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WORKING PAPER NO. 17

PUBLIC PARTICIPATION IN THE REGULATORY PROCESS: THE ISSUE OF FUNDING

by

Kenneth G. Englehart LL.B. with
Michael J. Trebilcock
University of Toronto

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Résumé

Dans la présente étude, les auteurs examinent si le subventionnement, par l'État, de la participation de groupes d'intérêt public au processus de réglementation peut être justifié. Les "groupes d'intérêt public" sont définis comme étant des institutions représentant de grands segments de la société qui ont généralement de la difficulté à recueillir les fonds nécessaires pour intervenir dans les décisions en matière de politique ou de réglementation. "Le processus de réglementation" est interprété au sens large et comprend les débats officiels devant les organismes de réglementation, les audiences tenues par les comités législatifs, les commissions royales d'enquête, les groupes d'étude et autres sur des questions de réglementation publique, ainsi que les rencontres représentatives officieuses où les "plaidoyers" en faveur d'une cause peuvent être adressés aux politiciens ou aux bureaucrates en vue d'influencer les politiques.

Les auteurs de l'étude soutiennent que certains genres de groupes d'intérêt sont susceptibles d'être systématiquement sous-représentés dans le processus de réglementation. Il s'agit de groupes dont l'intérêt global des membres peut être grand, mais dont l'intérêt des membres individuels est souvent faible.

En d'autres termes, ces groupes représentent, la plupart du temps, des intérêts considérables dans leur ensemble qui se répartissent sur un grand nombre de membres individuels. Les groupes de consommateurs et d'environnementalistes sont des exemples classiques. Par exemple, les consommateurs de services téléphoniques peuvent avoir, globalement, un grand intérêt à s'opposer à une hausse non justifiée des tarifs, mais un faible intérêt individuel à cet égard. Par contre, la compagnie de téléphone a un très grand intérêt concentré à obtenir cette augmentation des tarifs.

Dans les situations où les intérêts sont, d'une part, très concentrés et, d'autre part, dispersés chez un grand nombre de personnes, les déséquilibres dans la représentation sont presque inévitables. Il est difficile pour les groupes aux intérêts dispersés de regrouper leurs membres pour former une présence collective efficace, en raison des coûts plus élevés de cette organisation et de la tendance d'un grand nombre des membres à laisser aux autres le soin de payer le coût d'une intervention, même s'ils doivent en bénéficier.

Les auteurs examinent les avantages et les désavantages possibles du subventionnement public des groupes d'intérêt, dans le but de redresser les déséquilibres de la représentation. Ils étudient des données sur l'étendue de ces déséquilibres. Divers mécanismes de financement sont ensuite évalués, tels que le

remboursement des frais par les organismes de réglementation, la création de bureaux gouvernementaux pour la défense des groupes d'intérêt, l'affectation d'avocats auprès des organismes de réglementation, des subventions directes du gouvernement et des régimes de stimulants fiscaux permettant aux membres des groupes admissibles de réclamer un crédit ou une déduction d'impôts pour leurs cotisations.

Les auteurs arrivent à la conclusion que les groupes dont les intérêts sont répartis chez un grand nombre de membres devraient être encouragés à participer au processus de réglementation, soit par un programme de subventionnement public direct des groupes, soit par un régime de crédits d'impôt (à leur choix) dans le cas d'activités générales de représentation, ou encore par le remboursement des frais par les organismes de réglementation particuliers dans le cas de comparutions officielles devant ces organismes.

Summary

This study examines the case for public subsidization of the costs of participation by public interest groups in the regulatory process. "Public interest groups" are taken to refer to organizations who represent large segments of society that generally have difficulty mobilizing resources in order to influence political and regulatory decisions. "The regulatory process" is interpreted expansively and refers to formal proceedings before regulatory agencies, hearings by legislative committees, Royal Commissions, Task Forces and the like on issues pertaining to government regulation, and informal representational settings where advocacy efforts can be directed to politicians or bureaucrats in an attempt to influence regulatory policy.

The study argues that certain kinds of interest groups are likely to be systematically under-represented in the regulatory process. These are groups where the aggregate interest of members may be large but the interest of individual members may be small. In other words, these groups typically entail large aggregate interests that are thinly dispersed over many individual members. Consumer and environmental interests are the classic examples of such interests. For example, consumers of telephone services may have a large aggregate interest in resisting an unjustified rate increase but small individual interests to the same effect. On the other hand, the telephone company has a highly concentrated interest in securing the rate increase.

In situations involving highly concentrated interests on one side and thinly spread interests on the other, representational imbalances are almost inevitable. Free-rider and transaction cost problems will generally inhibit the thinly-spread interests from organizing an effective collective presence.

The authors explore the theoretical advantages and disadvantages of public subsidization of public interest groups to redress representational imbalances. Evidence on the extent of these imbalances is examined. Various funding mechanisms are then evaluated. These include cost awards by regulatory agencies, government advocacy offices, staff counsel to regulatory agencies, direct government grants to groups, and tax incentive schemes whereby members of qualifying groups can claim a tax credit or deduction for membership contributions.

The authors conclude that thinly-spread interest groups should be encouraged to participate in the regulatory process by either a direct government group grant programme or tax credit scheme (their preferred choice) in the case of general representational activities, and by ad hoc cost awards made by individual regulatory agencies in the case of formal representational activities before regulatory agencies.

CHAPTER I

PUBLIC PARTICIPATION IN THE REGULATORY PROCESS

Introduction: The Nature of the Issues

In Responsible Regulation, the Interim Report of the Economic Council of Canada, the Council made recommendations which are designed to improve the regulatory process in Canada. Many of these recommendations involve increasing the importance of input from the public. The Council recognized the importance of consultation with individuals and groups in the initial stages of regulatory design.[1] They explicitly encouraged governments to make use of informal procedures to consult with interested parties. The report also calls for the use of prior assessment procedures to assess the costs and benefits of proposed major, new regulations.[2] Following the publication of the Regulatory Impact Analysis Statement (RIAS), members of the public will be allowed to submit comments. The Interim Report also outlines procedures for periodic evaluation of existing regulatory programmes.[3] After such an evaluation is made, the resulting evaluation report will be made public. The public will then hopefully scrutinize and comment on the report. Furthermore, all evaluation reports will be tabled in the Legislature and referred to a Legislative Committee. This Committee will hold hearings and receive briefs. This is a further forum where public input can influence the decision making process.

The Interim Report clearly indicates that there is a risk associated with increasing the importance of public input. The Report

states: "The problems arise from the simple fact that some intersts are better able to organize themselves and make their views known to the relevant decision makers. In particular, smaller, more tightly knit groups of individuals with large stakes in the outcome of a decision will have an advantage over larger groups of individuals with small stakes in a specific issue."[4] The Council goes on to state that it is therefore essential that public interest groups be given public funds to participate "in the processes by which decisions are made concerning regulation."[5]

The Council realized that in designing a mechanism to provide funds to assist public interest groups, many questions need to be answered. Specifically, they identified the following questions:

(1) Who shall be funded?

(2) How much should they get?

(3) Should funding be granted on a general basis or only for specific issues?

(4) Should it be linked to the "quality" or "contribution" of the intervention?

(5) What degree of control should be exercised over the use of the funds?

(6) In what sense is the government to be held politically responsible for the use of the funds?[6]

In the course of this report we will address these and other issues in proposing mechanisms for funding public interest groups. It is important to define what we mean by public interest groups. We mean simply organizations who represent large segments of society that generally have difficulty mobilizing resources in order to influence political decisions. We do not mean to imply that these groups have any special claim to represent the public interest. Rather they represent interests which are often under-represented before decision makers who are empowered to determine issues in the public interest. Examples of public interest groups include consumer and environmental groups. Nor do we wish to imply that these groups are more virtuous than other groups in society. In describing the various actors in the political process (politicians, interest group leaders, etc.) one analyst has said:

"...let us state most emphatically that we take the view - indeed believe - that in considering the players in the roles we are about to describe, the important differences among them arise from differences in the rules under which they are selected and the rules under which they are rewarded and punished. There are few, if any, significant differences among the games in the intelligence, integrity and public-spiritedness of those who play them."[7]

This observation applies when comparing public interest groups with other groups in society.

One important question is "at what stages in the decision making process should public interest interventions be funded?" We will of course examine participation in consultative processes, prior assessment procedures and periodic review hearings. We will also look at public interest intervention in the hearings of regulatory agencies. We will consider public interest lobbying in the legislature and the bureacracy. Some time will be spent examining the extent to which public interest groups should be funded to educate the public about regulation or to attempt to mobilize public support for, or opposition to, a particular regulation.

One definitional note must be made. In this paper we will be considering all types of administrative agencies. Generally speaking we will use the term "regulatory agencies" to refer to statutory regulatory agencies, prior assessment and periodic review hearings as well as virtually any public body that holds hearings or receives submissions.

Chapter 2 looks at the case for funding. Here we examine arguments that indicate that large, diffuse groups will be underrepresented in the regulatory decision making process. We also look at counter-arguments which assert that large, diffuse groups are not underrepresented, or that if they are, funding is not a sound solution.

Chapter 3 outlines the present level of public participation. Some will, of course, assert that this level is sufficient. Others will argue that it is too low. Chapter 3 will at least attempt to ensure that there is some agreement as to what the actual level is.

Chapter 4 looks at the various methods of funding groups. These include tax incentives, cost awards, direct grants and other mechanisms. Our approach here is not to necessarily select one particular method of funding. We explore the possibilities of using a mix of funding techniques.

Chapter 5 examines the experiences of various administrative agencies with the funding of under-represented groups. While we will concentrate on the Canadian experience, we will also examine the U.S. and other common law jurisdictions. Finally, in Chapter 6 we outline our recommendations.

Chapter I

Footnotes

1. Responsible Regulation, An Interim Report by the Economic Council of Canada, Nov. 1979, at p. 74.

2. Supra., note 1 at p. 76.

3. Supra., note 1 at p. 78.

4. Supra., note 1 at p. 82.

5. Ibid.

6. Ibid.

7. Hartle, Douglas G., Public Policy Decision Making and Regulation, (Toronto: Institute for Research on Public Policy, 1979), at p. 60.

CHAPTER II

THE CASE FOR FUNDING: AN EVALUATION

1. The Nature of the Public Interest: The Policy Makers' Decision Calculus

We will begin by describing a model showing how the actors in our political system behave, how they interact and the type of regulatory structures that result. We will look at the problems that arise and point out how the funding of public interest groups can solve some of these problems. First, let us look at the Legislature.

a) Politicians

The general approach taken in our analysis is to view politicians as individuals who are attempting to get elected by providing voters with the policies that the latter group supports. Politicians therefore are characterized as vote maximizers.[1] Politicians "will adopt whatever policies are required to get themselves elected or re-elected as the case may be. In other words, collective decision-making is designed not to further 'the public interest' which on the view argued here is a concept without relevance and probably of little meaning, but to establish some acceptable state of social equilibrium among competing interests, out of which an effective coalition of political support can be forged."[2]

Of course, this view is only a useful generalization. Hartle states that:

"If we were to try and capture the single most important and persistent objective pursued by a ministry it would undoubtedly be to remain in power. For the opposition parties it is, of course, to gain power.....But politicians, like everyone else

(excluding psychopaths!) have feelings of altruism, a concern for their country, and the well-being of other individuals .... some politicians some of the time are willing to risk their careers by pushing for the adoption of policies ... that have little public acceptance....the daily bread of political compromise is leavened by the yeast of leadership." [3] Politicians, then, can at times engage in non-vote-maximizing behavior.

We can use the analogy of an economic market to talk about the interactions of politicians and voters as a political "market." In the paper "Markets for Regulation", Trebilcock et al. state: "We can view the political world as a 'market' where individuals bid votes or other forms of influence for their political party in order to receive 'benefits'. Politicians then try to earn this political support in return for a supply of promises." [4]

By looking at the political world as a market we can explain why politicians generally but not always maximize votes. In a private market which is not perfectly competitive, suppliers will generally engage in profit-maximization but will not be driven out of business if there are some excess profits which can be taken in the form of non-profit maximizing behavior. Similarly, political "markets" in Canada are not perfectly competitive. Most political markets have only three or four parties. The dynamics of small numbers competition will tend to force them towards the centre of the political spectrum.[5] The parties therefore will tend to have fairly similar platforms. (This is only true if there is a bell-shaped distribution of voters' preferences. If the voters are polarized

(e.g., as in Northern Ireland), political parties will tend to have radically different platforms.)[6]

Political markets differ from most private markets in that each election represents a decision on (or "purchase" of) policies regarding hundreds of different issues. This means that there are not accurate market signals for each individual issue. The fact that political "markets" are not directly analogous to perfectly competitive private markets means as mentioned above that politicians can engage in non-vote-maximizing behaviour. However, like firms in private markets they try to persuade voters (or "buyers") to prefer their policies (products). Also, like private producers, they are very sensitive to the views of their "buyers". Voters convey their views to politicians by lobbying, as well as voting.

Lobbying by various groups in society is an acknowledged and accepted part of our democratic system. Groups representing the public as producers (i.e. businesses, professional organizations and unions) tend to be active in lobbying efforts. The same is less true of consumer, environmental and health and safety groups.[7] Hartle describes the lobbying activities of corporation executives:

"Investing in manipulating government decisions one way or another, where the potential benefits are expected to exceed the costs, is just part of the job. There are many routes that may be followed to this end. Take a bureaucrat or politician to lunch.

Pay a professional lobbyist with the requisite 'contacts' to do so. Write a letter. Appear before some tribunal. Call a press conference and issue a press release. Proceed through an industry association of which the corporation is a member."[8]

Politicians are likely to be influenced more by the viewpoints and information presented by groups that are heavily engaged in lobbying. Hartle writes, "There are undoubtedly many strong pressures constantly brought to bear on governments by interest groups to obtain favourable policies. No doubt these forces are, to a considerable degree, countervailing, as the so-called pluralists would have us believe. But there is no reason to believe that the resulting equilibrium reflects much more than the resolution of the forces that are readily organized and already have a great stake in the outcome."[9]

Producer associations and professional lobbyists, then, exist because politicians do not have perfect information about the effectiveness of various policies and the voter's perceptions of these policies. Most significantly politicians are interested in the effect of their policies on the marginal voter (that voter who does not currently support them but who is most likely to give support given a small change in the politician's platform). In the Choice of Governing Instruments, the authors state:

".....this form of lobbying will attempt to provide information that purports to reveal political preferences of marginal voters (not necessarily accurately), or threaten, or attempt to change those preferences so as to be congruent with those of the interest

groups in question, thus forcing changes in policy consistent with the political party's vote-maximizing calculus."[10]

Producer associations and lobbyists also communicate information to their members to keep them informed as to the responsiveness of politicians to their demands and the effectiveness of the legislation and regulations enacted in response to these demands. If voters are made aware of what politicians are or are not doing for them, the politicians cannot afford to ignore their preferences in determining policies. Similarly "groups of voters (interest groups) may find it to their advantage to provide subsidized, selective, information to other groups of voters in an attempt to modify their preferences and so in turn influence the vote maximizing calculus of politicial parties."[11]

b) Bureaucrats

The bureaucracy is another key group in the decision making process. This group is at least de jure controlled by the legislature. Therefore, to a certain extent they too are constrained to implement policies which will maximize votes. However they are less influenced by political pressures than are politicians. They may not lose their jobs if the government falls.[12]

Many observers feel that bureaucrats will endeavor to increase their pay, power and prestige by advocating government policies which will involve a larger role for their department or ministry.[13] A contrary view is that "the most senior public officials, particularly those who support ministers with collective responsibilities

to the Cabinet as a whole,....resist as strongly as their influence allows more government intervention. They feel that the burdens they carry are already staggering and they certainly do not welcome additions."[14]

It is important to realize that top level bureacrats have policy making roles in the government. Presthus, in a study of one thousand directors of interest groups, shows that 40% of the groups regarded the bureacracy as their main target of interest. In contrast, 19% of the groups described the Cabinet as their primary target.[15]

c) Regulators

Regulators generally have even more independence from the political process than do bureaucrats. This is due to the fact that their tenure is usually lengthy and fixed.[16] However, there are many methods by which the legislature can control regulatory agencies. Politicians can exercise control by issuing policy directives, hearing cabinet appeals, amending the existing legislation which set up the agencies, making appointments, approving budgets, and by giving political and moral support. The recommendations of the Economic Council of Canada will leave considerable room for political control.[17] To this extent then, the boards may be constrained to act in a vote-maximizing way.

The regulatory agencies like the other actors in the process are heavily dependent on the information presented to them by the parties they regulate. It is true that they may have research staff who can undertake empirical research. However, much of the important information is not the sort which can be obtained from analyses

of market data. For example, a member of an industry may explain how his operation will be hurt by a particular regulation. An important part of a party's submission may be his analysis of the legal and public policy issues in a case.[18]

Chapter III will indicate that members of regulated industries are overrepresented at agency hearings. Naturally, this will mean that the information, policy analyses and legal interpretation presented at the hearing will favour the regulated industry. This will tend to influence decisions of the agencies in favour of the regulated firm at the expense of other groups in society. This problem can be alleviated by encouraging and subsidizing public interest interventions at agency hearings.

It is important to realize that capture theories which are perhaps useful in explaining the behaviour of regulatory boards in the United States are not as useful in explaining the Canadian Experience. According to more extreme versions of the capture theory, regulatory agencies are captured by the regulated industry as a result of two factors.[19]

1. The members of the agencies are picked from the ranks of the regulated firms and are therefore sympathetic towards them.

2. The members of the agencies frequently work for firms in the regulated industry after their stay with the agency. Therefore, they may bias their decisions in favour of the regulated firms in order to be rewarded with a good job with the regulated industry upon retirement from the agency.

The above factors are not present to a significant extent in the Canadian regulatory environment. A study of the membership of federal regulatory boards indicates that a great majority of the appointees come from the public sector, including politicians and bureaucrats.[20]

This distinction between the U.S. and Canadian regulatory environment is significant. That is, if an agency is captured by a regulated industry it may be of little value to have the views of public interest groups put forward at the hearings. However, when agencies are honestly trying to decide issues on the basis of the information before them, then providing new perspectives and data through public interest participation may be very valuable.

Although the capture theory as outlined above (which we could call the "strong" version of the theory) is not applicable to the Canadian regulatory scheme, a "weak" version of the capture theory may have relevance. That is, regulatory agencies that are persistently presented with one particular point of view may come to accept that point of view. That is, they will begin a new hearing influenced by the conclusions they came to in previous hearings. In fact, they may be so committed to the

views they have come to accept that they may be reluctant to accept alternative views as valid and useful. The point is that this type of "capture" can be remedied by the introduction of new views and information.

d) Summary

We see from the above analysis that political decisions can be influenced in two ways. (1) Information can be transmitted to politicians, bureaucrats, and regulators; (2) groups of voters can be kept informed as to how well politicians are favouring their interests, thereby becoming marginal voters. These marginal voters can influence the behaviour of politicians who in turn can to some extent control the behaviour of bureaucrats and regulators.

Therefore, effective policy making requires balanced representation in lobbying efforts both with legislators and civil servants. It also requires balanced representation in advocacy efforts before regulatory agencies. We need a theory to explain the under-representation of public interest groups. It is to this question that we now turn.

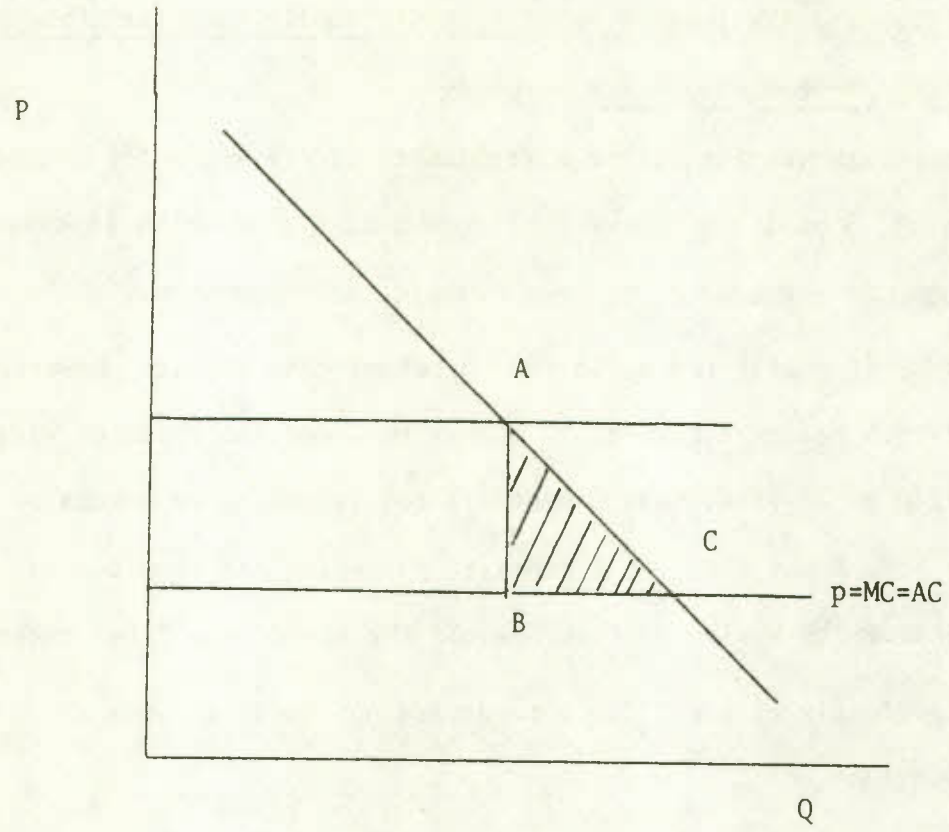
2. Arguments for Supporting Public Interest Groups

a) The Nature of the Regulatory Process

This section will explain why it is that some groups will have more difficulty than others in mobilizing their resources in order to appear before regulatory agencies. Most people will act only if it is worth their while to do so. That is, if the benefits of appearing

before an agency are greater than the costs, they will appear before the agency. Of course, the benefits are not always financial. Some people will appear before a regulatory agency as a matter of principle. That is, they feel they have been wronged and they want redress. However, for most people their actions in regulatory matters will largely be based on pecuniary concerns.

Typically regulatory board decisions will have a very large impact on each firm in an industry. However, the impact on each individual who is not a producer in that industry will be very small. For example, say a decision of an agency restricts competition among the members of an industry. They can then charge a somewhat higher price. This higher price may increase profits in the industry significantly. The impact on the consumer may be a few pennies per item and consequently may cause each household one or two dollars loss per year. Therefore, a rational consumer will not spend more than one or two dollars to make an intervention before a board. Thus, we would not expect an individual consumer to appear before regulatory agencies. However, in aggregate the consumers lose more than the producers gain. That is, in the diagram below consumers lose what the producers gain plus the triangle A B C. So the consumers end up losing more than the producers gain.



This example demonstrates the main problem associated with regulation. That is, a small group, each number of which stands to gain significantly from the regulations predominates over a large group where each member will consequently lose only a little. Examples include tariffs, entry controls and subsidies. Even the formulation of health and safety regulations may be influenced by some members of an industry so that they act as a barrier to entry for potential entrants to that industry. Similar problems are caused when regulators are committed to imposing costs on a small group of firms in order to provide benefits to a wide diffuse group. The firms may convince the regulators to water down the regulations as much as possible. This can happen, for example, with health, safety and pollution regulations.

b) The Organizational Disabilities of "Public Interest" Groups

(i) Free-Riders - Public Goods

A group intervention before a regulatory agency is in the jargon of economists, a public good. A public good is a good which if consumed by A can also be consumed by B. For example, an apple is not a public good. If A eats the apple then B cannot also eat it. However, if A intervenes before a regulatory agency to lower the price of widgets and the price is lowered, then B benefits too (assuming he purchases widgets). Now, B may not give A money to pay A for his time and expenses. Economists would say that B would therefore be a "free rider". It may be perfectly rational for B to decide not to contribute to A's intervention.

B reasons that if he does not pay his share, others will, and he will be represented without having paid. Furthermore, he reasons that if he does pay, his contribution relative to the entire sum needed, is so small that it will not significantly affect the probability of the project getting off the ground. So consumer B will not contribute. All other potential contributors might well reason the same way and no or few contributions will be made.

This example shows that it may be very difficult for someone to solicit money from a large group of individuals in order to accomplish some worthwhile aim like appearing before a regulatory board. In this way if, for example, a consumer wants to appear before a board he may have to finance it himself or with few supporters. However, as an indi-

vidual he probably stands to gain or lose only a few dollars as a result of any one regulatory hearing. This means that it is probably not worth his while to spend the large amounts of time and energy necessary for an effective regulatory intervention. Of course it will also not be worth his while to hire an expert and/or lawyer to do the preparation for him. Lawyers and experts can be very expensive since regulatory matters are often very complex. It can cost several thousands of dollars to make an effective intervention. Clearly it is generally the firms affected by the regulation who will find it worthwhile to spend this much money. Quite often at regulatory hearings we do in fact see only very large firms represented.

So far we have been using the example of an appearance at a regulatory hearing. However, the same comments tend to apply to lobbying activities. Hiring lobbyists can be very expensive. Lobbying on one's own can involve a great deal of time and effort. Therefore again, it is quite often only highly concentrated interests that lobby.

However, it is clear that some individuals and firms can group together to influence regulatory outcomes. For example, hardware store owners, nurses and manufacturing firms have trade associations which conduct lobbying efforts as well as performing other

functions. Even consumers and environmentally concerned citizens have associations. However, it is true that producer groups (that is groups composed of persons or firms that have the same occupation or business) can mobilize many more resources than can other groups. We now turn to a discussion of the ways groups can overcome the free-rider problem.

(ii) Transaction Costs

The transaction costs involved in forming a group are lower when a group is small than when it is large. This explains why a producer group composed of, say, furniture manufacturers will be more effective in organizing than will, say, furniture consumers. The latter group is in effect composed of all of society. The former group comprises one relatively small segment of society.

Transactions costs are lower if each contributor feels that the contributions of others are contingent on his contribution. That is, if each member feels that others will pull their weight so long as he does not chisel on them, he will feel an obligation to contribute. This sense of interdependence arises where the members know each other and/or perceive themselves as having a common goal. This is why smaller producer groups that meet at annual meetings and in the course of their business and social lives find it easier to group together to form powerful organizations. Moreover, members may know who has contributed and who has not. Those who do not contribute can be contacted and convinced

to contribute. Now it is easy to see that a large, diffuse group such as consumers, or citizens concerned about the environment will not have the sense of interdependence which leads to lower transactions costs and facilitates forming powerful groups. Not only are the costs of forming an effective group lower for small groups but, as explained above, in regulatory matters the benefits per member are often much higher for small groups. Therefore, higher transactions costs can be tolerated by these small groups. For example, as we said above, individual members can be contacted personally and asked for contributions. With large groups in regulatory matters where each member stands to gain relatively less, his expected contribution will be correspondingly less. Therefore, less intensive methods of solicitation must be used. For example, members can only be contacted by mail and asked to contribute.

Mancur Olson, in his classic book, The Logic of Collective Action, calls very large groups, "latent" groups. He states that "only a separate and selective incentive will stimulate a rational individual in a latent group to act in a group-oriented way." Selective incentives involve either "coercion of the individuals in the group or ... positive rewards to those individuals..."[21] Coercion can involve for example, legal sanctions. For instance, unions have the power to exert compulsory contributions from members. Therefore, they can provide collective goods such as lobbying for their members.

Lobbying organizations usually use positive rewards. "An organization that did nothing except lobby to obtain a collective good for some large group would not have a source of rewards or positive selective incentives it could offer potential members. Only an organization that also sold private or noncollective products, or provided social or recreational benefits to individual members, would have a source of these positive inducements."[22]

An example of the phenomenon that Olson describes is the Consumers Association of Canada. This organization solicits funds by selling a magazine along with membership in the organization. This magazine contains information about the quality of various consumer goods. It is probably the receipt of this magazine rather than a desire to contribute qua consumer that motivates most members to subscribe.

Thus, we see that transactions costs are higher for large groups. Also, where the benefits per member are larger (as is often the case for small producer groups) more expensive and effective solicitation techniques can be used. Therefore, powerful associations are more often formed by small producer groups than by large, diffuse groups.

Large diffuse groups can only organize when they can coerce contributions or offer non-collective benefits.

(iii) Information Costs

Another problem is that members of broad, diffuse groups may not be informed as to what impact a regulatory policy might have on them. Casual empiricism would suggest that many Canadians are uninformed about the nature or extent of government regulations except as those regulations affect them as producers. This fact can be understood as a form of rational ignorance. For example, what decisions would a rational citizen make regarding his expenditure on information about regulations in a certain industry? The citizen has a certain prior expectation about the potential benefits of a search for information. If he is employed in that industry he will expect that the information could be extremely valuable. He wants to stay informed about something as important as the government regulation of his livelihood. If he is not employed in that industry he will probably expect that the information will be considerably less valuable. That is, his yearly expenditure on the products or services of the particular industry may only be a few dollars.

The citizen also has a prior expectation about the costs of acquiring the information. If he works in the industry he will probably be familiar with the jargon, concepts and problems of the industry. He also has ready access to people who will be able to inform him about the nature of the regulations. The consumer, however, may have

no expertise whatever in these matters. The regulations will seem to him to be an inpenetrable, technical mass. Therefore, the rational citizen may well decide to become informed about the government regulations that affect his livelihood. He may well decide however, to stay ignorant of the regulations that affect his expenditures.

Clearly, though, it can be in society's interest to have citizens who are aware of the nature and extent of regulations that affect the environment, and the price, quality and type of products they buy. Informed citizens could convey their preferences to politicians. Furthermore, some might be able to make a useful submission to a regulatory proceeding. In this way, policy makers would know what individual citizens prefer regarding regulatory matters. Therefore, it seems legitimate to subsidize the acquisition of information about regulation by the public.

Public interest groups would seem to be an ideal two-way conduit of information. Part of their traditional function involves providing information to regulators and politicans. They are also constantly engaged in mobilizing public support for their policies. In performing these two functions they transmit information regarding regulation to the public and information regarding public perceptions to politicians and regulators.

Public interest groups are well equipped to transmit information to the public in such a way that it is comprehensible to them. For example, by publishing newsletters, magazines guidebooks, or press releases the

public interest groups could provide individuals with condensed and easy to understand information. The groups could keep their members in touch with the major issues. In this way the cost to the individual of acquiring information about regulations will be reduced.

(iv) Enhanced Sense of Political Participation

The above analysis uses a consequentialist outlook. Instead of focusing on the outcomes of the process we could instead focus on the process itself. That is, in a democratic society it is unfair if only some groups are represented before decision makers. This is especially true in the case of regulatory agencies that are mandated to determine issues in the public interest. In order for the decision making process to be valid, representatives of all members of the public should have a say.

Encouraging all members of society to participate in democratic institutions is a value which is given a high priority in Canada. For example, citizens are given time off work so that they can vote. Furthermore, contributions to political parties are allowed as a tax deduction.[23] Our values also indicate a commitment to ameliorating the effect of income disparities on access to the legal system. For example, those with low incomes are entitled to legal aid in order to go before the courts. It seems to be consistent with the established values in our society, therefore, to provide financial assistance for participation in non-traditional legal forums such as regulatory agencies.

Subsidizing public interest groups should give the public an enhanced sense of political participation. Frequently we hear that people feel threatened and overwhelmed by "red tape" and regulations. Perhaps this sense of frustration could be mitigated if the public knew that groups representing them were actively involved in the regulatory process.

3. Arguments Against Supporting Public Interest Groups

a) Lack of evidence of under-valuation of "Public Interest" Perspectives in Policy Making.

Some critics argue that the political and regulatory processes are not characterized by the predominance of highly concentrated producer groups. These critics point to the substantial successes of environmental, consumer and civil rights groups in obtaining legislative support for their respective constituencies. One must indeed acknowledge that many quality-of-life (e.g., health and environment) regulations have been enacted. These regulations and the institutions that enforce them are very different from the older industry-specific regulation (e.g., airlines, trucking).

Many of these newer regulations are indeed beneficial to the environment and the consuming public, etc., often at the expense of producer interests. The existence of these regulations, however, is evidence of the vote-maximizing behaviour of legislators. Politicians have quite rationally responded to the demands of voters by enacting these regulations. That is, sufficient interest in these matters has been raised by the media and by public interest groups, so that quality

of life issues were perceived by voters as being on the political agenda. The political pay-off in terms of votes, however, usually is realized simply by creating a regulatory structure. Many voters then perceive the politicians as having addressed the problem and secured a solution.

The voters are not nearly as sensitive to the success or failure of the regulations in actually solving the problem. This is because the issues involved in regulation are complex and, as discussed, individuals will generally not have the incentive to be informed. Therefore, although public interest legislation has been passed, the legislation will not always have brought about effective solutions.

Hartle, Trebilcock et al. write:

"...a general prohibition against a class of activities, such as discharge of harmful pollution, may have symbolic appeal. Here, the government may adopt a simple, broad prohibition that secures the political benefit of it being perceived positively by one group of marginal voters as having enacted 'tough' legislation, while allowing for the possibility that regulations or discretionary enforcement will enable the government to engage in low visibility moderation of the perceived effects of the legislation. This strategy depends for its effectiveness upon diffused interest groups facing higher information and organizational costs in monitoring and participating in day-to-day formal enforcement activities than in the initial process of legislative enactment." [24]

This problem cannot be emphasized too strongly. Voters simply cannot stay informed on all the intricacies of day-to-day regulatory activity. They can stay informed regarding key legislative efforts

in areas they perceive as being important. Therefore, it is only natural that their demands for solutions to environmental, consumer and other "public interest" problems are met by politicians who enact promising legislation. However, it is fallacious to generalize from these "public interest" victories on the legislative front and conclude that the war has been won by the diffuse, thinly-spread interests. The engine of voter awareness is absent in the regulatory setting. Therefore, after the initial battle has been won by the public-interest forces, the long, slow war of attrition begins. It is here that the producer interests will tend to prevail.

Public interest groups then, are most needed in the regulatory arena. Funding mechanisms, therefore, while providing for input into all stages of the decision making process, should be designed to ensure that public interest organizations concentrate the majority of their efforts on representing their constituencies in the day-to-day operation of regulatory agencies.

b) Unwilling Riders: Coerced Financial and Political Support for Political Minorities

Some critics argue that while some groups are indeed under-represented, the problem is not solved by funding public interest organizations to advocate policies on their behalf. The reason, it is argued, is that the funded organization may not accurately represent

the views of the client-group. For example, the professional advocates may be more governed by their own personal views and idealogical inclinations than by the interests of their alleged constituency. This problem requires methods of ensuring that public interest organizations are accountable to their client-groups. That is, funding mechanisms must be designed so that the preferences of the client-group are reflected in the views of the public interest organization. This issue will be developed in Chapters IV and V.

A similar problem arises because in many circumstances the client-group represents a diversity of interests. How can the advocate select from these views a single coherent position? For example, assume there is a certain regulation which will require a safety device for a consumer appliance. The addition of this safety device will increase the price of the product. Some consumers may feel that the increased expenditure is worthwhile. Some may not. The problem requires methods of providing funding that ensure that there is more than one public interest group representing major sectors of the public. This will ensure that all important view-points are conveyed to the decision maker.

c) Impairment to the Integrity of the Political Process

The independent regulatory agencies were orignally set up in part in order to insulate expert decision making from the pressures of short-term political opportunism. By funding public interest groups, do we undermine the agencies by encouraging non-efficient or unjust but politically expedient decisions? Such an argument can be made.

By funding different groups, the agency responsible for administering the funds can presumably affect the outcome of regulatory decisions by controlling the amount of funds a given group receives. Politicians have an incentive to fund those groups whose political support will be valuable. These groups may not be large diffuse groups for the reasons specified in Ch. II(2). Therefore, the funding process may not help under-represented groups so much as it will help politically influential groups. In short, there is a danger that the funds will go to the wrong groups. It is clear that the whole notion of funding under-represented groups may not be useful if the funds do not go to large, diffuse groups whose perspectives are under-represented in various proceedings.

d) Exacerbation of Social Conflict

In 2 (iv) we pointed out that by involving all groups in the decision making process, we legitimize the decision making process in a pluralist system. The contrary position is, of course, that such involvement only exacerbates social division and causes conflict. In other words, some would argue that if regulatory institutions are a battle ground of competing interest groups promoting their respective self-interests, this will increase public mistrust of the regulatory process.

This criticism, however, ignores the current reality of the regulatory process. Regulation already involves, in a large number of cases, competition by various producer and other interests for the adoption of regulatory policies which are most advantageous to them.

Funding of public interest groups then, will not create conflict where there was none before. Rather, it will alter the nature of the conflict so that it involves all affected parties. Furthermore, we believe that a regulatory process characterized by competing groups, each having an opportunity to be heard, can be a healthy and efficient means of making regulatory decisions.

e) Increased Delays and Costs in Public Decision Making

If public interest groups are encouraged to intervene more extensively and frequently at hearings, hearings will take longer on average.[25] This is probably one of the more significant costs associated with increased public interest advocacy. Reference to Chapter III of this report will show that currently, public interest interventions represent a small proportion of total interventions at regulatory hearings.

Therefore, even if funding of public interest groups does increase delays and costs, the increase should be low relative to the current costs associated with the hearings. If, however, there is a concern for increased delays, the funding mechanism can be designed so that these delays are minimized. Incentives should be built into the funding mechanism so that public interest groups are funded only when they add new perspectives and information to the hearing. This will discourage public interest groups from making arguments which merely duplicate points that have already been made.

There is also a real possibility that public interest intervention could lower the total cost of regulation. First, since new information and perspectives will be provided, the regulator can make better decisions. By better decisions, we mean that the decisions will be made after considering possible second-order effects (e.g., the impact on substitute and complementary goods which will result from the decision.) If better decisions are made, there could well be less need for subsequent hearings to deal with new problems. In this way the total number of hearings and the total cost of hearings may decline. Secondly, public interest groups may encourage regulators and policy-makers to favour policy prescriptions that require less regulatory supervision. For example, a consumer group may be able to promote the deregulation of a certain industry. The result would then be fewer hearings. The funding of public interest groups may therefore result in lowering the direct costs of regulation.

4. Conclusion

The above analysis shows that the free-rider problem, high transactions costs and informational deficiencies will cause public interest groups to be under-represented in lobbying efforts and in advocacy before regulatory agencies. This under-representation will distort decision making in the Legislature, in the bureaucracy and before regulatory agencies. Furthermore, it results in a process of decision making that is contrary to widely held pluralist values of representative government.

In order to correct this imbalance, public interest groups need funding. This funding should allow public interest groups to make representations before agencies, and to lobby with regulators, bureaucrats and politicians. Furthermore, these groups should be permitted to use public funds to keep their members informed about regulatory developments. However, the majority of the funds allocated to these groups should be used in advocacy efforts at hearings before regulatory agencies, since the voters are least informed and therefore least effective at the regulatory level.

The funding mechanism should be structured so that more than one group represents large, diffuse constituencies. For example, there should be more than one consumer group subsidized so that different consumer viewpoints can be expressed. Funding should be arranged so that regulatory hearings are not unduly delayed. That is, there should be incentives for groups to present only information and perspectives that other parties will not present. The funding system should be designed so that funds are channelled not to politically influential organizations but to organizations with under-represented constituencies. The constituencies themselves should be able to influence the flow of funds so that the organizations represent their preferences.

A note of caution should be introduced however. As we have discussed, funding public interest groups will lead to better regulatory decisions because (1) regulators and other decision makers will have new, and useful information and (2) voters can be mobilized by public interest groups.

On the basis of our involvement with the regulatory process we believe that given balanced information, in the long run, decision makers will make the right decisions. In other words factor (1), above, is important. Keynes said in The General Theory,

> ". . . the ideas of economists and political philosophers, both when they are right and when they are wrong are more powerful than is commonly understood. Indeed the world is ruled by little else. . . I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas. Not, indeed, immediately, but after a certain interval; for in the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age, so that the ideas which civil servants and politicians and even agitators apply to current events are not likely to be the newest. But soon or late, it is ideas, not vested interests, which are dangerous for good or evil." [26]

However, if our perceptions are wrong, or if as Keynes suggests, ideas change very slowly, then only factor (2) is important. It may be that political decisions can only be influenced by offering votes, campaign contributions etc. to decision makers. It may be that the free-rider, transactions costs and informational problems are such that the public cannot be mobilized (except at a very high cost) to demand effective, non-symbolic solutions to consumer, environmental etc. problems. If this is so, funding public interest groups may not work.

There are more fundamental criticisms that can be made. That is, we have assumed that where small producer groups prevail over larger, diffuse groups resulting in a non-pareto optimal result, we have a problem. Some feel that this concern is of secondary importance and that we should in fact be concerned with helping those at the lower end of the

income distribution.

It could be argued that we have put too little emphasis on the process. One could argue that what is needed is actual grass-roots involvement in the regulatory process. Therefore, improving regulatory outcomes through the efforts of professional public interest advocates may be unimportant if the citizens are not "animated" to become directly involved.

Chapter II

Footnotes

1. Downs, Anthony, An Economic Theory of Democracy, (New York, Harper & Row, 1957) at p. 51.

2. Trebilcock et al., "Markets for Regulation", in Government Regulation, (Ontario Economic Council, 1978) at p. 33-34.

3. Hartle, Douglas G., Public Policy Decision Making and Regulation, (Toronto, Institute for Research on Public Policy, 1979) at p. 34.

4. Supra., note 2, at p. 12.

5. Downs, supra, note 1, at p. 118.

6. Downs, supra, note 1, at p. 119.

7. Stanbury, W.T., Business Interests and the Reform of Canadian Competition Policy, 1971-75, (Toronto, Methuen, 1977) at p. 27.

8. Supra., note 3, at p. 62.

9. Supra., note 3, at p. 66.

10. Hartle et al., The Choice of Governing Instrument, First draft, (Economic Council of Canada, 1980), at p. IV-31.

11. Ibid., at p. IV-30.

12. Hartle, supra., note 3, at p. 70.

13. Trebilcock et al., supra., note 2, at p. 31.

14. Hartle, supra., note 3, at p. 77.

15. Presthus, Robert, Elites in the Policy Process, (London, Cambridge University Press, 1974) at p. 255, Table 8-3.

16. Roman, Andrew, Regualtory Law and Procedure, in Doern, The Regulatory Process in Canada, (Toronto: 1978) at p. 77.

17. Responsible Regulation, An Interim Report by the Economic Council of Canada, Nov. 1979, at p. 77.

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19. Andrew, Caroline and Pelletier, Rejean, "The Regulators", in Doern, Bruce G., The Regulatory Process in Canada, (Toronto, MacMillan, 1978) at p. 148.

20. Ibid., at p. 151

21. Olson, Mancur; The Logic of Collective Action, (Cambridge: 1965), at p. 51. For a recent critique of Olson, see Terry M. Moe, The Organization of Interests (University of Chicago Press, 1980).

22. Ibid., at p. 133.

23. Income Tax Act, Chapter 63, S.C. 1970-71-72 amended, S. 127(3)

24. Supra., note 10, at p. VI-28.

25. Trebilcock, M. J., "The Consumer Interest and Regulatory Reform", in Doern, The Regulatory Process in Canada, (Toronto: 1978), p. 119.

26. Keynes, John Maynard, The General Theory of Employment, Interest, and Money, (New York: Harcourt, Brace, 1936).

CHAPTER III

EMPIRICAL EVIDENCE OF UNDERREPRESENTATION OF PUBLIC INTEREST PERSPECTIVES

1. The Number of Public Interest Groups in Canada

There is very little data on the number of public interest groups in Canada. In part, this may be because of the difficulty in defining public interest groups. In Chapter I we defined public interest groups as "organizations who represent large segments of society that generally have difficulty mobilizing resources in order to influence political decisions".[1] This definition, though, could include organizations that are not usually thought of as public interest groups. For example, there are many churches that spend a lot of time and resources lobbying for changes in social welfare, immigration and human rights legislation.

We can overcome the above definitional difficulty and determine a useful number, by restricting ourselves to organizations that are primarily involved in public interest advocacy. In the summer of 1978, a study was undertaken by Consumer and Corporate Affairs, in order to assess the nature and number of consumer groups in Canada.[2] Only a list of respondents has been issued by the department. This list, and conversations with personnel at Consumer and Corporate Affairs indicate that the list in fact includes different kinds of public interest groups (i.e., environmental groups, civil liberties groups, etc. are included). The list also includes various organizations that we feel are not public interest or consumer groups for our purposes. The original list contains 195 names. We have deleted: (1) Better Business Bureaus, (2) Canadian University Women's Clubs,

(3) Co-operatives, (4) Credit Counselling Organizations, (5) Credit Unions (6) Home Economics Associations, (7) Information Bureaus. As well, where organizations such as CAC have national and provincial organizations we have counted these as one organization only. The following results were yielded:

PUBLIC INTEREST GROUPS IN CANADA: 1978

Environmental	Consumer	Health & Safety	Civil Liberties	Housing & Tenant	Poverty	Senior Citizen	Other
31	6	3	3	6	5	3	20

TOTAL = 77

On the one hand the above numbers imply a greater amount of public interest advocacy than in fact exists. Many of the organizations are not very active. Few of the organizations intervene in regulatory hearings. On the other hand, the above numbers have a countervailing bias. That is, there are a number of single issue lobbies that may be considered to be public interest advocates (e.g., pro and anti-abortion groups) which are not on the list. Furthermore, the list does not contain public service groups such as the Canadian Cancer Society which could in a sense be considered to be a public interest group. Finally, of course some public interest groups are probably left off the list since it was designed to be a list of consumer groups.

The number of public interest groups in Canada is not large compared with the number of producer lobbying groups.

The former president of the Ottawa chapter of the Institute

of Association Executives recently estimated that there are about 300 trade and professional associations with offices in Ottawa, employing 2000 people and spending more than $122 M. a year looking after group interests. These estimates do not include various associations, like the Canadian Bankers' Association, without Ottawa officers or the millions of dollars spent by corporations directly on "government-relations" (or lobbying) activities. [2a]

2. Public Interest Representation at Regulatory and Policy Proceedings

It is useful to have an understanding of the extent of public interest interventions before regulatory agencies. We have tabulated figures representing the extent and type of intervention in various regulatory proceedings in Canada. These hearings and proceedings were picked because they were generally high profile and important to Canadian public policy. A brief description of each proceeding and the results are set out below. Unless otherwise mentioned the results show the number of interveners who actually appeared at the hearing and made some sort of presentation.

We did not look at intervenors who merely sent in a written intervention' as these are often merely letters of complaint which have little impact on the outcome of the hearing.

The hearings examined were:

1. The CRTC Interconnect case held in 1978.[3]
2. The 1976/77 CRTC hearing to determine the Tariffs for the Use of Support Structures by Cable Television Licenses.[4]
3. The 1977 hearing concerning the Telesat Canada Proposed Agreement with TCTS.[5]
4. The CRTC Bell Canada Rate Increase, 1978[6]
5. The 1980 Canadian Transport Commission, A.T.C. to Consider Applications by C.P. Air and E.P.A. to extend their routes[7]
6. The 1978 C.T.C., A.T.C. hearing concerning the proposed acquisition of interest in Nordair by Air Canada.[8]
7. A 1978 C.T.C., Railway Transport Committee case concerning a C.P. Ltd. Railway relocation.[9]
8. A 1978 C.T.C., R.T.C. case concerning a proposed acquisition by Consolidated Rail.[10]
9. The Preliminary Hearing of the Berger Inquiry. All parties at the Formal Hearings were at the preliminary hearings but some of the parties at the preliminary hearings (e.g. the environmental groups) joined together at the formal hearings.[11]
10. The Canadian Royal Commission on Taxation (The Carter Commission).[12]
11. The public hearings on the White Paper on Tax Reform, 1970.[13]
12. The House Committee considering the Stage 1 Amendments to the Combines Investigation Act, 1974-75[14] Not all parties which submitted briefs were asked to appear at the hearing. The number in each space indicates the number of parties that submitted briefs or appeared before the committee.
13. The House Committee considering the Stage II Amendments to the Combines Investigation Act.[15] The number shown indicates those who appeared or submitted briefs. See 12 supra.

NUMBER OF INTERVENTIONS BY EACH TYPE OF ORGANIZATION

Hearing	Individual Firm	Business & Trade org	Govern-ment	Profes-sional org. & