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William A. W. Neilson

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Administrative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation

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ADMINISTRATIVE REMEDIES: THE CANADIAN EXPERIENCE WITH ASSURANCES OF VOLUNTARY COMPLIANCE IN PROVINCIAL TRADE PRACTICES LEGISLATION*

By WILLIAM A.W. NEILSON**

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** Lewtas Visiting Professor, Osgoode Hall Law School, York University, of the Faculty of Law, University of Victoria.

I. INTRODUCTION

The purpose of this paper is to study the experience in Canada with Assurances of Voluntary Compliance (AVC), a form of administrative remedy and enforcement procedure found in the trade practices legislation of Ontario,¹ Alberta,² British Columbia,³ Quebec,⁴ Prince Edward Island⁵ and Newfoundland.⁶ In the case of the first three jurisdictions, more than five years have elapsed since the introduction of AVC's and the resulting pattern of practice and application which may now be profitably analyzed on the basis of the nearly 100 AVC's accepted to date.

Assurances of Voluntary Compliance are essentially settlement agreements between the enforcement authority (the Director of Trade or Business Practices, appointed to administer the statute) and the supplier, individual or company, by which the latter undertakes to refrain from engaging in deceptive or unfair conduct and frequently to reimburse designated consumers, to complete contracts as originally represented and to reimburse to the Director the costs of any investigation caused by their conduct in the first place. In return, the Director undertakes to stop his investigation, withdraw proceedings that he might have commenced and to let the supplier continue with his business. The subject is closed unless the AVC is breached by the supplier in the future.⁷

For example, the B.C. version provides as follows:

17.(1) Where the director has reason to believe that any supplier has engaged in, or is engaging in, any deceptive or unconscionable act or practice in connection with a consumer transaction, the director,

(a) instead of ordering an investigation of the supplier under this Act or taking proceedings against the supplier under this Act; and

(b) if he is satisfied that the supplier has ceased engaging in such acts or practices,

may accept from the supplier a written undertaking or assurance in such form and containing such terms and conditions as the director may determine, and, without limiting the generality of the foregoing, such undertaking or assurance may include any or all of the following terms and conditions:

(c) An undertaking to comply with the requirements of this Act and the regulations:

(d) An undertaking to refrain from engaging in such acts or practices:

(e) An undertaking to reimburse to the consumers or class of consumers designated in the undertaking any money, property, or other thing received from them in connection with a consumer transaction, including money necessarily expended in the course of making and pursuing a complaint:

(f) An undertaking that consumer transactions involving the supplier and the

¹ *The Business Practices Act, 1974*, S.O. 1974, c. 131 [hereinafter the *Ontario Act*], s. 9.

² *The Unfair Trade Practices Act*, S.A. 1975, c. 33, as am. [hereinafter the *Alberta Act*], s. 10.

³ *Trade Practice Act*, R.S.B.C. 1979, c. 406, as am. [hereinafter the *B.C. Act*], s. 17, previously the *Trade Practices Act*, S.B.C. 1974, c. 96, as am., s. 15.

⁴ *Consumer Protection Act*, S.Q. 1978, c. 9, s. 314.

⁵ *Business Practices Act*, S.P.E.I. 1977, c. 31, as am., s. 11.

⁶ *The Trade Practices Act*, S.Nfld. 1978, c. 10, s. 16.

⁷ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 17.

consumers or class of consumers designated in the undertaking will be carried out by the supplier in accordance with terms and conditions specified in the undertaking:

- (g) An undertaking to furnish a bond in accordance with the *Security Bonding Act*:
- (h) An undertaking to reimburse to the director the costs of any investigation, as certified by the minister:
- (i) Requirements for the form, content, and maintenance of trust accounts, records, contracts, advertisements, or other documents or papers respecting consumer transactions engaged in by the supplier.

(2) Where

- (a) an investigation of a supplier has been ordered under section 9; or
- (b) enforcement proceedings have been instituted by the director under section 16,

the director may terminate the investigation or proceeding upon the acceptance of a written undertaking or assurance from the supplier under subsection (1).⁸

The statutes pursuant to which the AVC's are received are designed to encompass a wide range of deceptive and unconscionable practices in the consumer marketplace whether or not privity of contract is involved.⁹ The enactments follow the American practice¹⁰ of prohibiting all such acts or practices in general terms and then enumerating a list of specific situations that are deemed to be deceptive or unconscionable.

The availability of both private and public enforcement is another feature of trade practices statutes.¹¹ Private, consumer-initiated remedies may include declaratory and injunctive relief, rescission and punitive or exemplary damages. Public enforcement options normally include a cease and desist power, substitute actions on behalf of consumers, provincial criminal court proceedings and negotiated compliance pacts or AVC's.

The enforcement provisions are designed to achieve a combination of sanctions and procedures calculated to maximize the objectives of deterrence, compensation and efficiency.¹² The end result is an integrated sanctions network in which public and private law enforcement streams have been recog-

⁸ *Id.*

⁹ For a comprehensive description and analysis, see Belobaba, *Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection* (1977), 15 Osgoode Hall L.J. 327, particularly at 334-45; also, Panel Discussion, "Experience and Issues under Trade Practices Legislation," in Ziegel *et al.*, eds., *Proceedings of the 7th Annual Workshop on Commercial and Consumer Law, Toronto (October 21-22, 1977)* (Toronto: Canada Law Book, 1979) [hereinafter *Proceedings*]. For an excellent analysis of trade practices legislation including proposals for a model federal enactment, see Trebilcock *et al.*, *A Study on Consumer Misleading and Unfair Trade Practices* 2 Vols. (Ottawa: Information Canada, 1976).

¹⁰ The "most influential American model" was the *Uniform Consumer Sales Protection Act* (UCSPA), 7A Uniform Laws Ann. 1 (Master ed., 1978), approved by the Commissioners on Uniform State Laws in 1970 and by the ABA in 1972: Belobaba, *supra* note 9, at 333-34.

¹¹ Belobaba, *id.* at 356-74; Trebilcock, *supra* note 9, at 8-16, Vol. 2.

¹² These three objectives are identified in Trebilcock, *id.* at 302, Vol. 1, as being "paramount in an effective system of sanctions in the unfair trade practice context."

nized and tapped for their respective contributions to the attainment of the cited objectives.¹³

Initially, the hopes and expectations for the non-adjudicative proceedings of Assurances or Undertakings were significant and, common to most cases of legislative change in Canada, they were rooted in experiences elsewhere, principally in the United States and the United Kingdom. A brief review of these legislative antecedents¹⁴ is instructive for a number of reasons that are vital to an understanding of the present Canadian situation.

A. *The American Connection*

In 1925 a procedure known as stipulating¹⁵ was added to the enforcement options of the Federal Trade Commission (FTC) in the United States. The practice, as one U.S. observer noted recently, was

thought to be a revolutionary departure in law enforcement. . . . There were strong disagreements among the Commissioners before it was adopted, but the arguments of greater informality, less expense, and the ability to handle more cases while employing sanctions allegedly as satisfactory as those resulting from formal proceedings outweighed the arguments against it. Some 3,000 cases were disposed of in this manner during the next ten years, and the proceeding was widely used, with some modifications, until 1961.¹⁶

Formally described as a "Stipulation as to the Facts and an Agreement to Cease and Desist," the procedure afforded persons and companies charged with violating the law an opportunity to enter into a voluntary agreement to cease and desist from the alleged unlawful practice. If this option was exercised no complaint was filed by the FTC and no trial was held.¹⁷

¹³ Belobaba, "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention," in Reiter and Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 423 at 426-27.

¹⁴ This is hardly to suggest that the idea behind AVC's was created by legislation or that the path of settlement or consent agreements is confined to consumer trade practices enforcement. For example, very adept exploration of the basic enforcement strategy was practiced by the English Poor Law Commissioners in the mid-nineteenth century who sometimes chose to exercise their prosecutorial discretion against bringing charges in exchange for assurances of future compliance: *per* Arthurs, *Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law* (1980), 30 U. of Toronto L.J. 225 at 230. Similar choice patterns are undoubtedly evident in the administration of human rights statutes and occupational health and safety legislation. However, in the case of consumer trade practices statutes, the AVC choice is expressly provided for as a principal enforcement option within prescribed constraints including the maintenance of a public record of all undertakings accepted in lieu of civil or criminal proceedings. Only the Quebec Act omits reference to the public register of AVC's. In their form and employment, the legislative roots of the provincial AVC's have been more influenced directly by recent U.S. and U.K. statutes and their implementation by administrative authorities.

¹⁵ Stipulations were initiated by amendment to the FTC Procedure and Rules of Practice, "II Complaints," March 17, 1925, as reported in *Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1925* (Washington: Gov't Printing Office, 1925) at 111 (Exhibit I) and *per N.Y. Times*, March 18, 1925 at 33, col. 3; *id.*, March 19, 1925 at 2, col. 4.

¹⁶ Wagner, *The Federal Trade Commission* (N.Y.: Praeger, 1971) at 65.

¹⁷ *Id.*

The Stipulation, which was a matter of public record, included an agreement as to the facts, including those related to jurisdiction, but it did not constitute an admission by the party of engaging in any unlawful conduct. Any violation of the Stipulation, however, rendered it admissible in any subsequent cease and desist order proceedings. In the area of deceptive trade practices, Stipulations were used frequently but they gave way to formal proceedings when the alleged violation involved false advertising of foods, drugs, devices or cosmetics deemed to be inherently dangerous.¹⁸

By the early 1960's, stipulating had given way to the more expeditious and informal procedure of Assurances. Under this procedure persons and companies undertook, in affidavit form, to refrain from engaging in the claimed violation of the law.¹⁹ The Assurances normally included a statement that the undertaking "is for settlement purposes only and does not constitute an admission that the questioned acts or practices were unlawful."²⁰ The affidavit itself had no legal effect. In the event the conduct was repeated, how-

¹⁸ *Id.* at 62-65. A more comprehensive analysis of the stipulating option in the 1925-61 period may be found in Bohen, *An Analysis of the Formal and Informal Enforcement Procedures of the Federal Trade Commission as Devices for Restraining Unfair Methods of Competition and Unfair and Deceptive Business Practices* (unpublished Ph.D. thesis, University of Minnesota, 1970) at 38-46; see also 3 Trade Reg. Rep. (C.C.H.) ¶9593, at 17,095.

FTC Commissioner W.E. Humphrey mounted a vociferous defence of the stipulation procedure on several occasions soon after its adoption including these excerpts from an address to the Annual Meeting of the U.S. Chamber of Commerce on May 20, 1925:

Another change in our rules of far reaching importance is in regard to settling cases by stipulation. If a party is violating the anti-trust law and by stipulation quits such practice, why is not the public as fully protected by such stipulation as they would be by going to the expense of a trial and issuing an order thereafter?

It seems to me that our plan of stipulation not only accomplishes all that can be secured by trial, and saves the public expense, but that it is in harmony with the spirit of our jurisprudence, that always holds out every inducement to settle controversies by compromise and settlement without litigation, so long as the public interest is protected. . . .

Nothing has aroused greater opposition from those who are opposed to the change in rules than our policy of settling cases by stipulation. Our opponents say that this should not be done; that in all cases where stipulations are warranted, the case should proceed to trial. As I construe it, the primal duty of the Commission is to protect the public from unlawful practices. If this can be accomplished by stipulation instead of litigation, leaving out of the question the great cost to the taxpayer in these days of dire necessity for economy, what can be the objection to so stipulating? I know the objection voiced by the opponents to such procedure. They say that they want to terrorize dishonest business. To use the stock phrase of the professional demagogue, they tell us that they want to "put the fear of God into the hearts of the dishonest." But while we are terrorizing the ten men in business that are dishonest, are we not at the same time terrorizing the ninety men that are honestly trying to obey the law? It is absolutely dishonest to claim that there is a clear and distinct line between what is and what is not unlawful under the anti-trust acts. It is, therefore, absolutely dishonest to say that when they are violated, it is always done purposely. . . .

I believe that the chief objection to settling cases by stipulation lies in the fact that it tends to lessen the publicity that the demagogue and the fanatic wish to use in their propaganda of socialism and discontent.

¹⁹ Wagner, *supra* note 16, at 62-66.

²⁰ 3 Trade Reg. Rep. (C.C.H.) ¶9591, at 17,093.

ever, its presence would automatically result in a formal cease and desist proceeding by the FTC.²¹

Implementation guidelines were promulgated to afford suppliers a more detailed appreciation of the procedure's ambit and likely scope for application. Thus, AVC's were declared to be most appropriate:

- (1) where the act or practice does not constitute a grave or major violation;
- (2) where immediate cessation can be obtained;
- (3) where the prior history of the party involved is not such as to raise any question as to the adequacy of an assurance to prevent resumption; and
- (4) where nothing is present . . . to raise a question of good faith.²²

Assurances were deemed to be inappropriate where the public had been the victim of predatory conduct, fraud or serious deception or where the supplier had acted in plain and wilful disregard of established FTC rules or industry guidelines. In these instances, formal cease and desist orders were to be pursued.²³

In its early years this remedy was employed frequently. The FTC's Bureau of Deceptive Practices was concluding over 300 AVC's annually by the mid-1960's.²⁴ At the same time criticisms started to mount and culminated in 1969 in the observations of the 'Nader Report'²⁵ and the Report by the American Bar Association.²⁶

Within the context of an agency portrayed as being complacent, rudderless and devoid of enforcement initiative, the preference for informal, negotiated undertakings attracted considerable condemnation. The common thread²⁷ was that the FTC had used the informal procedure excessively in order to avoid contested cases, had drafted narrow and weak undertakings and had failed almost completely to monitor the programme of compliance outlined in the AVC. In pursuit of the goals of immediate cessation and administrative efficiency, the FTC had exceeded its own guidelines, leading the authors of the American Bar Association Report to conclude "that the de-emphasis of formal enforcement has gone too far."²⁸

As a result, the so-called "informal" AVC withered and was formally abandoned in 1977.²⁹ Since that time the Consent Order, a stronger version of

²¹ *Id.* at 17,094.

²² *Id.* at 17,093. The guidelines note that "[o]ther factors are also relevant such as the seriousness of the violations, their scope and duration, the circumstances surrounding their commission, and the co-operation of the person or firm in terminating them." (*Id.*)

²³ *Id.*

²⁴ Figures taken from *FTC Annual Reports* and cited in *Report of the ABA Commission to Study the Federal Trade Commission* (Chicago: ABA, 1969) at 22-23 [hereinafter *ABA Report*].

²⁵ Cox, Felmeth and Shulz, "*The Nader Report*" on the Federal Trade Commission (N.Y.: Baron, 1969) [hereinafter *Nader Report*].

²⁶ *ABA Report*, *supra* note 24.

²⁷ *Supra* note 25, at 61-63 and *supra* note 24, at 22-25. The *Nader Report* at 63 concluded that "[t]he FTC's inadequate handling even of voluntary enforcement suggests that the policy was adopted largely to mollify growing consumer indignation without having to punish the guilty." Shades of the 1925 debate revisited!

²⁸ *Supra* note 24, at 25.

²⁹ 3 Trade Reg. Rep. (C.C.H.) ¶9591, at 17,091.

the AVC, in existence for more than two decades, has prevailed as the principal enforcement procedure employed by the Federal Trade Commission. Under this procedure³⁰ the supplier is given the chance to settle the case by negotiating a cease and desist order. The order contains a prohibition against participation by the respondent in the practices enumerated in the order, but it does not contain an admission that the questioned practices violate the legislation. No formal adjudicative hearing is held.

