Whitelaw, president of the CCBBB, September 2002.

¹² See <<http://www.bbb.org/bbbcomplaints/Welcome.asp>>.

¹³ As some consumers complain both by telephone and in writing, the total number of complaints may be less than the sum of these two numbers.

¹⁴ From CBBB Web site, to which Canadian BBBs’ Web sites provide a link.

BETTER BUSINESS BUREAU

In BBB arbitration, the parties state their views at an arbitration hearing, offer evidence and let an impartial third party from the Bureau's pool of certified arbitrators make the decision that will end the dispute. The arbitrator is trained to listen to both sides and to weigh the evidence presented at the hearing. He or she makes a decision about the dispute after the hearing is over.

However, such services are employed only rarely. A company joining the local BBB agrees to permit the Bureau to use these mechanisms if necessary to resolve a consumer complaint. In practice, however, there is a wide variation among BBBs in the number of cases they mediate or arbitrate. One report provides the example of Buffalo, New York, where the local BBB is "strongly supported by the business community and is very well known for its work in dispute resolution by the people of Buffalo." Less well-known or less active BBBs receive fewer requests for mediation or arbitration.¹⁵

Costs to Businesses

Local BBBs design their own membership fee schedules, so they can vary considerably. In Vancouver, charges start at \$280 a year for companies with up to two employees. In Ottawa, fees start at \$125 for a home-based business and \$190 for a firm with one to four employees, and range up to a maximum of \$695.

Costs to Consumers

Most BBBs offer their company reliability reports free of charge. Some, however, charge a fee by using a 1-900 telephone number. This controversial practice is used in Southern Alberta and the Lower Mainland of British Columbia, for instance, as well as in a number of areas in the United States.

Some BBBs offer free mediation and arbitration services, while others charge a fee. For instance, a consumer seeking mediation with a BBB member company in Southern Alberta has to pay \$50. The price rises to \$200 for mediation with a non-BBB member. Arbitration costs the consumer \$500 per day for a case heard by one arbitrator, or \$1200 for a case heard by a panel of three. The BBB itself does not carry out these services in Southern Alberta; a private Calgary firm, the Dispute Settlement Centre, provides them under contract. Results are confidential.¹⁶

¹⁵ Peter Finkle and David Cohen, "Consumer Redress Through Alternative Dispute Resolution and Small Claims Court: Theory and Practice," Consumer and Corporate Affairs Canada, Ottawa, June 1993, p. 28.

¹⁶ Information in this paragraph was supplied by Loretta Richens of the Dispute Settlement Centre, May 2000.

Lack of Centralized Power and Standards

In the past, the umbrella Councils — both in Canada and the U.S. — have admitted to wielding only limited control over local BBBs.¹⁷ In 1997–1998, the CCBBB introduced 24 Bureau operating standards and 12 membership standards.¹⁸ The 14 Canadian BBBs are monitored and audited against the operating standards. The results are reported to Bureau CEOs, local boards, and the board of the CCBBB. Failure to comply can result in a designation of “not in good standing” or, in extreme cases, in termination of the BBB operating licence and trademark. In June 2001, the operating licence and trademark agreement of the Toronto BBB were terminated for failure to comply with operating standards — the first time such action had been taken in either Canada or the United States.

Conflict of Interest

Aside from inconsistencies, some people have complained that the fact that BBBs are entirely funded and run by their business members — with little or no input from organizations outside their membership — creates an inherent conflict of interest.¹⁹ It is fair to point out that BBBs are required to have a conflict of interest policy, though CCBBB documents do not lay out the contents of that policy in detail.²⁰

¹⁷ See, for instance, “BBB failed to act on early warnings national body claimed it had no power to probe Metro branch,” *The Toronto Star*, November 20, 1995, p. B6, where the Canadian CBBB President is quoted as admitting that the Council had no power to investigate allegations of wrongdoing at the Metro Toronto BBB.

¹⁸ This and subsequent information in this paragraph supplied by Bob Whitelaw, president of the CCBBB.

¹⁹ This criticism is mentioned in Verburg, *op. cit.*

²⁰ The Operating Standards for Member Bureaus state: “The Bureau shall have a conflict of interest policy covering the Board, the CEO, officers and staff. This policy will cover both paid and volunteer positions.” This document was provided by Mr. Searle of the CBBB.

Canadian Marketing Association

The Canadian Marketing Association (CMA) was established in 1967 by 21 companies involved in the direct marketing industry in Canada.¹ The CMA has grown to become the largest marketing association in the country with a membership of 800 companies, representing some 80 percent of the industry. In 2000, CMA members supported more than 482 000 jobs and contributed \$51 billion in overall sales to the Canadian economy.² Some of these companies focus solely on marketing, currently defined by the CMA as including the reaching of consumers through “Internet, television, telephone, radio and addressed advertising mail.”³ For others, marketing is only one component of a larger operation: members include major banks and such department stores as Sears Canada.⁴

In the late 1970s, the federal Department of Consumer and Corporate Affairs (CCA) encouraged the CMA to establish a self-regulatory program to deal with customer complaints about direct marketers. After about a year of study and negotiation, CCA and the CMA reached a deal in November 1977 to implement a complaint resolution program called Operation Integrity at the beginning of 1978. This program included a Code of Conduct for CMA members. A federal official at the time was quoted as saying, “Industry self-regulation is a more positive solution than passing a law.”⁵

The CMA’s consumer protection rules have changed over the years in response to issues that have caused consternation for growing numbers of consumers. For instance, the CMA curbed the use of automatic dialling and announcing devices in the early 1990s, when consumers started complaining about the technology.⁶ Also, and perhaps most notably, privacy policies were introduced in January 1993, in response to growing concerns, among the public and the federal and provincial

¹ The CMA has undergone a few name changes over the years. Formerly known as the Canadian Direct Mail/Marketing Association, then the Canadian Direct Marketing Association, in 1998 it became the Canadian Marketing Association, the name that will be used throughout this document. See the CMA Web site at <<http://www.the-cma.org>>.

² Figures supplied by the CMA, *ibid*.

³ *Ibid*.

⁴ See the CMA membership list at <<http://www.the-cma.org>>.

⁵ Scott Wade, Consumer and Corporate Affairs Canada, cited in Ellen Roseman, “The Consumer Game: U.S. rules stronger for mail-order merchandising,” *The Globe and Mail*, March 20, 1978, p. 26.

⁶ See discussion in Lawrence Surtees, “CRTC cuts off junk calls,” *The Globe and Mail*, June 14, 1994, p. A1.

governments, about marketers' handling of personal information.⁷ In addition, in 1998, member organizations were forbidden to send unsolicited commercial e-mail and had to further restrict their information handling practices as the Internet became an increasingly common marketing medium.⁸ In 1999, the CMA announced further guidelines for marketing to children.

Activities Covered

Under Operation Integrity, the CMA investigates a problem for a consumer if it relates to a marketing offer or purchase made by mail, telephone or the Internet. The complaints, which must be in writing, fall into six categories:⁹

- mail order problems — non-fulfilment (product ordered but not received);
- mail order problems — quality (product was not as advertised or was of inferior quality);
- mail order — other problems (for example, partial credit or refund delay, overpayment, returned merchandise or communication problem);
- record or book club problems (for example, inability to cancel, improper charge, communication problem or credit delay);
- magazine subscription problems (similar to record or book club problems); and
- problems related to the Internet and other electronic media.

Code Content

Members must follow the CMA Code of Ethics and Standards of Practice.¹⁰ This document includes requirements related to matters such as the following:

- the content of representations, including the accuracy of the representations and proper disclosure of the constituent elements of the offer;
- fulfilment practices (for example, goods to be shipped in 30 days or within the time indicated);
- media-specific practices (including rules specific to broadcasting, print, telephone and Internet marketing);
- product safety;
- marketing to children;

⁷ Robert Stacey, "Consumers to control trading of personal data," *Direct Marketing*, March 1993, p. 40.

⁸ See Stephen Barrington, "Canadian Marketers Take Steps to Foster Web Commerce: Members Must Have Consumer Consent Before Sending E-mail," *Advertising Age*, December 10, 1997, p. S35.

⁹ See <<http://www.the-cma.org/consumers/integrity.html>>.

¹⁰ Available at <<http://www.the-cma.org>>.

- environmental protection; and
- personal privacy protection.

In addition, companies are expected to obey applicable laws and to refrain from distributing material that is vulgar or that is disparaging to particular groups in society (racial, linguistic or gender groups, for instance).¹¹

Other Consumer Services

In addition to the Codes, the CMA tries to *prevent* complaints arising from one of the issues that most frequently concerns consumers: unsolicited telephone, facsimile and mail marketing. Member organizations must remove customers' names from their internal telemarketing, fax and direct mail lists when an individual makes such a request to the CMA.

Complaint Handling Process

Complaints come from the media and from other bodies, such as the BBB, as well as directly from consumers. When the CMA receives a complaint about an organization, whether or not it is a member, the CMA sends a copy of the complaint to the organization, along with a request that the organization investigate the problem and attempt to rectify it quickly. In the meantime, the CMA sends the complainant an acknowledgment of receipt of the complaint. If the organization does not respond to the CMA's inquiry within 30 days, or does not resolve the complaint within 90 days, and if the CMA's President feels the organization has violated the Code of Ethics and Standards of Practice, the CMA will ask the organization in writing to comply with the Code and Standards. If the matter remains unresolved, CMA staff will determine whether the organization has made every effort to resolve the complaint, and a member committee will be established to investigate the organization's conduct and to file a report to the CMA Board of Directors. If the CMA finds that the organization has violated the Code of Ethics and Standards of Practice, the Board may terminate the offending organization's CMA membership. If the CMA takes such an action, it will make a broad public announcement of the organization's expulsion. CMA also monitors repeat offenders and will deny membership to organizations that are the subject of frequent complaints or that seem unwilling to resolve consumer complaints.¹²

¹¹ *Ibid.*

¹² CMA Code of Ethics and Standards of Practice.

The largest proportion of communication relates to the “do not call” lists. The CMA receives about 4000 calls a month regarding these lists. Besides this issue, typical problems include non-fulfilment, fulfilment mistakes or trouble reaching a company.¹³ According to the CMA, Operation Integrity resolves over 95 percent of complaints made against its member companies and resolves the majority of complaints made against non-members. While the CMA compiles information on the number of complaints received and studies trends in numbers and types of complaints, it does not release this information to the public.¹⁴

Consumers seeking redress through the CMA do not pay a fee. Companies pay membership fees to belong to the CMA, which are based on a sliding scale reflecting company size and marketing sales. A small company may typically pay in the range of \$1500 to \$4000.¹⁵

It is worth considering whether the secrecy surrounding Operation Integrity’s results is justifiable. While companies would be understandably concerned about reputation damage resulting from the disclosure of such disputes, such information would present a favourable picture of CMA members 95 percent of the time, would it not? The experience of other associations, such as Advertising Standards Canada (see below), demonstrates that disclosure is both practical and, indeed, useful.

¹³ Commentary by Amanda Maltby, CMA Vice President, at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

¹⁴ Interview with CMA representative, August 18, 1999.

¹⁵ As per Amanda Maltby, CMA representative, February 9, 2000.

Canadian Automobile Association's Approved Automobile Repair Service

The Canadian Automobile Association (CAA) was formed in 1913. It is a non-profit corporation organized to assist motorists and to lobby governments on their behalf. There are currently 11 local CAA clubs in Canada, with 5 in Ontario, 1 for the Atlantic provinces, and 1 each in British Columbia, Alberta, Manitoba, Saskatchewan and Quebec. Over the years, the various CAAs have added a variety of services for their members, such as insurance, travel guides and maps. CAA represents an estimated four million Canadian consumers and is affiliated with auto clubs in 95 countries. The CAA is closely associated, and identified (by way of a similar logo), with the American Automobile Association (AAA).

For many years, CAA gave consumers expert reports on the condition of used vehicles. Each report would detail repairs to the vehicle that would eventually be necessary. As the CAA's National Director of Automotive Services, Gerald Turnbull,¹ puts it, members using the service would almost inevitably ask, "Where should I go to get this work done?" This led the CAA to start certifying establishments. This certification process led to a few complaints by club members who were not satisfied by work done at certified garages, so the CAA devised a redress process.

The Ontario CAA clubs launched the Approved Auto Repair Service (AARS) program in 1974.² Other regional CAA clubs soon followed suit. The redress mechanism (described later in this section) put in place at that time has remained relatively unchanged since. The certification system predated provincial consumer protection regulation in the field.³ When Ontario began regulating the car repair industry, the regulations reflected many of the scheme's components. Thus, according to Mr. Turnbull, major modifications have not been found necessary.

When a garage applies for an AARS designation, the facility must provide details of its operations, including the type of equipment on site and the qualifications of its mechanics. Representatives from

¹ Most of the information recounted in this study has been culled from conversations with Gerald G. Turnbull, a representative of the national office of the Canadian Automobile Association, in August 1999 and April 2000.

² This was the first such program offered in North America.

³ See, for example, Ontario's *Motor Vehicle Repair Act*, R.S.O. 1990, c M.43.

CAA'S APPROVED AUTOMOBILE REPAIR SERVICE

the local CAA club will visit and inspect the garage (a task that includes randomly pulling invoices), survey customers to measure their satisfaction with the establishment and its quality of work, and ensure that the facility meets the required standards before approving it. These standards ensure that the garage has formally trained and qualified workshop staff, fair prices that are competitive for that region, and adequate and clean customer reception and washroom facilities. Thereafter, the CAA regularly inspects approved garages. There are now more than 2000 approved independent garages across the country that meet CAA's quality and service standards.⁴ Once approved, the garages enter into a formal contract⁵ with CAA to uphold AARS program standards and conditions, and pay a nominal fee to offset the costs of the AARS program.

The AARS sign purports to assure consumers that they will receive quality work at a fair price. For CAA members, approved garages provide a 12-month or 20 000-kilometre guarantee for work done. The guarantee is valid throughout Canada — the various local CAA clubs will honour the guarantee of another club. Furthermore, as part of the AARS program, approved garages agree to accept an arbitration and a binding decision from the CAA if a dispute arises between a CAA member and the garage. This service is provided free of charge to CAA members.

The dispute resolution services are little advertised outside of the CAA members' magazines. Sometimes the garage reminds the member of the service when a dispute arises. In about half the cases, the facility itself seeks the CAA's intervention. This highlights a useful function of third-party intervention services for merchants: such services can handle problems arising from difficult customers.

Before the CAA becomes involved in the dispute, it will first refer the member to the garage so that the parties can try to settle the problem among themselves. If they do not resolve it, an experienced mechanic, employed by the local club, will investigate the situation and try to help the parties reach an agreement. If this is unsuccessful, the dispute will proceed to a formal arbitration in which the arbitrator — chosen and trained by the CAA club — will issue a decision that is considered binding on the facility, but not on the customer.

Administration costs for the AARS program are covered through a “nominal” fee paid by the garages. Ways this might change are discussed later in this section. The service is available only to consumers who are CAA members.

⁴ See the CAA's Web site at <<http://www.caa.ca>>.

⁵ If there is a change of ownership, the contract becomes null and void. The CAA will only consider an application by a new owner if the garage has operated under that owner for at least one year.

CAA'S APPROVED AUTOMOBILE REPAIR SERVICE

Because the service is run by a membership organization, members have the power to lobby for changes through annual meetings; according to the President, comments and suggestions are always welcomed.

According to the CAA, 95 percent of all cases are closed within five days. The Central Ontario CAA, which serves approximately 25 percent of the total Canadian membership, became involved in about 200 complaints in 1997 and another 200 in 1998. The average time it took to settle the cases was four days. No national figures are gathered or reported.

There were no formal arbitrations from 1997 through 1999; all disputes were resolved before they went to arbitration.

As discussed previously, the system remains relatively unchanged. It is well regarded by club members and repair establishments alike. Garages have told the CAA that customers, whether members of CAA or not, are impressed by the CAA certification. Customers give a great deal of credence to the CAA approval sign, in an industry not known for its credibility. The garages are so pleased with the results that they would like the CAA to market the accreditation and redress system more aggressively, even if it means charging more to participate in the program. At the moment, the CAA only charges establishments a low administrative fee, hoping to keep the program from relying on members' fees. If the CAA were to increase marketing, it would need to raise the fee it charges industry. It is currently considering this option.

