

2005

Looking for Cover: A Public Choice Critique of the Canadian Debit Card Code

Muharem Kianiëff

University of Windsor, Faculty of Law

Follow this and additional works at: <https://scholar.uwindsor.ca/lawpub>

Part of the [Banking and Finance Law Commons](#)

Recommended Citation

Kianiëff, Muharem. (2005). Looking for Cover: A Public Choice Critique of the Canadian Debit Card Code. *Ottawa Law Review*, 37 (1), 101-142.

<https://scholar.uwindsor.ca/lawpub/62>

This Article is brought to you for free and open access by the Faculty of Law at Scholarship at UWindsor. It has been accepted for inclusion in Law Publications by an authorized administrator of Scholarship at UWindsor. For more information, please contact scholarship@uwindsor.ca.

Looking for Cover: A Public Choice Critique of the Canadian Debit Card Code

MUHAREM KIANIEFF*

This paper compares and contrasts American and Canadian efforts to regulate debit cards. The paper begins by outlining significant differences between the two approaches arguing that Canadians do not enjoy the same level of protection as do their American counterparts with respect to its provisions governing unauthorized transactions, dispute resolution and its enforcement mechanisms.

The question is then asked as to why this is the case and the paper examines the two legal regimes through an institutions affirming public choice lens. The paper suggests that the more concentrated nature of the financial services industry in addition to its desire to forestall more onerous future legislation explains why Debit Cards in Canada are governed by a more lax consumer protection regime than is the case in the United States.

With respect to the methodology used to reach this conclusion, the author postulates that public choice can only be effective as a public policy tool if it is used in a positive prescriptive manner that is designed to provide an institutional alternative. The paper concludes with some suggestions for reform designed to make the legal regime in Canada more responsive to consumer concerns.

Cet article compare et contraste les efforts américains et canadiens en matière de la réglementation des cartes de crédit. Il souligne d'abord les différences importantes dans ces approches respectives, argumentant que les Canadiennes et les Canadiens ne jouissent pas du même de degré de protection que leurs homologues américains sur le plan des dispositions régissant les transactions non autorisées, le règlement de différends et les mesures d'exécution.

Cherchant à déterminer pourquoi il en est ainsi, l'article passe en revue les deux régimes juridiques sous la lentille d'une institution confirmant le choix du public. L'article suggère que le caractère plus concentré de l'industrie des services financiers et son désir de barrer le chemin à des mesures législatives plus rigoureuses dans l'avenir expliquent pourquoi les cartes de crédit au Canada font l'objet d'un régime de protection des consommatrices et consommateurs plus lâche que ce n'est le cas aux États-Unis.

En ce qui concerne la méthodologie utilisée pour arriver à cette conclusion, l'auteur suggère que le choix du public ne peut être efficace en tant qu'instrument de politique publique que si on l'utilise comme une norme positive afin de fournir une alternative institutionnelle. En conclusion, l'article propose certaines réformes afin d'améliorer le régime juridique au Canada de façon à répondre aux préoccupations des consommatrices et des consommateurs.

* Ph.D. Candidate, Osgoode Hall Law School, York University. This paper is based on one which was originally written for Professor Iain Ramsay. I would like to express my tremendous gratitude to Professor Benjamin Geva for his encouragement and most valuable suggestions. I would also like to thank Professor Harry Arthurs, Professor Craig Scott, Soren D. Frederiksen, Dennis Badeen, David Yarrow, Daniel Tsai, Mark A. Davidson, and Alberto Salazar for their support and helpful comments. Finally I would like to thank Karen Sadler, Matthew DiBattista and the editorial staff at the Ottawa Law Review for their excellent editorial assistance.

Table of Contents

104	I. THE DEBIT CODE AND ITS DEVELOPMENT
104	A. <i>American Efforts to Regulate Debit Cards</i>
109	B. <i>Canadian Efforts to Regulate Debit Cards</i>
117	II. PUBLIC CHOICE THEORY AND ITS SUBSTANCE
117	A. <i>Arrow's Theorem and the Basic Tenets of Public Choice Theory</i>
121	B. <i>Commercial Law and Public Choice</i>
122	C. <i>Interest Groups and the Policy-Making Process</i>
126	III. A PUBLIC CHOICE PERSPECTIVE
131	A. <i>The Desirability of Codes of Conduct Generally</i>
133	IV. THE ANALYSIS AND ITS UTILITY
134	A. <i>Differences between Outcomes in the US and Canada</i>
140	B. <i>Conclusion</i>

Looking for Cover: A Public Choice Critique of the Canadian Debit Card Code

MUHAREM KIANIEFF

In 1992, the government of Canada began to negotiate and implement a voluntary code that would govern rights and liabilities pertaining to consumer debit card purchases. These efforts culminated in the *Canadian Code of Practice for Consumer Debit Card Services*,¹ which was subsequently revised in 1996, 2002 and 2004. The *Debit Code* arrived with very little fanfare and scant media attention with respect to the processes used to generate its substantive provisions.² On a comparative level, despite the fact that the *Debit Code* was enacted much sooner than its American counterpart, the *Electronic Funds Transfer Act*,³ the *Debit Code* is less comprehensive and favourable to consumer interests. This is particularly the case with respect to its provisions governing unauthorized transactions and its dispute resolution and enforcement mechanisms. The question, then, is why are American regulations much more stringent in these regards?

Public choice theory postulates that legislative and regulatory decisions are a product of the intersection of complex and competing interests of different groups in society. This theory can help explain why it is that a voluntary code governing rights and liabilities in the area of consumer debit card purchases was adopted in Canada rather than a legislative scheme. One could hypothesize that the *Debit Code* was used as a proactive measure by the financial services industry to avoid governmental regulation in the future. Events in the past have shown that banking issues that directly impact consumers have been attractive political targets for regulation. By relying upon a voluntary code approach, the industry would have more control over the substantive content of the *Debit Code* and consequently be in a better position to shift the burden of losses onto consumers. The process was one that was particularly favourable for the industry to assert its expertise in economic affairs at the expense of consumer interests due to the relative weakness of the consumer movement *vis-à-vis* the financial services lobby.

Public choice as a paradigm is not monolithic and has been used to justify a broad variety of political and legal positions. One of the strengths of this mode of analysis is that it is helpful in allowing one to identify weaknesses in the legislative or

1. Electronic Funds Transfer Working Group, *Canadian Code of Practice for Consumer Debit Card Services*, online: Financial Consumer Agency of Canada <http://www.fcac.gc.ca/eng/compliance/DebitCardCode/DebitCardCode_e.pdf> [*Debit Code*].
2. Indeed a search of national newspapers reveals that the issue did not receive widespread attention in the media. *The Globe and Mail* saw fit to devote only a quarter of a column to the issue. See "Card Code Introduced" *The Globe and Mail* (2 May 1992) B2.
3. 15 U.S.C. § 1693 (1994) [*EFTA*].

regulatory process and in the legislation, rules and decisions issued by public institutions. It is argued, however, that the public choice approach is useful only when it is used in a comparative "institutions affirming" manner that seeks to design institutions that can withstand the public choice problem. In other words, it can meet its true potential if it is used as a tool to diagnose and then offer solutions to correct deficiencies in legislation or institutions as opposed to merely acting as a descriptive tool that undermines institutions without offering an alternative.

Broadly speaking, this paper will present a case study that seeks to illustrate how public choice can be used in a positive manner in order to argue for a more equitable rights allocation mechanism for consumers. This case study may prove to be a useful means of identifying deficiencies both within the *Debit Code* and within public choice theory itself. Admittedly, this is no small task indeed, and it is a rather ambitious task to be completed within the confines of this paper. Yet, one remains hopeful that the brief overview offered in this piece will acquaint those unfamiliar with the *Debit Code*, with its contents and theory, and outline some points of contention with a view to stimulating debate on the issues raised here. Section I of this paper will briefly outline the *Debit Code* and some of its deficiencies. Section II will outline some of the basic premises of public choice and interest group theories. Section III will examine the *Debit Code* through a public choice perspective and illustrate how private interests have found it advantageous to use law as a means of shifting risks onto consumers and as a means of averting onerous future legislation. The paper will conclude in section IV with some reflections on the methodology used in section III and an assessment of its utility as a form of analysis.

I. THE DEBIT CODE AND ITS DEVELOPMENT

A. American Efforts to Regulate Debit Cards

The development of the *Debit Code* did not take place in an isolated manner. International attempts and precedents played a large part in determining the Canadian course of action. As was previously stated, the *Debit Code* was promulgated in 1992. However, its American equivalent, the *EFTA*,⁴ was enacted in 1978. A comparison of the substantive components of Regulation E and the *Debit Code* is necessary in order to comprehend the actions of regulatory authorities both in the United States and in Canada.

But first, a little history. Regulation E is the logical extension of consumer protection laws that were first enacted with respect to credit cards eight years earlier. The credit card consumer protection provisions came in the form of amendments

4. *Ibid.*, as implemented through Regulation E by the Board of Governors of the Federal Reserve System: 12 C.F.R. § 205 (1996) [Regulation E].

to the *Consumer Credit Protection Act*,⁵ which is also implemented by the Board of Governors of the Federal Reserve System through Regulation Z.⁶ This regulation was largely developed in response to regulators' concerns regarding early credit card marketing techniques used by banks in the 1960s and 70s.⁷ When the precursors to today's major credit cards began operations in the late 1950s, many were confronted with the problem of obtaining a critical mass for their products. One way in which merchants were convinced of the virtues of accepting credit cards came in the representations made by banks and issuers that large numbers of individuals in a particular geographic area had access to a credit card.⁸

Credit card issuers still had to find a way of combating the converse problem of convincing consumers to accept and use a system of revolving credit, which, at that time, seemed like a foreign concept to the masses. During the late 1950s, individuals were much more credit averse than they are at the present time, in large part because many of them still had vivid memories of the pay-as-you-go era during the Great Depression.⁹ The solution, as envisioned by the issuers, was to distribute cards by mass mailings and rely on the good faith of individuals who would decide whether to keep the card or simply to discard it. Unfortunately for the issuers, a credit mechanism that essentially allowed individuals to act as their own loan officer ran contrary to 1950s paternalistic views of credit as shaped by the Depression.¹⁰ Those in public positions of authority seized the opportunity and denounced the credit card as a product that was "morally and financially ruinous to the public welfare."¹¹ Moreover, concerns arose over the onerous terms found in cardholder agreements that stated that holders of cards would be liable for their use even if their cards were lost or stolen.¹²

The precursor to what would eventually become the MasterCard credit card system had a very difficult time convincing consumers to adopt it due to negative publicity that followed its debut. Following their initial distribution in the Chicago market in the early 1960s, consumers in that area began hearing media reports that heightened their aversion to credit cards. One such report appeared when a van filled with new cards overturned and spilled the cards in every direction: "the newspapers had pictures the next day of people grabbing credit cards by the handful, presumably

-
5. 15 U.S.C. §§ 1642-43 (1988).
 6. 12 C.F.R. § 226 (1997) [Regulation Z].
 7. Jane Kaufman Winn, "Open Systems, Free Markets, and Regulation of Internet Commerce" (1998) 72 Tul. L. Rev. 1177 at 1232 [Winn, "Open Systems"].
 8. Joseph Nocera, *A Piece of the Action: How the Middle Class Joined the Money Class* (New York: Simon and Schuster, 1994) at 26.
 9. Thomas P. Vartanian, Robert H. Ledig & Lynn Bruneau, *21st Century Money, Banking and Commerce* (Washington: Fried, Frank, Harris, Shriver and Jacobson, 1998) at 56.
 10. Nocera, *supra* note 8 at 26.
 11. *Ibid.* at 31.
 12. *Ibid.*

for later use.¹³ Stories also appeared in which Chicago postal clerks were stealing unmailed credit cards to be sold on the black market.¹⁴ As Joseph Nocera notes, legitimate consumers “had to worry not only about all the unwanted cards that had arrived, but about all the unwanted cards that *hadn't* arrived.”¹⁵ Similar experiences were found in the Los Angeles area in the late 1950s, as the precursor of what is today Visa faced similar difficulties. Stories such as these became all too common and provoked significant public outcries over the terms found in cardholder agreements.¹⁶

Inevitably, credit card marketing became a political issue. The United States Congress held its first hearings on credit cards in November 1967.¹⁷ The paternalistic view of credit control was present in those hearings as witnesses warned of the potential for credit cards to encourage a dependency on debt. Senator William Proxmire of Wisconsin was quoted as saying: “Unless we bring unsolicited credit cards under control, we are likely to produce a nation of credit drunks.”¹⁸ When confronted with claims that bank mailings had gone awry and that the resulting problems created anxiety among consumers, banking industry lobbyists refused to acknowledge the problems.¹⁹ Faced with the prospect that the banking sector was unwilling or unable to rectify the situation for consumers, Congress decided to act. When Senator Proxmire introduced a bill that would ban unsolicited credit card mailings, the Senate voted in favour by a margin of 79-1.²⁰

Despite industry opposition to governmental intervention, the general consensus has been that regulation has been an effective means of preventing consumer injustices. This has also been the case in the common law interpretation of Regulation Z, which judges have tended to interpret in favour of consumers.²¹ As Jane Kaufman Winn states, credit cards are the consumer choice of payment device on the Internet, largely as a result of the consumer protection features that were mandated thirty years ago.²² In another work, Professor Winn argues that Regulation Z has had additional benefits. By placing more of the burden of unauthorized transactions on card issuers, merchants and merchant banks, additional resources have been invested in order to make the system more safe and secure.²³

13. *Ibid.* at 59.

14. *Ibid.* at 58.

15. *Ibid.* [emphasis in original].

16. Some of these incidents are outlined in Nocera, *ibid.* at 57-62.

17. Nocera, *ibid.* at 60.

18. *Ibid.*

19. *Ibid.* at 61.

20. *Ibid.*

21. See *Martin v. American Express Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978), citing *Irvin v. Public Finance Company of Alabama*, 340 So.2d 811 (Ala. Civ. App. 1976), which stated that Regulation Z was to be liberally construed in favour of the consumer and its terms strictly enforced against credit card issuers.

22. U.S., *The Future of Electronic Payments: Roadblocks and Emerging Practices: Hearing Before the Subcommittee on Domestic and International Monetary Policy of the House Committee on Banking and Financial Services*, 106th Cong. (2000) (Jane K. Winn), online: House Committee on Banking and Financial Services <<http://financialservices.house.gov/banking/91900win.htm>>.

23. Winn, “Open Systems”, *supra* note 7 at 1235.

The regulations that followed placed restrictions on the unsolicited mailing of credit cards and set liability limits for unauthorized transactions at \$50 for consumers.²⁴ These regulations guaranteed fairness in the provision of credit and helped protect consumer privacy as well.²⁵ While many industry participants had initially opposed regulation as a means of increasing transaction costs for consumers in the form of higher interest rates in order to pay for the costs of compliance, regulation has since been seen as something favourable for the industry. Regulation is viewed as a stabilizing force that has also increased consumer acceptance and helped generate a critical mass for credit cards.²⁶

As technology progressed in the 1970s and the myth of debit card technology was becoming a reality, many consumer groups realized that existing consumer protection laws were inadequate to safeguard against many of the same abuses that had plagued credit cards in previous years. Congress established the National Commission on Electronic Fund Transfers in 1974, giving it a mandate to recommend appropriate administrative and legislative action if necessary.²⁷ Despite the fact that this Commission was comprised mainly of bankers and bank regulators, it recommended that many consumer protection issues be addressed in order to safeguard consumer rights.²⁸ Consumer groups were successful in their efforts to obtain federal legislation despite the protests of some industry participants who argued (much the same way that they do today regarding smart cards) that legislation was premature and would end up fatally wounding an infant industry.²⁹

At the time, the *EFTA* was seen as a good starting point by some for providing minimal consumer protection as a means of addressing market failures.³⁰ The salience of the political issue at the time made debit card regulation a subject that garnered widespread support in the media.³¹ Politicians were quick to capitalize on the opportunity to pass electorally favourable legislation that was pro-consumer for the most part.

-
24. Regulation Z, *supra* note 6 § 226.12(b).
25. Lewis Mandell, *The Credit Card Industry: A History* (Boston: Twayne, 1990) at 52-61.
26. Jane Kaufman Winn, "Clash of the Titans: Regulating the Competition between Established and Emerging Electronic Payment Systems" (1999) 14 Berkeley Tech. L.J. 675, online: <<http://www.law.berkeley.edu/journals/btlj/articles/vol14/Winn/html/reader.html>> [Winn, "Clash of the Titans"].
27. Lewis M. Taffer, "The Making of the Electronic Fund Transfer Act: A Look at Consumer Liability and Error Resolution" (1979) 13 U.S.F.L. Rev. 231 at 232. See also David C. Hsia, "Legislative History and Proposed Regulatory Implementation of the Electronic Fund Transfer Act" (1979) 13 U.S.F.L. Rev. 299.
28. Taffer, *supra* note 27 at 232-33.
29. *Ibid.*
30. See for example Ellen Broadman, "Electronic Fund Transfer Act: Is the Consumer Protected?" (1979) 13 U.S.F.L. Rev. 245. But see Mark E. Budnitz, "The Impact of EFT Upon Consumers: Practical Problems Faced by Consumers" (1979) 13 U.S.F.L. Rev. 361.
31. See Taffer, *supra* note 27 at n. 12, citing media reports that raised public awareness.

Regulation E has six major substantive elements:

1. It restricts the issuance of unsolicited account access devices.
2. It requires certain initial disclosures of the terms and conditions of the electronic fund transfer service.
3. It requires notice of certain changes in the terms and conditions initially disclosed.
4. It requires transaction receipts and periodic account statements.
5. It establishes error resolution procedures.
6. It imposes limits for unauthorized transfers.

With respect to unauthorized transfers, a consumer's liability is limited to \$50 provided that the issuer is notified within two business days after the unauthorized transfer is discovered. However, if the account holder waits for more than two days before notifying the issuer, the maximum liability increases to \$500. After 60 days, the consumer is liable for the entire amount.³² Moreover, Regulation E states that an institution that fails to follow requirements can be liable to consumers without proof of actual damage.³³ The judicial treatment of this Act has generally been quite favourable to consumers and has been liberally construed.³⁴

Regulation E represents a political compromise over optimal risk allocation in the payment system. Although many have seen it as the manifestation of the successful lobbying efforts of consumer advocates, it still imposes various obligations on consumers.³⁵ Many of the rules and regulations pertaining to consumer electronic payments deal with issues of loss allocation resulting from fraudulent, negligent or unauthorized transactions.³⁶ Generally, laws that seek to attain economic efficiency with respect to loss allocation follow the principles of efficient loss spreading,³⁷ reduction³⁸ and imposition.³⁹

32. 12 C.F.R. § 205.6(b)(1) (2005).

33. 15 U.S.C. § 1693m (1992).

34. Tom S. Onyshko & Robert C. Owens, "Debit cards and stored value cards: legal regulation and privacy concerns" (1997) 16 Nat'l Banking L. Rev. 65 at 67.

35. Robert Hayhoe, "Fraud, the Consumer, and the Banks: The (un-) Regulation of Electronic Funds Transfer" (1995) 53 U.T. Fac. L. Rev. 346 at 354.

36. See generally Hal S. Scott, "The Risk Fixers" (1978) 91 Harv. L. Rev. 737.

37. This principle is described as the assignment of liability for a loss on the party that can achieve risk neutrality at the least cost. The party that can achieve this is the one that has greater economic resources and is in a position to spread the loss most effectively. See Robert D. Cooter & Edward L. Rubin, "A Theory of Loss Allocation for Consumer Payments" (1987) 66 Tex. L. Rev. 63 at 71.

38. *Ibid.* at 73 [footnotes omitted]: "Loss spreading presumes that a loss already has occurred and assigns liability to the party that can more effectively spread it, but the loss reduction principle assigns liability for the more complex purpose of affecting human behavior. It thus raises empirical questions about the effectiveness of liability rules, adds a dynamic element because behavior changes over time, and produces a variety of moral concerns about the proper standards of behavior. In discussing these issues, this Article distinguishes four distinct elements of the principle's operation: precaution, innovation, responsiveness, and learning"

39. *Ibid.* at 78: "The third principle in establishing an efficient payment law, the loss imposition principle, concerns the enforcement of this assigned liability. The enforcement process turns the law from a set of legal rules into a series of actual monetary transfers. Liability may be enforced through civil suits, criminal trials, or administrative proceedings, as well as through the many informal devices for settling disputes. One feature that all these mechanisms share is that they are costly; they represent a deadweight loss to the participants in the payment system. To achieve efficiency, therefore, the enforcement process should be as inexpensive as possible."

Robert Cooter and Edward Rubin argue that the \$50 unauthorized transaction limit in Regulation E serves as a means of encouraging "bilateral precautions" in an economically efficient manner. "Capped consumer liability", as they refer to it, ensures that "both consumers and financial institutions [are] strictly liable for their assigned portion of the loss." This gives consumers a pecuniary incentive to exercise care in the handling of their debit cards. At the same time, this also ensures that financial institutions absorb all losses over the limit since "they can spread the losses and develop new technology to counteract their own carelessness, as well as that of the consumer."⁴⁰

B. Canadian Efforts to Regulate Debit Cards

The adoption of Regulation E by American regulators would have worldwide benefits. Fundamentally, the argument that the regulation of debit cards was best left to the industry itself would not appear as persuasive since one of the world's leading proponents of *laissez-faire* economics had decided that governmental regulation was the best means of addressing the issue. Despite industry opposition, consumer advocates still managed to get the attention of lawmakers, bringing increased protection for consumers. American debit card issuers (many of whom are also credit card issuers) in turn agreed to extend their compliance with Regulation E to their global operations. However, domestic card issuers were under no such obligations.

Prior to 1992, consumer rights *vis-à-vis* debit cards were largely determined by cardholder agreements.⁴¹ As a result of the unequal bargaining power that exists between individual consumers and large financial institutions, these agreements tended to put a larger burden on individual cardholders with respect to unauthorized transactions.⁴² Not surprisingly, when Canadian banks were contemplating a large-scale roll out of a retail point of sale payment system using bankcards (what would eventually become Interac), reassurances had to be made to consumers that their concerns were being addressed.

Industry Canada states that during this initial period when the Interac system was being introduced, they received numerous complaints from consumer representatives.⁴³ These complaints centered on transaction errors, unauthorized use of debit cards, the handling of complaints and problem solving procedures. As a result, in 1989, the then federal Department of Consumer and Corporate Affairs established the Electronic Funds Transfer Working Group, a group charged with the

40. *Ibid.* at 90.

41. Onyshko & Owens, *supra* note 34 at 74.

42. See generally Margaret Samuel, "Non-cash alternatives and money laundering: An American model for Canadian Consumers' protection" (1992-93) 30 *Am. Bus. L.J.* 169.

43. Industry Canada, *Electronic Funds Transfer Code: Executive Summary* by Yves Giroux & David Waite (1996), online: Industry Canada Consumer Connection <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00786e.html>>.

task of developing a code that would apply to consumer debit card purchases.⁴⁴ With debit cards being a relatively new product in the Canadian market, and being offered by a relatively small number of suppliers,⁴⁵ Industry Canada felt that any sort of solution should be brought about by consensus with government, industry and consumer groups working together from the outset.⁴⁶ The Department felt that the remedy to be devised should be one that would be relatively easy to update as circumstances warranted.⁴⁷

The concept that was followed was the *Debit Code*, a voluntary code that is still in use. Substantively, the *Debit Code* is not as precise as its American counterpart is. As is the case with Regulation E, the *Debit Code* provides guidelines to be followed pertaining to the issuing of cards,⁴⁸ providing necessary disclosures written in plain language⁴⁹ and mandating the provision of receipts and records for consumer transactions.⁵⁰ Guidelines also pertain to the assignment of liability in the event of an unauthorized transaction,⁵¹ and outline dispute resolution procedures.⁵² Recent amendments in 2002 have added new definitions that encompass debit card terminals to be used in the home.⁵³ In addition, a new Appendix was added to act as an interpretative guide to the section pertaining to unauthorized transactions.⁵⁴

With respect to unauthorized transactions, the *Debit Code* caps the cardholder's losses to the established debit card transaction withdrawal limits.⁵⁵ However, the cap on liability is notably higher under the *Debit Code* than it is under Regulation E. Under the *Debit Code*, a cardholder's potential liability is a function of the cardholder's agreement,⁵⁶ failing which standard withdrawal limits apply. The components of the withdrawal limits are the amounts that can be withdrawn from an automated banking machine (ABM) and the amount that a consumer can purchase with their debit card through a point of sale terminal per day. As such, the total daily withdrawal limit that is derived for the purposes of the *Debit Code* is calculated by adding the two together. The example given in the Appendix gives the hypothetical figure of \$3,000 as a threshold of this limit⁵⁷—arguably a significant difference from the \$50 cap

44. Kernaghan Webb *et al.*, *Strategic Alliances for Consumer Groups*, (Ottawa: Industry Canada, 1996) at 20-21, online: Industry Canada Strategis <[http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Strate_e.pdf/\\$FILE/Strate_e.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/Strate_e.pdf/$FILE/Strate_e.pdf)>.

45. Industry Canada, *supra* note 43.

46. Webb *supra* note 44 at 20-21.

47. "Canadian Code of Practice for Consumer Debit Card Services" *Canada Newswire* (1 May 1992).

48. *Supra* note 1, s. 2

49. S. 3.

50. S. 4.

51. S. 5.

52. S. 7.

53. S. 9.

54. App. A.

55. S. 5(4).

56. App. A, cl. 4.

57. *Ibid.*

imposed by Regulation E during the initial loss period. However, these amounts can vary from individual to individual based upon the nature of their accounts. It would not be unreasonable to conclude that Canadian consumers do not face as clear a baseline of liability as that enjoyed by American consumers.

The *Debit Code* states that cardholders are not liable for any unauthorized transactions where the card issuer is responsible for preventing such use, such as where:

- the card is reported lost or stolen;
- the card has been cancelled or has expired; or
- the cardholder has reported that the Personal Identification Number (PIN) may have become known to a third party.⁵⁸

In addition, cardholders are not held liable in circumstances where they have unintentionally contributed to an unauthorized use provided that they cooperate in any subsequent investigation.⁵⁹ Consumers are also not liable for, among others, losses arising:

- from technical failures of the payment infrastructure;⁶⁰
- from the fraudulent or negligent conduct of actors in the payment system and their agents;⁶¹
- after the issuer has been notified of a card loss, misuse or security compromise;⁶² or
- “where the cardholder has been the victim of fraud, theft, or has been coerced by trickery, force or intimidation”.⁶³

Many of these provisions are analogous to those found in Regulation E.⁶⁴

Section 6 of the *Debit Code* sets out a hierarchy that consumers are expected to follow when they seek recourse for specific problems. Primary responsibility is in the hands of the PIN issuer, who is responsible for problems pertaining to transactions.⁶⁵ In the event of a dispute regarding card terminals in the home, a cardholder is directed to contact the card acceptor who shall trace the source of the problem and “advise the cardholder of the appropriate party to contact to resolve the problem.”⁶⁶ If there is a dispute regarding goods and services, the consumer is advised to find a remedy from the retailer.⁶⁷ Regulation E, with the exception of concerns pertaining to retailers,⁶⁸ makes no distinctions between issuers and acceptors.⁶⁹ Indeed part of

58. S. 5(3)(b).

59. S. 5(3)(c).

60. App. A, cl. 3(1)(a).

61. App. A, cl. 3(1)(b).

62. App. A, cl. 3(1)(f).

63. App. A, cl. 3(1)(g).

64. See 12 C.F.R. § 205 (1997); Supp. 1 § 205.2(m) (1997).

65. *Debit Code*, *supra* note 1, s. 6(1).

66. S. 6(2).

67. S. 6(3).

68. Although Regulation Z, which pertains to credit cards, does allow consumers to seek redress from card issuers in the event of a dispute regarding goods and services.

69. It ought to be noted that this distinction may have arisen as the result of an order made by the competition tribunal regarding the domination of large financial institutions in the provision of retail payment services, an area which retailers and insurance companies had wanted to enter into. For additional information please see Shameela Chinoy & Benjamin Geva, “Access to the Canadian Payment System” in *The Regulation of Financial Institutions: Issues and Perspectives*, *Queen’s Annual Business Law Symposium 1996* (Scarborough, Ont.: Carswell, 1997) at 411.

the difficulty in placing responsibility for consumer redress in the hands of a number of actors in the payment system, as the *Debit Code* does, is that the temptation for any of them to act as a quarterback handing complaints off to other actors may exist.

With respect to dispute resolution mechanisms, the *Debit Code* does have some subtle differences with Regulation E. For example, the *Debit Code* states that PIN issuers will have "timely procedures" to deal with debit card transaction problems and provide for reviews at a senior level within their organizations.⁷⁰ Regulation E, by contrast, specifically requires that financial institutions investigate and determine whether an error has occurred within ten business days of receiving notice of an error in the case of domestic transactions,⁷¹ and within twenty days with respect to transactions initiated outside of the United States.⁷² The *Debit Code* states that it does not pertain to international transactions (stating that other arrangements exist with respect to these transactions) although its members will endeavour to protect consumers and resolve any problems that occur.⁷³

Regulation E requires an issuer to grant provisional credit to the consumer's account where an investigation exceeds the ten-day period.⁷⁴ Conversely, the *Debit Code* uses the vague language that cardholders not be "unreasonably restricted from the use of funds that are the subject of the dispute."⁷⁵ Unlike the *Debit Code*, Regulation E mandates that even if an account has been credited provisionally, a financial institution must investigate the consumer's claim and provide a written report of its findings. In the event that the financial institution rules against the consumer, it must provide reasons and, upon request, copies of all documents that it relied upon in reaching its decision.⁷⁶ The *Debit Code* requires a PIN issuer to provide reasons to the consumer if it cannot settle the problem.⁷⁷ The *Debit Code* is silent on the need to provide copies of the documents relied upon. In the event that an issuer acts in bad faith or fails to credit an account when it is required to do so, Regulation E makes it liable for treble damages.⁷⁸ There is no such requirement under the *Debit Code*.

Unlike Regulation E, the *Debit Code* contains no sanctions for those who do not comply with its requirements. Regulation E, on the other hand, provides that those who fail to comply with its provisions are liable for actual damage, liquidated damages of \$100 to \$1 000 and attorney's fees.⁷⁹ As Professor Rubin notes, the possibility of obtaining up to \$1 000 without proving actual damage is a powerful incentive

70. *Supra* note 1, s. 6(4).

71. *Supra* note 4, § 205.11(c)(1) (1997).

72. § 205.11(c)(3)(i) (1997).

73. *Supra* note 1, s. 1(4).

74. *Supra* note 4, § 205.11(c)(2)(i) (1997).

75. *Supra* note 1, s. 7(3).

76. 15 U.S.C. § 1693f(d) (1988).

77. *Supra* note 1, s. 7(2).

78. 15 U.S.C. § 1693f(e) (1988).

79. § 1640 (a)(2)(A)(i) (1988).

for consumers to enforce their rights.⁸⁰ Moreover, the *Debit Code* does not have an appeal mechanism available for those consumers who feel that their complaints have not been adequately addressed.⁸¹

While these differences may seem trite at the outset, there are serious repercussions for consumers. Beginning first with the question of unauthorized transactions, one notices that the *Debit Code*, like Regulation E, does not hold consumers responsible for unauthorized transactions that they have not contributed to through their own negligence. Exceptions are also made for consumers who contribute to unauthorized use unintentionally.⁸² However, the *Debit Code* defines an incident of consumer negligence as one where a consumer fails to notify the issuer of a loss or breach of security "within a reasonable time."⁸³ Appendix A then refines the definition of a "reasonable time" to the instant that the cardholder becomes aware of the loss of a card or the disclosure of a PIN.⁸⁴ Should a cardholder fail to notify an issuer in time under this section, he or she can then be conceivably liable for the \$3 000 set out in the example found in Appendix A and for even greater amounts if an account has overdraft protection, is linked to a line of credit or has been subjected to the deposit of a fraudulent cheque or empty deposit envelope.⁸⁵

As a form of risk allocation, one can observe that the *Debit Code* places much greater liabilities on consumers than does Regulation E. As such, the *Debit Code* attempts to provide incentives for consumers to take greater precautions in order to mitigate the threat of a loss. Yet it ought to be noted that there is relatively little data pertaining to the effects of liability rules on consumer behaviour.⁸⁶ As Professors Cooter and Rubin observe:

Evidence indicating that consumers are unresponsive to liability would favor a rule of no liability for consumers; the opposite result would favor a rule of strict, but limited, liability. In no case, however, would economically based rules produce the unlimited consumer liability that the UCC and the EFTA currently impose.⁸⁷

-
80. Edward Rubin, "Efficiency, Equity and the Proposed Revision of Articles 3 and 4" (1990-91) 42 Ala. L. Rev. 551 at 581 [Rubin, "Efficiency"].
81. *Debit Code*, *supra* note 1, s. 7(1): "The PIN issuer will provide information, in writing on how the dispute-resolution process works if: a) a problem with a debit card transaction cannot be settled when the cardholder first complains."
S. 7(2): "A cardholder whose problem cannot be settled by the PIN issuer will be informed of the reasons for the issuer's position on the matter. The issuer will then advise the cardholder of the appropriate party to contact regarding the dispute." It is interesting to note that the *Debit Code* does not actually define what each stage is in the dispute resolution process that it is referring to.
82. *Debit Code*, *supra* note 1, s. 5(3)(c).
83. S. 5(5)(b).
84. App. A, cl. 5(8)(a).
85. App. A, cl. 4(1).
86. Cooter & Rubin, *supra* note 37 at 115.
87. *Ibid.* at 116.

One will recall that a benefit of shifting risks onto financial institutions is that they are given a pecuniary incentive to make the necessary investments required to improve security in the payment system and to make it more efficient.⁸⁸ By placing liability upon consumers, this incentive is removed to the detriment of the payment system as a whole. Indeed, by placing the threshold at such a high level, the *Debit Code* is diminishing the marginal utility that is gained by having consumers take extraordinary care. In order to be effective as a precautionary measure, the threshold of liability should be at a level that, if consumers lose money, it is an amount that matters enough to them to take reasonable care but not one that will “cause a personal crisis.”⁸⁹ Individuals who are facing losses if they act carelessly will still do so, even in the face of additional liability, since their actions are the result of their failure to take adequate care and not a conscious weighing of costs and benefits: “Beyond a certain point, liability simply punishes the consumer without achieving any increased level of loss reduction.”⁹⁰

A second concern regarding the effectiveness of the *Debit Code* in safeguarding consumer interests and thereby improving the efficiency of the payment system concerns the enforcement of consumer rights. Recent changes have added a new dimension to their enforcement. After years of study, the *Financial Consumer Agency of Canada Act*⁹¹ was enacted in 2001. The act established a new federal agency, the Financial Consumer Agency of Canada (FCAC), whose mandate is to:

- a. supervise financial institutions to determine whether they are in compliance with consumer [protection legislation] applicable to them;
- b. promote the adoption by financial institutions of policies and procedures designed to implement [the applicable] consumer [protection legislation];
- c. monitor the implementation of voluntary codes of conduct that are designed to protect the interests of customers of financial institutions and that are publicly available and to monitor any public commitments made by financial institutions that are designed to protect the interests of their customers;
- d. promote consumer awareness [of existing laws governing their rights and responsibilities]; and
- e. foster . . . an understanding of financial services and issues relating to financial services [with government, government agencies, industry and consumer groups].⁹²

While this institution was not in existence at the time that the *Debit Code* was promulgated, the FCAC has now undertaken to monitor compliance with the *Debit Code*.⁹³ To be sure, the FCAC does bring with it the potential that in the future, a legal

88. *Ibid.* at 90.

89. Rubin, “Efficiency”, *supra* note 80 at 583.

90. *Ibid.* at 568.

91. S.C. 2001, c. 9 [*FCAC Act*].

92. S. 3(2). The final paragraph would seem to confirm the suspicions of more sceptical public choice scholars.

93. R. Alan Young, “The New Watchdog In Town—Financial Consumer Agency of Canada” (2002) 21 *Nat'l Banking L. Rev.* 37 at 37.

enforcement mechanism for representations made to consumers by industry will be in place. However, at the present time, the FCAC has stressed that its role will primarily be that of a watchdog, providing consumers with facts as opposed to acting as an advocate for them.⁹⁴

The result, then, is that enforcement of the *Debit Code* will primarily be governed by a complaint-driven process. Individual complaints are considered to be outside of the FCAC's mandate. Therefore, the FCAC will have no choice but to direct consumers to find their remedies through the internal dispute resolution mechanisms of the parties outlined in the *Debit Code* and, if necessary, through the internal ombudspersons of the financial institutions and/or the Canadian Banking Ombudsman.⁹⁵ In the event of a dispute, "a financial institution possesses the disputed assets. . . . Thus, the consumer has the burden of going forward with a lawsuit."⁹⁶ To quote from Professor Rubin:

This is a market failure of its own, a market failure generated by the structure of the legal system. . . . What makes this particularly serious is that consumers almost always end up with the loss if there is a dispute. The bank is holding the consumer's money, and can simply debit the account for the amount in question. This power, virtually unique among businesses, means that the consumer must generally initiate the lawsuit.⁹⁷

This is in contrast to a credit account, where "the consumer can withhold the payment, which places the burden of going forward on the institution."⁹⁸

In the event that the dispute resolution mechanisms mandated in the *Debit Code* fail to produce a satisfactory result for a consumer, they will have to seek redress from a court. However, as Hayhoe observes, in many cases the losses resulting from unauthorized transactions will be small. As such, "the consumer is unlikely to be able to retain counsel for an amount commensurate with the possible recovery", and she or he "will have to present her [or his] own case." Such a consumer will be in the unenviable position of facing experienced counsel representing a large financial institution or corporation.⁹⁹ A consumer's lack of familiarity with the legal system or process may also result in an under-enforcement of consumer rights.¹⁰⁰

94. *Ibid.* at 38.

95. *Ibid.*

96. Cooter & Rubin, "Loss Allocation", *supra* note 37 at 116.

97. Rubin, "Efficiency", *supra* note 80 at 569-70.

98. Cooter & Rubin, "Loss Allocation", *supra* note 37 at 116.

99. Hayhoe, *supra* note 35 at 352.

100. Cooter & Rubin, "Loss Allocation", *supra* note 37 at 116. Indeed, society itself may be faced with additional externalities as a result of the fact that a commercial enterprise will be able to finance its legal operations at the expense of the state due to the fact that the cost of litigation is tax deductible as a business expense. See Reuben Hasson, "Unconscionability in Contract Law and in the New Sales Act—Confessions of a Doubting Thomas" (1979-80) 4 *Can. Bus. L.J.* 383 at 400.

Moreover, as Professor Rubin correctly observes, an agency charged with the enforcement of an act can be more proactive by "initiating enforcement efforts as a matter of governmental policy."¹⁰¹ This could cure the defects in both the *Debit Code* and Regulation E mentioned above. This type of enforcement can be initiated independent of the need to justify the potential return in any particular case.¹⁰² Unlike private parties, enforcement agencies are "not precluded from achieving [their objectives] by structural constraints present in the method of initiating the enforcement process."¹⁰³

It is clear that if we are to have a truly efficient and competitive payment system that places an emphasis on meeting consumer needs and expectations, then significant policy changes must take place. The question that remains to be answered is why have laws in Canada developed in the manner that they have? One answer is jurisdictional. The Canadian constitution makes the regulation of credit unions, *caisses populaires*, finance companies, cheque cashing outlets, mutual fund dealers and securities dealers a matter of provincial responsibility.¹⁰⁴ Nevertheless, this division of powers has not hindered a federally empowered agency, the Canadian Payments Association, from regulating these same entities with respect to the Canadian payment system on a macro level.¹⁰⁵

A second answer may be that political structures and interests have played a role in determining the course of action followed by Canadian regulators *vis-à-vis* international payment laws and standards. As these developments do not normally take place in a vacuum, card issuers knew very well that calls would be made for similar rules in Canada as those made to protect consumers in the United States. As such, a public choice analysis may be an ideal method of analyzing the subsequent development of rules in Canada and of explaining why institutions and rules have taken the shape they have.

101. Edward L. Rubin, "Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System" (1988-89) 49 *Ohio St. L.J.* 1251 at 1269 [Rubin, "Payment System"].

102. *Ibid.*

103. *Ibid.*

104. Young, *supra* note 94 at 37.

105. *Canadian Payments Act*, R.S.C., 1985, c. C-21, s.1; *FCAC Act*, *supra* note 91, s. 218.

II. PUBLIC CHOICE THEORY AND ITS SUBSTANCE

Public choice theory, broadly speaking, is a theory that has traditionally been used to question the effectiveness of the state and its organs in articulating and implementing the will of the public. The theory itself is divided into two separate claims regarding the ability of democracy to provide good government that works in the interests of society as a whole. For this reason, the vast majority of public choice scholarship is quite often classified as “pessimistic,” although not all strands of public choice theory reach the same conclusion (see discussion below). The first is the Arrow branch, which is designed to demonstrate that democratic decision-making does not produce definitive decisions that can be taken to reflect the true will of society. The second branch is the “interest group/capture” side, which in essence argues that decision-making in state institutions is not always in the public interest, but rather, is shaped by private/special interests that, more often than not, run contrary to the public interest. I will describe the two branches in more detail below. It is important to note, however, that both branches can be used together or independently from each other. They are both presented here for the sake of completeness in order for the reader to form a more thorough understanding of the substance and implications of public choice theory.

A. Arrow's Theorem and the Basic Tenets of Public Choice Theory

The rise of the administrative state brought with it a renewed interest in the fundamental motivations governing policy makers. The ability of disinterested bureaucrats to wield the discretionary power required of their stations raised concerns surrounding the legitimacy of their decisions and their roles in the democratic administration of government. Since the early 1940s, questions arose in political science regarding definitions of what would objectively constitute the public good. Politically, pluralism was seen as a means of bringing a sort of market equilibrium to the political arena whereby groups and interests competed with each other for political support among electors, who would determine public values as expressed through the ballot box. Under this arrangement, “the state did not itself articulate any fixed public values”.¹⁰⁶ The role of the courts and other legal institutions, in these circumstances, is limited “to ensuring that the process of legislative decision-making is fair and open.”¹⁰⁷

The notion of power struggles determining political outcomes was certainly nothing new in politics. From Plato to Machiavelli to Lord Acton to the present, many authors have characterized politics as such. Yet as political demands for account-

106. Michael D. Wright, “A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality” (1993) 25 Ottawa L. Rev. 1 at 7.

107. *Ibid.*

ability and governmental provision of public goods increased, questions arose as to whether an objective determination of the public interest could be reconciled with a political system founded upon majoritarian principles. This is further complicated by the fact that economic advantages have given some people a disproportionate influence on political decisions.

The limitations of majoritarian decision-making resulted in a new departure point for economists and political scientists alike. In 1951, Kenneth Arrow introduced a new approach that outlined new difficulties in majority rule by demonstrating that it could not produce a definitive decision when confronted with a plurality of choices.¹⁰⁸ "Arrow's theorem," as it is called, galvanized social science efforts to ascertain the nature of human motivation and had a profound impact on administrative lawyers as well. Borrowing Wright's example, the theory can be illustrated as follows:

Imagine three voters (legislators or citizens) who must choose among, death, dishonour and poverty. The voters rank their preferences in the following order:

Number One—death, dishonour, and poverty

Number Two—dishonour, poverty, and death

Number Three—poverty, death, and dishonour

Now suppose the three voters are asked to choose any two of the options: death will be preferred to dishonour by a majority made up of voters one and three; dishonour will be favoured to poverty by voters one and two; and poverty will be chosen over death by voters two and three. The result of this game is referred to as "cycling", because each choice will produce a different majority, with no non-arbitrary stopping point.¹⁰⁹

In other words, this "cycling" makes it impossible to gauge which two of the three options the decision makers will prefer most. Wright identifies this as part of the first claim made by public choice theory.¹¹⁰

The second claim as identified by Wright is the "interest group/capture" claim, which is divided into two parts.

On the demand side it is argued that citizens accept more than an optimal amount of government spending because they are under a misperception as to its true cost in taxes, in part because of the complexity in the tax system. In addition, well organized and financed interest groups that stand to gain from specific government programs will have a greater incentive to lobby for these measures than unorganized individual taxpayers — with their more diffuse interests — will have to oppose them.¹¹¹

108. Kenneth J. Arrow, *Social Choice and Individual Values*, 1st ed. (New York: John Wiley & Sons, 1951).

109. See Wright, *supra* note 106 at 13-14.

110. *Ibid.* at 14

111. *Ibid.*

The first part concerns voter misperceptions with respect to the true costs of governmental programs on the fiscal side, “in part because of the complexity in the tax system.”¹¹² The second part argues that:

... well organized and financed interest groups that stand to gain from specific government programs will have a greater incentive to lobby for these measures than unorganized individual taxpayers — with their more diffuse interests — will have to oppose them. According to the theory, these efforts by individuals and groups to further their own interests, referred to as “rent-seeking”, define the legislative process. . . .¹¹³

Public choice theorists argue that “well-organized groups . . . enjoy superior access to the political process” than ordinary citizens, with the result that legislation is enacted with a view to transferring “wealth from society as a whole” to these groups in particular (in the form of legislative concessions).¹¹⁴ This, the theory holds, harms the public interest.¹¹⁵

Many proponents of public choice theory argue in favour of the traditional microeconomic behavioural assumption that individuals are primarily rational utility maximizers who will naturally prefer to have others pay for benefits which they themselves enjoy whenever possible (“free riders”). The free-rider effect hampers the general interest since individual citizens do not have any pecuniary incentives to work for the general interest because they can benefit from the actions of others. The free-rider effect is what gives special-interest groups the power to exact rents, since these groups derive specific benefits that those outside of the group cannot benefit from.

The notion that private interests influence public institutions is not one that public choice theorists view as an external threat. Instead, they view it as one that is internal to institutions as well. Public choice theorists import the assumption of rational utility maximization into the political/legal realm. The effect of this mode of thought is that discretionary decisions made by legislators and public officials are viewed as decisions made to satisfy personal as opposed to public interests. The notion that interests pull and tug at the state apparatus to satisfy private concerns to the detriment of the public good (which “Arrow’s theorem” proved was unascertainable) would appeal to both progressives and realists alike.¹¹⁶ Gone is the Weberian notion of the state as an independent third party to be replaced by an institution that gives the rents of private interest groups the sanction and legitimacy of law.¹¹⁷

112. *Ibid.*

113. *Ibid.* [footnotes omitted].

114. Jonathan R. Macey, “Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model” (1986) 86 *Colum. L. Rev.* 223 at 230.

115. Wright, *supra* note 106 at 14.

116. David. B. Spence, “A Public Choice Progressivism, Continued” (2002) 87 *Cornell L. Rev.* 397 at 406-08.

117. *Ibid.* at 408, n. 38, citing Max Weber, “Bureaucracy” in Jay M. Schafritz & Albert C. Hyde, eds., *Classics of Public Administration* (Oak Park, Ill.: Moore, 1978) at 23.

Legal and political scholars alike began to see legislators as individuals who sought vote maximization in order to increase their chances of re-election. This is seen as being accomplished in two ways:

First, they maximize their appeal to constituents, by distributing goods and income among those who vote according to their own economic self-interest. . . .¹¹⁸ Second, legislators conclude that since voters are generally ignorant, an election may turn on financial backing, publicity and endorsements.¹¹⁹

Consequently, electoral advantages can be gained through the financial backing and organizational assistance acquired from interest groups in exchange for legislative concessions.¹²⁰

Public choice theory also posits that legislators bargain among themselves, particularly within the context of a legislature that is devoid of party discipline. In such systems, successful passage of bills is accomplished by forming alliances among various legislative blocks that cross party lines. This is particularly the case in the United States Congress where there exists a "bilateral monopoly" over the enactment of legislation between the President and the Congress.¹²¹ As such, special-interest legislation tends to be included in the form of riders to general public interest legislation, which the executive must endorse if it wishes to see passage of a favoured piece of legislation.¹²² Such bargaining also occurs between individual legislators with support being traded with respect to particular bills for subsequent support for future bills in a *quid pro quo* fashion known as "logrolling."¹²³ Such behaviour has given rise to literature that attempts to apply a game theory dimension to public choice.¹²⁴ One should note, however, that Canadian rules of parliamentary procedure require that "amendments to legislative proposals . . . relate in some direct fashion to the core substance of the legislation."¹²⁵ This, coupled with constraints imposed by party discipline, severely constrains the ability of legislators to "logroll" that is characteristic of the American Congress.

118. Wright, *supra* note 106 at 15, citing Sam Peltzman, "Constituent Interest and Congressional Voting" (1984) 27 J.L. & Econ. 181. Wright characterizes Peltzman's paper as "concluding that the more wealth distribution caused by an issue, the better economic variables can explain the legislative outcome" (Wright, *ibid.* at n. 52).

119. Wright, *ibid.*

120. *Ibid.*, citing Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991).

121. Glen O. Robinson, "Public Choice Speculations on the Item Veto" (1988) 74 Va. L. Rev. 403, as cited in Daniel A. Farber & Philip P. Frickey, "Public Choice Revisited", Book Review of *Public Choice and Public Law: Readings and Commentary* by Maxwell L. Stearns (1998) 96 Mich. L. Rev. 1715 at 1721, n. 14.

122. Maxwell L. Stearns, "The Public Choice Case Against the Item Veto" (1992) 49 Wash. & Lee L. Rev. 385, as cited in Farber & Frickey, *ibid.* at 1721, n. 15.

123. To expand upon this point further, logrolling is seen as an answer to the cycling problem. Here legislators trade votes on matters toward which they are relatively indifferent, in exchange for votes on matters that are of greater significance to them. See David A. Skeel Jr., "Public Choice and the Future of Public Choice-Influenced Legal Scholarship", Book Review of *Public Choice and Public Law: Readings and Commentary* by Maxwell L. Stearns (1997) 50 Vand. L. Rev. 647 at 655.

124. See Stephen W. Salant & Theodore S. Sims, "Game Theory and the Law: Ready for Prime Time?" (1996) 94 Mich. L. Rev. 1839.

125. John Saunders "Tax bill offering pork for all likely to wilt under Bush's veto" *The Globe and Mail* (24 October 1992) A1-2, as quoted in Keith Archer *et al.*, *Parameters of Power: Canada's Political Institutions* (Toronto: Nelson Canada, 1995) at 188.

B. Commercial Law and Public Choice

Up until now, a vast majority of scholarship informed by public choice has tended to focus on administrative law. Since this particular field of law tends to rely on the decisions made by delegated authorities, this seemed like a natural departure point for this method of analysis. However, the methodology need not be confined to one particular area of law. Constitutional law, due to its overtly political nature, has also become a popular point of reference for some public choice scholars.¹²⁶ Yet another field of law in which public choice has been used to some success has been in the commercial law context.

For the purposes of this paper, public choice debates within commercial law are significant for a number of reasons. First is the recognition of the fact that many policy decisions made in the commercial law context centre around debates over balancing the shifting of risk from one group to another.¹²⁷ Obviously, this involves an overtly political dimension although the discourse that surrounds it tends to portray this exercise as a means of increasing economic efficiency and of making gestures (either real or merely symbolic) that are designed to boost confidence in the marketplace.¹²⁸ Moreover, legislation that falls within this category is commonly referred to as “facilitation” rather than “regulation.” This characterization is a means of portraying the exercise as one of an objective technocratic function as opposed to a subjective political decision.¹²⁹

Second, public choice analysis has been applied to the actual drafting processes employed in the commercial law context, particularly in, but not limited to, the United States. This usually takes the form of analyzing the law reform process typically adopted by way of recommendations made by “private legislatures”. More commonly, this includes the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Such organizations usually rely on expert opinions to guide and draft specific provisions of new or revised articles of existing laws typically involving the UCC. The debates take place in a number of forums including study groups, legislative task forces and conference programs. Participants include industry and consumer representatives, academics, legal practitioners, bureaucrats and legislators.¹³⁰

126. See for example Jonathan R. Macey, “Getting Beyond Cynicism: Cynicism and Trust in Politics and Constitutional Theory” (2002) 87 Cornell L. Rev. 280. See also Edward L. Rubin, “Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby” (2002) 87 Cornell L. Rev. 309; Saul Levmore, “Ruling Majorities and Reasoning Pluralities” (2002) 3 Theor. Inq. L. 87; Philip P. Frickey & Steven S. Smith, “Judicial Review, the Congressional Process and the Federalism Cases: An Interdisciplinary Critique” (2002) 111 Yale L.J. 1707.

127. Jain Ramsay, “The Politics of Commercial Law” Commentary [2001] Wis. L. Rev. 565 at 566, citing Jean Braucher, “Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce” [2001] Wis. L. Rev. 527.

128. Ramsey, *ibid.*

129. *Ibid.*

130. See Norman I. Silber, “Substance Abuse at UCC Drafting Sessions” (1997) 75 Wash. U.L.Q. 225.

Legislatures lack a general familiarity with the discourse that shapes a particular area and hence, as Rubin observes:

Legislatures not only lack the expertise to draft operational rules. . . . A legislature will have general jurisdiction over an area covered by dozens or hundreds of administrative agencies, as well as over all other areas that are potentially subject to regulation, but not yet regulated. The division of labor, a necessary organizing principle for any modern state, demands that the great bulk of detailed rulemaking be performed by agencies. The only other alternative would be for the legislature to bureaucratize itself, to add so many staff members, and so many levels of command, that it would reproduce the structure of the agencies it was attempting to replace.¹³¹

Jonathan Macey maintains that banking law issues in the United States do not have the political saliency as issues such as civil rights or foreign policy do and hence few legislators find it in their interest to become knowledgeable about the complexities of banking law policy. As a result, “even the most well-meaning legislators are likely to be highly influenced by special interest groups”¹³² and, by extension, by the institutions that they may have captured. Consequently, a public choice analysis would go a long way toward exposing the political dimension of the law reform process both substantively within the policy prescriptions that they may provide and proportionally in the composition of their membership.

One would expect that substantial portions of the public choice literature would be devoted toward how these institutions’ internal machinations manifest themselves in statutes and regulations. Indeed, such is the case with some recent literature on the subject. Ramsay observes that functionalism in commercial law tends to be rationalized *ex post* as conforming to the facilitation discourse mentioned above.¹³³ Another manifestation of this sort can be seen in the choice of a private legislature between adopting a rule or a standard. In this case, “the choice of a rule rather than a standard may reflect the victory of one group in the political process, whereas standards represent a compromise where no one group was able to dominate.”¹³⁴

C. Interest Groups and the Policy-Making Process

Up until this point, it may be natural to assume that the competitors in the political marketplace of ideas have equal bargaining power *vis-à-vis* elected representatives and the public at large. However, as will be seen, there are significant power imbalances that can have a direct impact on the ability of interested parties to enact their respective agendas. It would be impossible to engage in a public choice analysis

131. Rubin, “Payment System”, *supra* note 101 at 1267.

132. Jonathan R. Macey, “The Political Science of Regulating Bank Risk” (1989) 49 *Ohio St. L.J.* 1277 at 1280.

133. Ramsay, *supra* note 127 at 568.

134. *Ibid.* at 571, citing Robert Scott, “The Truth About Secured Financing” (1997) 82 *Cornell L. Rev.* 1436; and citing Alan Schwartz, “The Case for Specific Performance” (1979) 89 *Yale L.J.* 271.

of any sort without some basic understanding of the power dynamics involved that determine the ultimate success or failure of a particular constituency in enacting its agenda. In the present case of rights and liabilities as they relate to consumer debit card purchases, one ought to remember that each of the interested parties has widely divergent issues and agendas.

On the card issuers' side, the concern is to maximize profits in a manner that presents the lowest transaction costs possible. Compliance with legal regimes that require disclosure and that impose losses upon banks in the event of unauthorized transactions only serves to increase transaction costs, thereby either reducing profits at the margin or resulting in higher costs being passed on to consumers. This, in turn, diminishes consumer demand for these types of financial products. Financial institutions must find a way to stimulate consumer demand for their products by reducing the substitution effect that can occur between products that have different liabilities as a result of the legal regimes that govern them. Consequently, efforts to maximize profits are tempered by the need to stimulate demand for new products that may come under less protective legal regimes than easily available substitutes. Lobbying efforts are thus concerned with balancing the need to minimize exposure to consumer-initiated losses with the need to find a critical mass for future products and to maintain goodwill toward existing ones.

Not surprisingly, consumers, on the other hand, have a different agenda altogether. They would like to see their exposure to losses limited as much as possible. Moreover, they would like to conduct transactions for the lowest possible transaction costs. Competition between products and transparency in contractual terms is seen as a crucial means for ensuring that consumers have access to the products that they demand at the lowest possible prices. Limiting legal liability for unauthorized transactions and increasing access to information are key concerns of consumer advocates. They, in turn, wish to minimize the costs and liabilities that are imposed upon them by the rules and regulations that are ultimately adopted.

From the legislative branch, this group can be divided into two subgroups. First there are the legislators themselves, the individual Members of Parliament. This group will be on the lookout for issues of concern to the public. They will seek to maximize their chances of re-election and will seek whatever advantages accomplish this. They may either choose to rely on the assistance provided by special-interest groups, or ignore this altogether, preferring to rely instead on issues that motivate the public (see discussion below). This may either come in the form of members convincing their party to adopt a position that might allow it to gain an electoral advantage, or it might culminate in the efforts of an individual member to introduce a private member's bill in an attempt to increase his or her personal popularity (more on this below).

The second of the subgroups consists of the civil servants who staff individual governmental departments and ministries. Individual members of this subgroup will be keen to bring the matter under the jurisdiction of their particular department. They will be interested in being able to bring their particular level of expertise to bear on the subject and in attempting to influence the development of rules in this area. They will want to bring as much prominence to their department as they can in order to maximize the value of their contribution and to convince their political masters to entrust them with greater responsibilities in the future (see discussion below).

Undoubtedly, individual members of the card issuer and consumer groups will find it advantageous to lobby government collectively in order to advance their interests. As the discussion above has demonstrated, many of the features present in the *Debit Code* do give a comparative advantage to Canadian business interests. Yet the question remains, why does a power imbalance continue to exist between these two groups? Interest group theory may provide an answer to this question. Mancur Olson has hypothesized that part of the problem stems from the fact that what is at stake on the part of consumers is the policy goal of changing regulations in their favour, which can be characterized as a public good. Assuming that individuals are rational utility maximizers, Olson concludes that when a public good such as legislation intended to benefit all members of society is introduced, people will refrain from joining or participating in these groups preferring instead to free ride on the efforts of others.¹³⁵

Those groups that were able to overcome the free-rider problem were those that, according to Olson, were able to provide their members with “*selective incentives* that were unrelated to the supply of the public good.”¹³⁶ Selective incentives are defined as benefits that only members of an organization can receive. As a result, Olson found that small constituencies of interests such as business lobbies tend to be the most effective at overcoming the collective action problem. This is the case since their small constituencies are seeking relatively concentrated benefits while their costs are widely spread (usually upon the backs of consumers through marginally higher prices). As a corollary, large constituencies such as consumer groups that represent broad interests seeking very diffuse benefits whose costs might be concentrated among other groups would have a difficult time in enacting their agenda.¹³⁷

135. See Mancur Olson Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965), as described in Gary J. Miller, “The Impact of Economics on Contemporary Political Science” (1997) 35 *Journal of Economic Literature* 1173 at 1177.

136. *Ibid.* [emphasis in original].

137. Archer *et al.*, *supra* note 125 at 479.

In Canada, the leading group that speaks on behalf of large financial institutions is the Canadian Bankers' Association (CBA,), which was first founded in 1887.¹³⁸ This group has maintained a permanent lobbyist in Ottawa since 1894.¹³⁹ Unlike traditional interest groups, membership in this association is not voluntary but rather is mandated by its Act of incorporation.¹⁴⁰ The CBA maintains a series of close relationships with many governmental departments and agencies, including the Office of the Inspector General of Banks, the Department of Finance and the Bank of Canada. Quite frequently, these agencies rely upon the CBA to provide them with expertise relating to banking regulation and its execution. For instance, banking personnel have served in the Department of Finance for periodic stints of service.¹⁴¹ The Office of the Inspector General of Banks has relied upon bank-employed auditors to carry out its work.¹⁴²

The close connection that results from the interaction between the CBA and government allows this organization to have access to senior levels of policy makers and allows it to wield considerable influence in having its voice heard. No such opportunities may be available to consumer groups that have to contend with the free-rider problem. As a result of free-riding, these groups may not have the necessary economic resources to assemble a competent full-time staff that can compete with the CBA on a par level. Moreover, due to its structural composition, the interests among the members of the CBA tend to be more monolithic than those of consumers. This coupled with its impressive economic influence have made the CBA a formidable force in the policy-making process and, as a result, one can infer that they have a "highly dominant position."¹⁴³

Yet the dominant economic and political influence of the CBA is not the only factor that consumer groups must overcome if they wish their voices to be heard. As an industry insider, the CBA enjoys additional privileges. Professor Coleman maintains that business groups in general have a more attentive audience within governmental circles than do other groups because "the demands of business leaders, given their overall responsibility for the economy, take on the appearance of being in the general interest of society. By comparison, those opposing business often appear to be arguing on the basis of a narrow or special interest."¹⁴⁴ While this may not always

138. William D. Coleman, *Business and Politics: A Study of Collective Action* (Montreal and Kingston: McGill-Queen's University Press, 1988) at 184.

139. *Ibid.*

140. *Ibid.* at 185.

141. *Ibid.*

142. William D. Coleman, *Financial Services, Globalization and Domestic Policy Change* (London: MacMillan Press Ltd., 1996) at 218 [Coleman, "Financial Services"].

143. *Ibid.* at 225.

144. William D. Coleman, "One Step Ahead: Business in the Policy Process in Canada" in Mark Charlton & Paul Barker, eds., *Crosscurrents: Contemporary Political Issues*, 2d ed. (Toronto: Nelson Canada, 1994) 338 at 340.

tip the balance in favour of business interests, it is claimed that more often than not, business will arrive at a favourable outcome and their representations will be listened to very carefully.¹⁴⁵ Moreover,

. . . interchanges between the state and business will usually appear to be *technical* in character. . . . Discussions between the two often centre on . . . the best approach for maximizing economic growth . . . while not harming unduly other individuals or groups in society individuals. Problems to be resolved are thus practical, demanding specialized discussions and knowledge.¹⁴⁶

This specialized knowledge may be beyond the reach of consumer groups.

And yet, by the same token, all is not lost for the efforts of those who would oppose interests with greater economic resources and access points into the policy-making process. While many groups may lack the organizational infrastructure that established interest groups possess, they may still be able to affect policy outcomes nonetheless. Paul Pross identifies groups that he refers to as "issue-oriented" interest groups that lack the organizational cohesion and staying power of groups such as the CBA. Such groups ". . . spring up at a moment's notice, usually in reaction to some government action or a private-sector activity that only government can change."¹⁴⁷ Historically, many of the more effective social advocacy groups that currently enjoy a more institutional status have their genealogy in these movements including groups such as Greenpeace and Pollution Probe.¹⁴⁸ This fact ought to be borne in mind when one considers the historical development of debit card regulation in North America.

III. A PUBLIC CHOICE PERSPECTIVE

One will recall that public choice theory posits that, in normal circumstances, a decision-maker cannot be relied upon to make a decision that is solely in the public interest as a result of the principle of individual rational utility maximization.¹⁴⁹ On a cynical level, this is a function of the amount of support from payoffs that a decision maker can expect from distributing rents among groups. Much depends upon the political saliency/voter elasticity of a particular issue.¹⁵⁰ It is submitted that consumer payment issues which may result in pecuniary losses for individuals are examples of these types of issues. As the examples pertaining to the early regulation of

145. *Ibid.*

146. *Ibid.* at 343 [emphasis in original].

147. A. Paul Pross, "Pressure Groups: Talking Chameleons" in Michael S. Whittington & Glen Williams, eds., *Canadian Politics in the 1990s*, 4th ed. (Toronto: Nelson Canada, 1995) 252 at 261.

148. *Ibid.*

149. Wright, *supra* note 106 at 5.

150. Spence, *supra* note 116 at 423.

credit and debit cards in the United States clearly demonstrate, these issues are of the type that tends to energize consumers and have historically resulted in gains for them. Another such example is the US *Expedited Funds Availability Act*.¹⁵¹

More recent examples include the following:

In the late 1990s, banks began aggressively marketing debit cards as an alternative to credit cards. These cards, marketed with a credit card brand name, had the same convenience for the consumer as credit cards, but very different consumer protections.

Consumers and consumer advocates were shocked by the magnitude of the disparity in consumer protection provisions for debit and credit cards. . . . In 1997, Visa USA and MasterCard International announced they would not rely on the full protections accorded debit card issuers under Regulation E, but would voluntarily narrow the gap between the treatment of unauthorized or erroneous transactions for debit and credit cards. . . .

They agreed to limit consumer liability for unauthorized transactions to the same \$50 that applies to credit cards, and to shorten the time a financial institution is permitted to make the decision whether to recredit a customer's account for an allegedly unauthorized withdrawal.¹⁵²

The preceding examples demonstrate that, in many instances, card issuers themselves will take pre-emptive action in order to reassure consumers that their concerns are being addressed. Yet, it may still be possible to reconcile this occurrence with public choice theory. Fred McChesney has suggested that one strand of public choice theory could posit that in certain instances, decision-makers could be convinced by private interests *not* to subject them to regulation. Thus, in this instance, rents are not being provided but rather decision-makers choose to refrain from regulating in exchange for benefits in a complementary fashion with traditional rent distribution.¹⁵³

It may be possible to view the evolution of the *Debit Code* with a slightly modified view of McChesney's proposition. When the *Debit Code* was being developed, card issuers were aware of the fact that consumers would in all likelihood express dissatisfaction with the terms found in cardholder agreements. The increasing popularity of debit cards, combined with the potential for high-profile incidents of consumers being disadvantaged through unauthorized transactions, would make debit cards an attractive political target for regulation. As David Spence states:

151. 12 U.S.C. §§ 4001-10 (1988). This Act was passed in response to industry practices present in the late 1980's. At the time, bankers were "placing 'holds' on deposited checks, so that customers were required to wait for days, or weeks, before they were able to withdraw their funds": Rubin, "Payment System", *supra* note 106 at 1257. A surge of consumer complaints would lead the US Congress to take action (Rubin, "Payment System", *ibid.*) The Act, implemented through Regulation CC, 12 C.F.R. § 229 (1997), requires that funds are made available to consumers according to specified time schedules.

152. Winn, "Clash of the Titans", *supra* note 26. Note that Canadian debit cards, unlike those in the United States, are not marketed under credit card brand names.

153. Fred S. McChesney, "Purchasing Political Inaction: How Regulators Use the Threat of Legal "Reform" To Extort Payoffs" (1997) 21 Harv. J.L. & Pub. Pol'y 211 at 213-215.

... politicians can help broader, less wealthy, mass interest groups to overcome Olsonian disadvantages, particularly in higher-salience policy debates. In debates over the kind of high-salience issues that produce major regulatory legislation (the kind that establish an agency's general mission), politicians act as political entrepreneurs, recognizing the political benefits of rallying the unorganized supporters of public interest policy goals. This is the so-called "republican moment" explanation for major regulatory legislation, one that echoes Anthony Downs's description of the "issue attention cycle". ... [R]epublican moments ought to produce policies that reflect the median voter's wishes; when an issue captures the public's imagination, legislators face greater electoral risk and have a strong disincentive to deviate from their constituents' wishes. The same cannot be said of the kind of lower-salience, second-order decisions that legislators often delegate to agencies.¹⁵⁴

As a result, the industry saw that it was in its interest to participate in an informal process initiated by government to promulgate a code that would initially rely upon moral suasion as an enforcement mechanism.

In this sense then, the knowledge that regulation may be inevitable could have convinced the industry to participate in this forum in order to have a hand in "mitigating the damage" that could be caused by unilateral government action. Such actions have been traditionally determinative factors in choosing to engage in voluntary regulation by means of a code.¹⁵⁵ In this manner, government could be convinced that this course of action would overcome the constitutional hurdles that were present and would be a means whereby the *Debit Code* could be easily updated in order to "adapt to the changing marketplace." Yet, as was stated earlier, should the government have chosen to, it could have charged the Canadian Payments Association with this mandate and relied upon the more stringent enforcement mechanisms available to it as opposed to those available in the *Debit Code*. Moreover, the argument that the "soft law" approach was more flexible than traditional forms of regulation seems somewhat suspect given the nature of the regulation of financial institutions in Canada. For example, no such problem is present in Canada's regulation of banks and banking. The *Bank Act* has been revised on average every ten years since its inception and the law mandates this revision.¹⁵⁶

Moreover, the *Debit Code* could also be beneficial to card issuers financially since, as was the case with Regulation E, it would help placate the concerns of consumer advocacy groups and lead to increased acceptability of the product. As further justification, the Australian experience with a similar code was cited as a good exam-

154. Spence, *supra* note 116 at 436.

155. Industry Canada, *An Evaluative Framework for Voluntary Codes* (Ottawa: Office of Consumer Affairs, 2000), online: Industry Canada: <<http://strategis.ic.gc.ca/pics/ca/evalu.pdf>> at 3-6.

156. *Bank Act*, S.C. 1991, c. 46, s. 21.

ple of a “soft law” approach that did not have the “rigidity” of the American counterpart.¹⁵⁷ However, it ought to be noted that, when the federal and state governments released the *Australian Code of Conduct*, it was accompanied by the warning that legislation would follow if its recommendations were not met.¹⁵⁸

While issuers had attempted to mitigate the repercussions of a governmental desire to regulate, they realized that this exercise had to extend beyond a symbolic gesture. Previous incidents regarding credit and debit cards in the United States, as outlined above, impressed upon issuers the fact that these issues could not be ignored until politicians found it expedient to embrace consumer causes. The consent and participation of consumer groups could furnish a means of demonstrating to government that efforts to regulate were unnecessary since consumer groups had lent their support to the exercise. Concessions made to these groups could also be used as leverage against them in arguing that they would have more policy input at this stage of the process than they would in subsequent phases. Yet, as the previous discussion illustrates, by acquiescing to the process and voluntarily choosing to self-regulate, industry representatives succeeded in shifting a greater proportion of loss allocation rules toward consumers than might otherwise have been the case. Despite similarities to Regulation E on the surface, the *Debit Code* would still manage to confer substantial benefits to issuers who had successfully managed to “capture” the agenda, to borrow a phrase from public choice.

Much of this argument stems from assumptions made by some public choice theorists regarding human motivations, which are still the object of debate within the literature. As a normative theory, public choice has been criticized for failing to prove its assumptions empirically.¹⁵⁹ It is puzzling indeed to see how some public choice proponents of a *laissez-faire* political position can assert that certain human behavioural traits are present within government, yet they remain silent in ascribing these very same traits to private sector actors.¹⁶⁰ One such example is a point made by Professor Macey in a recent article. Macey contends that government bureaucracies suffer from tension that is derived from norm internalization of members of the public service who, in turn, lobby to have their agencies discharge their duties in a manner that best reflects the norms of their respective professions.¹⁶¹ It is then argued that this exercise is also one of personal career advancement.

157. Hayhoe, *supra* note 35 at 355.

158. *Ibid.*

159. Wright, *supra* note 106 at 17-18.

160. *Ibid.* at 18.

161. Macey, *supra* note 126 at 287.

Building upon the Frye-Shleifer model, Macey borrows the example of a lawyer working in government who not only wishes to adopt an approach that uses legal skills, but who also seeks to develop those skills in the hope of landing a job with a well-paying, prestigious law firm.¹⁶² Fair enough. Yet one must ask whether such a situation could be replicated in the private sphere. Is it not hard to imagine this situation reproducing itself in the context of corporate counsel? Moreover, what about the case of a lawyer working within a law firm who is seeking to expand contact with the firm's clients and staff with the hope of someday luring them away from the employer to a firm that the lawyer hopes to establish independently? Why is it that self-serving, rational utility maximization is seen to be an affliction leading to the ineffectiveness of the political process, but not of the private sector, in which *laissez-faire* proponents would have us place our faith in to find a solution?

One possible answer to these queries may be to argue that the market subjects its participants to greater discipline than does the political system. Yet one must bear in mind that one cannot speak of the market as a monolith. Moreover, given the fact that profits and share prices are measured in relative terms on the stock exchange, industry-wide inefficiencies may be treated as the norm. Analogously, is there any reason to suspect that the difficulties associated with running a large bureaucratic structure are not present in a large multinational corporation, which, despite its profitability, must still confront the same problems?¹⁶³ As the consumer debit card example demonstrates, the market solution to market failures may not always be satisfactory.

By failing to consider alternative institutions and by focusing single-mindedly on the shortcomings of governmental regulation, *laissez-faire* public choice theorists are doing a great disservice to the public interest in general. Much of this type of analysis tends to assume that once the public choice problem is identified within the state, there is nothing that can be done to remedy the situation, apart from jettisoning state regulation. In this manner, market self-regulation or *laissez-faire* situations, are presumed to be better by default. Such an orientation leads to the perpetuation of a vicious circle. After all, how can a problem that originates as a market failure ever hope to be resolved in the market—the very institution that gave rise to the problem in the first place? Public choice scholars, particularly those of the *laissez-faire* school,

162. *Ibid.* at 286-87.

163. Moreover, when one speaks of corporations, one must bear in mind that their goals and aspirations are not static. Rather, they are path dependent. The current model of shareholder value maximization is an example where managers of corporations are concerned with managing share prices and engaging in activities that have short-term benefits, as opposed to working in the long-run interests of the corporation, its employees and the public. See Lucian Arye Bebchuk & Mark J. Roe, "A Theory of Path Dependence in Corporate Ownership and Governance" (1999) 52 *Stan. L. Rev.* 127. For another perspective see Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89 *Geo. L.J.* 439.

should be prepared to extend their analysis to the private sector itself before assessing whether or not the market or the government should perform a particular function. Otherwise, we are unduly limiting the scope of our analysis and we are failing to utilize a comparative approach in order to identify improvements in institutional design, which may go a long way toward addressing the issue of capture.

If we accept at face value the central proposition of public choice theory, that individuals are primarily motivated by self-interest (which recent literature is demonstrating may not be the case,)¹⁶⁴ then why is such scepticism confined only to public institutions? Why are the self-interested motivations of industry also not called into question by *laissez-faire* theorists? This does not necessarily apply with respect to firm conduct *vis-à-vis* each other, which is allegedly cured by the market, but rather should be looked at from the perspective of the industry, as a whole, *vis-à-vis* third parties. Could it be that industry advocates of the *Debit Code* suffer from this affliction and are looking to halt a potentially embarrassing and costly incident from occurring?

A. *The Desirability of Codes of Conduct Generally*

Indeed, it is not hard to imagine that the preceding train of thought did not inform the motivations of the industry when they were advocating that a code ought to be the proper form of regulation for this particular product. The analysis needs to consider what incentives industry had in order to concentrate their efforts upon the promulgation of a code as opposed to confining their standard lobbying efforts on the legislature. After all, a watered down form of legislation would more than likely have generated the desired effect. Speaking in the context of voluntary codes that are found in the labour sector, Harry Arthurs states that they bring employers the advantage of “no legal controls or sanctions, lower compliance costs (or none), and good publicity eclipsing bad.”¹⁶⁵ Professor Arthurs goes on to state that the advantages for government include “[being] seen to be . . . responsive without provoking negative reactions from investors, breaking current ideological taboos against regulation, or incurring the transaction costs associated with inspection, prosecution, and other traditional forms of intervention.”¹⁶⁶ If a particular instance of self-regulation should fail, government could be free to act in all good conscience that regulation was indeed a last resort.¹⁶⁷

164. See Raymond Boudon, “Beyond Rational Choice Theory” (2003) 29 *Annual Review of Sociology* 1.

165. Harry Arthurs, “Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation” in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) 471 at 482.

166. *Ibid.*

167. *Ibid.*

As was mentioned earlier, commercial law reform tends to emphasize the facilitative nature of regulation in appearing to make markets more responsive and competitive in order to promote economic objectives. Voluntary codes in Canada are no different. In the introduction to a recent Canadian government report, the Canadian Minister of Industry stated that:

Voluntary codes represent an innovative approach to addressing the concerns and needs of consumers, workers and citizens while at the same time helping Canadian *companies* to be more *competitive*. . . . A supplement and, in some circumstances, an alternative to traditional regulatory approaches, voluntary codes can be inexpensive, effective and flexible *market instruments*.¹⁶⁸

This statement nicely demonstrates the contention that voluntary codes have been seen, on a conceptual level, to conform to the discourse of market facilitation. This is an area where financial institutions can naturally assert their expertise in economic affairs and ensure that the transaction costs associated with compliance are minimized. This would surely fit into some of the capture claims made by Professor Macey and his followers!

The voluntary code approach can provide a crucial bypass around the legislative process. However, one has to consider the costs of doing so. First is the argument that the “stakeholder” model is not particularly well suited to the regulation of debit cards. After all, consumer protection for unauthorized debit card transactions is considered to be a public good. Theoretically, everyone in Canada who makes a payment has a vested interest in its regulation. In such an instance, how can one justify the exclusion of legislators, who are elected by the public for the purposes of safeguarding the public interest at large? This is not an issue that is confined to a small segment of the population. Who gets to decide which groups of individuals constitute legitimate “stakeholders” that ought to be invited into the policy-making process?

Secondly, bypassing Parliament has brought some additional difficulties. One ought to recall that the Westminster model, with significant party discipline, is deliberately set up as an adversarial system. As a result, self-interested opposition parties seek to expose flaws in government-sponsored bills and hold the government accountable for its actions. Bills that are proposed must also pass through a committee structure in both chambers that is designed to cure defects in drafting. All proceedings are a matter of public record and the results of the legislative process are

168. Industry Canada & Treasury Board Secretariat, *Voluntary Codes—A Guide for Their Development and Use* introduction by John Manley, Minister of Industry & Marcel Massé, President of the Treasury Board (Ottawa: Office of Consumer Affairs & the Regulatory Affairs Division, 1998), as quoted in Arthurs, *supra* note 165 at 485 [emphasis added].

widely reported to the citizenry by the media. By going through the voluntary code process, many of the proceedings are conducted behind closed doors, without the increased scrutiny of the parliamentary process. As such, the matter can appear to be resolved politically even though the details have yet to be tested and debated. Whether or not these defects are sufficiently publicized and seized upon by the opposition or by the government of the day remains to be seen since, up to the present, there is no systemic or ongoing mechanism to determine industry compliance and consumer satisfaction with the present legal regime.¹⁶⁹

IV. THE ANALYSIS AND ITS UTILITY

Traditional theories of public choice have been criticized for failing to explain differences between regulations that pertain to different financial products. Professor Gillette argues that a public choice analysis fails to explain why regulations with respect to cheque and card regulation in the United States have taken their present form.¹⁷⁰ As Gillette points out:

If financial institutions are truly dominant before private legislatures, then we would expect to see regulations arising out of the [American Law Institute] that are as precise as those arising out of Congress, because financial institutions would want to protect the deal they have struck within the legislative body they dominate. Instead, the risk allocations relating to consumer check fraud are defined by vague negligence standards. Such vagueness suggests a compromise among competing interest groups, none of which could enact its favored agenda. Standards may indicate that the drafters were confronted with competing claims from multiple groups and desired to avoid giving offense to any of them, because offense would create reputational injury in future dealings with the losing group. One way to accomplish that objective would be to draft a standard that shifts to some subsequent decision[-]maker, e.g., a court, the obligation to make the difficult choice among competitors.¹⁷¹

169. In 2002 Industry Canada commissioned EKOS Research Associates Inc. (EKOS) to conduct a study on the nature and extent of operational adherence to the Debit Code. Despite industry representations that self-monitoring is working, one can call this assertion into question as a result of the discrepancies in the data which was provided to EKOS. Of the ten institutions asked to submit call centre complaint data, only four institutions did so, and of those four, only two institutions provided aggregate complaint data at the level of detail requested. See Industry Canada, Highlights from: Evaluation of Operations Related to the Canadian Code of Practice for Consumer Debit Card Services (Ottawa: Industry Canada, 2002), online: Industry Canada <[http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/vwapj/EKOS_eng.pdf/\\$FILE/EKOS_eng.pdf](http://strategis.ic.gc.ca/epic/internet/inocabc.nsf/vwapj/EKOS_eng.pdf/$FILE/EKOS_eng.pdf)> at 5. It is also interesting to note for the purposes of this paper that EKOS found that financial institutions' "[c]ardholder agreements are often not in conformity with the [Debit Code] provisions with respect to cardholder liability for loss and in particular, that cardholders are not responsible for losses beyond their control" (ibid. at 34). The study also found that one third of cardholder respondents were unaware of the limits to their liability in the event of an unauthorized transaction (ibid. at 19).

170. Clayton P. Gillette, "Rules, Standards, and Precautions in Payment Systems" (1996) 82 Va. L. Rev. 181.

171. *Ibid.* at 199 [footnotes omitted].

The preceding point serves to reinforce the contention made earlier, that the effectiveness of rent seeking and distribution is a function of the political elasticity/saliency of the issue under consideration. Clearly, instances can be adduced where an interest group has been successful in dominating a legislative agenda and deriving rents. Yet it is argued that this ability is circumscribed by practical political considerations. Industry advocacy groups also take into account their long-term interests. A callous and capricious attitude toward consumer concerns regarding debit cards would give rise to the emergence of Pross' issue-oriented groups, which may result in harsh legislation being adopted that would be even more detrimental to industry interests. As Stanbury notes, "[n]othing promotes reform like well-publicized excesses."¹⁷² In addition, the relative power among groups is dynamic and largely depends on the particular context within which this power is exercised.¹⁷³ Context is defined by Stanbury to include "the nature of the specific issue(s), the timing of the group's actions, the temporal context (e.g. stage in the electoral cycle), and the amount of effort exerted by the group."¹⁷⁴ As a result, the interplay of these dynamics can give a group, who normally may be insignificant in the policy-making process, higher influence at different times.

Moreover, it would be foolhardy indeed for any politician, sincere or otherwise, to be seen as endorsing the interests of large commercial financial institutions to the detriment of consumers or of the economy as a whole.¹⁷⁵ Symbolism is not enough to rectify this situation since, in the event of a large unauthorized transaction, a voter would be consistently reminded of its significance whenever viewing his or her banking transactions. Increased political saliency, coupled with the need for consumer support, lobbying and electoral efforts, provide regulators with an incentive to produce effective legislation and give more strength to their ability to regulate via moral suasion. Conversely, while some modest gains have been made, the previous analysis demonstrates that much more needs to be done in order to adequately safeguard consumer rights and interests.

A. *Differences between Outcomes in the US and Canada*

Returning once again to the point made by Professor Gillette regarding the difference in outcomes, in assessing the utility of the public choice analysis, one needs to account for differences between the two jurisdictions. Once again, interest group

172. W.T. Stanbury, "Assessing the Political Power of Business Interests" in Charlton & Barker, *supra* note 144, 347 at 355.

173. *Ibid.* at 349 [footnotes omitted].

174. *Ibid.*

175. See, for example, the enduring opposition of successive Ministers of Finance to proposed bank mergers/industry consolidation in Canada.

analysis may furnish an additional explanation. Professor Coleman argues that an interest group's "density of representation" is one determining factor of its ability to influence the public policy process.¹⁷⁶ Professor Coleman writes: "If an association can claim that it represents firms responsible for all of the business activity in a sector, then its legitimacy in forums with public officials will be enhanced", with the converse being true for those with a smaller density.¹⁷⁷

As we have seen, in Canada the financial services lobby is a very cohesive group as a result of the mandated nature of its membership. The CBA currently has no immediate rivals that can compete with it on a par level. Recent consolidations among the four pillars of the financial system (banks, trust companies, investment firms and insurance companies) only serve to reinforce this fact. In the United States, by contrast, there does exist substantial competition. On an aggregate level, there were 54 banks in operation in Canada as of 1998 with the six major banks holding the overwhelming majority of deposits.¹⁷⁸ In contrast, the United States had 12 000 banks in operation at the same period.¹⁷⁹ As Professor Coleman notes:

The sheer number of firms presents a difficult challenge for any association like the American Bankers Association (ABA), or the US League of Savings Institutions, or the Credit Union National Association (CUNA) which seek to represent a whole subsector. The decentralized nature of federal government regulation, the existence of dual banking at the federal and state levels, and the dynamics of a congressional legislative system all offer incentives for interests to differentiate themselves. The task of a comprehensive association becomes even more daunting in this environment.¹⁸⁰

Moreover, competition among firms of different sizes also leads to increased fragmentation in the US market. Various organizations exist to represent such diverse interests as independent locally-owned banks, banks with a particular interest in the payment system, banks that deal exclusively with government securities and banks owned by minority groups, to name a few.¹⁸¹ As such, the ability of any interest group advocating financial interests in the United States is constrained by this fact.

The fragmentary nature of the US financial services lobby may be a possible explanation as to why US financial services providers were not as successful in enacting their agenda as their Canadian counterparts. The level of fragmentation would have made fighting off the claims made by consumer groups more difficult, particu-

176. Coleman, "Financial Services", *supra* note 142 at 53.

177. *Ibid.*

178. Angie Barrados, Banking on Consumer Power: The Issues for a Canadian Consumer Coalition for the Banking Industry (Ottawa: Public Interest Advocacy Centre, 1998), online: Library and Archives Canada <http://collection.nlc-bnc.ca/100/200/301/taskforce_cdn_fin/submission-e/79/piac1.pdf> at 22.

179. *Ibid.*

180. Coleman, "Financial Services", *supra* note 142 at 50.

181. *Ibid.* at 50-51.

larly in light of the high-profile incidents that were described above. The power differential between the CBA and its US counterparts could be an explanation as to why one sees more precise consumer protection terms in the US legislation than are present in the Canadian *Debit Code*. As we saw, many of the differences between the two are subtle, yet the differences present in the *Debit Code* lead to a much more lax consumer protection regime. Part of this fact stems from the approach of using a code, which is written in informal language designed to make it more "user friendly," but may, in effect, make violations more difficult to prove.¹⁸² Yet, vagueness in its language and the subtle differences in the operational aspects of the *Debit Code* lead one to believe that the CBA does enjoy a more substantial power base than its counterparts.¹⁸³

While this may account for differences in the comparative power of the business interest groups, one must still account for differences in the power of consumer groups. One will recall that consumers face particular difficulties as a result of the collective action problem as outlined by Olson. While Olson's theories have helped to explain why business groups have managed to maintain a prominent role in the political process, they do not account for the rise of numerous public-interest advocacy groups. To quote from Tarrow: "It is ironic that Olson's work . . . was published just as the western world was erupting in a paroxysm of protest, riot, rebellion, and increased political involvement."¹⁸⁴

Walker has sought to explain why one witnesses an increase of issue-oriented groups in the 1970s and '80s, which Olson's model failed to predict. One of the ways that he sought to explain how these groups overcame the free-rider problem was that often, the state supports these groups financially, thereby overcoming the problem. As Walker states:

. . . the formation of new groups was one of the *consequences* of major new legislation, not one of the *causes* of its passage. A pressure model of the policymaking process in which an essentially passive legislature responds to petitions from groups of citizens who have spontaneously organized because of common social or economic concerns must yield to a model in which influences for change come as much from inside the government as from beyond its institutional boundaries. . . .¹⁸⁵

182. Margot Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1998) 29 *Ottawa L. Rev.* 233 at 279.

183. Coleman, "Financial Services," *supra* note 142 at 52.

184. Sidney Tarrow, *Struggle, Politics and Reform: Collective Action, Social Movements, and Cycles of Protest* (Ithaca, N. Y.: Center for International Studies, Cornell University, 1989) at 12, citing Albert O. Hirschman, *Shifting Involvements: Private Interests and Public Action* (Princeton: Princeton University Press, 1982) at 78.

185. Jack L. Walker, "The Origins and Maintenance of Interest Groups in America" (1983) 77 *American Political Science Review* 390 at 403 [emphasis in original].

Hence, the approach is to examine the outcome in terms of a dynamic two-sided process of one where interests not only shape institutions, but rather, are also shaped by them in turn.

One would expect, then, that the more successful a consumer group could be at overcoming the free-rider problem, the more successful it could be at being able to counteract the influence of business. As was mentioned above, part of this is a function of the degree to which a consumer organization can attract sufficient financial support from government and individual members. One obstacle that consumer groups in Canada are faced with is competition from US groups. Selective incentives from US consumer groups, such as offering Consumer Reports, a high-quality magazine devoted to these issues, hinders the revenue-generating efforts of their Canadian counterparts.¹⁸⁶ While these publications are suitable in gauging the US marketplace, they are not particularly accurate in their assessments of the Canadian marketplace.¹⁸⁷

Moreover, consumer organizations in the United States have been successful in obtaining additional sources of revenue to supplement their research activities. In his survey of seven industrialized nations, Professor Kerton found that:

... the US has a policy action group, the Consumer's Federation of America, a research association, the American Council on Consumer Interests, Nader-inspired Public Interest Research Groups and specific financial sector groups like the four Citizens' Utility Boards financed by donations in response to mailouts included in bank statements.¹⁸⁸

Other jurisdictions, such as California and three other states, also mandate a check-off scheme for financial consumers as a method of financing consumer input in the policy-making process.¹⁸⁹

Despite the best efforts of Industry Canada to include consumer groups in the policy-making process, Professor Kerton has found that Canadian consumer groups have a profound lack of technical expertise when compared to their counterparts elsewhere. A lack of public funding has necessitated reliance upon voluntary expertise¹⁹⁰ that has manifested itself in the lower level of consumer protections found in the *Debit Code*. One must once again place this fact in its proper historical context.

186. Robert R. Kerton, "Policy: The Consumer in the Future of Canada's Financial Services Sector" in Robert R. Kerton, ed., *Consumers in the Financial Services Sector: Volume 1: Principles, Practice and Policy—the Canadian Experience* (Ottawa: The Task Force on the Future of Canadian Financial Services Sector, 1998) at 253-54, online: The Task Force on the Future of Canadian Financial Services Sector <http://www.fin.gc.ca/taskforce/research/pdf/rr8_v1_e.pdf>.

187. *Ibid.*

188. *Ibid.* at 257-58.

189. *Ibid.* at 253.

One will recall that the adoption of the *Debit Code* occurred at the same time as one of Canada's most heated constitutional debates. That debate generated a significant amount of backlash by "grassroots" movements concerned about the allegedly disproportionate influence of "special interests" in the policy-making process. This result would lead to increased calls to decrease public funding of interest groups in future years as governments sought to eliminate expenditures in order to fight accumulated deficits.¹⁹¹

Looking back at the development of the *Debit Code* in particular, the two public interest groups that were involved in the initial consulting and drafting phases were the Canadian Consumer's Association (CAC) and representatives of a coalition of Quebec Consumer Associations¹⁹² (most recently represented since 2002 by Options Consommateurs).¹⁹³ The former association was one of the first to bring the issue of debit card regulation to the forefront. The CAC was in some financial difficulty during the early 1990s when the *Debit Code* was introduced. In 1993, the CAC was forced to abandon production of its magazine, *Canadian Consumer*, and was compelled to accept logistical support from its American counterpart, the Consumer's Union (CU). The CU agreed to distribute the CAC newsletter to its 200 000 Canadian subscribers and also include CAC membership inserts on condition that the CAC not accept any corporate support.¹⁹⁴ While this did have the positive effect of enhancing the profile of the CAC, it also helps illustrate the preceding point that competition from American groups is hurting Canadian public-interest groups through competition between jurisdictions for the support of like-minded individuals hoping to achieve change.

On the governmental side, we also see a noticeable difference between the two jurisdictions that may be explained temporally as well. Politically, the 1970s saw less emphasis on cooperation between government, industry and the citizenry than the 1990s did. As a result of economic downturns that occurred in the early 1980s and again in the 1990s, North America moved toward a more neo-liberal stance that emphasized the limitations of the state as opposed to its virtues. Professionally, as we saw in the previous section, this entailed a greater emphasis on business facilitation, as opposed to regulation, which was closer to the American approach in the 1970s. The consequence of this mode of thought was a greater reliance on a "consultative" culture

190. *Ibid.*

191. Pross, *supra* note 147 at 269-72.

192. *Canadian Code of Practice* *supra* note 47.

193. Industry Canada Strategis

< [http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/wg-list.pdf/\\$FILE/wg-list.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwapj/wg-list.pdf/$FILE/wg-list.pdf) >

194. Webb *et al.*, *supra* note 44 at 37.

that emphasized the solicitation of views from stakeholders so that decision-makers could become aware of “impacts” that their decisions would have.¹⁹⁵ Since many of the individuals involved in government and in the industry tend to come from economics backgrounds,¹⁹⁶ these discussions tend to focus on considerations of efficiency, as was outlined above, and to place less of an emphasis on ensuring that citizens’ rights are not infringed.¹⁹⁷ Indeed, as the initial discussion stated, one of the reasons why Industry Canada itself chose to proceed with a code was because it was seen as a “flexible” instrument that could be easily adaptable to changing circumstances.¹⁹⁸

The temporal context is also an important reason why we witness a difference in approaches between Canada and the United States. One will recall that American regulations with respect to debit cards were introduced *after* various high-profile credit card incidents that were reported in the media shook consumer confidence in the ability of issuers to safeguard consumer interests. The Canadian *Debit Code* was promulgated *before* any high-profile reports appeared in Canada. Moreover, in seeking to introduce an unknown product in the Canadian marketplace, the issuers needed to find a way to assess consumer opinions and generate increased acceptability of their product. The voluntary *Debit Code* was seen by the industry as a means of achieving both of these things. To quote from an Industry Canada publication:

... strategic alliances with consumer groups would ... validate the activities of a company or industry in a way which may forestall more direct government intervention which would be more costly for the company, industry and perhaps ultimately consumers and the total economy. ... [A] strategic alliance with a consumer group would provide an industry or business with access to the group’s networks and partnerships already in place. ... Access to these networks and partnerships would be an additional source of market intelligence and would further contribute to the ability of the company or industry to favorably influence public opinion and government policy formulation.¹⁹⁹

As we can see, Industry Canada itself is well aware of the phenomenon described throughout this paper. As this section has demonstrated, one of the reasons why we notice differences between the US and Canada is a result of the ability of each respective interest group to overcome the free-rider problem. In Canada, industry interest groups are able to offer tangible benefits to a small group of entities while consumer groups are unable to garner the type of support that their American counterparts do. The problem is compounded through decreased public financial support for the activities of these groups and by competition from abroad for individual contributions.

195. William D. Coleman, “The Banking Policy Community and Financial Change” in William D. Coleman & Grace Skogstad, eds., *Policy Communities and Public Policy in Canada: A Structural Approach* (Mississauga: Copp Clark Pitman, 1990) 91 at 105.

196. *Ibid.*

197. See also the discussion in Barrados, *supra* note 178 at 13-27.

198. *Canadian Code of Practice supra* note 47.

B. Conclusion

It is hoped that the previous discussion has underscored the need to take a comprehensive view in assessing the substantive ramifications and effectiveness of existing institutions and in identifying shortcomings in proposals for reform. Public choice scholarship is a vital tool in this regard, as it can assist academics and legislators alike in institutional design. Much has been made of the fact that public choice scholarship has tended to dismantle as opposed to build. Despite this fact, a public choice/interest group perspective can highlight the fact that interests and institutions both shape, and are shaped, by each other. We must recognize that while institutions may have their shortcomings, by the same token, the recognition of the shortcomings in the process that led to their creation may lead to constructive proposals for reform. One such strand has been articulated by David Skeel Jr., which he calls "Institution Reinforcing" public choice.²⁰⁰ Professor Skeel argues that by changing the descriptive nature of public choice from one that is singularly focused on one institution, to one with a comparative dimension, changes can occur in the prescriptive area as well.²⁰¹ Such a change can allow one to seek change, not only by describing a particular institution and its shortcomings, but also by making institutionally affirming proposals for reform.

To be sure, unlike its US counterpart, the *Debit Code* leaves much to be desired from a consumer's point of view. The fact that the consequences of an unauthorized transaction are not precisely quantified arguably shifts a greater proportion of responsibility for losses on the backs of consumers. The high threshold of \$3 000 listed in the hypothetical example fails to induce consumers to take greater care. The dispute resolution procedures outlined in the *Debit Code* may be confusing to some and ineffective for others, as there are no discernible consequences for financial institutions that fail to follow them. Barriers are higher still for those not satisfied with the outcomes of these processes.

The analysis contained in this paper has endeavoured to show that a comparative dimension to institutional design can be very helpful in the law reform process. Canada can learn much from the experiences of other jurisdictions in the world in strengthening its institutions.²⁰² What is clear here is that changes must take place if we are to have a more just and equitable outcome for consumers. To this end, it is

199. Webb *et al.*, *supra* note 44 at 6.

200. Skeel, *supra* note 123 at 665.

201. *Ibid.* at 665-670.

202. For a comparative analysis of the Canadian *Debit Code* in relation to codes and legislation adopted in other jurisdictions, see Benjamin Geva, "Consumer Liability in Unauthorized Electronic Funds Transfers" (2003) 38 Can. Bus. L.J. 207.

proposed that the concept of a voluntary *Debit Code* be abandoned in favour of comprehensive federal legislation that:

- contains a lower cap on liability for unauthorized transactions. A \$100 deductible in the initial loss period with escalating liability ought to encourage a consumer to take just as much care as a flat \$3 000 deductible would. This would not result in a personal crisis for consumers yet still act as an incentive for them to take care. This would also serve as an incentive to industry to improve their systems to minimize losses for consumers.

- outlines comprehensive dispute resolution mechanisms that contain strict provisions for consumers not to be deprived of their funds after a ten-day period. Consumers should be provided with written reasons and supplied with any evidence used in the event of an adverse decision. Severe penalties should be enacted for those institutions that act in bad faith or do not comply.

- gives the FCAC a more proactive mandate to ensure that institutions comply with their responsibilities. The FCAC should become an agency that acts as an advocate for consumers and removes the burden of bringing forth lawsuits from consumers in order to ensure that industry complies with its obligations *vis-à-vis* consumers. This will result in a greater enforcement of consumer rights than is presently the case and will serve as an incentive for industry compliance by increasing the likelihood of litigation in the event of non-compliance with regulations.

- provides for a check-off scheme similar to that used in California, so as to better fund Canadian consumer interest groups and make sure that the democratic process is a more balanced one. This would allow Canadian consumer groups to have better access to revenue streams, which would allow them to assemble better resources with which they could advocate for the public interest. This would help them overcome the free-rider problem.

One would hope that these suggestions might go a long way toward ensuring that the needs of consumers are met in a just, fair and equitable manner. A more favourable perception of the system may help new products attain a critical mass. Increased acceptability will lead to greater efficiency and stability that will bring benefits to all parties involved.

In this manner, public choice need not induce an unhealthy scepticism about the legitimacy of the political process or discourage those who wish to promote change. While human nature may have its shortcomings, it also has its virtues. Some institutions have been more effective than others have in achieving their objectives. Public choice can play a valuable role on a comparative level by making us cognizant of the fact that certain individuals may wish to use institutions for their own ends, and this ought to be stressed, by allowing us to draw lessons from previous experiences in institutional design. The *Debit Code* is one such example where a public choice analysis can illustrate how existing structures have emerged and what effect they have

had on society. However, without the comparative dimension, the analysis lacks in providing a workable alternative to the existing institutional deficiency. While the *Debit Code* may be lacking in certain respects for consumers, there does exist the potential that in the future, consumers will have more rights than they have today. However, in order to do so, people must believe that they can still make a difference. Historical and comparative examples demonstrate that the public choice problem is not one that is insurmountable. The free-rider issue needs to be addressed and institutions designed with a view to promoting citizen empowerment so that we may all live in a more equal, democratic, balanced and free society.

