



**Undersizing: trends and regulation in Canada and abroad**

**Research report**

Produced by Option consommateurs  
and presented to Industry Canada's Office of Consumer Affairs  
June 2013

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Option consommateurs is a not-for-profit association whose mission is to defend the rights and interests of consumers and ensure that they are respected.

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Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familial movement, more specifically, the Montreal ACEF. In 1999 it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

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## SUMMARY

What could be more shocking than to discover, once you get home, that the box of cereal you just bought contains 20 grams less than the one you bought last week? Especially since you paid the same price! Has something like that ever happened to you? It may very well be that the product you purchased has been *undersized*.

Undersizing: an increasingly popular practice that allows manufacturers to raise the price of their products without the consumer noticing. How is this possible? A study by the Harvard Business School published in 2004 shows that consumers are more likely to notice a price increase than a change in the quantity of a product. Just put a little less in the container or change the packaging and hope that the difference goes unnoticed.

Are Canadian consumers protected against such tactics? There are a couple of legislative tools available at the moment for comparing prices and quantities. However, one of these does not seem very effective in counteracting undersizing , and the other is only available in Quebec. All Canadians should have access to such a tool.

Is undersizing legal? From the standpoint of current Canadian laws, it would seem so. On the other hand, the practice goes against the ethical codes established by marketing experts and is contrary to the spirit of consumer protection laws. If our regulations were formulated more along the lines of those in force in the United States, the European Union and the United Kingdom, we would be able to give more teeth to our legislation and better protect consumers.

Is that what we should do? We think so. Although the reduction in quantity is usually not significant, undersizing is no trivial matter. It has an impact on the consumer's purchasing decisions. It also has an impact on competition. And who knows where that could lead!

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## Introduction

When opening up some of the products you just bought from the grocery store, have you ever had the impression that there was not as much in the packages as you first thought? For example, was your pot of yogurt, your bag of chips or your orange juice container somewhat less than full? Maybe those products had been *undersized*.

Undersizing is the practice of reducing the amount of a product just enough to pass unnoticed, without changing the price. This tactic is growing more common every day. Dissatisfied consumers have been citing the brand names of undersized products on their blogs<sup>1</sup>. The phenomenon has been attracting the attention of the media<sup>2</sup>.

The practice is not new, however. According to Jordan LeBel, associate professor in the Department of Marketing at Concordia University, Kellogg's, in the 1990s, was one of the first companies to use this tactic in Canada. Two years earlier, in the United States, says John T. Gourville, professor of business administration at Harvard Business School, Chock Full o 'Nuts shrank its one-pound coffee canister to 13 ounces!

In this report, we describe what undersizing entails, and illustrate and explain how harmful the practice is for the consumer. We examine the legislation in an attempt to identify regulatory solutions and evaluate the various tools available to help consumers recognize undersizing and avoid it. Finally, we make recommendations on how things could be improved.

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<sup>1</sup> "Does Size Really Matter? Understanding Product Downsizing & Unit Pricing," Real Penny Wi\$e," consulted on January 2013, <http://realpennypiece.wordpress.com/2012/12/29/does-size-really-matter-understanding-product-downsizing-unit-pricing/>; "Here We Downsize Again – Part 1 (2012)," *Mouse Print\* - Sneaky Fine Print*, consulted on January 23, 2013, <http://www.mouseprint.org/2012/05/21/here-we-downsize-again-part-1-2012/>.

,"Downsizing | le marketing au service du mensonge... encore," consulted on January 23, 2013 <http://packaginguqam.blogspot.ca/2011/04/downsizing-le-marketing-au-service-du.html>.

<sup>2</sup> Stephanie Clifford and Catherine Rampell, "A Stealth Downsizing, as Shoppers Pay More for Less Food," *The New York Times*, March 28, 2011, sect. *Business Day*, <http://www.nytimes.com/2011/03/29/business/29shrink.html>; "Big-name grocery brands are STILL shrinking packs not prices," *Mail Online*, consulted on January 23, 2013, <http://www.dailymail.co.uk/news/article-2039052/Big-brands-cut-size-products--price-remains-same.html>; "Product-downsizing hits consumers," *Columbia Daily Tribune*, consulted on January 23, 2013, [http://www.columbiatribune.com/business/product-downsizing-hits-consumers/article\\_35094c41-4ebe-5789-82ac-6f924d1e7632.html](http://www.columbiatribune.com/business/product-downsizing-hits-consumers/article_35094c41-4ebe-5789-82ac-6f924d1e7632.html), *Consumer Reports Magazine*: February 2011: "10 items that shrank," consulted on December 15, 2012 <http://www.consumerreports.org/cro/magazine-archive/2011/february/home-garden/downsized-/downsized-products/index.htm>,"Busted: Incredible Shrinking Products," consulted on July 4, 2012, <http://www.cbc.ca/marketplace/2011/incredibleshrinkingproducts/>

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## **Methodology**

In carrying out this study, we performed a literature search that focussed primarily on the situation in the European Union, the United Kingdom, the United States, and Canada.

We also conducted a comparative legislative review in the same jurisdictions. In the United States, we studied the federal laws and the laws of the states of New Jersey, New York and California, which have been turning their attention to undersizing. We also analyzed Canadian federal law and the provincial laws of Quebec and Ontario.

Finally, we carried out semi-directed interviews with key stakeholders in consumer and marketing circles<sup>3</sup>.

### **1. Description of the phenomenon**

#### **1.1. A perplexing tactic**

Undersizing can be achieved either by retaining the same container or package<sup>4</sup> or by changing it in such a way that the product looks no smaller than it was before<sup>5</sup>. This is usually successful because consumers would have a hard time identifying an undersized product (to do this properly, one would need to have access to the old and new packaging at the same time, which rarely happens).

When manufacturers use this technique, they do not change the price of the product, but reduce the amount, resulting in a hidden price change<sup>6</sup>. Companies want to keep their

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<sup>3</sup> For their names, please refer to the acknowledgments at the beginning of this report.

<sup>4</sup> By container, we mean the object that contains the product. By packaging, we mean not just the container, but everything that envelops the product. To illustrate the difference between these two terms, take the example of cereals. These are usually sold in a bag, which is placed in a box. The bag is the container. The box is the package. The whole made up of the bag and the box is also designated by the term packaging.

<sup>5</sup> Definition taken from the information requested by the Internal Market and Consumer Protection Committee of the European Parliament as to whether Community legislation on misleading packaging practices is required: Directorate-General Internal Policies of the Union, *Misleading Packaging Practices*, Directorate A: Directorate for Economic and Scientific Policies, January 2012, pp.20-21.

<sup>6</sup> Aren Megerdichian, "Product Downsizing and Hidden Price Changes in the Ready-to-Eat Cereal Market," Department of Economics, University of California, San Diego, June 29, 2010.

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customers, and none of them wants to be the first to raise prices. However, when one company employs the tactic for a given product, others follow suit.

Undersizing products is also known as “downsizing,” “package shorting,” “grocery shrink” or “package to price.” It is often equated with misleading packaging, which is commonly defined as “product packaging that is intentionally designed to mislead the consumer into thinking that the product is of more quantity or of better quality than is actually the case”<sup>7</sup>.

Does undersizing actually constitute misleading packaging? It is misleading if the undersizing is not disclosed by the company. This, in fact, is generally what happens, since there are few companies that use this technique who clearly let their customers know about it. John T. Gourville, professor of Business Administration at Harvard Business School and Jonathan J. Koehler, a law professor at Northwestern University School of Law<sup>8</sup>, make it clear why companies act this way: “Presumably, one intent behind downsizing is to reduce or eliminate the negative impact one might otherwise expect with a straight price increase”<sup>9</sup>.

So what to think about this practice? Is it legal? Ethical? For now, let's say that those who use it are generally acting in accordance with the laws and regulations. This does not mean that their practices are morally acceptable, however. We will return to these issues later in this report.

## 1.2. Why they do it

Why are we seeing undersizing more and more often? When we put this question to companies in the food industry, one of the reasons most often cited was the rising cost of raw materials. This increase, which may be due to a variety of reasons - natural disasters, declining demand, for example - reduces the profit margin of the raw materials processors. There are two options available to them: to increase prices directly or to reduce the amount of the product in the packaging<sup>10</sup>.

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<sup>7</sup> Directorate-General Internal Policies of the Union, *Supra*, note 5, p.16.

<sup>8</sup> John T. Gourville and Jonathan J. Koehler, "Downsizing Price Increases: A Greater Sensitivity to Price than Quantity in Consumer Markets," Boston: Harvard Business School Marketing, June 30, 2004.

<sup>9</sup> *Id.*, p.4

<sup>10</sup> *Id.*

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In making their choice, companies will ask themselves whether it is less detrimental for them to raise their prices or to resort to undersizing; their choice will vary depending on their customers<sup>11</sup>. However, although most consumers are less sensitive to changes in size than to changes in price<sup>12</sup>, we know that a consumer who is familiar with different marketing tactics<sup>13</sup> will accept the fact that manufacturers need to increase their profit margin and their prices, whereas a consumer who knows little of these tactics will tend to be more sensitive to a price increase.<sup>14</sup> In addition, studies show that consumers who are loyal to a brand will continue to buy their favorite product even if the amount is reduced<sup>15</sup>.

### 1.3. ... and how

How do companies go about reducing content without seeming to do so? According to Dr. Jordan LeBel<sup>16</sup>, associate professor in the Department of Marketing at Concordia University, the company will attempt to ensure that there is a barely perceptible difference between the old and new packaging – a *just noticeable difference*<sup>17</sup> (JND).

The JND is used in marketing when manufacturers want to make changes to their product. If the manufacturer, as in the case of undersizing, does not want this change to be perceived, he will reduce the amount to less than the JND<sup>18</sup>. The more the company reduces the packaging, the easier it is for the consumer to notice it. Consequently, the change must not be too great.