Unlike the previous informal procedure, the cease and desist direction has the same direct force and effect with respect to compliances as an order produced by trial. Civil penalties may be imposed for violating the terms of such an order. Moreover, once the FTC accepts the consent order agreement, complete details are published in the Federal Register to permit interested persons a period of sixty days to comment on the proposed order to the FTC. In this connection, interested persons may gain access to material submitted to the FTC by the settling respondent provided it is reasonably related to the merits of the order and is not exempt from disclosure under *The Freedom of Information Act*.³¹ After the comment period, the FTC may either withdraw its acceptance and take such action as it deems appropriate³² or 'finalize' the settlement by issuing the complaint together with the executed consent order which then becomes a final order.

The vast majority of cases involving deceptive trade practices are handled by this consent order procedure. A much smaller percentage of cases are initiated by the laying of a formal complaint which is heard by an FTC hearing examiner whose decision is open to review by the Commission and the courts—a protracted and expensive prospect compared to the consent order procedure.³³

It is necessary to study the FTC experience in order to comprehend the legislative and operational beginnings in Canada of AVC's as an administrative remedy in consumer protection statutes. Similarly, the Canadian legislation has been affected significantly by model legislation proposed for and largely

³⁰ Evident from *FTC Annual Report, 1979*, at 10-11, and Appendices A and B. According to 3 Trade Reg. Rep. (C.C.H.) ¶9595, at 17,096:

the consent order procedure will be invoked by the agency where time, the nature of the proceeding, and the public interest permit (§2.31, ¶9807.31). In practice, the vast majority of potential respondents are given the opportunity to utilize the consent order procedure and, of this group, most do.

The consent order procedure also is available to respondents already formally charged with violating the law. The FTC can be asked to withdraw a case from adjudication for settlement by consent (§3.25, ¶9815.25).

³¹ FTC rule 16 C.F.R. §2.34, summarized in 3 Trade Reg. Rep. (C.C.H.) ¶9595, at 17,096-97.

³² Only the FTC may withdraw its acceptance of a proposed consent agreement. A respondent company was barred from withdrawing its consent in *Johnson Products Co. v. F.T.C.*, 549 F.2d 35 (7th Cir. 1977) notwithstanding its claim that the Commission's failure to carry through with even-handed treatment of its competitors, as originally promised, had significantly prejudiced the respondent's competitive position. The issue of competitive inequities in the context of discretionary remedies is addressed more fully, *infra*.

³³ Wagner, *supra* note 16, at 64-71.

adopted by state legislatures in the United States.³⁴ One of these model acts, the *Uniform Consumer Sales Practices Act*, was approved by the Commissioners on Uniform State Laws in 1970 and by the American Bar Association in 1972.³⁵ The UCSPA strongly endorsed the concept of AVC³⁶ and this legislation ultimately had the most direct impact on the contents of provincial legislation that was enacted later in the 1970's.

B. *The British Connection*

Similar tendencies appeared in the United Kingdom following the passage of *The Fair Trade Trading Act* in 1973.³⁷ Under the terms of this statute, the Director General of Fair Trading was expressly authorized to "use his best endeavours" to obtain formal assurances from businesses to refrain from persistent patterns of conduct determined by the statute to be "detrimental to the interests of consumers."³⁸ This direction has been employed to obtain some 235 undertakings in the past seven years³⁹ and it has prompted the present Director General, Gordon Borrie, to describe the procedure of assurances "as a particularly useful and successful measure" with excellent compliance results and a high incidence of redress for aggrieved customers of the businesses involved.⁴⁰

³⁴ Belobaba, *supra* note 9, at 331-34. For a brief analysis of U.S. legislation at the federal (FTC) and state levels see Trebilcock, *supra* note 9, at 110-19, Vol. 2.

³⁵ 7A Uniform Laws Ann. 1 (master ed. 1978) discussed in Panel Discussion, *The Uniform Consumer Sales Practices Act (1971-72)*, 27 Bus. Law 139 and criticized as a "status quo" model act in Rice, *Uniform Consumer Sales Practices Act—Damages remedy: The NCCUSL Giveth and Taketh Away (1972-73)*, 67 Nw. U.L. Rev. 369 at 384, cited in Belobaba, *id.* at 333n. 33.

³⁶ 7A Uniform Laws Ann. 1 (master ed. 1978) §9(c).

³⁷ *The Fair Trading Act, 1973*, 1973, c. 41 (U.K.) [hereinafter *U.K. Act*]. In Lawson, *Consumer Protection and the Office of Fair Trading (1978)*, 128 New L.J. 376-77, the assurance provisions in Part III are described as "a quiet success" based on a record of "determination to see Part III put to good use" even if very few national firms have been party to assurances—a result judged to be "surprising and regrettable" by the commentator.

Professor Ison has criticized the failure to specify prohibited conduct in many of the U.K. assurances and the inclination to employ AVC's "in hardcore situations of serious and repeated crime" where assurances are wrongfully "sought in desperation from traders against whom criminal sanctions have already proved an inadequate deterrent": Ison, *Credit Marketing and Consumer Protection* (London: Croom Helm, 1979) at 396.

³⁸ Section 34(1) of the *U.K. Act, id.*, provides:

Where it appears to the Director that the person carrying on a business has in the course of that business persisted in a course of conduct which—

- (a) is detrimental to the interests of consumers in the United Kingdom, whether those interests are economic interests or interests in respect of health, safety or other matters, and
- (b) in accordance with the following provisions of this section is to be regarded as unfair to consumers,

the Director shall use his best endeavours, by communication with that person or otherwise, to obtain from him a satisfactory written assurance that he will refrain from continuing that course of conduct and from carrying on any similar course of conduct in the course of that business.

³⁹ Letter from Gordon Borrie, Director General of Fair Trading, to the author (December 17, 1980).

⁴⁰ *Id.* and letter from Gordon Borrie to the author (December 31, 1980).

The authority of the Director General to accept undertakings in lieu of formal, adjudicative proceedings was extended last April by the adoption of the *Competition Act, 1980*.⁴¹ In providing for the selective investigation and control of practices that restrict competition, the Act⁴² empowers this official to publish the results of a preliminary investigation and then to accept an undertaking from the enterprise, a procedure very similar to the FTC's pre-complaint consent order approach.⁴³ Thus, the more formal alternative of referring the matter to the Monopolies and Mergers Commission for investigation may be avoided.

Both countries have adopted a similar three-step procedural approach. Once the enforcement authority has the initial grounds for believing that the respondent business has contravened the applicable statutory standards, the party in question is given an opportunity to give an undertaking to refrain from engaging in the acts or practices in question. Depending upon the circumstances of the case, other elements may be sought to complete the assurance, including redress or other forms of compensatory action, the modification of contract forms, the completion of promised commitments, corrective advertising and the submission of compliance reports for stated periods of time.

The failure to enter into an undertaking satisfactory to the enforcement authority or a subsequent breach of an assurance will usually result in a formal, adjudicative proceeding where the question of liability is directly addressed. It is clear from the design of the legislative scheme and the experience under it, in both the U.S. and the U.K., that this recourse is taken only in a minority of cases. For instance, there have been only seven non-compliance proceedings arising from the 235 Assurances accepted under the *Fair Trading Act, 1973*.⁴⁴

Regarding the other situations, the Director General of Fair Trading states that:

[a] small proportion of traders refuse to give assurances and I have to commence proceedings in the Restrictive Practices Court or in a County Court. Very few traders actually contest my action in Court, many of them signing assurances just prior to the hearing or voluntarily giving undertakings under the Fair Trading Act to the Court.⁴⁵

Indeed, the growing favour with the AVC-type procedure is underlined by the "last chance" option employed in the *Competition Act, 1980*.⁴⁶ Earlier⁴⁷

⁴¹ *Competition Act, 1980*, 1980, c. 21 (U.K.) which received Royal Assent on April 3, 1980.

⁴² *Id.*, s. 4, by which the Director is required to publish such undertakings. Where the matter was referred in the first instance to the Monopolies and Mergers Commission which issues an adverse report, the responsible Minister may ask the Director General to seek an appropriate undertaking from the respondent enterprise or may make an order prohibiting the practices or for remedying their adverse effects. See text accompanying notes 44-48, *infra*.

⁴³ See 3 Trade Reg. Rep. (C.C.H.) ¶9595, at 17,096.

⁴⁴ Letter, December 31, 1980, *supra* note 40.

⁴⁵ Letter, *supra* note 39.

⁴⁶ *Competition Act, 1980*, 1980, c. 21, s. 4 (U.K.).

⁴⁷ Text accompanying note 43, *supra*.

the opportunity to sign an undertaking immediately after the Director General had published the adverse findings of his preliminary investigation was described. A second and final opportunity is also provided for where the results of the more formal investigation by the Monopolies and Mergers Commission establish that the practices are not in the public interest. The responsible Minister may either issue a cease and desist order or ask the Director General to seek a satisfactory undertaking.⁴⁸ This is the last time of asking, one might say.

C. *The Canadian Experience*

An examination of the procedures adopted for the public enforcement of trade or business practices legislation enacted in Canada during the 1970's indicates that both the U.S. and the U.K. experiences exerted considerable influence in formulating the standards adopted by the provinces.

The adoption of the AVC remedy is common to all six provincial acts presently in force.⁴⁹ It also figures prominently in government-sponsored research proposals in both Saskatchewan⁵⁰ and New Brunswick.⁵¹ In last minute amendments in 1977 to the ill-fated Bill C-16, the *Borrowers and Depositors Protection Act*,⁵² federal authorities sought to add the AVC option to the range of enforcement choices available under that omnibus credit statute. The desire to include the AVC option may undoubtedly be traced to the 1976 report of an advisory task force headed by Professor Trebilcock. In recommending the contents of a model federal trade practices statute, the task force closely followed the provincial precedents. In an effort "to reduce reliance on formal criminal processes,"⁵³ the model statute would allow a supplier to pre-empt a criminal action where he is willing to comply with the Act in the future.⁵⁴

It is clear, therefore, that in the area of public regulation concerned with deceptive or unfair business practices, the employment of administrative remedies, particularly of the AVC format, is firmly established as an integral part

⁴⁸ *Competition Act, 1980*, 1980, c. 21, s. 9 (U.K.).

⁴⁹ *Ontario Act*, S.O. 1974, c. 131, s. 9; *Alberta Act*, S.A. 1975, c. 33, s. 10; *B.C. Act*, R.S.B.C. 1979, c. 406, s. 17; *Consumer Protection Act*, S.Q. 1978, c. 9, s. 314; *Business Practices Act*, S.P.E.I. 1977, c. 31, s. 11; *The Trade Practices Act*, S. Nfld. 1978, c. 10, s. 13.

⁵⁰ Sask. Dept. of Consumer Affairs, *Proposal for a Bill on Trade Practices 1976* (Regina: Dept. of Consumer Affairs, 1976) at 21, s. 13.

⁵¹ Dore, 1 *Third Report of the Consumer Protection Project* (Fredericton: N.B. Law Ref. Div., Consumer Protection Project, 1976).

⁵² Bill C-16, 1976 (30th Parl., 2d Sess.) s. 30, one of many amendments put forward by the sponsoring Minister of Consumer and Corporate Affairs, the Honourable Tony Abbott. See, generally, Panel Discussion, Bill C-16, *The Borrowers and Depositors Protection Act: Retrospect and Prospects*, in *Proceedings*, *supra* note 9, 87 at 87-110.

⁵³ Trebilcock, *supra* note 9, at 323, Vol. 1.

⁵⁴ Cf. the wishful statement *per* Lovekin Co. Ct. J. in *Queen v. Southdown Builders Ltd.*, unreported, Feb. 6, 1981 (Peel Co. Ct.):

If it were in my power, I would have been quite satisfied to have seen this charge withdrawn by the Crown on condition that the condominium owners be given the ten year extended warranty coverage because the situation is not one where the vendor deliberately supplied a defective product in a wilful sense.

Instead a \$10,000 fine was levied.

of the combination of private and public enforcement techniques. Experiences in the United States and the United Kingdom, as is so often the case, have been a significant factor in the reasons favouring the adoption of this alternative. The apparent novelty of the exercise has now given way to a measure of familiarity. The time is thus appropriate to study the actual pattern of practice and application in Canada and to identify the possible lessons for legislative design.

II. GETTING THE FACTS: "PUBLIC RECORDS" IN PRACTICE

First a *caveat* and disclaimer about what follows. Traditionally, the legal analyst approaches a subject field such as sales law or personal property security law by studying the governing legislation and the reported cases. The study of administrative remedies, at least in this case, presents fresh and often unique challenges to the researcher in Canada. The observations made in this paper are based on and are only as accurate as the public record which discloses the details of accepted undertakings or assurances.

Except for Quebec, whose Act is silent on the point,⁵⁵ every provincial statute requires the maintenance of a public record of all AVC's entered into under the legislation.⁵⁶ The interpretation of this duty in practice warrants some comment. In Ontario, one binder containing single copies of the AVC's is available in Toronto at the Consumer Bureau of the Ministry of Consumer and Commercial Relations.⁵⁷ In Alberta, copies are on file at each of the six regional offices. While the term "public record" is interpreted to include "public perusal," it does not include photocopying even at personal expense.⁵⁸ This is permitted in Ontario.

As a result, the completeness of the research for this paper may well suffer. With regard to Alberta, 'summaries' of thirty-nine of the forty-three AVC's accepted between proclamation of the Act at the beginning of 1976 and the end of 1980 were used on the assurance that these 'summaries' are accurate.

The Ontario record disclosed two anomalies. Notwithstanding the mandatory direction of the *Business Practices Act* to maintain a record "available for public inspection" of both AVC's and cease and desist orders,⁵⁹ one of the eight AVC entries simply informs the inquiring party that a cease and desist order was "disposed by Agreement" and that "The Public Record is composed of this document only."⁶⁰ This is a most intriguing and singularly unhelpful interpretation of a statutory obligation.

⁵⁵ *Consumer Protection Act*, S.Q. 1978, c. 9, s. 314.

⁵⁶ *Alberta Act*, S.A. 1975, c. 33, s. 10(5); *B.C. Act*, R.S.B.C. 1979, c. 406, s. 5(e)(iii); *Ontario Act*, S.O. 1974, c. 131, s. 5(c)(i). *Business Practices Act*, S.P.E.I. 1977, c. 31, s. 6(c)(i) and *The Trade Practices Act*, S.Nfld. 1978, c. 10, s. 13(6).

⁵⁷ Available for perusal in the Consumer Resource Centre, 555 Yonge St., Toronto.

⁵⁸ Confirmed as the prevailing administrative practice by R. Turner, the present Director of Trade Practices (December 12, 1980).

⁵⁹ S.O. 1974, c. 131, s. 5.

⁶⁰ The entry refers to a cease and desist order pursuant to s. 7 issued in *Re Trans-World Dance Studio* (Ont.) Dec. 30, 1975, which was "Disposed of By Agreement" on Feb. 25, 1976 (See Table III, No. 3). No other details are provided of either document.

The second weakness could have more serious, long-run repercussions for the legality of Ontario's procedures. The *Ontario Act* permits the Director to "enter into a written assurance of voluntary compliance in the *prescribed* form. . . ."⁶¹ Although the Act has been in force nearly six years,⁶² an AVC form has yet to be determined and published as a regulation. This is obvious the moment one studies the seven AVC's on file. Their format, language and terms vary a great deal and betray an increasingly infrequent contact with the remedy.⁶³ More important, one must consider the legal force of these AVC's in light of the failure to prescribe the form that they are to satisfy. The statute equates accepted AVC's with orders made by the Director, the breach of which is an offence leading to a maximum fine of \$2,000 or one year's imprisonment or both.⁶⁴ A proceeding has never been taken to enforce an AVC in Ontario; hence, the question has not been directly addressed. Since the last AVC accepted by the Director was in August, 1979,⁶⁵ the record suggests that the preparation of an AVC form will languish along with employment of the remedy by the Ontario authorities.

Records of the B.C. experience are the most accessible and comprehensive of the jurisdictions. In addition to the formal public record which is available at four locations around the province, an *Enforcement Report* is published at regular intervals with complete details of all enforcement proceedings, judgments, orders, injunctions and AVC's under the Act. The *B.C. Act* is the only provincial enactment that refers specifically to this practice. Reports are to be published by the Director as advisable or upon the direction of the Minister.⁶⁶ In a statute concerned with full and accurate disclosure by businesses in the consumer marketplace, it was felt that comparable obligations should rest on the government to account regularly for the discharge of its mandate to act in the public interest.⁶⁷

The supreme irony and bitter disappointment of the Canadian scene is that enforcement is carried on too often in an atmosphere of stealth and anonymity in which generalities abound, names disappear and enforcement priorities, let alone activities, only infrequently come into sharp focus. The prevailing failure to administer the trade practices statutes in an accessible, compre-

⁶¹ S.O. 1974, c. 131, s. 9.

⁶² Proclaimed in force effective May 1, 1975.

⁶³ The AVC's in question were accepted between August 27, 1975 and December 14, 1978. They vary greatly in the handling of common issues such as compliance monitoring, effects of breach, place on the public record, etc. There is little evidence of drafting familiarity with the features or ambit of the remedy as one would expect over time.

⁶⁴ *Ontario Act*, S.O. 1974, c. 131, s. 17(1)(c).

⁶⁵ *Re United Institute Educational Services* (Ont.) Aug. 2, 1979, amending AVC Sept. 23, 1977 (See Table III, No. 7). The most recent 'new' AVC involving *Re Cottman Transmissions (Canada) Ltd.* (Ont.) was accepted Dec. 14, 1978 (See Table III, No. 8) and is discussed at text accompanying note 109, *infra*.

⁶⁶ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 5(d).

⁶⁷ Neilson, *Consumer Protection and Public Administration* (1977-78), 2 Cdn. Bus. L.J. 169 at 178-79.

hensive and regular fashion⁶⁸ makes analysis more difficult. It is difficult to be precise and informative about the state and adequacy of enforcement of what has been described as the 'flagship' statute. The same might be accurately said of the other consumer protection statutes administered by the same ministries. Accountability has taken on a very muted and sporadic meaning. Disclosure is for commercial, not political, markets.

Reference was made above to the B.C. provision that mandates the publication of enforcement details "from time to time as advisable, or upon the direction of the Minister." The *Enforcement Report* was published every two months for the first two years following proclamation, then they lapsed into six month intervals and for the period between November 1978 and February 1980, there was no publication. When semi-annual publication was resumed, a reason for the sustained silence was quickly suspected—of the twenty-four proceedings noted, only four had been initiated during the term of the incumbent Minister who had taken office more than fourteen months earlier. The other twenty actions had been launched by his predecessor and reported upon earlier.⁶⁹

One may be forgiven for harbouring similar suspicions about the reasons for irregular and incomplete disclosure of enforcement activity in other provinces. Unencumbered by the potentially embarrassing legislative reference to regulatory disclosure and denied adequate investigative and legal resources, the process of quiet administration continues. At the best of times there is likely to be little in the way of enforcement to acknowledge. The Reports may not make for exciting reading, but they would be informative in their own way. In Newfoundland, after waiting for a year to proclaim the 1978 Act, the record stands at one prosecution and one order freezing assets.⁷⁰ Prince Edward Island still has a clean slate for its 1977 statute.⁷¹ In Ontario, the major activity for the past several years has been the issuance of largely uncontested cease and desist orders.⁷²

In 1977, Professor Belobaba took sharp issue with Ontario's approach to enforcement.⁷³ At that time, the Director explained the lack of enforcement

⁶⁸ Discussed at greater length in the forthcoming Neilson, "The Future of Canadian Consumerism: A Retrospective and Prospective View," in *Proceedings of the 10th Annual Workshop on Commercial and Consumer Law, Toronto (Oct. 17-18, 1980)* (Toronto: Canada Law Book, 1981).

⁶⁹ As reviewed in *Vancouver Province*, Feb. 8, 1980, Poulsen Column, referring to the *Enforcement Report* just released summarizing activities between November 15, 1978-January 31, 1980.

⁷⁰ Confirmed by T. Fagan, Director of Trade Practices (Dec. 16, 1980).

⁷¹ *Per* E. Goodwin, Director, Consumer Services Bureau (Dec. 15, 1980).

⁷² Compared to the 8 AVC's accepted by the Director, the public record discloses a total of 31 cease and desist orders between commencement of the Act on May 1, 1975 and the inspection date of January 26, 1981. Details of prosecutions taken under s. 17(2) of the *Ontario Act*, S.O. 1974, c. 131, against operators "knowing" that their activities constitute "an unfair practice" are not required to be placed on the public record. The most recent cease and desist order was issued on July 14, 1980.

⁷³ Belobaba, *supra* note 9, at 379-81 and on the necessary link between enforcement strategy, staff resources and public accountability, see also, Neilson address, quoted in Buchwald, *Consumer Protection in the Community: The Canadian Experience: An Overview (1977-78)*, 2 Cdn. Bus. L.J. 182 at 204.

particulars by stressing the Ministry's preference for mediation, warnings, *in camera* conferences and educational efforts, "preventive in nature," in line with an overall "building block approach to the statute."⁷⁴

This approach is all too prevalent in the administration of important consumer statutes in this country. The building blocks end up going nowhere. Complaint mediation is confused for the separate, public task of law enforcement; opportunities for clarification and the on-going interpretation of the law are avoided; and quiet, undisclosed settlements become the norm instead of merely being one factor in an integrated and visible mix of private and public remedies.

The utility of the legislation in bringing about these unpublicized settlements is acknowledged openly by the provincial authorities.⁷⁵ The supplier usually agrees to refrain from continuing a practice that appears to be unlawful under the Act and may offer redress to the consumer complainant.⁷⁶ Is this not an AVC? The answer is 'yes' and 'no'. For the affirmative, the essential elements of a statutory AVC are there, but the legal format is not followed. Nor are the details placed on the public record. The matter is handled privately and they are without legal effect.

The choice to follow lies within the discretion of the administering authorities. Factors that may influence its adoption include the gravity of the violation, whether the activity has ceased, the co-operative behaviour of the party involved, the absence of clear intent and so on.⁷⁷ Interestingly, these

⁷⁴ Simpson, Panel Discussion, in *Proceedings*, *supra* note 9, 1 at 10.

⁷⁵ *Id.*, in discussing the Ontario experience in 1975-77, the then Director of the Business Practices Division reported that mediation was used successfully in 40% of the complaints received, further evidence of the oft-cited view by complaint staff that many informal settlements are reached via the leverage accorded by the *existence* of trade practices legislation. The individual results may (or may not) be quite suitable for the parties involved. Since comparisons are difficult, if not impossible to make, who is to know? In the larger sense, however, the objectives of the legislation are thwarted by these *sub rosa* intercessions when they become the primary application of the statute, a process accelerated by inadequate staff resources and the absence of either published enforcement guidelines or case reports at regular intervals. Trade practices legislation was intended to be more than a tool for negotiating *ad hoc* settlements to close consumer complaint files.

⁷⁶ *E.g.*, see Ministry of Consumer and Corporate Affairs, *Alberta Consumer and Corporate Affairs, Annual Report for 1978* (Edmonton: Min. of Consumer and Corporate Affairs, 1978) at 17 reporting the investigation of "636 unfair trade practices complaints resulting in the return of \$33,416.35 to aggrieved consumers."

⁷⁷ In response to questions concerning 'informal' unpublicized assurances, the Alberta Director of Trade Practices responded (December 29, 1980):

Investigations of complaints at the regional level often lead to our obtaining an informal assurance of future compliance from the supplier who has breached the Act. However, regional offices follow a policy of advising the supplier that all completed investigations are forwarded to the Director of Trade Practices for his review, and possible further action. If the Director decides that an Undertaking is not warranted, the Director, or Assistant Director, may reiterate the Department's concern in a formal letter to the supplier, and confirm with that supplier that he has provided an informal assurance of future compliance. The supplier is also warned in this letter that any future breaches of the Act, of a similar nature, which come to our attention will most likely lead to a request for an Undertaking or even action by Statement of Claim.

considerations were the principal reasons given by the FTC in the 1960's for the acceptance of AVC's on the public record,⁷⁸ the same FTC later accused of over-using AVC's to avoid contested proceedings.⁷⁹

The accuracy of the public record thus suffers from the absence of an undetermined but apparently sizeable number of 'negotiated settlements'. The absence of published guidelines or procedures establishing the parameters of this practice is commonplace in Canadian administrative practice. This factor, combined with inadequate records of formal proceedings, complicates efforts to evaluate the enforcement choices made in the disposition of cases coming within the statute.

As a result, the analyst works from flawed and incomplete records. Commercial reporting services limit their coverage to occasional court decisions and the homogenized and out-of-date results found in the annual reports of the ministries involved. In this case, many gaps in the public information base were filled through interviews with officials in the affected provinces.

III. FIRST IMPRESSIONS

Relying upon the information available, this study focuses its attention on some initial impressions of the pattern and pace of the Canadian experience with AVC's since the proclamation of the first statute, the B.C. *Trade Practices Act* in July 1974, followed by the Ontario statute in May 1975 and the Alberta version in January 1976.

Ninety formal Undertakings have been negotiated and placed on the public record in the period up to the end of 1980. Three provinces, Alberta, B.C. and Ontario, account for all of them. Neither Newfoundland nor P.E.I. has sought or signed any AVC's to date.⁸⁰ Quebec is in the same position but intends to give a priority to the AVC option in 1981.⁸¹

Alberta has accepted the most undertakings of any of the provinces. Of the forty-three it has accepted to date, twenty-three have been settled in the past twenty-one months, three more than in the preceding thirty-six months. British Columbia comes next with a total of twenty-six Assurances spread over a time frame seventeen months longer than Alberta's total enforcement period.

In contrast to the pattern in Alberta, most of the B.C. Assurances were signed quite soon after proclamation of the Act. Thirty-five Assurances were recorded between August 1974 and March 1977. There was one in 1978, none in 1979 and two in the second half of 1980. Some possible explanations for

⁷⁸ *Supra* note 18.

⁷⁹ *Supra* notes 25, 26.

⁸⁰ *Supra* notes 70, 71.

⁸¹ *Per* J. Dagenais, Director of Law Enforcement, Consumer Protection Bureau, Department of Consumer Affairs, Cooperatives and Financial Institutions (Feb. 6, 1981). The first Quebec AVC was accepted on May 11, 1981 and involved Cablevision Nationale Ltée.

these significant swings in usage are discussed below. The Alberta and B.C. results are summarized in Tables I and II respectively.

The Ontario figures trail with a total of eight Assurances of which six were recorded in the thirteen months beginning in August 1975. The general results of the Ontario AVC experience may be seen in Table III.

British Columbia maintains its reputation for producing the zaniest and most unusual cases. There is the case of the 'recycled coffin'⁸² in which it was alleged that an expensive casket, sold for a funeral service and subsequent cremation, in fact never reached the second stage. Instead it was re-painted and sold again without the knowledge or consent of the relatives of either deceased. An AVC was eventually signed that included the reimbursement of nearly \$1,000 to each of the estates in question.

The 'coffin' AVC followed closely upon the case of the 'crematorium and the unsued urn'⁸³ about which further details are surely unnecessary. One may assume that these two cases have laid to rest consumer complaints against B.C.'s undertaking and funeral industries for some time.

IV. AVC TERMS AND COVERAGE IN PRACTICE

A. Introduction

It was noted⁸⁴ that deterrence, compensation and efficiency were the principal objectives in designing the AVC remedy. Neither criminal sanctions nor civil litigation, particularly in the absence of comprehensive class action legislation, was thought to satisfy all of these enforcement goals. Imaginative and vigorous employment of the AVC, it was reasoned, would fill the gaps in an expeditious manner, deceptive practices would be curtailed, instructive precedents would accrue on the public record and collective consumer redress would take on a meaning unknown in case-by-case adjudication. AVC's while not the panacea, if intelligently employed, would be an essential part of the enforcement choices.⁸⁵

Have these expectations been achieved in the Canadian experience? The potential scope of Assurances is set forth very clearly in the B.C. provisions recited earlier.⁸⁶ The non-exhaustive list of terms and conditions determined by the Director may include: an undertaking to comply with the requirements

⁸² *Re Vernon Funeral Home Ltd.* (B.C.) Sept. 23, 1975 (See Table II, No. 17).

⁸³ *Re Memorial Gardens (B.C.) Ltd., Valley View Memorial Gardens Ltd. and Thor Industries (Canada) Ltd.* (B.C.) Aug. 13, 1975 (See Table II, No. 21).

⁸⁴ *Supra* note 12.

⁸⁵ See Belobaba, *supra* note 9, at 369-70, "AVC's play an indispensable role in any effective program of public enforcement of trade practices legislation. [The AVC] is most often a happy middle ground whereby a good faith supplier undertakes to discontinue the alleged unfair trade practice and to make appropriate amends to any aggrieved consumers; thus, the Director's office is spared the costs of protracted injunction or cease and desist proceedings," and see authorities on U.S. states' experience cited in Belobaba, *op. cit.*, at 369, 312 and 370n. 313.

⁸⁶ Text accompanying note 8, *supra*.

of the Act and to refrain from engaging in the questioned acts or practices; reimbursements to the consumers or class of consumers designated in the undertaking including the costs of pursuing complaints; completion of transactions in accordance with AVC terms; furnishing a bond; reimbursement of investigative costs incurred by the Director, as certified by the Minister; and requirements for the form, content, and maintenance of trust accounts, records, contracts, advertisements or other documents. While the Alberta⁸⁷ and Ontario⁸⁸ provisions are phrased in less specific language, any or all of these features could be included in an AVC signed in either province.

The results in many cases bear out the optimistic forecasts. Direct reimbursement to consumers figured in exactly one-third of the B.C.⁸⁹ cases and in over sixty percent of the Alberta representative case summaries made available.⁹⁰ The Ontario experience has been less encouraging. The first two Assurances⁹¹ each included a deposit of \$1,000 security for customer reimbursement at the discretion of the Director within the first year of each AVC's operation. Direct, confirmed redress does not appear in any of the remaining Ontario agreements.⁹²

The reimbursement situations ranged from single complainant cases to class or collective recoveries. In one B.C. case, deficiency balances were credited to more than one hundred car buyers by a national finance company that had not observed the "seize or sue" provisions of the *Conditional Sales Act*.⁹³

B. *Misleading Standard Form Contracts*

In B.C., several compliance agreements involving alleged breaches of other consumer statutes were signed. The undertakings acknowledged dealer disclosure requirements,⁹⁴ repossession obligations⁹⁵ and contract cancellation

⁸⁷ *Alberta Act*, S.A. 1975, c. 33, s. 10(1) permits the supplier to sign an undertaking "in such form and containing such provisions as the Director, upon negotiation with that supplier, considers proper" and which may contain "specific undertakings" to refrain from engaging in unfair practices and to redress aggrieved consumers.

⁸⁸ *Ontario Act*, S.O. 1974, c. 131, is described as "the most deficient" provincial measure in providing for guidelines as to the potential terms of AVC's. Section 9 simply refers to undertakings "as are acceptable to the Director" to which may be added security for the reimbursement of consumers and of investigative costs: Belobaba, *supra* note 9, at 370.

⁸⁹ Table II.

⁹⁰ Table I.

⁹¹ *Re Phoenix Publishing Co.* (Ont.) January 30, 1976 (See Table III, No. 2) and *Re Cashbak International Inc.* (Ont.) Aug. 27, 1975 (See Table III, No. 1).

⁹² Table III.

⁹³ R.S.B.C. 1960, c. 70, now *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373. *Re Chrysler Credit Canada Ltd.* (B.C.) June 17, 1975 (See Table II, No. 12) and similarly *Re Associates Financial Services Ltd.* (B.C.) Jan. 8, 1976. (See Table II, No. 24).

⁹⁴ *Re John Barnes Wholesaler* (B.C.) Jan. 27, 1976 (See Table II, No. 25) (failure to disclose dealer's licence number in classified ads *per Motor Vehicles Act*).

⁹⁵ See cases, *supra* note 93.

rights.⁹⁶ The undertakings are also tied to the statutory prohibition of any misleading representation about rights or remedies given or protected by applicable law.⁹⁷

Soon after the enactment of the *B.C. Act* warnings were issued⁹⁸ to bring the terms of standard form contracts into line with applicable provincial legislation governing a wide variety of contractual terms. This was felt necessary because some standard form contracts employed by both national and local firms routinely contained provisions blatantly at odds with consumer rights and remedies guaranteed by provincial legislation. This situation was corrected in a number of AVC cases.⁹⁹ Redress was provided and new contracts complying with a proper interpretation of provincial laws were put into use along with provisions for the monitoring of their employment for up to one year.

In B.C., the Act empowers the Lieutenant-Governor in Council to prescribe, "in respect of any class of supplier, the form and content of any form of contract, notice or other document to be used in consumer transactions. . . ."¹⁰⁰ The readiness to clean up self-serving boilerplate contracts purporting to override provincial law was in direct proportion to the awareness of the potential scope of this provision. Many changes were accomplished via negotiations between the Ministry of Consumer and Corporate Affairs Legal Services Branch and relevant trade associations and their counsel.¹⁰¹

The intransigent attitude of several of the chartered banks took a long time to break down. After several adverse lower court rulings¹⁰² and a great deal of unfavourable publicity,¹⁰³ however, the banks modified their contracts

⁹⁶ *Re A-1 Handyman Industries Ltd. and Kehrl* (B.C.) Jan. 17, 1977 (See Table II, No. 31) (purported waiver of *Consumer Protection Act*).

⁹⁷ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 3(3)(m). Although similar provisions may be found in the *Ontario Act*, S.O. 1974, c. 131, s. 2(a)(xii) and the *Alberta Act*, S.A. 1975, c. 33, s. 4(1)(d)(xiv), comparable AVC's enforcing other consumer statutes apparently have not been recorded.

⁹⁸ News Release, Department of Consumer Services (Aug. 30, 1974) "Businesses Asked to Clean up Contracts by Phyllis Young" (Minister of Consumer Services) referring to discussions held by the Director of Trade Practices with major retail and credit trade associations since the proclamation of the Act on July 5, 1974.

⁹⁹ AVC's cited, *supra* at notes 93, 94, 96.

¹⁰⁰ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 33 (n), added by S.B.C. 1975, c. 80, s. 15, in apparent recognition of the need to control both the form and the content of standard form contracts employed by some classes of suppliers. The power has never been used. Perhaps the fact of its existence has had the desired effect.

¹⁰¹ The "Standard Contract" project continued at sporadic intervals into 1978.

¹⁰² *E.g.*, *Gettle v. Bank of Nova Scotia*, unreported, (B.C. Prov. Ct.); according to Aug. 2-Nov. 15, 1978 *Enforcement Report* (Victoria: Ministry of Consumer and Corporate Affairs) [formerly Ministry of Consumer Services] [hereinafter *Enforcement Report*], the Bank of Nova Scotia agreed to discontinue using a "complex standard guarantee form" in its consumer credit transactions in response to complaints about the undisclosed, open-ended indebtedness purportedly created by the fine print instrument (at 6).

¹⁰³ *E.g.*, the outspoken remarks of T. Enemark, Deputy Minister to the 7th Annual Workshop on Commercial and Consumer Law, Toronto (October 22, 1977).

and practices to take into account, for example, personal credit reporting and "seize or sue" laws of the province.¹⁰⁴

C. *Curbing Undesirable Market Practices*

In addition to the minimum undertaking to cease and refrain from engaging in specified unfair or deceptive practices, a third or more of the AVC's in the Canadian survey included specific commitments to change advertising, sales practices, contract clauses, sales marketing plans and the like.¹⁰⁵ Details of these changes are provided to the Director for monitoring purposes.¹⁰⁶ Customer complaints to the businesses are to be handled in an expeditious manner. In several B.C. and Alberta cases, it was agreed that promotional materials would be submitted in advance to consider their compliance with the legislation.¹⁰⁷

In Ontario, the United Institute, a private educational agency catering to foreign students, agreed to refrain from inferring in its advertising government affiliation or sponsorship and to insert clear, irrevocable rescission rights in its enrolment contracts in block letters.¹⁰⁸ Cottman Transmissions, in the single 1978 Ontario AVC, undertook to clean up a host of questionable practices, to handle complaints promptly and to implement the AVC with their franchisees across the province.¹⁰⁹

In a twenty page B.C. Assurance, Maclean-Hunter Ltd. completely revamped its door-to-door sales programme in the province.¹¹⁰ The AVC included a withdrawal by the Director of an action in the Supreme Court of British Columbia alleging numerous misrepresentations made by representatives of Maclean-Hunter Ltd. with respect to the purpose of their calls and the terms

¹⁰⁴ News Release, Ministry of Consumer and Corporate Affairs, "Banks Agree to Review Consumer Loan Forms" (March 14, 1978) reporting that "all of the major banks operating in B.C." had agreed to review their forms employed with their customers to ensure their compatibility with provincial legislation governing debt collections, trade practices, financed sales and credit reporting. Constitutional considerations were not mentioned.

¹⁰⁵ E.g., *Re Don Mills Jaycees* (Ont.) Jan. 5, 1977 (See Table III, No. 4) (a circus promotion/solicitation scheme); *Vacuum seller's 'consumer survey' sales plan* (Alta.) (See Table I, No. 6); *Re Comor Sports Centre Ltd.* (B.C.) Dec. 3, 1975 (See Table II, No. 22) (dealing with questionable 'regular' price claims).

¹⁰⁶ Compliance reports submitted at regular intervals for periods of up to a year following acceptance of the AVC are quite common. In *Re S.S. Kresge Co. Ltd.* (B.C.) Feb. 19, 1976 (See Table II, No. 26), involving alleged sales of returned appliances as new items, the supplier promised, *inter alia*, until Jan. 1, 1978, to "submit to the Director in advance of their use, all advertising and promotional materials and procedures to be used in connection with the sale of previously sold articles. . . and further forthwith upon the request by the Director to provide a written report giving details of its compliance with this undertaking."

¹⁰⁷ E.g., *'Warehouse' furniture store advertising* (Alta.) (See Table I, No. 4); *Re Metro Toyota Ltd.* (B.C.) March 11, 1975 (See Table II, No. 6) (auto lease claims).

¹⁰⁸ *Re United Institute Educational Services*, *supra* note 65.

¹⁰⁹ *Re Cottman Transmissions (Canada) Ltd.*, *supra* note 65.

¹¹⁰ *Re Maclean-Hunter Ltd.* (B.C.) Feb. 26, 1976 (See Table III, No. 27).

of the subscriptions being sold. The company paid \$1,000 towards the reimbursement of investigative and legal costs and entered into a \$10,000 trust agreement to furnish compliance security for a three year period.

D. *Consumer Reimbursement*

A major case in Alberta involved an aggressive home renovator and building supplies dealer.¹¹¹ They undertook to stop high pressure exploitation of elderly homeowners, to cancel approximately \$21,000 worth of unperformed contracts and to return over \$5,000 in deposits placed with the firm.

In another case, which nicely illustrates the integration of public remedies, an Undertaking was given by a stereo and appliance retailer to reimburse customers who had been misled by a credit voucher scheme tied to fictitious 'regular' prices.¹¹² Within a week of giving the Undertaking, the operator closed down his business. Immediately the Director successfully applied for an Order freezing the store's assets. As a result, \$30,000 in cash and goods were tied up. The Order was vacated at a later date in favour of the establishment of a \$10,000 trust to satisfy more than 100 claims.

The result of that case recalls an analogous situation that arose in B.C. in 1976 where the Director, within a month of obtaining an interim injunction against a trailer manufacturer who was misrepresenting CSA approval for its products, returned to court to seek the appointment of a receiver-manager to take over the company's operations in order to safeguard the property of consumer creditors.¹¹³ Again, as in the Alberta case, the manufacturer had closed his doors and there was reason to believe that purchase deposits would be dissipated and that customers' property would be removed.

E. *Corrective Advertising*

Corrective advertising was undertaken on four separate occasions,¹¹⁴ all involving the clarification of retail price claims in urban markets. In an Alberta case, a drugstore in a national chain withdrew its Suggested List Price claims via newspaper advertisements which also invited the public to buy the items at cost or below cost prices.¹¹⁵ Pursuant to one of the two B.C. Assurances incorporating corrective advertising, a major home furnishings retailer in Victoria and a local radio station separately agreed to run both print and radio corrections of misleading advertisements after it was disclosed that a "sneak preview" sale was neither restricted nor a sale.¹¹⁶ The radio station had had a long and very close association with this particular discount house and did not

¹¹¹ *Panther Building Supplies Ltd. (Alta.) Annual Report for 1977* (Edmonton: Ministry of Consumer and Corporate Affairs, 1977) at 18 (See Table I, No. 9).

¹¹² *Little Giant Warehouse Ltd. (Alta.) Annual Report for 1977, id.* at 18-20 (See Table I, No. 13).

¹¹³ *Re Apollo Trailer Mfg. Co.*, reported in May 4, 1976 and June 25, 1976 *Enforcement Reports*.

¹¹⁴ *Sporting goods retailer (Alta.)* (See Table I, No. 2) and cases cited at notes 115, 116, 118, *infra*.

¹¹⁵ *National drug retailer (Alta.)* (See Table I, No. 8).

¹¹⁶ *Re The Traders Home Furnishings and Appliances Ltd. and Capitol Broadcasting System Ltd. (B.C.)* March 25, 1975 (See Table II, No. 7).

seek to argue the "good faith" exception provided to the media under the *B.C. Act*.¹¹⁷

The most memorable AVC calling for corrective advertising involved a Vancouver company, also an appliances and furniture retailer,¹¹⁸ who had been aggressively promoting its sale at bargain prices of stock purchased from a competitor that had gone out of business. In addition to paying \$2,000 towards the costs of investigation, the store agreed to make a ten percent refund to all customers who could prove that a purchase had been made during the time of the advertisements. The offer was to be valid for sixty days and open to monitoring by the Director. The refund offer, it was agreed, was to be publicized in minimum one-quarter page advertisements on prime pages in the Saturday editions of the two Vancouver dailies. The language was settled and the advertisements appeared albeit in minute print (that would warm the heart of the best boilerplate lawyer) surrounded by monstrous borders of blank space. The Ministry acquiesced, not without some laughter, when the wily retailer trotted out an advertising expert who was prepared to testify that the eighty percent white border space was a highly successful method for drawing attention to the refund offer in the centre of this field of snow. He did not explain, however, why his client never again ran such an ad!

F. *Recovery of Investigation Costs*

The recovery of investigation costs has become a frequent item in AVC's recorded in Alberta and B.C. but it has not emerged in any of the Ontario Assurances despite explicit reference to that possibility in the statute. In the British Columbia cases, the practice appears in forty percent of the AVC's signed since September 1975 and the Alberta figures reveal a slightly higher percentage on the basis of the representative cases provided.¹¹⁹

The rising incidence of recovering investigation costs and legal expenses involves more than a new version of the "user pay" philosophy. The practice underlines the need to commit experienced personnel to the programme if administrative remedies are to have their intended effect. AVC's are not to be pursued on the basis of whim or fancy. Each statute clearly sets out the threshold before the option of a non-adjudicated agreement may be considered by the Director.

¹¹⁷ *Trade Practice Act*, S.B.C. 1974, c. 96, s. 1(2), similar to the *Ontario Act*, S.O. 1974, c. 131, s. 4(a) and the *Alberta Act*, S.A. 1975, c. 33, s. 2(4)(a). Section 1 of the British Columbia statute was amended by S.B.C. 1975, c. 80 to place the onus on the radio station, newspaper or other medium to obtain an exemption from any statutory liability by proving that it had received the ad "in the ordinary course of business" and "did not know and had no reason to suspect that its publication would amount to a contravention" of the Act. The amendment followed the February 1975 publication of McLeod and Dihon, *A Report on the Practices, Procedures, and Standards for Acceptance of Advertising Copy by the Media in British Columbia*, prepared for the Minister of Consumer Services which concluded at 34, *inter alia*, "the 'good faith' exemption accorded to the media... has led to the 'blind faith' acceptance of ad copy and a corresponding indifference to the argument that a duty of reasonable care rests upon the media in this revenue-generating activity." Now R.S.B.C. 1979, c. 406, s. 2.

¹¹⁸ *Re Apt. Distributors Ltd.* (B.C.) Dec. 16, 1975 (See Table II, No. 23) reported in Jan. 5, 1976 *Enforcement Report*.

¹¹⁹ See Tables I, II and III, *infra*.

V. SELECTION OF THE AVC OPTION

In Ontario, the Director must believe on reasonable and probable grounds that the supplier in question is engaged or has engaged in an unfair practice;¹²⁰ the same requirement for his issuance of a cease and desist order which could involve review by the Commercial Registration Appeal Tribunal¹²¹ and, ultimately, the courts.¹²² The language of the Act makes it clear that acceptance of the undertaking does not require or constitute an admission by the signing party of engaging in an unfair practice.¹²³ This is also the case in the B.C. legislation, where it is sufficient for the Director to have "reason to believe" that the supplier "has engaged in, or is engaging in, any deceptive or unconscionable act or practice. . . ."¹²⁴ In such cases, he may accept an AVC "in such form and containing such terms and conditions as [he] may determine" instead of ordering an investigation, if he is satisfied that the practices have stopped. Similarly, the Director may terminate any investigation or declaratory or injunctive proceeding brought by him against the supplier upon acceptance of a satisfactory AVC.¹²⁵ The withdrawal of proceedings in the Supreme Court of British Columbia occurred on occasions involving Maclean-Hunter¹²⁶ and a large Vancouver automobile dealer.¹²⁷

In these cases, as in every case in which an AVC is given consideration as an enforcement option, a legal opinion is on file confirming the sufficiency of evidence to support a judicial proceeding. The Act does not distinguish between minor and major violations or suggest an order for enforcement options. This is not to minimize the inherent presence of discretion that is involved within any enforcement system in which judgments are made every day by complaints officers. Senior staff may shunt *prima facie* violations into the informal mediation pigeonhole or simply drop them altogether. Earlier, there

¹²⁰ *Ontario Act*, S.O. 1974, c. 131, s. 9(1) refers the Director back to the s. 6(1) terms, "[w]here the Director believes on reasonable and probable grounds that any person is engaging or has engaged in an unfair practice. . . ."

¹²¹ *Id.*, s. 6(5).

¹²² *The Ministry of Consumer and Commercial Relations Act*, R.S.O. 1970, c. 113, as am., s. 96 provides for judicial review.

¹²³ *Ontario Act*, S.O. 1974, c. 131, s. 9(1) only commits the signing party "to not engage in the specified unfair practices after the date thereof." The *B.C. Act*, R.S.B.C. 1979, c. 406, s. 17(1)(b) is drafted in terms of the Director's satisfaction "that the supplier has ceased engaging" in prescribed acts or practices. Admission by the supplier of his participation in such conduct is not required (see text accompanying notes 189-93, *infra*, for a discussion of the 1977 B.C. shift in interpretation). *Cf. Alberta Act*, S.A. 1975, c. 33, s. 10(1) which requires a finding (*i.e.* admission) that the supplier has engaged or has been engaging in an unfair act or practice and that the supplier has satisfied the Director that he has ceased engaging in that act or practice.

¹²⁴ *B.C. Act, id.*, s. 17(1)(a) and (b).

¹²⁵ *Id.*, s. 17(2).

¹²⁶ *Re Maclean-Hunter Ltd.*, *supra* note 110.

¹²⁷ *Re Bill Dockstader Motors Ltd. and W.H. Dockstader* (B.C.) Feb. 27, 1977 (See Table II, No. 33). In *Re Lo-Cost Automatic Transmission Rebuilders Ltd.* (B.C.) Oct. 9, 1975 (See Table II, No. 19) a private action commenced by one of three consumers reimbursed by reason of the AVC terms was withdrawn as a result of the settlement.

was reference to the alternative of 'informal settlements'¹²⁸ much favoured in some jurisdictions. These are not part of the public record, but then 'subterranean administration' is scarcely confined to the trade practices field.

The AVC's that have been signed in Canada would go substantially beyond the case guidelines developed by the Federal Trade Commission for its own 'informal' AVC's in the 1960's.¹²⁹ For instance, they include allegations of both technical¹³⁰ and major¹³¹ violations. They refer to predatory conduct, and fraud or serious deception,¹³² forms of conduct determined to be inappropriate for an AVC by FTC guidelines. The Canadian framework is more flexible in that it makes it clear that an AVC may be chosen as an alternative to a formal cease and desist order in Ontario;¹³³ to declaratory or injunctive proceedings in B.C.¹³⁴ and Alberta;¹³⁵ and to prosecution in both Ontario¹³⁶ and B.C.¹³⁷ The AVC, in other words, may be shaped to the circumstances at hand, as a clear alternative to several kinds of court proceedings.

A. *The Alberta AVC Experience*

The Alberta requirements are unique and deserve particular mention. Contrary to the provisions in B.C. and Ontario,¹³⁸ or for that matter the U.S.¹³⁹ or U.K.¹⁴⁰ measures, the Alberta *Unfair Trade Practices Act*¹⁴¹ calls for the business to admit that it has been engaging in an unfair act or practice before an AVC will be considered.

¹²⁸ See text accompanying notes 54-80, *supra*.

¹²⁹ Discussed in text accompanying notes 22-23, *supra*.

¹³⁰ *E.g.*, *Re Empress Allabout Tours Ltd.* (B.C.) Aug. 15, 1974 (See Table II, No. 1) (advertised duration of tour).

¹³¹ *E.g.*, *Re Panther Building Supplies Ltd.*, *supra* note 111 (high pressure door-to-door selling to elderly homeowners).

¹³² *E.g.*, *Re Balmere Automotive Enterprises Ltd. and Gregory Balmere* (B.C.) May 18, 1976 (See Table II, No. 29) (Mr. Transmission franchisee; a veritable shopping list of ripoff claims); *Auto dealer* case (Alta.) (See Table I, No. 16) (auto dealer's attempt to withdraw from agreed upon sale); *General Motors* case (Alta.) (See Table I, No. 21) (Undisclosed substitution of Chevrolet engines in other G.M. automobiles).

¹³³ *Ontario Act*, S.O. 1974, c. 131, ss. 6(1) and 9(1). By s. 9(2) an AVC accepted by the Director "has and shall be given for all purposes of this Act the force and effect of an order made by the Director."

¹³⁴ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 17(1)(a) permits the Director to accept an AVC "instead of ordering an investigation of the supplier under this Act or taking proceedings against the supplier under this Act."

¹³⁵ *Alberta Act*, S.A. 1975, c. 33, s. 12(1)(a) and (c).

¹³⁶ *Ontario Act*, S.O. 1974, c. 131, s. 17(2).

¹³⁷ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 25(2).

¹³⁸ Discussed in text accompanying notes 123-24, and note 123, *supra*.

¹³⁹ See discussion in text accompanying note 20, *supra*.

¹⁴⁰ *The Fair Trading Act, 1973*, 1973, c. 41, s. 34(1) (U.K.).

¹⁴¹ Thus, *Alberta Act*, S.A. 1975, c. 33, s. 10(1) provides "Where a supplier has engaged in . . . an unfair act . . . [and] has satisfied the Director that he has ceased engaging in that act . . . that supplier may enter into an undertaking . . . to refrain from engaging in those acts . . . that were unfair" with the consent of the Director.

Resort to the AVC remedy in Alberta in recent years does not appear to have been impaired or restricted by the 'admission of guilt' procedure, although the compatibility of the requirement with the origins of voluntary undertakings is open to question.

Non-compliance with the terms of an Undertaking is not an offence in itself as it is in Ontario¹⁴² and B.C.¹⁴³ Rather, the Director's remedy is to maintain an action against the signing party under the same section that governs actions by the Director seeking to enjoin parties who never signed an AVC.¹⁴⁴

Only one action has ever been taken to completion under this provision in the four years since proclamation of the *Alberta Act*. In 1977, a Calgary automobile dealer, Heninger Motors Ltd., breached an Undertaking given in the previous year. Rather than enforce the AVC in a Queen's Bench action under section 12, it was decided to allow the supplier to enter into a second Undertaking.¹⁴⁵ In due course, this AVC was also breached and an action was commenced against the dealer alleging an unfair trade practice in the sale of a used automobile and breach of the two Undertakings in question. The Director was successful in obtaining his costs of investigation and was awarded punitive or exemplary damages amounting to \$5,000.¹⁴⁶

This result yields the equivalent of a 'provincial offences' fine with the added fillip of costs and special damages.

The *Heninger* decision, perhaps more significantly, is evidence of strong judicial support for the binding force of AVC's.¹⁴⁷

The statistics by the end of 1980 stood at forty-three AVC's and one

¹⁴² *Ontario Act*, S.O. 1974, c. 131, s. 17(1)(c).

¹⁴³ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 25(1)(d).

¹⁴⁴ *Alberta Act*, S.A. 1975, c. 33, s. 12(1)(b).

¹⁴⁵ *Per* Assistant Director of Trade Practices in a letter to the author (Dec. 29, 1980). The second undertaking was amended (for undisclosed reasons) on June 2, 1978.

¹⁴⁶ *Director of Trade Practices v. Heninger Motors Ltd.*, unreported, (Calgary docket no. 139689) March 4, 1980, (Alta. Q.B.), *aff'd*, unreported, (Calgary Appeal No. 12962) Dec. 2, 1980, (Alta. C.A.), in a unanimous one page judgment refusing to alter the trial decision in the face of "a consciously false representation" by a salesman acting within his delegated authority.

¹⁴⁷ The facts in *Heninger* were agreed to by Counsel. Holmes J. found misrepresentation as to the proper mileage on the car in question. Prior to the Director's action, the dealer and the complainant had reached a mutually satisfactory settlement. The Court awarded \$225 in special damages to cover the Director's costs of investigation and \$5,000 in punitive or exemplary damages *per* s. 12(3) "taking into consideration the one contravention of the Act proven in this case *as well as the past misconduct of the defendant as outlined in its undertakings to desist from further unfair practices*" (at 10) [emphasis added]. Indeed, it could be argued that the \$5,000 figure is almost entirely attributable to the breached AVC's since only one of three grounds pleaded by the Director involving the odometer misrepresentation was accepted or acted upon by the Court and an injunction requested by the Director against the defendant was refused because "the Act is relatively new and because it has had a rather considerable impact on the used car sales business" (at 10). *Quaere* the basis for judicial notice in the first s. 12 proceeding taken by the Director and in which witnesses were not called?

Statement of Claim. Is one to conclude, even after deducting the two *Heninger* AVC's, that ninety-seven percent of the cases coming to the Director's attention that warrant formal enforcement action end up as AVC's that are satisfactory to the Director? This would be an incredible statistic and impossible in practice unless the terms negotiated were so advantageous for the suppliers as to make the AVC irresistible. What is the alternative for the supplier? Section 19 requires the Director to have the authorization of the Attorney-General before entering into an AVC or commencing an enforcement proceeding under section 12. As noted previously, this means that reasonable grounds must be present to go to court if necessary.

The established practice in all three Canadian jurisdictions is for departmental negotiators to initiate all AVC discussions with notice that the supplier is being given an opportunity to consider an AVC in lieu of a formal enforcement action.¹⁴⁸ In B.C., two actions in fact had already been commenced before AVC discussions were successful.¹⁴⁹

Even if one allows for the submission of new evidence by the supplier during the AVC negotiations which results in a reconsideration or withdrawal of the original decision to recommend proceedings, the Alberta numbers remain a puzzle. The case summaries provided do not suggest soft or weak AVC terms in comparison to B.C. or Ontario. Are Alberta businesses, in that bastion of ruggedness and individualism, as compliant and submissive as the track record indicates? Might it be that difficult cases are dropped or withdrawn? Perhaps there is a reluctance to proceed against suppliers who, in the words of the Director General of Fair Trading in the United Kingdom, "use negotiations as a delaying tactic, hastily improve the conduct of their business . . . and then argue that there is no longer justification for seeking assurances."¹⁵⁰

This enigma prompted further inquiries since the available data suggested that AVC's were being loosely negotiated in preference to formal enforcement before the courts, a serious charge levelled at the FTC in the 1960's.¹⁵¹

More questions elicited very interesting results consistent with the view that the successful and creative use of AVC's as an administrative remedy depends heavily on a readiness to resort to court proceedings. If the Director does not carry through with his statutory option to test the matter in court failing the signing on satisfactory grounds of an Assurance, then the remedy loses all legitimacy and becomes a servile tool. It is more of an escape than an alternative, contributes less and less to the purposes of the legislation and reduces the opportunities for judicial development and clarification of an important enactment. Especially given the lack of accurate and accessible enforcement records, quiet and weak AVC bargains quickly undermine any vestige of credibility in the statute's administration.

¹⁴⁸ Confirmed in separate interviews with officials in Ontario, Alberta and B.C.

¹⁴⁹ See AVC's cited in notes 126, 127, *supra*.

¹⁵⁰ *Supra* note 40.

¹⁵¹ See text accompanying notes 24-28, *supra*.

The new Alberta data reveals a welcome clarification of this issue.¹⁵² In the period between January 1976 and March 1979, not a single Queen's Bench proceeding was launched and pressed to completion. The Ministry, explained a spokesman, was "still feeling its way" at the time.¹⁵³ The 'takeoff' stage for the AVC in Alberta began in March 1979 and enthusiasm for the remedy has not waned. Since March 1979, twenty-three AVC's were signed in twenty-one months, three more than in the preceding three years. There has been a corresponding increase in the resort to court actions under section 12. In each case, the collapse of AVC negotiations has been the triggering factor. Of the eleven proceedings taken, only the *Heninger* case has gone to judgment after a trial on the merits and three cases have been otherwise wound up: one became a fraud prosecution, another folded into an AVC and the third became a consent judgment. Discoveries and trial hearings are proceeding in the remaining seven cases. Both the carrot and the stick are at work.

B. Recent B.C. Trends

The adaptability of negotiated assurances to changing or novel marketing practices is illustrated in the two most recent AVC's in British Columbia.¹⁵⁴ Both dealt with the aggressive promotion and sale of "time-sharing" contracts entitling the buyer to several weeks' accommodation each year in condominium apartments in Hawaii, Nevada and other southern locations. The scope of the operations is illustrated by the fact that the second venture involved a mailing blitz of more than 500,000 solicitations in 1980, sufficient to reach every other household in the southern half of the province.¹⁵⁵

The contracts involved would often amount to more than \$6,000 up front, plus an annual fee of \$150 or more, to use a one-bedroom condominium suite for one week a year. In the most recent Undertaking signed December 1st 1980, the promoter, The Aloha Group, acknowledged the application of the *B.C. Act* and the cancellation rights granted by the *Consumer Protection Act*.¹⁵⁶ Whether either proposition is entirely correct is possibly open to challenge since realty interests, including tenancies, would appear to be covered by other legislation.¹⁵⁷ The Superintendent of Insurance, however, in a 1979

¹⁵² Provided by R. Turner, Director of Trade Practices (Feb. 4, 1981).

¹⁵³ *Id.*

¹⁵⁴ *Re Scottish Inns of America Inc.* (B.C.) Sept. 19, 1980 (See Table II, No. 38) and *Re The Aloha Group Inc.* (B.C.) Jan. 6, 1981 (See Table II, No. 39).

¹⁵⁵ The promotion featured 6 'gifts' including a car (no one ever won it), TV sets (one winner) and \$1,000 cash (one winner): *Vancouver Province*, Jan. 9, 1981, Kathy Tait Consumer Column.

¹⁵⁶ *Aloha AVC*, *supra* note 154, preamble para. (D): "It is agreed by the parties hereto and by the Superintendent of Insurance that the Suppliers' operations are governed by the *Trade Practices Act* and the *Consumer Protection Act*."

¹⁵⁷ *B.C. Act*, R.S.B.C. 1979, c. 406, applies to "consumer transactions" defined by section 1 as the "disposition or supply of any kind of personal property" which in turn is deemed to include chattels, services and credit, but not securities as defined by the *Securities Act*, R.S.B.C. 1979, c. 380, s. 1 or contracts of insurance under the *Insurance Act*, R.S.B.C. 1979, c. 200, s. 1. *Cf. Consumer Protection Act*, R.S.B.C. 1979, c. 65, s. 13(1)(a) granting seven day cancellation rights under "executory contracts" involving goods or services and the *Real Estate Act*, R.S.B.C. 1979, c. 356, s. 1 by which "real

ruling, decided that the supplier's prospectus did not disclose an interest in land within the meaning of the *Real Estate Act*.¹⁵⁸

In the face of growing complaints of high-pressure tactics, forfeited deposits, foreign exchange ripoffs and non-existent gift schemes, an AVC was fashioned which covered every facet of the marketing scheme that had been questioned by the consumer columnists of Vancouver's two daily newspapers.¹⁵⁹ Clear refund rights were made retroactive to January, 1980, a seven-day cancellation clause was confirmed, overbooking was prohibited and misleading telephone solicitations were curbed.¹⁶⁰

These 'time-sharing' AVC's were the first AVC's signed in British Columbia in nearly eighteen months and followed a period of over three and a half years in which only two Assurances had been recorded. The remaining thirty-five Agreements had been negotiated in the interval between August 1974 and February 1977.¹⁶¹ The reasons for the decline are found in policy announcements on enforcement priorities made by the Ministry late in 1977.¹⁶² Since those reasons address the central objectives of a diverse enforcement mechanism, they merit careful analysis and consideration.

Prior to the middle of 1977, the B.C. *Enforcement Reports*¹⁶³ disclose a pattern of reliance on AVC's and substitute actions in terms of Director-initiated proceedings. The latter remedy adopted a precedent from the State of South Australia¹⁶⁴ in which the Director, with the consent of the Minister and the consumer, is authorized to take on the carriage of the consumer's case (as plaintiff, defendant or on appeal) "with a view to enforcing or protecting the rights of the consumer" arising under "any enactment or law relating to the

estate' includes a leasehold, an estate or interest or charge less than the fee simple. . . ." The characterization of the buyer's interest under a time-sharing contract is obviously not without difficulty. Is it a supply of personal property or an interest in land or something of each? Unfortunately, a copy of the contract employed was not available for closer scrutiny.

¹⁵⁸ *Aloha AVC*, *supra* note 154, preamble para. (C): "The Superintendent of Insurance, at the request of the Supplier, determined that the prospectus filed by the Supplier on March 22, 1979 does not disclose an interest in land and accordingly the Supplier's operations as disclosed in the prospectus are not governed by the Real Estate Act."

¹⁵⁹ Parton, "Dealing with Complaints Against Aloha," *Vancouver Sun*, Jan. 11, 1981 and Tait Column, *Vancouver Province*, Jan. 9, 1981 where a senior B.C. official is quoted as saying that the AVC is "a very solid way" of dealing with Aloha-type situations while acknowledging that the whole issue of growth in time-sharing operations would probably require separate legislation "in the long term."

¹⁶⁰ *Aloha AVC*, *supra* note 154. These are the principal commitments made by Aloha out of a total of 13 detailed provisions.

¹⁶¹ See Table II.

¹⁶² *Per* Enemark, Panel Discussion in *Proceedings*, *supra* note 9, at 11-16 and confirmed by Gould, "Recent Developments in Trade Practices (1978)," in Woodsworth, ed., *Consumer Law* (Vancouver: Continuing Legal Educ. Soc'y of B.C., 1979) at 53-56.

¹⁶³ *E.g.*, *Enforcement Reports* dated July 8, 1975; Aug. 15, 1975; Nov. 7, 1975; Feb. 4, 1976; May 4, 1976; Aug. 24, 1976; Dec. 7, 1976.

¹⁶⁴ *Prices Act, 1948-75*, R.S.S. Aust. 1975, s. 18a(2), enacted by Stat. S. Aust. 1970, c. 40, s. 6, authorizing the Commissioner for Prices and Consumer Affairs to take on substitute actions on behalf of consumers.

protection or interests of consumers."¹⁶⁵ Approximately fifteen actions were taken under this provision during the first three years.¹⁶⁶

The enforcement record was rounded out by a half-dozen injunctive or declaratory proceedings in the Supreme Court initiated by the Director,¹⁶⁷ several freezing orders to protect consumer property¹⁶⁸ and a single instance of prosecution against a major furniture retailer who had earlier been party to an AVC.¹⁶⁹ These figures do not take into account private civil actions including separate, successful injunctive applications by a Vancouver radio station¹⁷⁰ and the B.C. Branch of the Consumers' Association of Canada¹⁷¹ under section 16 of the statute. The preference for civil sanctions and remedies in the pre-1978 period is thus amply established.

In the 1978-79 fiscal year, the pattern of enforcement choices reversed as thirteen prosecutions were completed compared to a single AVC.¹⁷² The eight substitute actions remained a relatively constant contributor in the year ending March 31, 1979¹⁷³ and were vigorously employed to reach a number of settlements on behalf of consumer complainants in 1980.¹⁷⁴

The AVC's fall from favour was forecasted in statements released by

¹⁶⁵ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 24 and similarly *Alberta Act*, S.A. 1975, c. 33, s. 13 but there the Director is not able to employ the action to defend the consumer in proceedings commenced by a supplier. The *Ontario Act* does not provide for substitutions: Belobaba, *supra* note 9, at 371 who describes the provision as "the single most important administrative measure to ensure that worthwhile consumer-initiated litigational efforts are not abandoned."

¹⁶⁶ B.C. Dept. Consumer Services, *Annual Reports* for 1974-76 (Victoria: B.C. Dept. Consumer Services).

¹⁶⁷ *Id.* Particular examples would include *Belmont Sales Ltd.*, Aug. 15, 1975, *Enforcement Report* (combined substituted action and injunction application); *Maclean-Hunter Ltd.*, Sept. 23, 1975, *Enforcement Report* (interim injunction); *Household Finance Corp. of Canada*, March 26, 1976, *Enforcement Report* (declaration).

¹⁶⁸ *E.g.*, *Re Baillif's Sale*, June 25, 1976, *Enforcement Report* at 4: that this marks "the sixth time that a freezing order has been issued by the Director to prevent anyone from dealing with the assets of a firm under investigation."

¹⁶⁹ See *Re Traders Home Furnishings and Appliances Ltd.*, *supra* note 114 and accompanying text. The firm was convicted and fined \$200: May 20, 1977, *Enforcement Report*.

¹⁷⁰ *Radio NW Ltd. v. Bell-Kraft International Ltd.*, unreported, April 22, 1975 (B.C.S.C.), uncontested, alleging misleading affiliation claims by defendant's representatives with plaintiff's "Bridal Fair" promotion.

¹⁷¹ *Stubbe v. P.F. Collier and Sons Ltd.* (1977), 74 D.L.R. (3d) 605, [1977] 3 W.W.R. 493, 30 C.P.R. (2d) 216, *supplemental reasons*, [1978] 3 W.W.R. 257 (B.C.S.C.).

¹⁷² B.C. Ministry of Consumer and Corporate Affairs, *Annual Report* (Victoria: Ministry of Consumer and Corporate Affairs, 1979) at 12.

¹⁷³ *Id.*

¹⁷⁴ *E.g.*, *Canadian Imperial Bank of Commerce* Feb. 1, 1980-July 23, 1980 *Enforcement Report* at 3 (suit for deficiency balance notwithstanding prior repossession); *Strand Holidays (Canada) Ltd.*, *Enforcement Report, op. cit.*, at 3 (\$200 compensation for each of 23 disappointed travellers plus \$1,000 costs); *General Motors of Canada and Rice Chevrolet Oldsmobile Ltd.*, *Enforcement Report, op. cit.*, at 4 (a total of \$4,236 to two Prince George purchasers alleging premature rusting, inadequate repairs, plus \$2,320 investigation costs).

senior spokesmen of the Ministry commencing in October 1977.¹⁷⁵ The re-examination of the role of the AVC as an enforcement tool, it was announced, had been prompted by several deficiencies identified in the remedy's deployment and effects. The results of this "accumulation of experience" in turn supported the desirability of moving towards more criminal prosecutions as a principal strategy of enforcement.¹⁷⁶

As a result, the role of the Assurance was narrowed to those cases of probable violation in which the supplier clearly demonstrated good faith, initiated the AVC request and admitted its violation of the statute. "Good faith," as a term of art, was considered as isolated or careless misconduct or ignorance based on established, industry-wide practice. Prosecution would be the primary enforcement tool for the remaining cases.¹⁷⁷

The new policy amounted to significant *de facto* amendment of a statute imprinted with a clear bias for civil proceedings. Enforcement in the provincial criminal court was to be a last resort option.¹⁷⁸ The limitations of a marketing practices statute tied to the criminal law have been long recognized in the federal experience under the *Combines Investigation Act*.¹⁷⁹ For the better part of a decade, efforts,¹⁸⁰ ultimately unsuccessful, had been made in Ottawa to escape an enforcement path that was slow and expensive, in which redress was unavailable, and, judging by the erratic and often derisory level of fines, deterrence elusive.¹⁸¹

Was this prosecution to be the basis for a Brave New World in provincial enforcement? The discovery by April 1979¹⁸² that thirteen prosecutions under both the *Trade Practices Act* and *Consumer Protection Act* had yielded

¹⁷⁵ Enemark, in *Proceedings*, *supra* note 9, plus text accompanying note 162.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 15.

¹⁷⁸ The common thread of all the provincial statutes is the prominence given to the government-initiated remedies and private redress actions in the basic statutory scheme. The bias was clearly identified by the Ontario Divisional Court in *Re Aamco Transmissions Inc. and Simpson* (1981), 29 O.R. (2d) 565 at 573, 113 D.L.R. (3d) 650 at 658, (Div. Ct.) in the course of upholding the constitutionality of the *Ontario Act* in the face of arguments that it was penal legislation, see also, *Stubbe*, *supra* note 171, at 642 (D.L.R.), 537 (W.W.R.), 254 (C.P.R.); Cohen and Ziegel, *Political and Constitutional Basis for a New Trade Practices Act* (Ottawa: Ministry of Supply and Services, 1976) at 28-34.

¹⁷⁹ Trebilcock, *supra* note 9, at 45-46, Vol. I, describes the criminal law approach as a "clumsy regulatory device" and recommended the restriction of the criminal sanction in more innovative forms to "situations involving fraud and negligence and as a support measure to be invoked in the event of breach by an advertiser of other forms of order."

¹⁸⁰ Stanbury, *Business Interests and the Reform of Canadian Competition Policy, 1971-1975* (Toronto: Carswell/Methuen, 1977) describes this with vim and vigour in the context of competition law reform.

¹⁸¹ See conviction results in *Annual Report, Director of Investigation and Research, Combines Investigation Act, 1980* (Ottawa: Ministry of Supply and Services, 1980) and for an earlier analysis see data collected by the Law Reform Commission of Canada in Trebilcock, *supra* note 9, at 105-106nn. 119-20, Vol. I.

¹⁸² *Annual Report*, *supra* note 172, at 11.

\$15,000 in fines might have been readily predicted by any novice analyst of the subject area before the proceedings had been contemplated. According to the new guidelines, these cases must have concentrated on wilful, flagrant, often repetitive violations which, one might observe, carry a maximum penalty under the *Trade Practices Act* of \$100,000 for a convicted corporation and \$5,000 for an individual.¹⁸³

In fairness, the 1977 policy shift betrayed several major concerns with Assurances that were judged to override the acknowledged weaknesses of an approach weighted towards criminal prosecutions. In particular the AVC was characterized as a potentially unfair bargain extracted by zealous, anonymous civil servants. The criticism was most graphically summarized in these words:

What is at issue here is not the administrator's authority to proceed; rather, it is his authority to treat privately with an offender, to decide not to proceed in the courts, in effect to combine the role of prosecutor and judge. It is this situation which lays the administration open to charges of blackmailing 'innocent' businessmen into half-hearted AVC's.¹⁸⁴

The identical accusation has recently been the subject of commentary in the United States in connection with the vigorous use of consent decrees by the Securities and Exchange Commission.¹⁸⁵ Unlike the U.S. example, however, this indigenous accusation is based on inferences and suggested possibilities of misbehaviour without any supporting cases or even statements on the public record by aggrieved parties or sympathetic commentators.

It may be readily conceded that the opportunity for exercising discretionary control over the choice and content of enforcement options carries with it the parallel potential for aggressive and unfair exploitation. This is a phenomenon scarcely limited to administrative proceedings if one considers comparable and ultimately more determinative opportunities open to prosecutors in the arraignment of charges and plea bargaining.¹⁸⁶

The trade practices statutes require a "reasonable belief" of probable violation before any enforcement option may be considered. According to interviews and case analysis, this requirement is strictly construed by the Attorney-General counsel who are consulted on each case in the three provinces in

¹⁸³ *B.C. Act*, R.S.B.C. 1979, c. 406, s. 25(2) and (3). The highest recorded corporate fine levied was \$2,000 in *Swan Automotive Ltd.* Nov. 15, 1978-Jan. 31, 1980 *Enforcement Report* at 5 (failing to disclose vehicle lien to buyer), and also in *Westwood Toyota Ltd.*, *Enforcement Report*, *op. cit.*, (refused to honour price rebate coupon). The average level of fine reported between late 1978 and early 1981 appears to run in the \$100-\$1,000 range.

¹⁸⁴ Enemark, in *Proceedings*, *supra* note 9, at 13.

¹⁸⁵ For a spirited account, see Bruck, "Stanley Sporkin, Waning Days for the Zealot at the SEC," *The American Lawyer*, Nov. 1980, at 16-24; also Block and Barton, *Administrative Proceedings to Enforce the Foreign Corrupt Practices Act (1979-80)*, 7 *Sec. Reg. L.J.* 40 and Mathews, *Litigation and Settlement of SEC Administrative Enforcement Proceedings (1979-80)*, 29 *Cath. Univ. of Am. L. Rev.* 215 at 273-80.

¹⁸⁶ See Manning, *Abuse of Power by Crown Attorneys (1979)*, L.S.U.C. Special Lectures 571 and *cf.* the cautionary views of Verdun-Jones and Cousineau, *Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada (1979)*, 17 *Osgoode Hall L.J.* 227.

question.¹⁸⁷ Their consent is required before any action is taken on any of the enforcement options. To infer that the Directors have been engaged in capricious acts distorts established operating checks and balances.

Indeed, it might be argued that the cautious vetting of investigated cases has led to a largely conservative and frequently unimaginative application of the sanctions in the Canadian experience. At any rate, the approval to go to court is well in hand prior to any AVC negotiations. In the words of the Alberta Director, "as administrators, we must ensure that before we attempt to negotiate an Undertaking we are satisfied that the facts in our possession would support a successful court action."¹⁸⁸

Where the courts have been involved in Director-initiated proceedings, there has never been the slightest suggestion that the cases have been brought in bad faith or mounted on frivolous or vexatious grounds. In the circumstances, the picture or the prospect of unprincipled zealots utilizing AVC's to vanquish bewildered traders does not correspond with Canadian practice or experience.

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

The restriction of B.C. Undertakings to situations in which the supplier admitted to violating the Act did not accord with the statute's requirements. Neither the B.C. nor the Ontario statutes require an admission of guilt from parties signing Assurances or Undertakings,¹⁸⁹ nor do the U.S. or U.K. precedents employed in their drafting.¹⁹⁰ The reason is obvious. The principal attractions of the remedy to both sides are its capacity to isolate the practices in question, to deal expeditiously with questions of redress and compensation in a single package and to bring the matter to a clear-cut conclusion. The remedy was not designed as an act of public contrition in which past sins are admitted.¹⁹¹

The switch to a "true confessions" interpretation in B.C. was borne out in the first two AVC's accepted after adoption of the approach.¹⁹² The most

¹⁸⁷ *Alberta Act*, S.A. 1975, c. 33, s. 19 formally requires the prior consent of the Attorney General before the Director is able to initiate any court proceedings or enter into an undertaking.

¹⁸⁸ Communication to author (Dec. 29, 1980).

¹⁸⁹ See note and text accompanying note 138, *supra*.

¹⁹⁰ See notes 139, 140 and text accompanying these notes, *supra*.

¹⁹¹ Confirmed in the author's experience in B.C. and interview with A. Coleclough, Director, Investigation and Enforcement (Dec. 19, 1980).

¹⁹² *Re North Shore Capilano Recreation Society* (B.C.) April 28, 1978 (See Table II, No. 37) and *Re Scottish Inns of America*, *supra* note 154.

recent Assurance, however, signed by the supplier in December, 1980, reverted to the non-admission language found in every AVC adopted prior to October 1977 and in circumstances virtually identical to the time-sharing promotions involved in the immediately preceding Assurance.¹⁹³

It appears that the present British Columbia trend is toward a more pragmatic and pluralistic enforcement policy largely freed of the restrictive conditions announced in 1977 and very much in the spirit of the announcement at that time calling for periodic re-evaluation of enforcement policies.¹⁹⁴

C. Ontario's Experience with AVC's

By comparison, it is difficult to locate a visible enforcement strategy in the employment of administrative proceedings outside the two most-Western provinces. The experience in Newfoundland,¹⁹⁵ Prince Edward Island¹⁹⁶ and Quebec¹⁹⁷ has been so negligible as to defeat analysis. In Ontario, enforcement has increasingly concentrated on gathering evidence for prosecutions under the *Criminal Code*.¹⁹⁸ This is interspersed with occasional *ex parte* Cease and Desist orders against marginal operators,¹⁹⁹ a procedure unavailable to enforcement authorities in B.C. and Alberta where interim injunctions must be

¹⁹³ *Re The Aloha Group Inc.*, *supra* note 154, accepted by the Director on Jan. 6, 1981, the supplier "without acknowledging that it had failed to comply with the Trade Practices Act and with the Consumer Protection Act" entered into a series of undertakings (at 3).

¹⁹⁴ A new enforcement policy was adopted to encourage more varied use of the civil remedies provided in the *Trade Practices Act*: B.C. Ministry of Consumer and Corporate Affairs, *Annual Report* (Victoria: Ministry of Consumer and Corporate Affairs, 1980) at 6.

The most recent *Enforcement Report* covering the period July 24, 1980-Feb. 15, 1981 records two AVC's (the 'time-sharing' cases), one substitute action and three prosecutions: one involving a breach of the Act in the face of prior warnings; the second concerning the sale of a used two-year old appliance as new; and the third involved fraudulent TV repair practices as part of a 'test shopping' project conducted by the Ministry over the past three years. The failure of criminal sanctions to address directly the redress of aggrieved consumers was the subject of a 1980 amendment of the *B.C. Act* in S.B.C. 1980, c. 5, adding s. 25.1 by which the Provincial Court may, upon conviction of a supplier under the Act, order the payment of an amount not exceeding the monetary jurisdiction under the *Small Claims Act* "as compensation for pecuniary loss suffered by the aggrieved consumer as a result of the commission of the offence." Interestingly, *ad hoc* efforts in that direction were occasionally made prior to the amendment, *viz.*, in *R. v. Murray*, discussed in *Wise Construction Co.*, July 24, 1980-Feb. 15, 1981, *Enforcement Report* at 4 (unconscionable conduct in performing house repairs for elderly homeowners) where on appeal by the accused, the four-month sentence ordered at trial was altered to weekend incarceration over 90 weeks, probation for the period in question, \$1,000 fine and a probation order to reimburse three consumers a total of \$1,750.

¹⁹⁵ See note 70 and accompanying text, *supra*.

¹⁹⁶ *Supra* note 71.

¹⁹⁷ *Supra* note 81.

¹⁹⁸ R.S.C. 1970, c. C-34, *e.g.* fraud, odometer tampering and confirmed in interview with A. Coleclough, Director, Investigation and Enforcement (Dec. 19, 1980).

¹⁹⁹ See note 72 and accompanying text, *supra*.

sought before the courts. The most recent Ontario AVC is dated December 1978.²⁰⁰ Only two Assurances have been negotiated since September 1976.²⁰¹ The province's tentative attitude towards the remedy is perhaps most clearly exemplified by the failure, since the statute's proclamation in May 1975 to produce the required standard form or outline for compliance agreements.²⁰²

Interviews suggest that the Ontario aversion is based on several grounds.²⁰³ For instance, it is said that some AVC's in the North American experience have been drawn in imprecise terms reflecting hasty concessions by one or both of the sides. The net force of the Undertaking becomes too uncertain to measure. On the other hand, efforts to stiffen the terms or to look for minimum compensation too often result in protracted delay, stonewalling and weak AVC's that appear more as partnership pacts between the Director and the signing party rather than enforceable commitments of compliance.

These characterizations are difficult to accept. In essence, the test of the endeavour is in the completeness of the Director's preparation, the prior disclosure of the procedures governing the format of, and time available for, any negotiations and the constant readiness to let the courts settle the matter if negotiations should be unsuccessful. Weak, imprecise and counterproductive Assurances will go on the public record along with the more creative, imaginative and comprehensive products.

The total experience is open to scrutiny. Compared to a static reliance on standard prosecutions and quiet moral suasion, the compliance agreement is the clearest barometer of resilient and resourceful leadership in the administration of business practices legislation.

Part of Ontario's reluctance to adopt AVC's as an enforcement option may be attributed to the apparent aftermath of the last Assurance recorded by the Ministry that was signed in December 1978 by Cottman Transmissions (Canada) Limited. The company undertook to refrain from a number of allegedly deceptive or unfair practices including unnecessary repairs, inaccurate estimates, misleading advertisements and the like. Cottman also agreed that staff would be properly trained and complaints would be handled in a reasonable and expeditious manner.

The complaints are virtually identical to those raised in a number of cases handled by way of Assurances and substitute actions in British Columbia over the past several years.²⁰⁴ Hence, it is not surprising that the terms of the

²⁰⁰ *Re Cottman Transmissions (Canada) Ltd.*, *supra* note 65.

²⁰¹ See Table III.

²⁰² See text accompanying notes 61-63, *supra*.

²⁰³ Interview conducted with A. Coleclough, Director, Investigation and Enforcement (Dec. 19, 1980).

²⁰⁴ *Re Lo-Cost Transmission Rebuilders Ltd.*, *supra* note 127; *Victoria Automatic Transmission Services*, Feb. 4, 1976, *Enforcement Report* at 1-2, (substitute action); *Re Balmere Automotive Enterprises Ltd.*, *supra* note 132, (Mr. Transmission franchisee); and separate substitute actions in *Actions Against Cottman Ltd. and George Gregory Ltd. as Aamco Transmission*, Nov. 15, 1978-Jan. 31, 1980, *Enforcement Report* at 6 (settled on the payment of \$1,000 to the consumer complainant in each case).

Undertaking read very much like a code of good conduct for Cottman and as a clear message to its fellow operators to measure up to the practices called for in the AVC. Indeed, for the first time in Ontario's experience, this Agreement referred specifically to its place on the public record and the intention to circulate details to interested suppliers, a practice regularly followed in B.C.²⁰⁵ and Alberta.²⁰⁶

Apparently the example did not have a persuasive impact on Cottman's competitors. Within the year, notices, proposed Cease and Desist Orders and Orders for immediate Compliance were issued by the Director to Aamco, Mister Transmission and other operators. In September 1980, the Notices and Orders were quashed by the Divisional Court²⁰⁷ on the grounds that the Orders were too vague to be enforced, lacked specificity and failed to comply with the requirements of *The Statutory Powers Procedure Act*.²⁰⁸ The decision is being appealed.

The Cottman and Aamco situations, it might be argued, illustrate the AVC potential for creating competitive inequities. In succumbing to an AVC, has not Cottman been placed at a competitive disadvantage as a result of its commitment to observe the only enforceable Order obtained from or imposed upon the industry?²⁰⁹

Surely this contention is ill-conceived. Even if the decision of the Divisional Court is upheld on appeal, the result may illustrate more directly the difficulties of framing appropriate Cease and Desist Orders²¹⁰ than in defining

²⁰⁵ The practice has been expressly provided for in all AVC's accepted in B.C. since *Re Lo-Cost Transmission Rebuilders, id.*, when details are circulated to the trade, identifying marks are usually removed since the principal intention is to use the AVC as a form of trade rule and good practice guideline.

²⁰⁶ Limited in practice by the largely passive attitude of the Director to AVC publicity reflected most graphically in the refusal to permit photocopying of Assurances despite their being on the public record *per* s. 10(5) as discussed in text accompanying note 58, *supra*.

²⁰⁷ *Simpson, supra* note 178.

²⁰⁸ S.O. 1971, c. 47.

²⁰⁹ Assuming, of course, strict compliance with the AVC by Cottman.

²¹⁰ Apart from deciding that the Director's proposed order to cease and desist from unfair practices under s. 6(2) of the *Ontario Act*, S.O. 1974, c. 131 is subject to judicial review under s. 1(f) of the *Judicial Review Procedure Act, 1971*, S.O. 1971, c. 48 and confirming the constitutionality of the *Ontario Act*, the brunt of the decision deals with the applicant's challenge of the specificity of the s. 6 and s. 7 notices. Despite a notice running some 104 pages in length, the Court held that there was insufficient detail provided about particular practices alleged to be unfair within the meaning of the Act. Thus, the Director

[i]n many cases . . . does not specify what is considered to be unfair about certain practices, nor does he state precisely what practices the applicants should cease. Instead, the Director describes a system of business, concludes that the system is unfair, and proposes to make an order to cease and desist from the unfair practices. . . . The applicants . . . could not be expected to discern the potential subject-matter of a written assurance of voluntary compliance, since the notice does not set out, with any specificity, the activities that must be ceased. (*Simpson, supra* note 178, at 582 (O.R.), 667 (D.L.R.).

the discriminatory fallout of an AVC which, at the end of the day, addressed future conduct in general terms and omitted any redress provisions.²¹¹ There is little to suggest on its face that such an AVC leaves the supplier at a competitive disadvantage.

Take the reverse case in which an Aamco dealer argues that the terms being sought in the injunctive proceeding exceed the restraints imposed on a Cottman dealer in an AVC accepted by the Director with the result that Aamco, complying with the conditions imposed, could not compete on equal terms with Cottman. This precise issue was argued before the Supreme Court of British Columbia in 1977 in *Stubbe v. P. F. Collier & Son Ltd.*²¹² The "fallacy" of this assertion, Mr. Justice Aikens held, "is that the AVC is not a licence to [the signing party] to engage in specific unlawful acts or practices not in terms prohibited thereby."²¹³ Ultimately, the decision to enjoin the defendant supplier on the terms requested is a discretionary decision and the "only discrimination is that [the defendant], if the injunction is granted, may be dealt with more expeditiously in respect to specific unlawful practices than [the AVC company]."²¹⁴

These comments are not meant to minimize the practical difficulties of proceeding to restrain practices felt to be widespread in a very competitive industry. Those problems, however, are not restricted to administrative proceedings. Nor is the prospect of discriminatory results an appropriate reason to decline enforcement or, in turn, to shelve employment of the AVC as a viable choice by the Director. In the absence of an authority to convene rulemaking procedures for specific trades or industries,²¹⁵ the present legislation calls for the consistent application of clearly stated enforcement procedures and priorities. Where industry-wide enforcement is contemplated, every consideration should be given to securing uniform and concurrent voluntary corrective ac-

This passage highlights the Director's dilemma (and frustration) in utilizing the cease and desist power in the absence of a comprehensive industry-wide trade rule. The problem with this line of business activity, as a cursory analysis of the B.C. cases will confirm and as the *Cottman AVC*, *supra* note 65 reflects, is in the total system of merchandising employed. Specific, finely tuned, particularized instances of unfair practices admittedly only nibble away at the larger target. However, to borrow the Director's 1977 words (text accompanying note 74, *supra*), several such proposed orders under s. 6 or s. 7 (immediate compliance to protect public safety) might have yielded the "building blocks" prior to more ambitious "system-oriented" enforcement efforts. Yet, the Divisional Court's interpretation of specificity betrays an unfortunately rigid and unnecessarily high standard of specificity if the remedial purposes of this consumer protection legislation are to be realized.

²¹¹ Cottman agreed to follow specific disclosure and repair practices, to handle complaints expeditiously and to inform its franchisees and licensees of the AVC terms *Quaere*, the effect of the AVC on Cottman affiliates in any event. Redress was not involved. All in all, quite an innocuous document.

²¹² *Stubbe*, *supra* note 171, at 637 (D.L.R.), 531-32 (W.W.R.), 249 (C.P.R.).

²¹³ *Id.* at 638 (D.L.R.), 532 (W.W.R.), 250 (C.P.R.).

²¹⁴ *Id.* at 638 (D.L.R.), 533 (W.W.R.), 250 (C.P.R.).

²¹⁵ See generally Mullan, *Rule-Making Hearings: A General Statute for Ontario?* (Toronto: Commission on Freedom of Information and Individual Privacy, 1979).

tion applicable to all members of the subject group.²¹⁶ That choice, if exercised, leaves open the option of more formal action as laid out in the Act.

VI. CONCLUSION

The mixed results of this initial review of Canada's AVC experience should not come as a surprise or revelation for they correspond very closely to the general administrative profile identified with market practices legislation in Canada. Little wonder that the newest enforcement option is still regarded in many quarters as an idea more than slightly ahead of its time.

The ninety compliance agreements since the advent of the use of AVC's appear as an uneven, often erratic experience. In the face of the continuing favour with the remedy in the U.K. and in its several forms in the U.S., our record in this country covers the entire spectrum: from slumber, apprehensions of bureaucratic duress, vows of administrative celibacy and second doubts, to unbridled enthusiasm and imaginative application. It would appear that the common legislative roots have had little impact on the employment of the AVC as a significant administrative remedy in marketing practices regulation.

²¹⁶ Cf. 3 Trade Reg. Rep. (C.C.H.) ¶9591, at 17,092-93:

Special consideration is given by the Commission to the possibility of utilizing the voluntary compliance procedure in dealing with acts or practices which are being engaged in by a number of competing firms, where *competitive inequities* might be created by proceeding separately on a case-by-case basis, and where the acts or practices are not otherwise of such a gravity as to require orders to cease and desist.

TABLE I
ALBERTA ASSURANCES OF VOLUNTARY COMPLIANCE*
January 1, 1976 to December 31, 1980

No. Supplier	Activity	Comments
1 Shoe retailer	Alleged "half-price sale"—prior to "sale", normal retail price raised by one-third	Cease and desist; refund to complainant.
2 Sporting goods retailer	Sale "up to 75% off"—competitor complaint—largest discount 57% in fact	Corrective advertising to average sale discount of 50%.
3 Auto dealer	Took down payment for purchase of used car—subsequent claim of demolition in accident to evade sale—car in fact undersold	Car sold at bargained for price plus payment of all legal fees—standard compliance undertaking.
4 "Warehouse" furniture retailer	Advertising "Buy direct and save" claims—in fact, standard retailer	Agreement to cease practice; prior approval of advertising format by Director required.
5 Building siding contractor	Brochure claims re price, factory trained staff, fire resistant products, etc.—all claims misleading	Withdrawal of brochure—Director's approval required for new brochure.
6 Direct seller of vacuums	Telephone "consumer survey"—misleading statement of purpose of solicitation	Stop practice; provide Director with copies of all sales promotional material; clear identification of caller and purpose of call at outset agreed to.
7 Figure or weight reducing salon	\$2.00 treatment advertised—in fact, only available if term contract signed	Undertaking to cease ads; equal prominence to be given to total price.
8 National drug retailer	Misleading Manufacturer's Suggested List price claims	Apology ad in newspaper; new sale of items at cost or less.
9 Home renovator and building supplies dealer	Unconscionable sales tactics involving elderly homeowners	\$21,000 worth of contracts cancelled, \$5,000 in down payments returned; cease high pressure sales tactics.
10 Auto dealer	Classified ads to sell "repossessed" cars—claimed to be private seller	Cease and desist undertaking.
11 Weight reducing salon	Alleged benefits of treatments—unsubstantiated	Refunds to consumer complainants; promise to cease advertising, any similar benefit or result claims, etc.
12 Physical fitness centre	"2 for 1" membership fee offer—claimed single membership fee misleading	Agreement to cease claims.

TABLE I (cont.)

No.	Supplier	Activity	Comments
13	Appliance dealer	"Free draws" yielding "credit vouchers" to be deducted from "regularly advertised price"—no such price in trading area; dishonoured "satisfaction" guarantee	Promotion discontinued; one week later retailer closed doors—Director obtained Freezing Order <i>per s. 9</i> on cash and goods worth \$30,000, later vacated in favour of \$10,000 trust to satisfy complaints.
14	Household movers	Estimate — claimed amount "materially more than initial estimate" upon delivery, otherwise refused to unload goods	Reimbursement of difference between original estimate and claimed amount plus additional sum for inconvenience.
15	Mobile home vendor	1968 model represented knowingly to be 1972 model	\$700 reimbursement plus \$200 investigation costs to Director; standard claims re cessation of practice, etc.
16	Auto dealer	"Demonstrator" claim—in fact, lease unit put back into inventory; warranty coverage representation untrue	Consumer complainant compensated; portion of Director's investigation costs paid.
17	Appliance retailer	Inflated "regular selling price" offset claimed savings from credit coupon promotion	Customer reimbursement; payment of Director's investigation costs; practice stopped.
18	Direct seller of cutlery and cookware	"Survey" contacts by sales representatives; discount claims misleading	Customers reimbursed; costs of investigation paid.
19	Plumbing supplies retailer	Unnecessary repairs	Replacement of parts; payment for inconvenience; cover Director's investigation costs.
20	Sporting goods retailer	False "regular" price advertisements—"sale price" really regular price	Ads discontinued; compliance undertaking; payment of Director's investigation costs.
21	General Motors of Canada Ltd.	Chevrolet engines substituted in other GM automobiles—practice undisclosed	Extended warranty and \$200 rebate to affected car buyers; contribution towards Director's costs of investigation.
22	Weight reducing salon	Unsubstantiated body wrap claims	Cease and desist; agreement to reimburse all costs to any consumers complaining about services; payment of portion of investigation costs.
23	Shoe retailer	Price claims, also purported 1¢ sale for second pair—in fact, only selected inventory on sale	Undertaking to stop claims and contribute towards costs of investigation.
24	Auto dealer	1972 model sold as 1974	Customer reimbursement plus costs of investigation to Director.

TABLE I (cont.)

No. Supplier	Activity	Comments
25 Auto dealer	Misrepresentation of mileage on four autos	Compensation to four customers; payment of Director's costs of investigation.
26 Dance studio	"Reduced price" claims for "limited time"—in fact, regular price	Full contractual disclosure undertaken; also discontinuance of advertising claims.

*SOURCE: 26 AVC "summaries" provided by the Director of Trade Practices from a total of 43 AVC's accepted to the end of 1980 since proclamation of the *Unfair Trade Practices Act*, on Jan. 1, 1976. Based on fiscal year periods (except for 1980), the breakdown is as follows:

Jan. 1, 1976 - Mar. 31, 1976	—	3
Apr. 1, 1976 - Mar. 31, 1977	—	10
Apr. 1, 1977 - Mar. 31, 1978	—	3
Apr. 1, 1978 - Mar. 31, 1979	—	4
Apr. 1, 1979 - Dec. 31, 1980	—	23
	TOTAL	43

per Director of Trade Practices, Jan. 21, 1981 and *Annual Reports* for the years in question.

TABLE II
B.C. ASSURANCES OF VOLUNTARY COMPLIANCE*
July 1974 to December 31, 1980

No.	Date	Supplier	Activity	Comments
1	Aug. 15/74	Empress Allabout Tours Ltd.	Advertising length of tours	Refund offer made available; advertising corrected and to be submitted for compliance for next six months.
2	Nov. 27/74	Dollar Rent a Car Ltd.	Disclosure of mileage surcharge	Refunds to 40 customers of record; advertising corrected; six months' compliance programme undertaken.
3	Feb. 6/75	Airclub International Inc. et al.	Disclosure of tour details including specific departure points and ticket surcharges	Complaints to be handled promptly, compliance details forthwith upon Director's request, advertising clarified and to be submitted for next two months.
4	Feb. 7/75	Imperial Oil Limited	Greater prominence to monthly payment than to cash price in credit card customers catalogue promotion <i>contra</i> s. 2(3)(g)	Corrective notice to all cardholders; advertising changed.
5	Mar 6/75	Texaco Canada Limited	Same as no. 4	Same as no. 4.
6	Mar. 11/75	Metro Toyota Limited	Representations concerning "Purchase-Lease Scheme"	\$2,200 refund to consumer complainant advertising changed; 3 months' pre-clearance of all related advertising materials by binding decision of Director.
7	Mar. 25/75	The Traders Home Furnishings & Appliances Ltd. and Capitol Broadcasting System Limited (CKDA)	"Sneak preview sale" promotion in retailer mailing and radio ads	Corrective retailer and radio messages; retailer to submit all similar advertisements to Director in the future.
8	Apr. 1/75	Kingsway Plymouth Chrysler Ltd.	Less prominence to actual cash price than to down payment and possible monthly payment in newspaper advertising of autos	Cessation of such advertisements, compliance reports upon request from the Director.
9	Apr. 17/75	Westminster Chevrolet-Oldsmobile Ltd.	Same as no. 8	Same as no. 8.

TABLE II (cont.)

No.	Date	Supplier	Activity	Comments
10	Apr. 17/75	Inter-Provincial Pest Control Ltd.	Display of "Public Health Certificates" neither issued nor approved by official authorities	Cessation of practice; compliance reports upon request; pre-clearance by Director of any similar representations.
11	May 9/75	Kingsway Fiat Ltd.	Same as no. 8	Same as no. 8.
12	June 17/75	Chrysler Credit Canada Ltd.	"Notice of Intention to sell" letters to delinquent car buyers alleging right to repossession costs and any deficiency after resale—contrary to "seize or sue" provisions of <i>Conditional Sales Act</i>	Compliance report upon request for next 5 years; pre-clearance of all relevant contract forms and notices to Jan. 1, 1980; correction letter to 102 customers of record.
13	June 20/75	Sinclair Datsun Sales Ltd.	Sale of used car as new vehicle	Refund of \$3,201 to consumer buyer; future disclosure promised; compliance details upon request of Director.
14	July 23/75	Midway Distributors (1974) Ltd.	Price advertising of motorcycles	One year filing of all advertisements; cessation of practice.
15	Aug. 7/75	Glenmore Egg Ranch	Representation of Manitoba eggs as "B.C. Fresh—Okanagan Finest"	Cessation of practice; compliance details upon request for following year.
16	Aug. 25/75	Can-Am Building Supply Ltd.	Canadian Standards Association (CSA) approval claimed for packaged pre-cut homes	Cessation of claims; compliance details upon request to Jan. 1, 1976.
17	Sept. 23/75	Vernon Funeral Home Ltd.	Steel casket sold, then repainted and sold second time without disclosure of prior use	Refunds of \$995 to each of the two estates; payment of Director's investigation costs of \$146; public record filing expressly acknowledged (standard clause thereafter).
18	Sept. 24/75	Tuffy Muffler Ltd., formerly "Midas Muffler Shops"	Unnecessary repairs and parts replacement	\$25 refund to consumer complainant; undertaking to cease practice, communication of AVC to all "officers, employees, servants and agents."

TABLE II (cont.)

No.	Date	Supplier	Activity	Comments
19	Oct. 9/75	Lo-Cost Automatic Transmission Re-builders Ltd.	"Free diagnosis" ads unauthorized repairs, dismantling tactics, use of "warranty" cards to claim mechanic's lien	Consumer redress over \$1,500; payment of investigation costs; cessation of practices; compliance details upon Director's request to Jan. 1, 1977.
20	Oct. 23/75	Davidson's Color Television Repair Centre Ltd.	Unnecessary repairs	\$35 refund to consumer complainant; compliance promised.
21	Nov. 10/75	Memorial Gardens (B.C.) Ltd. et al.	Brass urn sold but not used as represented	Discontinuance of selling urns for burial of cremated remains; series of compliance reporting undertakings.
22	Dec. 3/75	Comor Sports Centre Ltd.	"Regular"/"sale" price advertising claims	5 point price advertising undertaking; compliance details upon Director's request to Oct. 1/77.
23	Dec. 16/75	Apt. Distributors Ltd.	Price claims in "Close-Out" sale of inventory of other furniture retailer—"was"/"now" claims	\$2,000 investigation costs paid; 10% refund offer to bona fide customers claiming to and approved by Department; ¼ page apology notice in Sat. first news section of two Vancouver dailies.
24	Jan. 8/76	Associates Financial Services Ltd.	Misleading deficiency claim notices <i>contra Conditional Sales Act</i> governing "seize or sue" limitations	Corrective notice to all affected customers plus reimbursement of any actual payments; submission of all contract and notice forms to Jan. 1, 1980 upon Director's request.
25	Jan. 27/76	John Barnes Wholesaler	Car dealer identity undisclosed in classified ads; misleading representations as to condition of autos	\$680 refund to consumer complainant; compliance with <i>Trade Practices Act</i> and <i>Motor Vehicle Act</i> ; submission of classified ads and contract forms upon Director's request to Jan. 1, 1978.
26	Feb. 19/76	S.S. Kresge Company Limited (K Mart Department Stores)	Resale of used, returned appliances as new stock	Full disclosure promised; submission of all advertising of previously sold articles in advance to Director to Jan. 1, 1978; "used tag" attached in Schedule A as procedure to be followed.

TABLE II (cont.)

No. Date	Supplier	Activity	Comments
27 Feb. 26/76	Macleam-Hunter Ltd.	Alleged misleading sales pitches by door-to-door vendors selling magazine subscriptions, particularly re purpose of solicitation and seller identity	\$10,000 Trust Agreement established to furnish compliance security in event of "pattern of conduct" in breach of AVC for next 3 years; \$1,000 paid to contribute to investigation costs and costs of Supreme Court injunction proceeding previously launched by Director, now withdrawn; submission of all promotional kits and materials within 48 hours of inception of use; substantiation of any claims therein within 45 days upon Director's demand.
28 Apr. 15/76	WorldBook-Childcraft of Canada Ltd.	See AVC. no. 27 encyclopedia sales scheme	Disclosure of purpose of visit, vendor identity and contract terms undertaken; compliance programme of submission of materials, etc. to Jan. 1, 1978.
29 May 18/76	Balmere Automotive Enterprises Ltd. and Gregory Balmere (Mister Transmission franchisee)	Series of alleged misleading repair practices—automatic transmissions, bait and switch "free inspection" offers; unnecessary repairs; undue pressure	Undertaking to comply with Act and not engage in any of cited practices.
30 Nov. 24/76	Shell Canada Ltd.	Greater prominence to monthly payments than to cash price in credit card customer mailing	Corrective notice to all affected customers.
31 Jan. 17/77	A-1 Handyman Industries Ltd. & Heinz Kehrl	Home repair contract form clause waived <i>Consumer Protection Act</i>	Payment of investigation costs plus Director's legal costs on party and party basis of withdrawal of interim injunction action.
32 Feb. 1/77	Impala Industries Ltd.	Sale of used tent-trailer as new unit	Undertaking to cease practice.
33 Feb. 22/77	Bill Dockstader Motors Ltd. & W. H. Dockstader	Sale of autos previously substantially damaged without disclosing damage; misleading mileage claim	Standard form notice prescribed for all damaged car sales; Director's action withdrawn on payment of party and party legal costs.

TABLE II (cont.)

No.	Date	Supplier	Activity	Comments
34	Mar. 21/77	The Racquet Club of Victoria	Membership fees advertising claims	General compliance terms.
35	Apr. 11/77	Grolier Ltd.	Door-to-door encyclopedia sales practices	Cease and desist undertaking, particularly re full disclosure of identity of vendor, purpose of call; municipal licencing requirements acknowledged; compliance details to Aug. 1, 1978.
36	July 18/77	Bill's Mobile Homes Ltd.	Sale of non-CSA approved mobile home; non-disclosure of material fact	Compliance undertaken; repair of unit to official standards prior to Aug. 1, 1977.
37	Apr. 28/78	North Shore Capilano Recreation Society	Membership fees' advertising claims	Admission of non-compliance (first such clause).
38	Sept. 19/80	Scottish Inns of America Ltd.	Promotion of "Time-sharing" vacation in U.S.—solicitation and contract practices	Acknowledgement of failure to comply with <i>Trade Practice Act</i> and <i>Consumer Protection Act</i> ; agreement to revise contract re disclosure of cancellation right under <i>C.P. Act</i> , applicability of B.C. law; refund procedures clarified; compliance with <i>Credit Reporting Act</i> and <i>Travel Agents Act</i> .
39	Jan. 6/81 (AVC given by supplier on Dec. 1/80)	The Aloha Group Inc.	See AVC No. 38	No acknowledgement or admission of statutory breach. Specific terms similar to AVC no. 38.

*SOURCE: Record of AVC's maintained pursuant to s. 4(e)(iii), *Trade Practice Act*, R.S.B.C. 1979, c. 406, proclaimed July, 1974.

TABLE III
 ONTARIO ASSURANCES OF VOLUNTARY COMPLIANCE*
 May 1, 1975 to December 31, 1980

No.	Date	Supplier	Activity	Comments
1	Aug. 27/77	Cashbak International Inc.	Cash discount promotion	Undertakings including \$1,000 security to settle consumer claims per Director's binding decision for one year period.
2	Jan. 30/76	Phoenix Publishing Co. Ltd. et al.	Book, magazine & encyclopedia sales promotions	Assurances tied to number of unfair practices cited in s. 2(a) and (b); posting of \$1,000 security to settle consumer claims per Director's binding decision for one year period.
3	Feb. 25/76	Trans-World Dance Studio	N/A	Entire public record as follows: "Cease and Desist s. 7 Order issued December 30, 1975 Disposed of by Agreement February 25, 1976. The Public Record is composed of THIS DOCUMENT ONLY."
4	Jan. 5/77	Don Mills Jaycees et al.	Circus ticket solicitation scheme	Agreement to disclose full, proper affiliation/sponsorship in future ticket selling activities.
5	May 10/76	Vic Tanny Fitness Ltd. et al.	Fitness salon advertising and personal sales activities	Two day cancellation right undertaken; expeditious handling of complaints promised plus submission of compliance reports to Director.
6	Sept. 22/76	Rockwood Gardens Ltd.	Direct and mail order sales of plants, shrubs, seeds, etc.	Agreement to specific advertising practices, the hiring of qualified expert staff, refunds if out of stock, etc. Sales system open to monitoring at Director's option.
7	Sept. 3/77; Supplementary AVC, Aug. 2, 1979	United Institute Educational Services	Selling private school courses	Undertaking to refrain from government approval claims; to change standard contract to permit two day cancellation right; monitoring capacity of Director acknowledged.

TABLE III (cont.)

No. Date	Supplier	Activity	Comments
8 Dec. 14/78	Cottman Trans- missions (Canada) Limited Activity	Advertising and repair/service practices involving auto transmission systems and parts	Undertaking to recited dis- closure and repair practices, prompt handling of com- plaints and communication of AVC to each Cottman franchisee and licensee. First acknowledgement of filing on public record. No specific redress.

*SOURCE: Record of AVC's and Cease Orders maintained per s. 5(c), *Business Practices Act*, S.O. 1974, c. 131, proclaimed May 1, 1975.