The AARS is a rather low-key program that has apparently generated very little media coverage over the past two and a half decades. What coverage has occurred has been very general, indicating the value of the program as an informational tool for consumers looking for a good mechanic. Overall, in comparison to other market-based, consumer-oriented redress mechanisms (such as CAMVAP), relatively little information about the program seems to be readily available to the public. It may be desirable to put more information about the AARS on CAA Web sites.

Advertising Standards Canada

Advertising Standards Canada (ASC — in French, Les normes canadiennes de la publicité) is the Canadian advertising industry's national self-regulatory body. Its primary functions are to receive and review complaints from the public regarding advertising, and to pre-clear certain kinds of advertising for advertisers. ASC began in 1957, when a group of advertisers and ad agencies created the Canadian Advertising Advisory Board (CAAB). The Board encouraged member compliance with an ethical Code of Practice. In 1963, the Canadian Code of Advertising Standards was first published. The CAAB changed its name to the Canadian Advertising Foundation (CAF) in 1992, and then to Advertising Standards Canada in 1997. The CAAB-CAF-ASC (hereafter ASC) remains a non-profit corporation financed principally by the contributions of its member companies, who now number more than 200 and include media outlets, advertising agencies and other major companies that rely heavily on advertising to promote their products.¹

Advertising self-regulation in Canada developed largely due to growing public concerns about the industry. Governments were being prompted to respond to these concerns with regulations. Iain Ramsey writes of the era:

The [public's] concerns related to overcommercialisation of the media, misleading and absurd claims, tastelessness, and a fear of psychological manipulation by television advertising. The rise of the consumer movement and the recognition by government of the consumer interest, represented in 1967 by the creation of the Department of Consumer and Corporate Affairs, signalled the serious potential of regulation of various aspects of advertising. The prosecution of misleading price advertising had increased sharply and further regulation of misleading advertising was anticipated.²

¹ See the list of members in Advertising Standards Canada, *1999 Ad Complaints Report*, p. 20. This can be downloaded from the ASC Web site at <<http://www.adstandards.com>>.

² Iain Ramsey, *Advertising Self-Regulation*, paper prepared for the conference "Exploring Voluntary Codes and Their Role in the Marketplace," Ottawa, October 1996. (Footnotes omitted.) Since the 1960s, ASC has continued to reassure regulators that it can provide a self-regulatory mechanism that is more efficient and effective than government regulation. Indeed, concern about impending encroachment of government regulation has occasionally caused some members to call for tighter self-regulation. For instance, the President of Maclean-Hunter Ltd. (a Toronto publisher) told fellow CAF members in 1984 that they must contribute more money to the organization and support tighter controls in order to show the government that more regulation was unnecessary. (Donald Campbell, cited in "Tighter self-policing advised," *The Globe and Mail*, April 11, 1984, p. B8.)

The evolution of advertising self-regulation over the years has involved more than name changes. The principal set of rules (the Code mentioned previously) has been subject to frequent minor amendments over the years, with a major addition in 1980 — the inclusion of a clause regarding taste and decency. The current version, dated May 1999, contains two important additional changes: expansion of the definition of included media to encompass the Internet,³ and replacement of the taste and decency clause with an unacceptable depictions and portrayals clause. This second change was intended to clarify which kinds of advertisements will contravene the Code.⁴ It specifies that portrayals that are discriminatory, denigrating or offensive to human dignity are prohibited, but that simple bad taste is not.

The Code addresses 14 specific issues, most relating to honesty in marketing claims.⁵ A general accuracy and clarity provision forbids deceptive claims and requires that all relevant information be revealed. It is followed by prohibitions on the following: disguised advertising techniques (such as the infomercial that is not clearly labelled as such, or the newspaper ad that resembles editorial content); deceptive price claims and guarantees; bait and switch techniques; unfair comparisons; false testimonials; distorted professional or scientific claims; misleading imitations of others' marketing initiatives; ads that show disregard for safety; ads that play upon superstition and fear; harmful advertising to children; and ads directed at minors promoting products that are not legally for sale to them.⁶ The final provision, mentioned previously, addresses advertisements that are discriminatory or exploitive, incite people to violence, demean individuals or groups, or undermine human dignity.

Meanwhile, other Codes have been added to the roster of ASC responsibilities over the years.⁷ They include the Gender Portrayal Guidelines, originally developed by a Canadian Radio-television and Telecommunications Commission (CRTC) task force in 1981 and taken on by the CAF as part of its responsibilities;⁸ and the Broadcast Code for Advertising to Children, published by the Canadian Association of Broadcasters. In fact, an interesting aspect of ASC's work is that the Codes it administers have a variety of origins. In addition to the examples just mentioned, the ASC draws on the *Guide to Food Labelling and Advertising*, which originates with the Canadian Food Inspection

³ See Advertising Standards Canada, *AASC 1999 Update*, 1999 Ad Complaints Report, p. 7.

⁴ Janet Feasby, ASC Director of Public Affairs and Communications, mentioned this motivation in a conversation with the author, July 6, 2000.

⁵ See Canadian Code of Advertising Standards, *op cit*.

⁶ *Ibid*.

⁷ The complete list is at <<http://www.adstandards.com/en/Standards/IndustryCodes.html>>.

⁸ See <<http://www.adstandards.com/en/Standards/Gender.html>>. These guidelines were originally called the Sex-role Stereotyping Guidelines, but were renamed during a 1987 revision.

Agency, a federal government body.⁹ The ASC's role in pre-clearing food and non-alcoholic beverage commercials was the result of a 1992 transfer of that power from Consumer and Corporate Affairs Canada.¹⁰

All of the ASC-related Codes and guidelines are available on the ASC Web site.¹¹

Advertising Pre-clearance

ASC's pre-clearance process helps ensure that certain categories of advertising adhere to applicable regulations and guidelines. For a fee, advertisers may submit advertising copy to ASC's Advertising Clearance Division. The copy will be analysed for compliance with relevant provisions of a statute, regulation or guideline. The pre-clearance process is provided for the following categories: advertising to children, alcoholic beverage advertising, cosmetic advertising, food and non-alcoholic beverage advertising, non-prescription drug advertising directed to consumers, and tobacco sponsorship advertising.

Doryne Peace, who until recently worked for the Advertising Clearance Division, explained that ASC does not have the government-delegated authority to make final decisions regarding the application of any laws — indeed, governments may disagree with ASC's decisions.¹² No law directly requires pre-clearance, but members of the Canadian Association of Broadcasters look for evidence of pre-clearance before airing advertising in categories subject to pre-clearance. Pre-clearance procedures do not, however, guarantee that advertisers will avoid complaints about a cleared advertisement. Rather, ASC's pre-clearance services reduce the possibility of problems with government and consumers. The pre-clearance service is not included in ASC membership fees.

Complaints Handling

ASC invites consumers to submit complaints about advertisements. It makes consumers aware of the organization and its complaints handling function through advertising campaigns, such as one in 1999 that included radio, print and out-of-home advertisements, such as billboards. This campaign

⁹ See <<http://www.inspection.gc.ca/english/bureau/labeti/labetie.shtml>>.

¹⁰ Consumer and Corporate Affairs Canada, "Federal Government Gives Preclearance of Food and Beverage Ads to the Canadian Advertising Foundation," News Release NR-10760-92-25, August 12, 1992.

¹¹ See <<http://www.adstandards.com>>.

¹² Conversation with Doryne Peace, July 7, 2000.

and the resulting media coverage reached 12 million Canadians, according to ASC figures.¹³ ASC gets additional public attention when the media widely cover certain ASC decisions.

Complaints originate from consumer agencies such as the Better Business Bureau, from government agencies such as the CRTC and from consumers. Complaints must be in writing and must include information on the nature of the advertisement, precisely when it was seen and the reasons for the complaint.

Consumers are not expected to refer to specific provisions of a Code they feel the advertisement has breached, although they may do so. When ASC decides a complaint raises an issue under the Code of Advertising Standards, it forwards the complaint to the applicable National Consumer Response Council (either for English Canadian or French Canadian advertising) or Regional Consumer Response Council (located in Halifax, Calgary and Vancouver). The independent Councils have about 20 members each, though not all sit on a single panel to hear complaints. Councils include representatives from advertisers, advertising agencies, the media and the public, who volunteer their time to support the self-regulatory process. If a complaint is not a disguised trade complaint — that is, a complaint from a business about a competitor's advertising, for which a separate process exists — and if there are reasonable grounds for the complaint based on the Code, the complaint will be processed. The Code states:

If, after a complaint is received, there is a preliminary determination that there may be a Code infraction by the advertisement, the advertiser will be notified in writing of the nature of the complaint and, if informed consent is freely granted by the complainant to ASC, the identity of the complainant. The advertiser will be asked to respond, without unreasonable delay, and provide information requested by Council in order that Council may deliberate and reach a fully-informed decision about whether the Code has, in fact, been violated.¹⁴

At the Council's initial deliberation, the materials available for the Council's review include, at a minimum, the complaint letter, the advertiser's written response, if any, and a copy of the advertisement in question.

Council's decisions are by majority vote, with the Chair having a casting or deciding vote. Any member of the Council may abstain from voting on any matter.

If a Council concludes an advertisement violates the Code, it will notify the advertiser of the decision in writing, and send a copy of the notice to the complainant. The Council will also ask the advertiser to amend the advertisement appropriately or to withdraw it, in either case without unreasonable delay.

¹³ *1999 Ad Complaints Report, op. cit.*, p. 7.

¹⁴ "How Consumer Complaints are Received and Handled by ASC and Council," Canadian Code of Advertising Standards, *op. cit.*

ADVERTISING STANDARDS CANADA

If, at its initial deliberation, a Council does not uphold the complaint, the Council will send a written explanation of its decision to both the complainant and the advertiser.

Both the advertiser and the complainant can appeal a decision. Appeals are heard by a panel of five, chosen from the same pool of people available to the Councils, and representing the same groups in the same proportions. (Members of the appeal panel must not have heard the original complaint.) The appeal panel's decision is final and binding.

When a complaint raises an issue under the Gender Portrayal Guidelines, the complaint goes to one of the Advisory Panels on Gender Portrayal (either for English Canadian or French Canadian advertising). The panels consist of representatives of advertisers, advertising agencies, the broadcast media (including both the CBC and private broadcasters), the print media and the public (two members). When a Panel finds an advertisement violates the Guidelines, it "will seek the cooperation of the advertiser, advertising agency and the media in having the message amended or removed."¹⁵

The ASC review process is initiated by any single complaint. Indeed, of the 33 advertisements cited in the ASC report for the first half of 1998, 25 stemmed from just one complaint each.¹⁶ This has caused consternation for some companies, including GM Canada. It cancelled its membership in ASC in 1998, at least in part because of the single-complaint system, according to media reports.¹⁷ One advertising agency representative agreed, saying, "It is designed to be taken advantage of by crackpots and special interest groups."¹⁸ The President of the ASC responded to this view by saying, "Whether we get five complaints or 20 complaints or 50 complaints, if it doesn't raise an issue under the Code, then it doesn't move forward through the process."¹⁹ In any case, the "one-complaint rule" is consistent with the practices of advertising self-regulatory organizations in numerous other jurisdictions, a fact pointed out in a survey presented in ASC's 1998 complaints report.²⁰

¹⁵ Gender Portrayal Guidelines, *op. cit.*

¹⁶ "Ad watchdog barks back," *The Globe and Mail*, March 1, 1999, p. B13.

¹⁷ "Controversy hounds ad watchdog," *The Globe and Mail*, May 21, 1998, p. B11. GM Canada has since regained membership in ASC.

¹⁸ Chris Staples, of Vancouver firm Palmer Jarvis DDB, cited in "Ad watchdog barks back," *op. cit.*

¹⁹ Linda Nagel, cited in *ibid.*

²⁰ *1998 Ad Complaints Report*, ASC, p. 6, available from ASC.

As stated, more than 200 companies are ASC members. The organization does not, of course, count among its members a large number of the thousands of companies that advertise in various Canadian media. However, ASC does include many of the major national advertisers of consumer products (such as Colgate-Palmolive and Proctor & Gamble), advertising agencies, and, perhaps most importantly, the Canadian Association of Broadcasters, the Canadian Broadcasting Corporation, and major newspapers and newspaper chains. Compliance with ASC decisions is virtually complete.²¹ In the very few instances when ASC has advised the media that an advertiser has not complied with a Council decision, they have cooperated by not exhibiting the advertisement.

ASC publishes a year-end report containing statistics regarding complaints handling activity and summaries of cases where a complaint was upheld. Each summary states the region and the type of media involved; notes the number of complaints; describes the advertisement and the nature of the complaint; and includes excerpts from the decision. Whether the name of the company is publicly stated depends on an important factor. When ASC receives a complaint and decides it may raise an issue under the Code, it sends the complaint to the advertiser, who has 10 days to respond. If the advertiser responds by amending or withdrawing the offending advertisement before Council meets to deliberate the complaint, and Council then upholds the complaint, ASC does not reveal the name of the company, although it will summarize the case in the published report. However, if the advertiser fails to amend or withdraw the ad, and Council upholds the complaint, ASC names the advertiser but allows the firm to briefly present its side of the case in the complaints report summary. ASC names the advertiser in about half of the upheld complaints.

In 1999, ASC received 1075 complaints regarding 813 ads. It did not pursue 273 of these complaints (involving 261 ads), as they did not meet the criteria for complaint acceptance. ASC staff evaluated the other 802 complaints (552 ads) under the applicable provisions of the Code or Guidelines, and forwarded 248 complaints (123 ads) to a Consumer Response Council or an Advisory Panel on Gender Portrayal. The Council or Panel upheld 181 of these complaints (67 ads).²²

The number of complaints is increasing, with 1143 complaints in 2000. Interestingly, roughly the same number of ads is generating the complaints — 815 ads in 2000.²³

²¹ This is true whether the advertiser is an ASC member or not. The Canadian Code of Advertising Standards states that “AASC through its appropriate Division will advise exhibiting media of the advertiser’s failure to cooperate and request media’s support in no longer exhibiting the advertising in question; and may publicly declare, in such manner as Council deems appropriate, that the advertising in question, and the advertiser who will be identified, have been found to violate the Code.” Such public declarations have never been found necessary.

²² *Complaints Report, op. cit.*, p. 5.

²³ Janet Feasby, Director, Public Affairs and Communications, Advertising Standards Canada, commentary at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

ADVERTISING STANDARDS CANADA

ASC has also done researched consumers' trust in advertising and knowledge of the advertising self-regulatory process. In the general population surveyed, on a 10-point scale, there is about a 5.3 base level of trust in advertising. This rises to 6.5 once the person is made aware of an organization (which is described) that fulfils the ASC mandates of advertising review and standards. In addition, 74 percent of respondents said their trust in an advertiser would increase if they knew it supported such an organization.

No costs are involved for the consumer who complains. ASC membership fees are based on advertising revenues or advertising expenditures and vary depending on whether the company is an advertiser, a media organization, an advertising agency or another type of supplier. Fees range from a minimum of \$400 to a maximum of \$20 000. ASC also derives significant portions of its income from its pre-clearance services. In its pre-clearance and complaints handling efforts, ASC employs 14 staff in its Toronto office and two in the Montreal office of Les normes canadiennes de la publicité.

ASC does not have guaranteed deadlines for the process. However, for a simple complaint where ASC does not need to track down a copy of the advertisement, then ASC's goal is to settle the process within a week. In cases that raise an issue under a Code and which go to Council, ASC tries to settle the case within four weeks, including the 10 days offered to an advertiser to respond to a complaint.

ASC is a model of responsiveness to public concerns for several reasons. First, through marketing and public reporting, it takes positive steps to ensure that consumers are aware of its existence and its *raison d'être* — listening to their concerns. Second, it takes even a single complaint seriously. Third, over the course of decades, it has tried to keep up with changing tastes and concerns by amending existing Codes and developing new ones. This is a remarkable self-regulatory effort in these respects.

Of course, there is a major difference between the issues ASC faces and most other consumer redress issues: consumers dealing with ASC are not trying to repair a contractual relationship that has gone wrong; nor are they seeking reimbursement for monetary losses. However, ASC — through a voluntary, self-regulatory process — is helping consumers who want to redress grievances with businesses, an important issue in the context of the Market-Driven Consumer Redress Project.

Alberta New Home Warranty Program

The Alberta New Home Warranty Program (ANHWP) was established in 1974 by the Alberta Council of the Housing and Urban Development Association of Canada (HUDAC), a national industry association.¹ The mid-'70s saw a huge rise in the number of homes being built in Canada, thanks largely to great numbers of young baby boomers moving into the home-buying market. (At the time, 270 000 to 280 000 new homes were built in Canada each year, compared to 150 000 to 160 000 today.)

The Canadian Mortgage and Housing Corporation (CMHC)² started raising concerns about the quality of the homes that were being built, as it found that some industry players were having trouble keeping up with the demand. (In addition, it found that some companies were absconding with consumers' deposits.) At a 1974 builders' conference and on other occasions, CMHC told the industry that solutions to this problem were needed; it hinted that a national, legislated solution might be found. Some members of the Alberta Council of HUDAC took these signals quite seriously. Opposed to the notion of a mandatory national solution, these members established a voluntary, provincial warranty program to serve the needs of consumers (as defined by CMHC) and industry.

The details of the initiative, originally called the Alberta New Home Certification Program, were worked out in close collaboration with the consumer affairs department of the Alberta government. In part, they were modelled on a well-established non-governmental home warranty program in the United Kingdom.

The Alberta New Home Warranty Program is not a government entity, though there is a (currently unfilled) seat on the Board of Directors for a government representative. Nor does the program enjoy a monopoly, as builders are not required to be members and other programs may compete against it. According to ANHWP President Dennis Little, some 80 to 85 percent of the new homes built in Alberta (16 500 out of a total of about 21 000 yearly) are sold with a warranty from the organization.³

¹ HUDAC was renamed the Canadian Home Builders Association in 1984. Except where otherwise indicated, information in this paper is taken from a conversation with Dennis Little, President of the Alberta New Home Warranty Program, July 4, 2000, and from the ANHWP Web site.

² A federal Crown corporation incorporated in 1946, CMHC has taken on numerous roles over the years in an effort to address Canadians' housing needs. (See a history of CMHC at <<http://www.cmhc-schl.gc.ca>>.) Currently, CMHC's roles include providing mortgage loan insurance to lenders.

³ Conversation with Dennis Little, July 11, 2000. Mr. Little admits that there is some disagreement among organizations about the total number of new homes built every year. The 21 000 figure is his. Though he stands by this count, he notes that CMHC forecasts have been higher than this.

ALBERTA NEW HOME WARRANTY PROGRAM

This is in contrast to other programs, such as Ontario's New Home Warranty Program (ONHWP), which has been delegated the authority to administer the *Ontario New Home Warranty Act*, even though it is not a government body. Builders attempting to construct houses in Ontario who are not program participants ("rogues," as the ONHWP calls them) are subject to prosecution and fines of up to \$100 000.⁴ Please see the Annex for a further comparison of the legislative (Ontario) versus the non-legislative (Alberta) model for new home warranties.

The ANHWP is a non-profit corporation with its headquarters in Calgary and an office in Edmonton. Management and staff in both offices total 36 employees. Its 20-member Board of Directors consists principally of representatives of the home builders industry. The current Board also has two financial services representatives, a corporate counsel and, as always, a consumer interests representative (chosen by the Consumers' Association of Canada (CAC), at the ANHWP's request.) A veteran consumer representative, CAC Alberta chapter President Larry Phillips, feels that although only one seat is reserved for consumers interests, the whole Board nevertheless attends to those interests.⁵ As Mr. Phillips notes, the Board does so because it must ensure that the program works for consumers, in order to avoid the prospect of government regulation (which is always a concern). He notes that the ANHWP pays the consumer representative a per diem, and provides a caucus fee to the CAC's Alberta chapter for its services to the Board.⁶

The Board sets policy for the ANHWP, including the content of warranties; typically, it bases its decisions on the advice of the ANHWP staff, headed by the President, Dennis Little. All Board members can vote on decisions made.

The two-pronged concept of the ANHWP has not changed since its inception. The program certifies builders to prevent complaints from occurring, and provides a warranty to deal with problems that do arise.⁷

⁴ See the ONHWP Web site, <<http://www.newhome.on.ca>>.

⁵ Conversation with Larry Phillips, July 5, 2000.

⁶ *Ibid.*

⁷ While the protection the ANHWP may provide to consumers is not regulated, there is a relationship between new home warranties and high-ratio mortgage loan default insurance. CMHC (along with one private insurer) provides such insurance to approved lending institutions. The insurance covers mortgages for borrowers who have less than a 25-percent down payment. (Lenders are generally forbidden to provide such mortgages unless the loan is insured.) CMHC requires new home warranty coverage on these mortgages to reduce the probability of default. CMHC, like its competitor, assesses any warranty plan against given criteria before approving the plan.

Certification

The certification aspect of the program ensures that each “registered builder member” is competent and financially solvent.⁸ To ensure the latter, at least in part, builders provide personal guarantees, letters of credit and other security instruments to cover the amounts described in the following sections.

Warranty

A consumer who puts a deposit on a house being built by a “registered builder member” receives five warranty protections (with some significant differences for condominiums).

Deposit protection: Should the builder default, the consumer’s deposit is insured for up to 15 percent of the purchase price, to a maximum of \$60 000.

Builder performance protection: This element provides coverage for up to \$30 000 towards the completion costs of discharging builders’ liens if the builder fails to complete the home as contracted.

Materials and workmanship protection: This element provides coverage of up to \$60 000 to repair defects in materials and workmanship, during the first year of occupancy only. The \$60 000 also applies to the next part of the warranty.

Structural integrity protection: The unused portion of the \$60 000 in materials and workmanship protection coverage is used to provide five years of protection from structural defects affecting load-bearing components of the house.

Additional living expenses protection: This element provides up to \$6000 coverage for pre-approved temporary accommodation, if the occupants need to live elsewhere while work is being done in accordance with warranty coverage.

Condominium buyers’ protections: Deposits are protected up to 15 percent of the purchase price or \$30 000; there is coverage of up to \$30 000 (including legal and living fees) for builder performance. Deposit protection and builder performance protection coverage are limited to \$1 500 000 for the whole condominium project. The coverage for materials, workmanship and structural integrity is the same as for other residences, but is subject to a maximum project limit of \$1 500 000.

⁸ The ANHWP Web site makes the following rather vague assurances: “To be accepted as a registered builder member of the program, a builder must meet standards in every aspect of professional knowledge and conduct, including: customer service, financial ability, industry reputation, technical expertise, management skills [and] market awareness. Once registered in the program, builder members must continue to meet membership requirements. Among the considerations for renewal is the builder’s customer service record for each home built — from purchase to construction through occupancy and the first year of ownership.” See <<http://www.anhwp.com/qualify.html>>.

ALBERTA NEW HOME WARRANTY PROGRAM

A third aspect of the ANHWP's work, aside from certification and warranties, is public education for builders and homeowners. The program educates builders through the Professional Home Builders' Institute, a not-for-profit corporation wholly owned by the ANHWP. The Institute offers courses on technical aspects of home building, as well as on the business management and administrative aspects of the industry.

The ANHWP educates consumers principally via publications offered to purchasers of warranty-protected houses and through public seminars based on one of the publications, *From Purchase to Possession and Beyond*.

The builder pays a program enrolment fee to the ANHWP, passing these costs on to the consumer. According to the 1999 ANHWP annual report, the average enrolment fee in 1999 was \$268 per unit, down from \$406 in 1994 (a reduction attributable in part to greater activity in lower-priced condominium construction).⁹

Fees are based on the price of the house and went up in 2000 to about \$300, typically. This is in contrast to jurisdictions with mandatory warranty programs, where the fee is often three times higher. Enrolment fees are low, according to Adrian de Jonge, Vice President of the ANHWP, because the program gets other types of security from the builders, such as personal security. The program evaluates members' customer service and financial standing, and will terminate a builder for violations. If the builder's track record does not satisfy program staff, the ANHWP will raise premiums.¹⁰

The ANHWP also collects membership fees from builders. These fees totalled \$178 046 in 1999. The Program maintains an investment portfolio of approximately \$12 000 000 to offset its warranty reserve liability, which is actuarially modelled by its consultant, KPMG. The ANHWP has accumulated this investment portfolio mainly from enrolment revenue.

In cases of conflict between buyers and builders, the Program offers three levels of dispute resolution. The process may start with a "request for assistance," either from the builder or from the consumer. There is no fee payable by the builder or home owner for a mediation conducted by the ANHWP staff. If an external mediator is selected, then they participants are responsible for the mediator's fee. The fee for facilitating a conciliation is currently \$50 from the requesting party

⁹ The Alberta New Home Warranty Program, *1999 Annual Report*, pp. 13–14.

¹⁰ Adrian de Jonge, from commentary provided at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

ALBERTA NEW HOME WARRANTY PROGRAM

(whether the consumer or the builder), but it will soon rise to \$100 from each party. The three levels of dispute resolution are mediation, conciliation and arbitration.

Mediation is an informal process where the builder and buyer agree to meet with a mediator they both approve, who helps them find a mutually acceptable solution to the dispute.

Conciliation is a more formal process, in which an inspector appointed by the Program conducts an investigation and issues a report to the builder and the buyer. If the builder fails to complete the work called for in the report in the time allotted, the Program does the work, in accordance with the coverage provided in the warranty.¹¹ Strictly speaking, this process does not fit the general definition of conciliation (a term usually associated with a consensual agreement). The conciliation decision is described as binding, although it may be appealed to arbitration. Conciliation involves no fees beyond the original fee for a request for assistance.

Under *arbitration*, an arbitrator is chosen with both parties' consent. The arbitrator conducts a formal hearing and issues a binding decision that allocates the costs that the parties will bear. Arbitrators are outside professionals, and the costs of their services can be significant. The application fee is \$200, and it may cost an additional \$600 to arrange the arbitration. Mr. Little points out that the ANHWP is anxious to ensure that the process is fair and that both parties think it is worth the effort to continue with an arbitration. By establishing a proper arbitration, the costs help ensure fairness. They also discourage parties from proceeding purely on a point of principle. Mr. Little says that the ANHWP used to use less expensive forms of dispute resolution, but that some people will inevitably take advantage of a free process, using it to the greatest extent possible, even when their case is weak. Although the disputant pays the fees, which the program does not refund, arbitrators may make decisions regarding costs, meaning that the loser may ultimately pay the fees.

Current figures indicate that approximately 4 percent of enrolments (16 000 in 1998) result in a request for assistance. Of this 4 percent, approximately one eighth (0.5 percent of all enrollees, in Mr. Little's terms) are satisfied at the mediation stage, and three quarters are satisfied at the conciliation stage. One eighth move on to an arbitration. Although the ANHWP's annual report provides figures for complaints and dispute resolution, the program keeps the outcome of specific processes confidential.

As we have noted, provincial law does not require builders to be members of the ANHWP. However, the program, particularly its dispute resolution services, does not operate in a legal vacuum.

¹¹ A search of the case law involving the ANHWP shows that the conciliator's report has occasionally been a useful piece of authoritative evidence in court regarding the facts of a dispute.

Arbitrations in Alberta are governed by the *Arbitration Act*,¹² which provides for only minimal intervention by the traditional court system. For instance, the Act leaves it up to the arbitrator to “determine the procedure to be followed in the arbitration.”¹³ Indeed, the only guidelines that arbitrators must always follow in Alberta (because the parties cannot agree to opt out of those procedural rules) are to “treat the parties equally and fairly” and to give each party “an opportunity to present a case and to respond to the other parties’ cases.”¹⁴ Thus, parties have great freedom to decide the terms under which their dispute is to be resolved. At the same time, a court may grant leave to appeal an arbitral ruling if the issues at stake are sufficiently important to the parties and if the determination of a question of law sufficiently affects the parties’ rights.¹⁵ Furthermore, the court may set aside arbitral rulings under a number of circumstances, including fraud or an invalid arbitration agreement.¹⁶

Notably, when purchasing a house from a member builder, a buyer must use the ANHWP dispute resolution system first, before any other remedy. The warranty mentions that there may be a fee for this service. Due to the large amounts of money at stake in the construction and sale of houses, it is not surprising that disputes occasionally end up before the courts, despite the fact that the program is designed to prevent that outcome. Such cases may involve an attempt to overturn an arbitrator’s ruling.¹⁷ Interestingly, the program’s inspection services can sometimes serve an evidential function; judges occasionally use an inspector’s findings to calculate damages.¹⁸

The ANHWP arguably provides a good example of a redress approach with built-in checks and balances. It is in everyone’s interest that the program work well for consumers. When consumers are largely satisfied with an individual builder, then its membership premiums stay low. At the same time, overall consumer satisfaction with the program generally eases any pressure for regulation that might otherwise exist. Some may thus feel that the program not only handles complaints well, but also prevents them.

¹² *Arbitration Act*, S.A. c. A-43.1.

¹³ *Arbitration Act* (Alberta), *ibid.*, ss. 19(1).

¹⁴ *Ibid.*, s. 19. These are the only statutory directions to the arbitrator that the parties may not opt out of by agreement. Cf. s. 3, “Party Autonomy.”

¹⁵ *Ibid.*, ss. 44(2).

¹⁶ *Ibid.* paras. 45(1)(b),(h) and (i).

¹⁷ See, for example, *Carlin v. 395772 Alberta Ltd* [1998] A.J. No. 870 [QL].

¹⁸ See, for example, *Boutin Construction v. Brees*, [1995] A.J. No. 974 [QL].

ALBERTA NEW HOME WARRANTY PROGRAM

On the other hand, some may see warranty programs simply as instruments designed and used by the industry for purely self-serving purposes, with consumer protection a low or non-existent priority. This is the view of some who examined the experience in British Columbia.¹⁹

Perhaps the greatest reminder of the importance of preventing complaints through quality construction is the B.C. “leaky condo” problem. In 1999, the New Home Warranty of British Columbia Inc., a non-profit corporation, filed for bankruptcy under the weight of claims filed by aggrieved condominium owners. A commission of inquiry found that mismanagement and inappropriately low funding reserves — a result of what the commission called a conflict of interest, since the builders running the program were essentially exacting premiums from themselves — were partly to blame. However, the commission also found that the construction and regulatory systems in general failed to provide the checks and balances needed to assure reasonable compliance with good construction practices.

Warranty programs in themselves are not designed nor funded to be the only compliance mechanism for the residential construction industry. Instead, they work with other aspects of the regulatory and non-regulatory systems to provide checks and balances for the various participants in the quality home-building system. The catastrophic nature of the “leaky condo” problem challenged even the resources of the British Columbia government. The negative financial implications flowing from the leaky condo situation led the provincial government to establish an agency to replace the warranty program. Consumers are still seeking compensation for their financial losses.²⁰

This is not to say that warranty programs are naturally inadequate to protect home buyers. Rather, the B.C. condominium situation underscores the need for adequate reserves; for checks and balances throughout the system; and, arguably, for training programs to ensure that members actually provide quality products and services. The extent to which a warranty program genuinely protects consumers will depend on whether the program meets these needs.

In addition to the ongoing debate over the utility of warranty programs in general, there are some concerns regarding the obligation of buyers to use the Program’s dispute resolution system. Some observers have commented that since buyers “choose,” at the time of house purchase, to use the Program’s dispute resolution system — potentially long before a dispute arises — they may not make an entirely informed decision. If this “choice” forecloses — or at least postpones — access to the public judicial system, it may be problematic.²¹

¹⁹ See, for example, M.A. Waldron, “How T-Rex Ate Vancouver: The Leaky Condo Problem on the West Coast,” *Canadian Business Law Journal*, vol. 31, 1999, pp. 335–367.

²⁰ See the Homeowner Protection Office Web site <<http://www.hpo.bc.ca>> and the Bartlett Commission’s summary of findings.

²¹ Discussion at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

ANNEX I

Comparison of protections provided by the voluntary ANHWP with those of the government-mandated ONHWP

Issue	Alberta	Ontario
Deposit protection	15 percent of purchase price to a maximum of \$60 000	Maximum of \$20 000
Builder performance	\$30 000 for completion costs	N/A
Workmanship and materials	One year; up to \$60 000	One year workmanship and materials; two year for certain defects; protection against substitutions
Protection against delayed closings without notice	Not explicit	Yes
Major structural defects	Five years (with an option of 10 years)	Seven years
Pay living expenses?	Up to \$6000 coverage, if consumer is forced to move out for repairs	Up to \$5000 in case of delays without notice
Total maximum coverage	\$60 000 (plus the living expenses of \$6000, which seem to be separate)	\$100 000

The Alberta program may reject builders that do not meet the program’s requirements for technical expertise and financial stability. The Ontario program cannot reject any builders, though it can “impose higher security requirements, more frequent inspections, or other methods to ensure that builders provide quality homes.”²²

²² *A Survey of Home Warranty Programs in Canada*, report prepared for Canada Mortgage and Housing Corporation, March 23, 1994.

ALBERTA NEW HOME WARRANTY PROGRAM

An Ontario consumer may obtain redress through the provincial program, even when a builder has failed to register. Alberta consumers whose homes are not covered by the program likely will be able to seek redress only through the courts.

The ANHWP operates in a competitive environment; other, less well-known entities may offer similar services.²³ This is an additional spur to ensuring quality for consumers, one that arguably does not exist where government mandates a single home warranty program.

²³ Among them is National Home Warranty (NHW). Dennis Little described NHW as more purely an insurance scheme, rather than a warranty scheme. Unlike the ANHWP, an insurance company typically has a limited educational mandate. Nor does it require builders to do repairs (or, if the builder refuses, do the repairs itself); the insurer would likely settle a claim through a monetary payout. According to Consumers' Association of Canada member (Alberta) Larry Philips (via e-mail, July 27, 2000), a warranty program has several advantages over an insurance scheme. First, there is a cost advantage; an insurance scheme simply "transfers the costs of repairs to the consumer and neither the builder or the insurer have any motivation to control costs or improve the quality of the product." Through education, warranty programs also make builders "acutely aware of what the acceptable standards are." And third, the builder tries to do the job properly in the first place, to avoid the burden of redoing it. That said, however, much of a warranty program's function — assessing risks and setting premiums accordingly — is essentially that of an insurance program, a fact pointed out in Waldron, *op. cit.* Though she concentrates on the B.C. experience with warranty programs, she generally describes warranties as insurance.

Market-Driven Consumer Redress and the Law

Market-driven consumer redress mechanisms operate within a framework of law, in at least three ways.¹ First, the law gives businesses strong incentives to comply with such redress mechanisms. These incentives function via a framework of substantive obligations, which the government normally administers or oversees. Merchants generally comply with these obligations, to avoid incurring liabilities (through civil or regulatory processes). Second, the law ensures fairness in the relationship between individual merchants and the associations that administer market-based redress initiatives. Third, the *possibility* of regulation can help ensure that market-based initiatives are established and well run. That is to say, when governments contemplate regulation in a given field, they can spur businesses to self-regulate to meet public policy needs. In short, market-driven redress mechanisms operate within a framework of law.

Over the years, governments and the judiciary have established basic rules governing the business-to-consumer relationship. Businesses that breach the requirements and prohibitions laid down in consumer protection legislation and other laws may be subject to expensive, time-consuming and even punitive civil or regulatory actions. This ever-present risk encourages businesses to prevent dissatisfaction from occurring and to provide means of resolving complaints that do occur.

So what are businesses' minimum legal obligations? Important consumer matters covered by provincial and territorial legislation include prohibitions against unfair business practices and the establishment of implied consumer warranties. In addition, federal and provincial law prohibit misleading advertising. Provinces have also enacted a variety of sector-specific statutory and regulatory instruments; some are common to most or all jurisdictions — for instance, legislated disclosure requirements for credit transactions — while others are used in only a few jurisdictions.²

¹ The term *law* refers to two distinct but related phenomena. The first is the regulatory environment, meaning the framework of rules (statutes and regulations) that governments have developed to bring various consumer-related matters under their constituted authority, so that they can actively guide the market to protect consumers. Such guidance takes the form of government enforcement — both traditional command and control mechanisms, and more innovative, cooperative systems, where market players help ensure compliance with government regulations. The second subgroup of legal mechanisms is the civil court system, through which consumers protect their rights as they are constituted either in the common law or in statutory instruments.

² For instance, Alberta specifically regulates time share contracts through the *Fair Trading Act* (Alberta), S.A. 1998, part 3, and the *Time Share Contracts Regulation*. Quebec, to provide another example, regulates physical fitness studio membership contracts through the *Consumer Protection Act*, R.S.Q., c. P.40.1. ss. 197–205.

MARKET-DRIVEN CONSUMER REDRESS AND THE LAW

The law of implied warranties and conditions is the most fundamental example of cross-sectoral legal assurances for consumers.³ All common-law provinces⁴ and territories have enacted legislation that provides for implied warranties of merchantability and fitness for purpose of goods within all sales contracts, including consumer contracts. Sales of goods statutes in these jurisdictions contain such warranties and conditions.⁵ Quebec's *Civil Code* provides similar protections; among other things, it imposes obligations regarding delivery, ownership warranties and quality warranties.⁶

The merchants' obligations in these warranty provisions are buttressed by specific rules regarding representations, which eight provinces have enacted in their unfair business practices statutes. Seven provinces — Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Prince Edward Island and Saskatchewan — provide similar lists of unfair practices.⁷ Such practices are typically specific kinds of false or misleading representations.⁸ For its part, Quebec's *Consumer*

³ In the interest of concision, this paper does not explore the important differences between warranties and conditions. The term "cross-sectoral" is used to distinguish this legislation from sector-specific consumer protection legislation, such as that dealing with direct selling, cost of credit disclosure, credit reporting and collection agencies. Again, for the sake of brevity, this paper does not discuss the various ways in which this legislation provides redress.

⁴ The term "common-law province" refers to provinces other than Quebec, which has codified its civil law into the *Civil Code of Quebec*, S.Q. 1991, c. 64.

⁵ See, for example, Ontario's *Sale of Goods Act*, R.S.O. 1990, c. S-1.

⁶ *Civil Code of Quebec* (C.C.Q.), S.Q. 1991, c. 64, arts. 1716–1731. See, more generally, C.C.Q., Title Two, Chapter One, "Sales". Beyond all of the generally applicable implied warranties cited here and above, Manitoba, Nova Scotia, Northwest Territories and Yukon provide additional warranties and conditions to be implied in consumer sales contracts. The *Consumer Protection Act* (Manitoba), R.S.M. 1987, c. C200, ss. 58–58.2; *Consumer Protection Act* (Nova Scotia), R.S.N.S., 1989, c. 92, s. 26; *Consumer Protection Act* (Northwest Territories), R.S.N.W.T. 1988, c. C-17, ss. 70–79; *Consumer Protection Act* (Yukon), R.S.Y. 1986, c. 31, s. 58.

⁷ See the *Fair Trading Act* (Alberta), S.A. 1998, c. F-1.05, ss. 5–19; *Trade Practice Act* (British Columbia), R.S.B.C. 1996; *The Business Practices Act* (Manitoba), S.M. 1990-91, c. B120; *Trade Practices Act* (Newfoundland), R.S.N. 1990, c. T-7; *Business Practices Act* (Ontario), R.S.O. 1990, c. B.18. *Business Practices Act* (Prince Edward Island), R.S.P.E.I. 1988, c. B-7; *The Consumer Protection Act* (Saskatchewan), S.S. 1996, c. C-30.1, ss. 3–38.

⁸ For instance, Ontario's *Business Practices Act* (*ibid.*) lists 14 unfair practices, such as the following: a representation that a seller's goods have been used to an extent that is materially different from the fact; an untrue representation that the business is supplying goods or services in accordance with a previous representation; and an untrue representation that a specific price advantage exists (*ibid.*, paras. 2(1)(v), (vii) and (x)).

MARKET-DRIVEN CONSUMER REDRESS AND THE LAW

*Protection Act*⁹ prohibits the making of any false representation “by any means whatsoever.”¹⁰ It then provides more detailed sets of representations that a businessperson may not falsely make.¹¹

Penalties for contravening the various trade practice statutes include fines¹² and, in very rare instances, imprisonment.¹³ Moreover, some statutes give consumers a right to take civil action to rescind the contract or seek damages.¹⁴

As seen in the case studies prepared for this project, many businesses have established mechanisms to prevent complaints and to promote effective handling of them, although there are no generally applicable obligations on businesses to do so. Despite these voluntary mechanisms, consumers can usually take further legal action to attempt to rectify a problem. This may take the form of a private legal action, through the civil court system. Admittedly, the possibilities for court-based relief regarding consumer transactions are limited when the amount in question is small, given the expense of the process. Consumers may also complain to appropriate government consumer protection agencies in the hope of spurring some form of public legal action, such as enforcement.¹⁵

Regardless of the existence of voluntary mechanisms, the law is always available to consumers as an instrument of last resort. Even when consumers have signed contracts with extensive and mandatory alternative dispute resolution provisions, the traditional system remains as a backup to ensure fairness. Contracts that oblige a consumer to use an organization’s dispute resolution systems first, before proceeding to any other remedy, may be problematic if they do not ensure the consumer has given fully informed consent to opting out of the public legal system. Of particular concern are

⁹ *Consumer Protection Act*, R.S.Q., c. P.40.1.

¹⁰ *Ibid.*, s. 219.

¹¹ These representations include the following: ascribing certain special advantages to goods or services; claiming that acquiring or using goods or services will result in pecuniary benefit; and claiming that acquiring or using goods or services confers or ensures rights, recourse or obligations. (*Ibid.*, s. 220; see also generally *ibid.*, ss. 215–253.)

¹² For example, up to \$500 000 in the case of a corporation committing a second or subsequent offence in Saskatchewan: *The Consumer Protection Act*, S.S. 1996 c. C-30.1, para. 23(3)(b).

¹³ For example, up to three years for a second or subsequent offence in Manitoba: *The Business Practices Act*, *op. cit.*, para. 33(1)(3).

¹⁴ See, for example, Prince Edward Island’s *Business Practices Act*, *op. cit.*, s. 4.

¹⁵ Legislation empowers some provincial consumer protection agencies to attempt to mediate consumer complaints. Manitoba’s Consumers’ Bureau is particularly active in this regard.

MARKET-DRIVEN CONSUMER REDRESS AND THE LAW

situations where organizations have consumers agree, when they sign a contract, that any dispute that arises (possibly some time later) will be settled through a particular process.¹⁶

The law plays an important role, as Webb and Morrison have written: “Private dispute resolution approaches...depend to some extent for their success on the existence of a court system as a final resort.”¹⁷ This dependence takes a number of forms. The first is an indirect one: as noted in the first section of this paper, the court system is burdensome for all parties, who therefore naturally seek ways to avoid using it. Secondly, the law oversees alternative dispute resolution in a more direct way. When two parties undertake such a process — whether it be mediation, conciliation or a more interventionist arbitration process — they typically do so through an agreement to which, at the very least, contract law applies. In the case of parties in an arbitration, the most court-like of alternative dispute resolution procedures, legislators in most Canadian jurisdictions put in place arbitration statutes designed to ensure fairness for the parties involved.¹⁸

It is obvious from even this brief survey that merchants must provide at least a basic level of service, to reduce the risk of complaints or legal action. Merchants are required to make honest representations and to sell goods that largely conform to consumers’ expectations. The possibility, however small, of subsequent action looms in the background any time a complaint against a business arises.

While a market-based redress mechanism must strive to be fair to consumers, it also has to be fair to businesses. Any group establishing such a mechanism must keep this fact in mind, for the success of the effort will depend in large part on merchants’ confidence in the mechanism’s substantive rules, procedures and disciplinary processes. The law backs up this confidence, for a business’s voluntary membership in an organization creates a contractual relationship, one that creates mutual obligations for the business and the organization. Any self-interested business will expect fairness to be built into this relationship, especially in relation to the association’s role in disciplining participants.

¹⁶ Commentary by Michael Cochrane, lawyer, mediator and Chair of the NovaForum International Roster, at the Market-Driven Consumer Redress Workshop, Ottawa, January 25, 2001.

¹⁷ Kernaghan Webb and Andrew Morrison, “Voluntary Approaches, the Environment and the Law: A Canadian Perspective,” in *Voluntary Approaches in Environmental Policy*, Carlo Carraro and François Lévêque, eds., Dordrecht: Kluwer, 1999, pp. 229–259, at 239–240.

¹⁸ Statutes include Alberta’s *Arbitration Act*, S.A. c. A-43.1; British Columbia’s *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55; Manitoba’s *Arbitration Act*, S.M. 1997, c. 4; Northwest Territories’ *Arbitration Act*, R.S.N.W.T. 1988, c. A-5 (adopted by Nunavut); Nova Scotia’s *Arbitration Act*, R.S.N.S., 1989, c. 19; Ontario’s *Arbitration Act*, S.O. 1991, c. 17; P.E.I.’s *Arbitration Act*, R.S.P.E.I., 1988, c. A-16; Quebec’s *Code of Civil Procedure*, Book VII: “Arbitrations”, R.S.Q., C-25; Yukon’s *Arbitration Act*, R.S.Y., 1986, c. 7. One question that arises is whether mediation or conciliation processes are subject to this legislation. Some may be, by virtue of the fact that some legislation specifically allows arbitrations to proceed in the form of mediation or conciliation. When this happens, and the parties agree to an outcome, that outcome may be entered as the equivalent of the arbitrator’s ruling. See, for example, Alberta’s *Arbitration Act*, *ibid.*, ss. 35–36.

MARKET-DRIVEN CONSUMER REDRESS AND THE LAW

Some essential elements of this fairness were expressed in a 1998 Quebec case, *A.A.A. Khan Transport Inc. v. Bureau d'éthique commerciale de Montréal Inc.*¹⁹ There, the owner of a moving company felt that his company had been unfairly expelled from the Montreal chapter of the Better Business Bureau (BBB) for refusing to pay an arbitrator's award to a complaining consumer. The owner felt — and a judge agreed — that the arbitrator “had not done his job.” The judge stated: “Although neither the membership agreement nor the *Annuaire de la Confiance* (a publication containing the names of BBB members as well as the text of the BBB Code of Ethics) so states, the Court is of the view that the rules of natural justice implicitly form part of the contract between Kahn and the BBB.”²⁰ Such rules would include the right to receive notice that a complaint has been laid against oneself, and the right to have an opportunity to respond to the complaint before one is removed from the organization.²¹ This responsibility on the part of the organization stems at least in part from the BBB's perceived public integrity, for the judge noted that expulsion from the organization could significantly harm a company's reputation.

A government may occasionally state its public policy concerns about a particular industry's practices and indicate the ways in which it intends to address those concerns. Historically, ample evidence shows that such actions may encourage industry associations to assure a government that they can resolve the problem through self-regulation. For instance, builders founded the Alberta New Home Warranty Program in 1974 after the federal government began considering regulatory solutions to perceived problems with reliability, competence and financial solvency in the home-building industry.²² Similarly, the Canadian Motor Vehicle Arbitration Program's origins lay at least in part in provincial governments' consideration, during the mid-1980s, of U.S.-style “lemon laws” as a solution to problems that governments felt some automobile purchasers were experiencing.²³ And the cable television industry's customer service and redress approach was devised with the encouragement of the Canadian Radio-television and Telecommunications Commission.²⁴

¹⁹ [1998] Q.J. No. 226 [QL].

²⁰ *Ibid.*, para. 23.

²¹ While this case took place in the context of Quebec legislation, including that province's Charter of Rights and Freedoms, the principles regarding natural justice — derived from a Supreme Court of Canada case — may arguably be applied elsewhere in Canada. See *Senez v. Montreal Real Estate Board* [1980] 2 S.C.R. 555, which is also a Quebec case, but which relies for part of its reasoning on English-based corporation law.

²² See the case study on the Alberta New Home Warranty Program, in this series.

²³ See the case study on the Canadian Motor Vehicle Arbitration Program, in this series.

²⁴ See the case study, above, on the Cable Television Standards Council.

MARKET-DRIVEN CONSUMER REDRESS AND THE LAW

These are three examples of a phenomenon described by Kernaghan Webb: “Where government has a responsive, up-to-date regulatory system and a track record of acting decisively through regulatory measures when new problems arise, there is arguably a credible threat stimulus to galvanize voluntary industry action.”²⁵

Thus, the threat of government action — and constant government vigilance in overseeing the private sector’s market-based response to that threat — can provide a framework for *effective* self-regulatory solutions to public policy concerns. (“Effective” solutions are as good or better than solutions the government could have offered through mandatory means.) As the above examples show, this pattern has been reflected in the area of consumer redress.

In several sectors, governments and courts have chosen not to assert specific controls on business operations regarding the quality or type of redress mechanisms offered to consumers. Rather, they remain in the background, protecting consumers when the market fails to do so. As we have seen, the law — or the *threat* of law, as described in the preceding section — therefore provides a framework that gives businesses freedom to find appropriate and fair solutions to consumers’ redress needs through voluntary, market-based action.

²⁵ Kernaghan Webb, “Voluntary Initiatives and the Law,” in *Voluntary Initiatives: The new politics of corporate greening*, Robert Gibson, ed., Peterborough, Ontario: Broadview Press, 1999, p. 37.