Consumers have been shown to be more sensitive to price increases than to changes in quantity or the size of the package<sup>19</sup>. Some authors<sup>20</sup> claim that consumers are up to four times more sensitive to the price of the products than to the size of the packaging.

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<sup>11</sup> John Gourville and Jonathan J. Koehler, *Supra*, note 8 p. 29 ; Luke Kachersky, "Reduce Content or Raise Price? The Impact of Persuasion Knowledge and Unit Price Increase Tactics on Retailer and Product Brand Attitudes," (4, 2011) 87 *Journal of Retailing* 479, p. 47.

<sup>12</sup> John Gourville and Jonathan J. Koehler, *Supra*, note 8 p. 29.

<sup>13</sup> Luke Kachersky, *Supra*, note 11, p. 480.

<sup>14</sup> *Id.*

<sup>15</sup> Dave Lennard, Vincent-Wayne Mitchell, Peter McGoldrick and Erica Betts , "Why consumers under-use food quantity indicators," (2001) 11:2 *The International Review of Retail, Distribution and Consumer Research* 177; Ronnie Ballantyne, Anne Warren, and Karina Nobbs , "The Evolution of Brand Choice," (April-June 2006) 13, *Journal of Brand Management* 339, Omprakash K. Gupta, Sudhir Tando, Sukumar Debnath, Anna S. Rominger, "Package downsizing: is it ethical?" (2007) 21 *AI & Soc* 239, p. 240.

<sup>16</sup> Remarks recorded during an interview at the beginning of 2013.

<sup>17</sup> *Weber's Law of Just Noticeable Difference*, University of South Dakota. Consulted on February 21, 2013  
<<http://sunburst.usd.edu/~schieber/coglab/WebersLaw.html>>

<sup>18</sup> "The Just Noticeable Difference" Consulted on February 21, 2013, <[http://en.wikipedia.org/wiki/Just-noticeable\\_difference](http://en.wikipedia.org/wiki/Just-noticeable_difference)> and *Weber's Law of Just Noticeable Difference*, University of South Dakota. Consulted on February 21, 2013 <<http://sunburst.usd.edu/~schieber/coglab/WebersLaw.html>>

<sup>19</sup> According to Metin Cakir and Joseph V.Balagtas, sensitivity to price and size varies in accordance with a variety of demographic and educational factors. For instance, the higher their family income, the less buyers are sensitive to prices and sizes. In addition, more

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## **1.4. By hook or by crook**

There are several ways of achieving a reduction in the contents of a package without it showing. These are the main ones:

### **1.4.1. Reducing the quantity of a product while keeping the same container or the same packaging**

It has no doubt happened to you that bought a product and noticed that the container it was in was not full. It is likely that the manufacturer had made the decision to reduce the amount without changing the container. This is the simplest undersizing method. Unbeknownst to the consumer, the package has remained the same, but its content has been reduced. Only the most vigilant consumer will figure out that the amount listed on the package has changed.

This procedure is used with several types of products, for example: not quite filling pots of yogurt or margarine, changing the number of granola bars or fish sticks contained in a box and putting fewer cookies or chips in a bag. (Note: this sometimes causes problems: e.g. if the amount of ice cream is reduced without reducing the size of the container, frost will form on the lid)<sup>21</sup>.

### **1.4.2. Using air to increase the volume of a product**

This technique, called non-functional slack-fill, is not new<sup>22</sup>. It involves putting unnecessary air into a bag to give it more volume. Generally, it is used with bags of cookies or chips – assuring that the bag has a certain volume even if it is not full - as well as with yogurt or ice cream – injecting air into yogurt turns it into a kind of mousse, and injecting it into ice

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educated consumers pay little attention to format changes, probably due to lack of time. In: Metin Cakir and Joseph V. Balagtas, "Estimating Consumer Response to Package Downsizing: an Application to the Chicago Ice Cream Market," 2012, consulted on September 19, 2012. <[http://www.agecon.purdue.edu/staff/balagtas/Pcksz\\_Noauthors\\_Manuscript20120202.pdf](http://www.agecon.purdue.edu/staff/balagtas/Pcksz_Noauthors_Manuscript20120202.pdf)>, p.12

<sup>20</sup> *Id., p.13*

<sup>21</sup> Bruce Tharp and Steve Young, "Resizing Your Ice Cream Package" (February 2009), *Dairy Foods*, p.46.

<sup>22</sup> This technique was used in 1906, when consumers complained that there was too much air in the packaging of certain products. See: Franklin M. DEPEW, "The Slack-Filled Package Law," (1946), 1 *Food Drug Cosm. L.Q.* 86, p. 88,

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cream diminishes the quality<sup>23</sup>. It is interesting to note that this phenomenon tends to reflect the state of the economy. It is more frequent in times of economic crisis<sup>24</sup>.

#### 1.4.3. Playing with sizes and shapes

Another way to undersize is change the shape of a container, for example, changing a jar by making it taller and narrower (see Fig. 1) or changing a container by making it a little shorter (see Fig. 2). The result is a kind of optical illusion that makes the consumer believe that the new format is as big as the old one, which it certainly is not. Another tactic is to reduce the space inside a container by giving a concave shape to the bottom or sides (see Fig. 3)

**Fig. 1: Classico Tomato Sauce 700 ml vs Classico 650 ml**



At first glance, it may seem that these two containers hold the same amount of sauce. However, the container on the left contains more sauce than the one on the right, which has been stretched.

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<sup>23</sup> B. Tharp and S. Young, *Supra*, note 21 p.46 and comments recorded during an interview with Jordan LeBel, associate professor in the Department of Marketing, Concordia University.

<sup>24</sup> Interestingly, after the Second World War, manufacturers faced with the difficulty of finding raw materials continued to use this technique so as not to lower their profit margins and keep their customers. See Peter Barton Hutt, "Development of Federal Law Regulating Slack Fill and Deceptive Packaging of Food, Drugs, and Cosmetics," (1987) 42 *Food Drug Cosm. L.J.* 1p. 16.

**Fig. 2: Tim Horton's coffee: 930g. vs 1 kilo**



The container on the right (1 kg) was replaced by the one on the left (930 g). Although both containers have the same circumference (bottom photo), the one on the left seems wider (top photo).

**Fig. 3. 650 g Activia yogurt and 750 g Liberté yogurt**



Both these containers have concave bottoms, but the Activia is more recessed than the Liberté and therefore contains less yogurt.

Another possibility is to change the material the container or package is made of. For instance, a container made of thicker glass or packaging than before will now have a double wall. From the outside, the new version will either be similar to the old or have a new design.

In each of these cases, the consumer could be prevented from accurately gauging the amount of product contained in the package. First, because anyone would have difficulty perceiving volumes correctly when faced with new packaging<sup>25</sup>. Second, because more attractive packages are perceived as containing a larger amount of product than less attractive ones<sup>26</sup>.

The consumer may also get the impression that a container holds a larger amount of product if its shape is changed and a large lid is added<sup>27</sup> (See Fig. 4).

**Fig. 4 Various brands of orange juice**



Which of these containers holds the most orange juice? All three contain 2,63 liters!

<sup>25</sup> Valerie Folkes and Shashi Matta, "The Effect of Package Shape on Consumers' Judgments of Product Volume: Attention as a Mental Contaminant," (September 2004) 31:2 *Journal of Consumer Research* 390, p. 396.

<sup>26</sup> *Id.*, p.390.

<sup>27</sup> Directorate-General Internal Policies of the Union, *Supra*, note 5, p.20.

Manufacturers can also make changes inside their containers<sup>28</sup>. For example, by inserting a tray of molded plastic inside a box of crackers, they can put just a few crackers inside a relatively large package (see Fig. 5)

**Fig. 5: Two brands of crackers**



Both boxes contain 250 grams of crackers, but their content is presented in different ways. In the box on the left, the crackers are in a bag, in the one on the right, they are placed inside a tray, molded to accommodate crackers of different shapes in different spaces, thereby taking up more room.

#### **1.4.4. Offering a bonus amount**

In some cases, the manufacturer will offer a “free” bonus amount (e.g. 20 mL), to purchasers of the product (e.g. dish soap). However, the content has previously been reduced by 20 mL. In this case, the consumer is not really getting anything for free, since no additional amount is actually being offered. Later, when the “gift” is no longer available, the amount will be slightly reduced<sup>29</sup>.

<sup>28</sup> Directorate-General Internal Policies of the Union, *Supra*, note 5, p. 21.

<sup>29</sup> Directorate-General Internal Policies of the Union, *Supra*, note 5,p.21.

### 1.4.5. Sewing confusion

If undersizing often manages to go unnoticed, it is partly due to the bewildering array of packages of varying formats, the size of which is not always directly related to the quantity they contain. This has the effect of creating confusion and preventing consumers from easily arriving at an informed choice<sup>30</sup>. Here are some examples.

#### 1.4.5.1. Same size different content

Sometimes boxes of the same size contain different amounts. This technique can be used to prevent one of the products a company offers being at a disadvantage because its price is higher or its container is smaller than other products produced by the same company<sup>31</sup> (See Fig. 6).

**Fig. 6: Four boxes of Christie brand crackers**



These four products are all the same brand. The boxes are all the same size and the same price (\$ 3.29). However, none of the boxes contains the same amount. From left to right, they contain 100 g, 175 g, 200 g and 250 g.

<sup>30</sup> In Quebec, the confusion is reduced by the requirement to display the price per unit of measurement. More on this later.

<sup>31</sup> J. Gourville and J. Koehler, *Supra*, note 8, pp.30-31.

Conversely, some companies choose to put their products in larger containers than those of their competitors, even when the quantity is the same<sup>32</sup> (See Fig. 7).

**Fig. 7: Different brands of crackers**



Both of the above boxes contain 200 g.

<sup>32</sup> Remarks recorded during an interview at the beginning of 2013 with Jordan LeBel, associate professor in the Department of Marketing at Concordia University.

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## 2. Consumer behaviour

Long used to protect the product, packaging now plays an important role in the promotion and dissemination of information related to quantity<sup>33</sup>. Faced with more than 200 food decisions a day<sup>34</sup>, the consumer is each time forced to adopt a decisional strategy, using minimal cognitive effort<sup>35</sup>. If we add time constraints, the range of products offered and the large amount of information printed on each package, then it is unlikely that the consumer will be able to make an informed choice about the quantity/price ratio of each of his or her purchases<sup>36</sup>.

Various legislative tools have been introduced to inform consumers about the amounts contained in a package. Among these are the declaration of net quantity<sup>37</sup> (compulsory in Canada) and the display of the price per unit of measurement<sup>38</sup> (compulsory in Quebec). These provisions allow consumers to compare similar products in order to arrive at an informed decision about the quantity/price ratio. More about this later<sup>39</sup>.

Do consumers know that these legislative tools exist? Do they use them? Do they find them useful? To our knowledge<sup>40</sup>, in recent years, no quantitative or qualitative studies have been conducted in Canada on consumers' understanding and use of quantity indicators<sup>41</sup>. On the other hand, a British study published in 2001<sup>42</sup> revealed that consumers almost never use this type of information and explained why. There is no reason to believe that these results may not also apply to Canada. In the following pages, we present

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<sup>33</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, Note 15, p.192.

<sup>34</sup> Wiktor L. Adamowicz and Joffre D. S Wait, *Are Food Choices Really Habitual? Integrating Habits, Variety-Seeking, and Compensatory Choice in a Utility-Maximizing Framework*, Oxford, Oxford University Press, 2012, p. 17.

<sup>35</sup> *Id.* and R. Ballantyne, A. Warren, and K. Nobbs, *Supra*, note 15, p.340.

<sup>36</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 179.

<sup>37</sup> *Consumer Packaging and Labelling Act*, L.R.C. 1985, c. C-38, s. 4 <<http://laws-lois.justice.gc.ca/eng/acts/c-38/>> and *Consumer Packaging and Labelling Regulations* ((C.R.C., c. 417)) (2012), ss. 11-27.1 <[http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.\\_c\\_417/](http://laws-lois.justice.gc.ca/eng/regulations/C.R.C._c_417/)>

<sup>38</sup> *Regulation Respecting the Application of the Consumer Protection Act*, RRQ, c. P-40.1, r 3. <<http://www.canlii.org/en/qc/laws/regu/rrq-c-p-40.1-r-3/latest/rrq-c-p-40.1-r-3.html>>

<sup>39</sup> See section 3.2.1.

<sup>40</sup> In arriving at this conclusion, we consulted several Internet databases including Google, Google Scholar, HeinOnline and the Centre d'accès à l'information juridique.

<sup>41</sup> Also note that Option consommateurs has already conducted a study on the display of price per unit of measurement. See <[http://www.option-consommateurs.org/documents/principal/fr/File/rapports/pratiques\\_commerciales/oc\\_ic\\_rr\\_affichage\\_unite\\_mesure\\_201006.pdf](http://www.option-consommateurs.org/documents/principal/fr/File/rapports/pratiques_commerciales/oc_ic_rr_affichage_unite_mesure_201006.pdf)> (French) or <[http://option-consommateurs.org/documents/principal/en/File/rapports/commercial\\_practices/oc\\_ic\\_rr\\_unit\\_pricing\\_201010.pdf](http://option-consommateurs.org/documents/principal/en/File/rapports/commercial_practices/oc_ic_rr_unit_pricing_201010.pdf)> (English)

<sup>42</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, 177.

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## 2.1. Not enough time

When they are doing their groceries, consumers are usually in a hurry<sup>43</sup>. They are on their way home from work, they have their children with them, they are thinking about dinner, and so on. In short, they have their heads full! Hardly the best situation for choosing the product with the best quantity/price ratio. Thirty-three percent of consumers surveyed say they do not have time to read the information printed on the products<sup>44</sup> while shopping and 37% believe that their time is too valuable to waste on selecting the product that offers the best value<sup>45</sup>. Moreover, 40% of those surveyed said that they would prefer to spend less time in the grocery store<sup>46</sup>.

Although the time it takes consumers to read the information about quantity varies depending on education, age and gender<sup>47</sup>, in general, they spend very little time on it. Why? The reasons given range from an urgent feeling that they must buy a specific product, to perceived pressure to buy one brand rather than another, to whether or not they had children with them.

In addition, 35% of consumers said that even if they had more time to spend on their shopping, they would not check the information related to weight<sup>48</sup>. In fact, over 50% did not verify this information<sup>49</sup>. In short, consumers do not want to take the time to compare the prices of similar products and therefore run the risk of not making the most economical choices<sup>50</sup>.

Fact: consumers underestimate the time required to understand and compare the information found on various products<sup>51</sup>.

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<sup>43</sup> This is true of 44 % of consumers, according to D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15 p.189.

<sup>44</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 189.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, pp. 183-184, 193

<sup>48</sup> *Id.*, p. 189

<sup>49</sup> *Id.*, p. 189

<sup>50</sup> *Id.*, p. 194

<sup>51</sup> *Id.*, p. 179

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## **2.2. Literacy and numeracy**

To determine which product is cheaper, consumers should compare prices. Due to the variety of sizes of the same and similar products, this is a difficult operation, even for consumers with strong reading and writing skills. However, according to the British study<sup>52</sup>, this is not the case for all consumers. Indeed, in Britain, a sixth of the population has low literacy rates and a third of the population has difficulty performing simple calculations<sup>53</sup>.

Note: In Canada, the situation is even worse. Forty-two percent of the population aged between 16 and 65 have poor or very poor literacy and numeracy skills<sup>54</sup>. These people are functionally illiterate, which is to say that they may find it difficult to understand a dosage, for example. For these people, comparing the prices of items of different sizes is even more challenging.

## **2.3. Misconceptions**

Another interesting fact is that 47% of respondents stated that they did not refer to the quantities since the physical size of the packaging is usually a good indicator of the amount it contains<sup>55</sup>. They rely on what they see of the package, on the total price of the product, on indications about the number of portions, on their past experience, on their general knowledge and on tactile sensations.

Rather than compare prices, consumers tend to make automatic choices, or always buy the same product. The British study also revealed that, in order to save time and effort, the respondents also relied on presumptions. For example, the belief that the bigger a container or package is, the more product it will contain and the less expensive (relatively speaking, of course) it will be. Items on sale are presumed to cost less than other products and house brand products are presumed to be cheaper<sup>56</sup>.

We also know that packaging designers are familiar with these behaviours and know that consumers rely more on past experiences than on factual information in making choices.

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<sup>52</sup> *Id.*, p. 185

<sup>53</sup> *Id.*, p. 185

<sup>54</sup> Information obtained as a result of the publication by Statistics Canada of the National Report of the International Adult Literacy and Skills Survey (IALLSS, 2003), on 30 November 2005. See: Literacy Foundation <[http://www.foundationalalphabetisation.org/en/](http://www.foundationalphabetisation.org/en/)> Consulted in January 2013

<sup>55</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15., p. 188

<sup>56</sup> *Id.*, p. 186,188

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The temptation is to use this information to sell products, thereby making the consumer vulnerable to the practice of undersizing<sup>57</sup>.

## 2.4. A false sense of security

Also, according to the British study, some buyers see no need to consult the information related to quantities since they believe retailers comply with the legislation regarding consumer protection and that the bodies governing business practices enforce their rules<sup>58</sup>. Accordingly, 40% of respondents believe they are well protected against misleading packaging as regards quantities while 46% believe that their retailer would not stock products with misleading packaging<sup>59</sup>. They see the informative labels affixed to containers or packages as an added safety feature<sup>60</sup>.

## 2.5. Too much information all at once

However necessary the information shown on a package might be, there is a limit to the amount of information that consumers can absorb. However, there is an ever greater amount of information on the packaging of products: product name, best-before date health claims, nutrition table, etc. It is not surprising that 54% of respondents in the British study said that there was too much information on packaging and that they found some of it unnecessary<sup>61</sup>.

A number of studies – one directed by Miller<sup>62</sup> and the other by Shiffrin<sup>63</sup> – suggest that there is a limit to the amount of information that consumers can take in at one time. And when there is too much information, they are no longer able to make the right choice.

Interestingly, according to the British study, 70% of respondents would prefer less variety of formats<sup>64</sup>. The study suggests that consumers are confused and overwhelmed by the range of formats available and the large amount of information they find on the packaging<sup>65</sup>.

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<sup>57</sup> Omprakash K. Gupta, Sudhir Tando, Sukumar Debnath, Anna S. Rominger, "Package downsizing: is it ethical?" (2007) 21 *AI & Soc* 239. p. 239

<sup>58</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 188.

<sup>59</sup> *Id.*

<sup>60</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 188.

<sup>61</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 189.

<sup>62</sup> G.A. Miller, "The magical number seven, plus or minus two: some limits on our capacity for processing information" (March 1956) 63 *Psychological Review* 81.

<sup>63</sup> R.M. Shiffrin, "Capacity limitations in information processing: attention and memory" in Kestes, WK. (ed.) *Handbook of Learning and Cognitive Process* Vol. 4, Hillsdale, NJ: Erlbaum 1976.

<sup>64</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 189.

<sup>65</sup> *Id.*

## 2.6. Hazy information

According to the British study, people with poor eyesight and limited manual dexterity have a harder time than others understanding information relating to quantity<sup>66</sup>. For instance, 56% of survey respondents had difficulty reading the information about weight because it was printed in small characters, and 59% of respondents had trouble with the font used and the low contrast between the characters and the colour of the background they were printed on.<sup>67</sup>

In Canada, the declaration of net quantity must be legible and set apart from all other information<sup>68</sup>. On the other hand, it is not mandatory for the information to be printed in a contrasting colour. Low contrast also makes the net quantity declaration harder to locate (See Fig. 8).

**Fig. 8: Net quantity declaration on various boxes of crackers**



The law requires the net quantity declaration to be readable, but does not require it to contrast markedly with the background on which it is printed. Would you say these net quantity declarations are clearly visible?

Another interesting fact from the British study: 55% of consumers had a hard time identifying the indications relating to weight<sup>69</sup>. Some of the people who participated in the

<sup>66</sup> *Id.*, p. 190

<sup>67</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p.190

<sup>68</sup> *Consumer Packaging and Labelling Act*, L.R.C. 1985, c. C-38, s. 4 < <http://laws-lois.justice.gc.ca/fra/lois/c-38/TexteComplet.html>

<sup>69</sup> D. Lennard, V.-W. Mitchell, P. McGoldrick and E. Betts, *Supra*, note 15, p. 190

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study had forgotten their glasses and others had problems with manual dexterity (they could not handle the boxes as they wished)<sup>70</sup>.

## 2.7. A certain lack of interest

The British study also found that 68% of respondents were not bothered by small quantity differences<sup>71</sup>. The reason? They focussed on other factors that they considered more important. For instance, 63% believed checking the ingredients and the nutritional information to be more important than knowing how much the product weighed<sup>72</sup>. Consumers are increasingly more concerned with the characteristics of the product, its ease of use and health and safety considerations than about the quantity.

Perhaps there's a connection: even though consumers do contact consumer groups and government agencies, none of the organizations we contacted reported receiving any complaints directly related to undersizing<sup>73</sup>.

That consumers are so uninterested in the phenomenon may seem surprising. What is more so is that the government and consumer protection agencies are also paying such scant attention to it. During the interviews, the view was often expressed that since the net amount was listed on the packaging of undersized products, there was no misrepresentation. And since there was no misrepresentation, legally speaking, not much could be done to counter the phenomenon. We will come back to this in the legislative section of this report<sup>74</sup>.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, p. 186

<sup>72</sup> *Id.*, p. 190

<sup>73</sup> The Ministry of Consumer Services (Ontario), *L'Office de la protection du consommateur* (Québec) and the Canadian Food Inspection Agency.

<sup>74</sup> Section 3.2.3.

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### 3. Legal aspects

#### 3.1. Historical notes

In the United States, the packaging and labelling of food products has long been regulated. In fact, it was in 1906 that the *Food and Drug Act* (The “Wiley” Act<sup>75</sup>) was adopted for that very purpose. However, the Act does not contain any rules against slack-filling or other techniques that could be used to mislead consumers.

In 1913 it became mandatory to indicate net quantity on packaging<sup>76</sup>. While useful, this provision is not sufficient because consumers prefer to rely on the shape and size of the package rather than looking for changes on the informative label<sup>77</sup>. Besides, manufacturers have found other ways to lead consumers astray, such as using inverted bottoms<sup>78 79</sup>.

That same year, the practice of slack-filling was regulated<sup>80</sup>. A first amendment to this effect was tabled in 1919 and was supported by members of the spice industry who faced unfair competition from some of their competitors who were not filling the packaging of their products completely<sup>81</sup>. The food industry was unhappy with the requested amendment, and it was not adopted. Finally, it was not until 1938 that slack-filling was regulated<sup>82</sup> under section 403 (d) of the *Federal Food, Drug, and Cosmetic Act* of 1938.

The aim of section 403(d) was to prevent packaging-related economic fraud being committed despite compliance with the net quantity declaration<sup>83</sup>. This did not, however, solve everything, especially since, during the legislative process leading to its adoption, it was somewhat watered down<sup>84</sup>. Apart from being written in vague terms<sup>85</sup>, it contains the stipulation that the Food and Drug Administration (FDA) must prove that the manufacturer intended to defraud or mislead the consumer, which can be especially difficult<sup>86</sup>. The result has been that in spite of the provision, courts have had a hard time ruling on such practices. Between 1938 and 1946, the section was evoked in only one case<sup>87</sup>.

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<sup>75</sup> Franklin M. DEPEW, “The Slack-Filled Package Law,” (1946), 1 *Food Drug Cosm. L.Q.* 86, p.86.

<sup>76</sup> Eric C. WALL, “A Comprehensive Look at the Fair Packaging and Labeling Act of 1966 and the FDA Regulation of Deceptive Labeling and Packaging Practices: 1906 to Today,” (Harvard Law School) May 2002. p.5.

<sup>77</sup> *Id.*, p. 5 and F. M. DEPEW, *Supra*, note 75, p. 88.

<sup>78</sup> We refer to this technique in section 1.1.4.3.

<sup>79</sup> P. B. Hutt, *Supra*, note 24, p.6., E.C. Wall, *Supra*, note 77. p.5.

<sup>80</sup> *Id.*,

<sup>81</sup> F. M. Depew, *Supra*, note 75, p. 88

<sup>82</sup> F. M. Depew, *Supra*, note 75, p. 88., P. B. HUTT, *Supra*, note 24, p.15., E.C. Wall, *Supra*, note 77. p.7.

<sup>83</sup> F. M. Depew, *Supra*, note 75, p. 89

<sup>84</sup> *Id.*, p. 88

<sup>85</sup> *Id.*, p. 90

<sup>86</sup> *Id.*, p. 94., Wesley E. Forte, “The Food and Drug Administration, The Federal Trade Commission and The Deceptive packaging of Foods,” (1965) 40 N.Y.U. L. Rev. 860. p. 874.

<sup>87</sup> United States v. approx. 738 cases, including Jiffy-Lou Vanilla Flavor Puddings, Safeway Stores Incorporated, claimant. For further details, see: F. M. Depew, *Supra*, note 75, p. 92 and ss.

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In 1966, the *Fair Packaging and Labelling Act* (FPLA)<sup>88</sup> was adopted. This law requires companies to identify their products on the packaging, which must bear the name and address of the manufacturer, packer or distributor and the content<sup>89</sup>. Great importance was given to the declaration of net quantity, which had to be placed in one standardized location<sup>90</sup> on the front of the package<sup>91</sup>.

The Act stipulates that the FDA and the Federal Trade Commission (FTC) should jointly take care of all cases of misleading packaging and promulgate regulations on the practice. They do so rather half-heartedly. A common explanation is that, since the FDA's mission is to protect consumers against "potentially hazardous foods" and "dangerous or ineffective drugs"<sup>92</sup>; protecting them from economic risks is not a priority<sup>93</sup>.

In Canada, the *Consumer Packaging and Labelling Act* and its regulations came into force in 1974<sup>94</sup>. It was judged at that time that it was important to have regulation in the area of weights and measures to provide consumers with sufficient information to arrive at an informed choice<sup>95</sup>. It is only when the declaration of net quantity became mandatory that slack-filling in prepackaged products was prohibited<sup>96</sup>.

As for the other tactics used in undersizing, there are no regulations (either here or in the jurisdictions studied<sup>97</sup>), although in the 1990s, bills were tabled in the states of New York and New Jersey,<sup>98</sup>. Nevertheless, new marketing tactics involving product undersizing emerge regularly. This leads us to believe that today's consumers are in greater danger of falling into the undersizing trap than ever before.

### 3.2. The current situation

In Canada, there are no specific provisions against undersizing, either at the federal or provincial level. This situation is similar to that in the other jurisdictions studied. On the other hand, other laws do exist to ensure that consumers get the information they need to make an informed choice when making purchases. Certain provisions of these laws

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<sup>88</sup> W. Angoff, "Trade Regulation: Federal Fair Packaging and Labeling Act," *8 B.C. Indus & Com. L. Rev.* 626, p.626

<sup>89</sup> William W. Goodrich, "The Issues We Face in Carrying Out The Fair Packaging and Labeling Act," *Food, Drug, Cosmetic Law Journal* 22 (March 1967) 158

<sup>90</sup> "Uniform location"

<sup>91</sup> W. W. Goodrich, *Supra*, note 89, p.160

<sup>92</sup> E.C. Wall, *Supra*, note 76, p.40

<sup>93</sup> *Id.*

<sup>94</sup> *Consumer Packaging and Labelling Act, Royal Proclamation*, (1974), TR/74-30 (*Canada Gazette. II*) 752.

<sup>95</sup> *Consumer Packaging and Labelling Regulations* (1974) SOR 74-14230 (*Canada Gazette. II*) 752.

<sup>96</sup> *Consumer Packaging and Labelling Act, Royal Proclamation*, (1974), TR/74-30 (*Canada Gazette II*) 752.

<sup>97</sup> United States (Federal, New Jersey, New York, California), Europe (European Union and United Kingdom)

<sup>98</sup> N.Y.S01874 *An Act to amend general business law, in relation to reduction of weight, measure or quantity of certain consumer packages*, 1999-2000 Regular Sessions, January 29 (<<http://assembly.state.ny.us/leg/?bn=S01874&term=1999>>) and N.J Bill 4880 (1991). These bills were never adopted.

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(packaging and labelling laws, consumer protection laws, laws on unfair commercial practices) could be used to regulate undersizing. In this section, we will see how.

### **3.2.1 Tools to help the consumer**

The above-mentioned laws offer very little in the way of actual consumer protection. Fortunately, however, there are tools that can help consumers see more clearly: the indication of quantity and of weight and measures, and the display of price per unit of measurement. We perused these legislative tools carefully in order to assess their relevance and adequacy.

#### **3.2.1.1. Indication of quantity and weights and measures**

In Canada, the declaration of net quantity<sup>99</sup> (or the quantity declaration) is the tool that tells consumers how much product is contained in a package. Armed with this information, they can compare the prices of different products of the same type and make an informed choice.

All the jurisdictions studied require manufacturers to include the net amount on their packaging. However, the manner of displaying the net amount varies from one jurisdiction to another.

#### **Canada, Quebec and Ontario**

In Canada, declaration of net quantity is governed by sections 4 and 10 of the *Consumer Packaging and Labelling Act*<sup>100</sup>, sections 14 to 18 of its *Regulations*<sup>101</sup>, section 9 of the *Weights and Measures Act*<sup>102</sup> and sections 46 to 48 of its *Regulations*<sup>103</sup>.

All providers of prepackaged products must declare the net quantity of the product. This statement must be placed on the principal display panel of the package<sup>104</sup>; it must also be

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<sup>99</sup> *Consumer Packaging and Labelling Act*, L.R.C. 1985, c. C-38, s. 4.

<sup>100</sup> See: <<http://lois-laws.justice.gc.ca/eng/acts/C-38/FullText.html>>

<sup>101</sup> See: <[http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C\\_c\\_417/FullText.html](http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C_c_417/FullText.html)>

<sup>102</sup> See: <<http://laws-lois.justice.gc.ca/eng/acts/W-6/FullText.html>>

<sup>103</sup> See: <[http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C\\_c\\_1605/FullText.html](http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C_c_1605/FullText.html)>

<sup>104</sup> This is the total area “that has a side or surface that is displayed or visible under normal or customary conditions of sale or use (CPLR), excluding the top, if any.” In simple terms, it is the area used to present the product, usually the front of the package. Other conditions may apply if the packaging has special characteristics. See the definitions in the *Consumer Packaging and Labelling Regulations* (C.R.C., c. 417):

<[http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C\\_c\\_417/FullText.html](http://lois-laws.justice.gc.ca/eng/regulations/C.R.C.%2C_c_417/FullText.html)>

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readable and separate from other information. No specific colour is required, nor is the use of contrasting colours.

The net quantity declaration must be accompanied by the name of the product, the name and address of the manufacturer and any additional information required by the regulations (including the nature and quality of the product)<sup>105</sup>.

The net quantity must be declared in metric units, in both French and English. In general, it must be expressed in units of volume, weight or number. In addition, this amount should not include a decimal number (this is permitted if the amount is less than 100 )<sup>106</sup>. Imperial measurements may be used provided they are accompanied by metric and that the latter are the first disclosed on the packaging. The only acceptable units of measurement are those prescribed in Schedules I and II of the *Weights and Measures Act*<sup>107</sup>. Certain products are exempt from the declaration of net quantity<sup>108</sup>.

#### Minimal height

The letters and numbers<sup>109</sup> used to record all the information required by the declaration of net quantity must be of a specific minimum height in relation to the main surface area of the package<sup>110</sup>. For example, if the main surface area is less than 32 cm<sup>2</sup>, the minimum character height must be 1.6 mm (for other examples, See Fig. 9).

**Fig. 9: Minimum height of letters**

Area of principal display surface (in square centimetres)	Minimum height of letters (in millimeters)
≤ 32	1.6
> 32 to ≤ 258	3.2
> 258 to ≤ 645	6.4
> 645 to ≤ 2580	9.5
> 2580	12.7

Source: *Guide to Food Labelling and Advertising*<sup>111</sup>

<sup>105</sup> *Consumer Packaging and Labelling Regulations*, s. 12.

<sup>106</sup> Canadian Food Inspection Agency, "Guide to Food Labelling and Advertising," July 27, 2011, c. 2.

Section 2.6.1. See: <<http://www.inspection.gc.ca/english/fssa/labeti/guide/ch2e.shtml>>

<sup>107</sup> See: <<http://laws-lois.justice.gc.ca/eng/acts/W-6/FullText.html>>

<sup>108</sup> *Consumer Packaging and Labelling Regulations*, s.18.

<sup>109</sup> NOTE: The number specifically indicating the net quantity must be in bold.

<sup>110</sup> *Consumer Packaging and Labelling Regulations*, s. 14.

<sup>111</sup> Canadian Food Inspection Agency, *Supra*, note 106.

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In the laws of Quebec and Ontario, other conditions apply. For example, in Quebec, according to the *Regulation Respecting Food*<sup>112</sup>, the packaging of eggs and maple products whose principal display surface is less than 10 cm<sup>2</sup> may display the net quantity in characters of a minimum height of 0.8 mm<sup>113</sup>. The same situation applies in Ontario for meat packaging<sup>114</sup>. This derogation is permitted under s. 16 of the *Consumer Packaging and Labelling Regulations*.

## The United States

In the U.S., the declaration (statement of net quantity) is governed by certain sections of the *Fair Packaging and Labelling Act* (FPLA)<sup>115</sup> and certain sections of its *Regulations*<sup>116</sup>.

Section 1453 (2) FPLA stipulates that the label must include the statement of net quantity in terms of weight, mass, measure or numerical count. This must be accurate and separate from other information<sup>117</sup>. It should appear in the lower third of the principal display surface (unless the surface is less than 32.2 cm<sup>2</sup>). The net quantity statement must be parallel to the base of the package<sup>118</sup>.

The units of measurement used must be accurate and legible, in order to facilitate comparison between different products of the same nature.<sup>119</sup>

The net quantity statement itself shall appear in “boldface type or print” and be conspicuous (through the use of “typography, layout, color, embossing or molding”)<sup>120</sup>.

The legislation in the State of New Jersey is similar to the Canadian federal regulations, but includes an extra requirement: the letters and numbers in the net quantity statement must be in a colour that contrasts with the background on which they are printed<sup>121</sup>.

The laws of the State of New York and of California do not contain any provisions that might help improve the Canadian regulations.

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<sup>112</sup> *Regulation Respecting Food, RRQ, c. P-29, r 1*  
<[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/P\\_29/P29R1.HTM](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/P_29/P29R1.HTM)>

<sup>113</sup> *Regulation Respecting Food, Schedules 5D and 8C*

<sup>114</sup> *Food Safety and Quality Act, 2001*, Ontario Regulation 31/05 s. 124 <<http://www.search.e-laws.gov.on.ca/en/isysquery/d3c330c9-cbdf-492a-9fc0-d50d058212d5/1/doc/?search=browseStatutes&context=#hit1>

<sup>115</sup> 15 U.S.C. c.39 (2011) § 1453 <<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap39.htm>>

<sup>116</sup> 16 C.F.R., Part 500, (1994), 16 C.F.R., Part 502, (1971), 16 C.F.R., Part 503, (1969) <[http://www.ecfr.gov/cgi-bin/text-idx?SID=cd5e2d48ecd88b89bf89c12f0fc63bef&tpl=/ecfrbrowse/Title16/16tab\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?SID=cd5e2d48ecd88b89bf89c12f0fc63bef&tpl=/ecfrbrowse/Title16/16tab_02.tpl)>

<sup>117</sup> 16 C.F.R. Part 500.6

<sup>118</sup> *Id.*,

<sup>119</sup> *Id.*,

<sup>120</sup> 16 C.F.R. Part 500.20

<sup>121</sup> N.J. Title 13, *Law and Public Safety*, (N.J.A.C) c. 47K § 13:47K-4.8

## Other jurisdictions

With regard to net quantity, we found nothing in the European Union and the United Kingdom that might improve the Canadian regulations<sup>122</sup>.

### 3.2.1.2. Displaying the price per unit

As its name suggests, the price per unit of measurement is the price of a standard basic unit of a product, measured in millilitres or grams, for example (See Fig.10)<sup>123</sup>.

**Fig. 10: Price per unit of measurement**



On this label, the total price shown for 750 G is \$3.99 and the price per unit of measurement, printed on the left, is “\$0.5320/100 G”

Each of the jurisdiction studied<sup>124</sup> had laws and regulations regarding the display of price per unit of measurement, except for Canada<sup>125</sup> and the United States<sup>126</sup>. Although slightly

<sup>122</sup> The documents we consulted are: EC, *Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of Member States relating to the labeling and presentation of food and advertising of foodstuffs*, JLO 109/29 (European Union) and *Weights and Measures Act 1985*, (R.U.) 1985 c. 72 and The Weights and Measures (Packaged Goods) Regulations 2006, 2006 No. 659

<sup>123</sup> Price per unit of measurement = price of the article/quantity. See p. IV of Option consommateurs “Unit pricing: An effective tool?” 2010 <[http://www.option-consommateurs.org/documents/principal/fr/File/rapports/pratiques\\_commerciales/oc\\_ic\\_rr\\_affichage\\_unite\\_mesure\\_201006.pdf](http://www.option-consommateurs.org/documents/principal/fr/File/rapports/pratiques_commerciales/oc_ic_rr_affichage_unite_mesure_201006.pdf)> (français) ou <[http://option-consommateurs.org/documents/principal/en/File/rapports/commercial\\_practices/oc\\_ic\\_rr\\_unit\\_pricing\\_201010.pdf](http://option-consommateurs.org/documents/principal/en/File/rapports/commercial_practices/oc_ic_rr_unit_pricing_201010.pdf)> (anglais)

<sup>124</sup> New Jersey (Title 56, *Trade names, Trademarks and Unfair Trade Practices, Unit Price Disclosure Act*, P.L.1975, c.242 (N.J.S.A). 56:8-25 Title 13, *Law and Public Safety*, (N.J.A.C) ch. 45A, subchapter 14), New York (N.Y., Agriculture and market (AGM), article 17, § 214-h., N.Y., Tit. 1 Department of Agriculture and Markets, ch.VI, subchapter H, part 345); California (Business and Professions Code (BPC), division 5, ch.6.5 §12655-12656., European Union (*Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers*), United Kingdom (*The Price Marking Order 2004*, (U.K.) 2004 No. 102)

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different from one jurisdiction to the next, they all allow consumers to compare the prices of similar products and select the product that offers them the most for their money. Which of course, is the whole point.

We are not going to analyze each of these policies — we did that in our 2010 report<sup>127</sup>. We do wish to point out, however, that the cards on which the unit prices are displayed are not uniform and are not always easy to understand. In our report, we also suggest ways these could be improved.

### **3.2.2. Laws on packing and labelling**

To sell their products, manufacturers must meet the standards for packaging and labelling, which they usually do. The problem lies in the non-disclosure of new information about quantities. Could manufacturers or retailers be required to disclose this information? How can the current legislation be used to better protect the consumer from undersizing? In this section, we will attempt to answer these questions.

We will present the relevant provisions in these jurisdictions that could serve as an inspiration to Canadian legislators and ensure that consumers are better informed, the goal being to find new solutions.

#### **3.2.2.1. Misleading containers and slack-filling**

As we have already seen, filling packages with air did not start yesterday. It is not surprising that several jurisdictions have introduced measures to combat the practice.

##### **Canada, Québec and Ontario**

In Canada generally, it is against the law to use containers that may - particularly due to their shape – lead consumers to believe that the quantity is greater than it actually is<sup>128</sup>. Accordingly, containers that are larger than necessary or “slack-filled” should not be on the shelves.

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<sup>125</sup> As mentioned previously, Quebec has legislated in this regard and is also the only Canadian province to have done so. See section 91.5 of the *Regulation Respecting the Application of the Consumer Protection Act*.

<sup>126</sup> Several states (19) do however have provisions in this regard, as is the case of the ones we study in our research.

<sup>127</sup> Option consommateurs “Unit pricing: An effective tool?” 2010

<sup>128</sup> *Consumer Packaging and Labelling Act*, s.9.

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On the Canadian Food Inspection Agency (CFIA) website<sup>129</sup>, it states that it would be misleading not to fill a non-transparent bottle completely. This statement is supported by a ruling made by the CFIA on November 24, 1992<sup>130</sup>.

The *Regulation on processed products* (Schedule III) requires that certain products be packed under specific conditions.

There are no provisions aimed at slack-filling or misleading containers in the laws of Quebec and Ontario.

## United States

There are a number of sections of laws and regulations<sup>131</sup> governing misleading containers and slack-filling. The Food and Drug Administration (FDA) is responsible for enforcing these sections.

A container may be considered to be “misbranded”<sup>132</sup> if it is “made, formed or filled” so as to be misleading<sup>133</sup>.

How does one decide whether a package fits this description? The relevant statute<sup>134</sup> describes the circumstances under which a container is judged to be misleading. For instance, when a container does not reveal its contents completely (because it is opaque, for example), it can be judged to have been filled in a misleading manner if contains an unnecessary amount of air<sup>135</sup>.

Slack-fill<sup>136</sup> is the space inside the container that is not occupied by the contents. Slack-filling is considered unnecessary except for reasons such as:

- Protection of the contents;
- Calibration of the machine used to manufacture the container;
- Shipping logistics;
- Inability to reduce the size of the container.

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<sup>129</sup> Canadian Food Inspection Agency, labelling, decisions, net quantity.

< <http://www.inspection.gc.ca/food/labelling/decisions/net-quantity/eng/1348165767809/1348165893105>>

<sup>130</sup> This is the case with s. 343 (d) (formerly 403(d)) of the *Food, Drug and Cosmetic Act* (21 U.S.C. c 9 (2011)) and of s. 100.100 of the *Code of Federal Regulations* (CFR) (21 C.F.R. part 100).

<sup>131</sup> This is the case with s. 343 (d) (formerly 403(d)) of the *Food, Drug and Cosmetic Act* (21 U.S.C. c 9 (2011)) and s. 100.100 of the *Code of Federal Regulations* (CFR) (Title 21 C.F.R. part 100)

<sup>132</sup> Term used by the FDA.

<sup>133</sup> 21 U.S.C. ch.9 (2011), § 343 (d) : < <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title21/html/USCODE-2011-title21-chap9-subchapIV-sec343.htm> >

<sup>134</sup> 21 C.F.R. part 100 subchapter F § 100.100 (1994): <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=6e1d38e0e4f04d4e0839229406aabb89&rgn=div8&view=text&node=21:2.0.1.1.3.1.1&idno=21>

<sup>135</sup> *Id.*

<sup>136</sup> Note: Section 21 CFR 100.100 has not been modified since January 5, 1994, when it came into force.

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In the United States, it became necessary to add a new section<sup>137</sup> to ensure adequate regulation under section 403(d)<sup>138</sup>. Since that time, this regulation has served as a guide to industry to better protect consumers<sup>139</sup>. In 1993, during the discussions preceding the entry into force of this regulation, certain comments originating from the food industry, among others, claimed that it was not necessary to regularize the situation, since s. 403(d) fulfilled that role satisfactorily<sup>140</sup>. It was maintained that all that was needed was to introduce guidelines<sup>141</sup>. The industry's position was that consumers were rarely misled by slack-filled containers. The FDA rejected these comments and reiterated that its mission was to properly inform the consumer, in order to ensure the fair and efficient operation of the free market<sup>142</sup>.

### Important judgments

There are few legal cases on record that invoked ss. 403 (d) or 343 (d) of the FDCA. Four important judgments<sup>143</sup> are often found in the literature relating to misleading packaging. These cases, which date from before 1966, do not involve undersizing, but non-functional slack-fill. The FDA lost all four.

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<sup>137</sup> 21 CFR 100.100

<sup>138</sup> 58 Fed.Reg. 64124 (1993), p.64124.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> United States v. 738 Cases of Jiffy-Lou Vanilla Flavor Pudding, United States v. Cataldo, United States v. 116 Boxes of Arden Assorted Candy Drops, United States v. 174 Cases of Delson Thin Mints. To find out more about these cases, you can consult John C. Martin, "Section 403 (d) – Containers so made, formed or filled as to be misleading," (1953) 8 *Food Drug Cosm. L.J.* 663 and Wesley E. Forte, "The Food and Drug Administration, The Federal Trade Commission and The Deceptive packaging of Foods," (1965) 40 *N.Y.U. L. Rev.* 860.

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## **European Union and United Kingdom**

We found no provisions regarding misleading containers in the European Union or the United Kingdom. Non-functional slack-fill, incidentally, comes under environmental laws in the context of wastage<sup>144</sup>, which prohibit the use of larger packaging than necessary. Some<sup>145</sup> have suggested that this prohibition could be used to combat undersizing.

### **3.2.2.2. Misleading containers and undersizing**

As stated above, it is generally forbidden to use containers that could lead people to believe that their quantity is larger than it actually is. Let us look at the rules in this regard.

#### **Canada**

There is nothing, either in law or jurisprudence, that could serve as a precise illustration of what constitutes misleading packaging. The same is true of undersizing.

#### **United States**

The FDA considers that it does not have to regulate the practice of undersizing when this consists of reducing the size of the packaging and its contents<sup>146</sup>. It considers that the problem is more that the consumer who is used to buying a product will not pay attention to the subtle reduction in the amount and will not realize that he or she is getting less value for money<sup>147</sup>. According to the FDA, this marketing technique comes under trade practices and, therefore falls to the Department of Commerce<sup>148</sup>. The Secretary of Commerce could develop voluntary standards for the industry<sup>149</sup>.

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<sup>144</sup> EC, Directive 94/62/EC of the European Parliament and Council of 20 December 1994 on packaging and packaging waste, O.J.L.365 and The Producer Responsibility Obligations (Packaging Waste) Regulations 2007, (U.K.) 2007 No. 871

<sup>145</sup> NOTE: the average consumer is a careful, diligent and relatively well-informed person. See in this regard: Directorate General for Internal Policies, "Misleading Packaging Practices," Policy Department A: Scientific and Economic Policy Internal Market and Consumer Protection," Briefing Paper, January 2012, p. 61.

<sup>146</sup> 58 Fed.Reg. 64124 (1993), p.64135.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

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It should be noted that the FDA considers that there is a difference between “downsizing” and “package shorting.<sup>150</sup>“ Package shorting,” which involves reducing the quantity of a product while keeping the same package (thus creating an empty space) is governed by s. 403 (d). If the manufacturer cannot justify the presence of an empty space, this constitutes non-functional slack-fill, according to the criteria of s. 100.100<sup>151</sup>.

An interesting fact: in New Jersey, it is prohibited for a container to have a false bottom, false walls or a false lid<sup>152</sup>. Anyone violating this provision is liable to a fine<sup>153</sup>.

In the state of New York, there is an additional rule: no container may be coloured in such a way as to mislead consumers<sup>154</sup>.

## European Union and United Kingdom

As mentioned previously, there is no legal definition of misleading packaging in the Directives of the European Union, nor in the laws of the United Kingdom.

### 3.2.2.3. Standardized containers

Every law that has provisions relating to standardized containers<sup>155</sup> stipulates that some products can only be sold in certain quantities. In Canada, for example, peanut butter may only be sold in 250 g, 375 g, 500 g, 750 g, 1 kg, 1.5 kg and 2 kg sizes<sup>156</sup>). Other products may only be sold in certain containers. Also in Canada, canned fruit with a liquid must be sold in a container measuring between 68 mm/56 mm and 157mm/177mm<sup>157</sup>)<sup>158</sup>.

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<sup>150</sup> We mentioned this term previously, stating that it is another name for undersizing.

<sup>151</sup> 21 C.F.R. § 100.100 (1994).

<sup>152</sup> Title 51, Standards, Weights, Measures and Containers (N.J.S.A) § 51 :1-29 c) (1) < [http://lis.njleg.state.nj.us/cgi-bin/om\\_isapi.dll?clientID=24460746&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={14CD9}&softpage=Doc\\_Frame\\_PG42](http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=24460746&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={14CD9}&softpage=Doc_Frame_PG42)>

<sup>153</sup> *Id.*

<sup>154</sup> N.Y, Agriculture and Markets (AGM), Article 17, § 201

<[http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWs+&QUERYDATA=\\$\\$AGM201\\$\\$@TXAGM0201+&LIST=LAW+&BROWSE\\_R=BROWSER+&TOKEN=53741686+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWs+&QUERYDATA=$$AGM201$$@TXAGM0201+&LIST=LAW+&BROWSE_R=BROWSER+&TOKEN=53741686+&TARGET=VIEW)>

<sup>155</sup> Among those studied: Legislation of the United States and the States of New York, New Jersey and California.

<sup>156</sup> Consumer Packaging and Labelling Regulations (C.R.C., c. 417).

<sup>157</sup> Diameter/height.

<sup>158</sup> Processed Products Regulations, C.R.C., c. 291. (2013) Schedule III

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## **Canada**

In Canada, section 11 of the *Consumer Packaging and Labelling Act (CPLA)* allows the Governor in Council, on the recommendation of the Minister, to standardize certain containers when the effect of an undue proliferation of sizes or shapes is to “confuse or mislead the consumer.” To do this, he must seek the advice of at least one consumer organization and one dealers’ organization. The Governor in Council may also seek advice from the Standards Council of Canada or any other Canadian standardization body.

When containers of one type of product are standardized, the net quantity that is listed must meet the standards set by the regulations. In the case of processed products, the net quantity must correspond to one of the sizes specified in Schedule III of the *Processed Products Regulations (PPT)*. The Regulations also stipulate mandatory dimensions for the containers of certain processed products.

However, standardized containers could be disappearing from our shelves. In fact, in its 2012 budget, the Canadian government announced that it intended to repeal the regulations respecting the standardization of food containers. Discussions are under way between the CFIA and stakeholders involved in this process. Some speakers stressed that repealing this regulation could endanger their competitiveness. It was noted that the restrictions on the size of the containers do not fall within the mandate of the CFIA, which is primarily responsible for ensuring food safety. At the time of writing, further consultations were upcoming between the food industry, enterprises and organizations representing producers and food processors<sup>159</sup>.

## **United States**

Few products in the U.S. have to be packaged in standardized containers. There are certain legislative provisions<sup>160</sup> that set standards for baskets of fruit such as apples, limes and berries.

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<sup>159</sup> See Canadian Food Inspection Agency news release “Container Size Regulations” <<http://www.inspection.gc.ca/food/processed-products/labelling-and-packaging/container-size-regulations/eng/1353621089533/1353621169021>> The proposed modifications will be the topic of a publication in the official Gazette Part I, in the fall of 2013.

<sup>160</sup> 15 U.S.C. ch. 6 (2011), §231-239 <<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title15/html/USCODE-2011-title15-chap6-subchapVI.htm>>

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## European Union and United Kingdom

Except in a very few cases, the European Union, in *Directive 2007/45/EC*<sup>161</sup>, prohibited its Member States from selling prepackaged products in standardized containers. It was decided, in the interests of promoting trade and the free movement of goods between Member States, that it was more appropriate to repeal all laws standardizing containers or packaging<sup>162</sup>. Only wines, spirits and a few other items are still subject to regulation on the size of their container<sup>163</sup>. The European Union considers that *Price Indication Directive 98/6/EC*, which displays the price per unit of measurement, affords sufficient protection<sup>164</sup>.

To offset this repeal and provide better consumer protection, it was recommended that Member States ensure that “weight and volume indications on consumer product labelling are more easily legible and visible on the prepackage<sup>165</sup>.”

### 3.2.3. Consumer protection laws

Do the laws designed to protect consumers contain provisions that could be applied to undersizing? We carried out an exhaustive study of the legislation in an attempt to answer this question. This is what we found.

## Canada

The legislative provisions relating to unfair and misleading trade practices were instituted to protect merchants and consumers, and enable the free market to operate effectively. Some of these, namely those related to the omission of a material fact (provided for under the laws of Quebec and Ontario<sup>166</sup>), could be used to regulate undersizing. On the other hand, those related to false or misleading representation (provided for under federal law<sup>167</sup>) do

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<sup>161</sup> EC, *Directive 2007/45/EC of the European Parliament and of the Council of 5 September 2007 laying down rules on nominal quantities for prepacked products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC*

<sup>162</sup> The European Court of Justice held in its judgment of 12 October 2000 in Case C-3/99, Cidrerie Ruwet, that “Member States are precluded from prohibiting the marketing of a prepackage having a nominal volume not included in the Community range, which is lawfully manufactured and marketed in another Member State, unless such a prohibition is designed to meet an overriding requirement relating to consumer protection, applies without distinction to national and imported products alike, is necessary in order to meet the requirement in question and is proportionate to the objective pursued, and that objective cannot be achieved by measures which are less restrictive of intra-Community trade.” *Directive 2007/45/EC*, (3).

<sup>163</sup> *2007/45/EC*, (2).

<sup>164</sup> Preamble to *Directive 2007/45/EC*, paragraph 4.

<sup>165</sup> Preamble to *Directive 2007/45/EC*, paragraph 12.

<sup>166</sup> The *Consumer Protection Act*, R.S.Q., c. P-40.1 (Québec) and the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sch. A (Ontario)

<sup>167</sup> The *Competition Act* (R.S.C., 1985, c. C-34).

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not seem relevant, since in most instances of undersizing, labelling rules are generally respected.

## Quebec

Quebec's *Consumer Protection Act* states that "No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer." It also states that omission is in itself a representation.

*216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.*

*228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.<sup>168</sup>*

As stated previously, undersizing is always done without the consumer's knowledge. The practice always involves something not being disclosed. Could this constitute omission of a material fact? One thing is certain: only the maker or the manufacturer knows that the prepackaged product has been undersized. He is in possession of important information related to the transaction.

This puts consumers, who rarely commit to memory the amounts contained in the packages of the products that they regularly buy, at a disadvantage. If the merchant clearly indicated that the amount of the product had been reduced, this would provide useful information to consumers, who could then knowingly decide whether or not to purchase the product. Not to mention that the transaction would be fairer!

## Ontario

The 2002 *Consumer Protection Act* considers that omission of a material fact may be included under false or misleading statements<sup>169</sup>. That much is clear! Given that undersizing involves omission of a material fact, we can assert that undersizing violates this law.

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<sup>168</sup> *Consumer Protection Act.*

<[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P\\_40\\_1/P40\\_1.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_40_1/P40_1.html)>

<sup>169</sup> *Consumer Protection Act, 2002*, SO 2002, c. 30, Sch. A, s. 14<[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02c30\\_f.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_f.htm)>

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Ms. Jacqueline Meyer at the Ministry of Consumer Services told us that very few people have ever contacted the ministry to complain about undersizing and that no charges have been filed in the courts with regard to the practice. In addition, she posited that the laws on packaging and labelling are best suited to the regulation of undersizing and indicated that the CFIA was working to improve its regulations.

## **United States**

In the U.S., the agency in charge of enforcing laws and regulations on commercial practices is the Federal Trade Commission (FTC). According to the *FTC Policy Statement on Deception*<sup>170</sup>, omissions can be used to mislead the consumer. For this to be the case, however, an important fact needs to have been withheld from the consumer that influenced his or her decision to buy the product or not.

## **European Union and United Kingdom**

In the European Union consumers are protected from deceptive practices by *Directive 2005/29/EC on Unfair Commercial Practices*<sup>171</sup>.

Before concluding that a consumer has been the victim of undersizing, the European Court of Justice will have to decide whether the provisions of the *Directive* apply to the situation, whether the commercial practice in question is unfair to the average consumer<sup>172</sup> and if there is a causal link between the commercial practice and his decision to purchase - in other words, would the consumer have purchased the property had he known it was undersized and by how much? If all these conditions are satisfied, it will rule that there has been an unfair commercial practice.

Note: There is an unfair practices black list<sup>173</sup>; if the censured practice is on this list, the applicant does not need to prove that it is unfair. Undersizing is not on the list.

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<sup>170</sup> Federal Trade Commission, *FTC Policy Statement on Deception*, 103 F.T.C. 110, 174 (1984) < <http://www.ftc.gov/bcp/policystmt/ad-decepc.htm>

<sup>171</sup> EC, *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')*, O.J.L.149/22

<sup>172</sup> Note: The average consumer is a careful, diligent and relatively well-informed person. See in this regard: Direction Générale des politiques internes de l'Union, *Supra*, note 5, p.43

<sup>173</sup> Directive 2005/29/CE, s. 5

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## 4. Codes of ethics

### 4.1. Canada

In Canada, the Canadian Marketing Association (CMA)<sup>174</sup> has developed a *Code of Ethics and Standards of Practice* to which members must adhere.

The CMA defines marketing as:

Marketing is a set of business practices designed to plan for and present an organization's products or services in ways that build effective customer relationships<sup>175</sup>.

The ACM code applies to all members of society, from the companies (where the marketing agent works) to the consumer. It enshrines the same broad principles as the American Marketing Association (AMA)<sup>176</sup> *Code of Ethics* discussed later.

Some of the principles defined within it can be applied to undersizing. These are, mainly:

- Disclosures must include the exact nature of what is being offered, including the price and all related charges.
- Communications must be clear and accurate. No false or misleading representation must be knowingly made.
- Prior to a purchasing, streaming or downloading activity by a customer, marketing offers must provide all the information necessary to make an informed decision to commit and/or engage. Marketers must take reasonable steps to ensure that the agreement to enter a contract is fully informed and intentional.

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<sup>174</sup> <http://online.the-cma.org>

<sup>175</sup> Canadian Marketing Association, *Code of Ethics and Standards of Practice*, section C.

<sup>176</sup> American Marketing Association, *Statement of Ethics*.

<<http://www.marketingpower.com/AboutAMA/Pages/Statement%20of%20Ethics.aspx>>

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## 4.2. United States

In addition to not respecting the spirit of the *Fair Packaging and Labelling Act (FPLA)*<sup>177</sup>, undersizing goes against the *Statement of Ethics of the American Marketing Association (AMA)*<sup>178</sup>.

This association's code of ethics proclaims six core values: honesty, responsibility, fairness, respect, transparency and citizenship<sup>179</sup>. The members of the association agree to abide by the association's code of ethics. We draw attention to three of these major principles and their consequences that apply directly to the phenomenon of undersizing.

- The responsibility of marketing agents extends to the public, to consumers, organizations and society

Marketers must act with respect for other members of society. The principle of general society can be expressed as follows:

*General society may posit that business transactions are a specialized form of community interaction permitted to its members. These exchanges are mutually beneficial and the society prospers as a result of exchanges when they are regarded just. This concept is expressed in the principle of equivalence which states that for an exchange to be regarded as just, the parties involved are to (1) exchange things of equal value and (2) impose equal burdens on one another*<sup>180</sup>

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<sup>177</sup> Section 1451 of the de la FPLA states: "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of the Congress to assist consumers and manufacturers in reaching these goals in the marketing of consumer good."/ 15 U.S.C. c. 39 (2011) § 1451.

<sup>178</sup> American Marketing Association, *Statement of Ethics*.  
<<http://www.marketingpower.com/AboutAMA/Pages/Statement%20of%20Ethics.aspx>> See in this regard: Omprakash K. Gupta, Sudhir Tando, Sukumar Debnath, Anna S. Rominger, "Package downsizing: is it ethical?" (2007) 21 *AI & Soc* 239 and Edward J. O'Boyle and Lyndon E. Dawson, Jr., "The American Marketing Association Code of Ethics: Instructions for Marketers," (Dec., 1992) 11:12 *Journal of Business Ethics* 921.

<sup>179</sup> American Marketing Association, *Statement of Ethics*.  
<<http://www.marketingpower.com/AboutAMA/Pages/Statement%20of%20Ethics.aspx>>

<sup>180</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, *Supra*, note 178, p.246.

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However, undersizing ensures that the exchange is uneven. Indeed, consumers believe they are buying a good of a certain value, but they are wrong because the price has been changed indirectly. When important information is hidden from consumers, they can no longer purchase freely<sup>181</sup>.

- Not to knowingly cause problems

This principle encourages full disclosure of relevant information. Problems arise when consumers are left in the dark because they do not have the information necessary to make the purchase because the advertiser has not disclosed it. When an advertiser benefits from a result caused by the ignorance of the consumer, he knowingly causes a problem<sup>182</sup>. Knowingly causing a problem is a violation of the principle of a free society<sup>183</sup>.

- Truthfulness in the sales process: honesty and loyalty

This imposes an obligation on the marketing agent to inform the buyer honestly about the product. This requirement ensures that the consumer can make the purchase in full knowledge of the facts. Price is one aspect of the product. The consumer should be fully informed in order to make a free and informed choice. This principle is not respected when the price is increased in an insidious way. Marketers should avoid selling a product using a misleading strategy; they must always act in good faith<sup>184</sup>.

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<sup>181</sup> *Id.*, p.248

<sup>182</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, préc., note 178, p. 248.

<sup>183</sup> *Id.*

<sup>184</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, préc., note 178, p. 248.

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## 5. A certain lack of interest

Although the practice of undersizing is questionable (to say the least) and is widespread throughout the retail trade, regulatory bodies seem to show little interest in it. Moreover, what comments we were able to elicit in interviews remained elusive.

The Ontario Ministry of Consumer Services said that it has not studied the practice<sup>185</sup> and, in Quebec, *l'Office de la protection du consommateur* says that since the declaration of net quantity is displayed on the undersized product, it is difficult to see undersizing as misrepresentation. A representative of the Canadian Food Inspection Agency (CFIA), stated that since this practice seems to respect the laws on labelling and packaging, it is not illegal<sup>186</sup>. In the same breath, they did add that the regulations could be changed.

More surprising still is that undersizing is sometimes presented as beneficial for consumers, for a variety of reasons. One study<sup>187</sup> lists the reasons usually cited to justify this claim. It states that by undersizing:

- products are adapted to the demands of a society in which more and more people live alone
- products will remain fresh and tasty because they are consumed more quickly
- products are available in smaller portions for those who want to eat less
- products are sold in easier-to-use packaging
- products remain affordable.

So, does undersizing benefit the consumer? Is it a good idea for consumers to pay more to get less — and do so without their knowledge?

Obviously not. Perhaps there are some positive side effects to undersizing, but everything indicates that the aim of the practice is first and foremost to raise the price of a product in a roundabout way<sup>188</sup>. Moreover, the so-called merits of these “beneficial” effects are themselves questionable, from several standpoints. “In general, it is a good thing that the portions are smaller,” says Pierre Chandon, a professor at INSEAD and a specialist in food psychology. “Portions have become enormous and there were no benchmarks. If you

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<sup>185</sup> Interview conducted at the beginning of 2013 with Ms. Jacqueline Meyer, Consumer Services Coordinator at the Ontario Ministry of Consumer Services.

<sup>186</sup> Interview conducted at the end of 2012 with Ms. Kathy Twardek, of the Canadian Food Inspection Agency.

<sup>187</sup> A. Adams, C.A. Di Benedetto, R. Chandran, “Can you reduce your package size without damaging sales?” (1991) 24 *Long Range Planning* 86, in O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, *Supra*, note 178, p. 242

<sup>188</sup> O. K. Gupta, S.Tando, S. Debnath, A. S. Rominger, *Supra*, note 178, p. 245

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reduce the size of soft drinks, for example, people will drink less. On the other hand, if you reduce the size of a cereal box, people will not tend to put less in their bowl.<sup>189</sup>”

Other authors prefer to point to arguments based on economic philosophy to justify why the state should not intervene in the issue of undersizing. For instance, invoking the “social responsibility” of the company over this practice would be opposed to the basic principles of the free market.

*Defenders of this approach would argue that the information needed to determine price changes is available to the consumer, with some investigative effort. The consumer has, however, failed to exercise diligence in keeping package and price data for future comparisons. It is this failure to keep pertinent data about the pricing of particular package sizes, which has prevented value comparisons. If the market will bear package downsizing as an effective method of price changes, then no further discussion is relevant. The market has determined the price and should continue to do so.*<sup>190</sup>

This is a common argument that could be used against many already existing consumer protection standards. However, the purpose of these standards is precisely to correct the balance of power between consumers and merchants, to act as a counterbalance to the principle of the absolute will of the contracting parties in the context of a free market.

As stated earlier, the problem of undersizing resides mainly in the asymmetry of the information held by each of the parties. The seller knows more than the buyer:

*This invisible price increase often goes unnoticed by the customers, who unknowingly continue their love affair with the brand, oblivious of the change in the value equation that had initially enamored them to the brand.*<sup>191</sup>

Consumers are in a position of vulnerability, a situation that the merchant obviously seeks to benefit from by misleading them about the price of the product<sup>192</sup>.

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<sup>189</sup> Interview conducted at the beginning of 2013 with Dr. Pierre Chandon, Professor of Marketing at INSEAD.

<sup>190</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, *Supra*, note 178, p. 245

<sup>191</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, *Supra*, note 180, p. 240

<sup>192</sup> O. K. Gupta, S. Tando, S. Debnath, A. S. Rominger, *Supra*, note 180, p. 240

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Seen in this light, while undersizing does not violate the letter of any of the laws instituted to protect consumers, it is nonetheless in violation of their spirit. Although our research has not brought to light any specific rules of law governing undersizing, the practice definitely betrays some of the general principles of equity. We can also mention the obligation to conduct one's affairs in good faith, codified in Quebec under article 6 of the *Civil Code*, which is treated in rather cavalier fashion, to say the least.

Undersizing also violates the ethical rules that marketing associations in both the United States and Canada have voluntarily imposed on themselves. One need only glance at the section devoted to this topic to be convinced of this.

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## In conclusion

As we asserted earlier, undersizing allows manufacturers to increase the price of their products without the consumer noticing. This is no trivial matter.

Undersizing has an impact on consumers' purchasing decisions. If they realize that they are getting less for their money when they buy a product, maybe they will buy another one.

By the same token, undersizing also has an impact on competition.

In Canada, there are no laws to counter the practice.

In Quebec, consumers do have a tool to detect the practice (posting the price per unit of measurement), but it can only be used in stores equipped with scanners and on regular-priced items.

We consider it important to regulate undersizing, or at least to equip all Canadian consumers with the tools they need to recognize it whenever it arises.

Our recommendations are as follows:

### Our recommendations:

#### To the federal and provincial governments:

- Put undersizing on the list of deceptive packaging practices.
- Amend the *Competition Act* (Canada), the *Consumer Protection Act* (Quebec) and the *2002 Consumer Protection Act* (Ontario) to ensure that undersizing is classified as a deceptive trade practice.
- Set up an awareness campaign, in cooperation with government consumer protection agencies and consumer associations, to ensure that the public is better informed about undersizing.
- Publish a list of companies that practice undersizing, the tactics they employ and the price increases these represent.

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- Provide funding for studies to learn more about undersizing (as well as other similar tactics), with the ultimate aim of improving consumer protection.

**To the federal government:**

- Make the display of unit pricing compulsory everywhere in Canada, even on sales items, with penalties for those who do not comply.
- Do not repeal the regulations on standardization of food containers.
- Amend the *Competition Act* so that the term "misrepresentation" includes the omission of important information, as is the *Consumer Protection Act*.
- Require that the principal display panel of any product that has been undersized contains a clear indication to consumers that the product has been undersized and by how much.

**To merchants:**

- Adopt the display of price per unit of measurement, even on sales items.
- Make sure that price per unit of measurement is displayed in a way that is easy to read and understand.

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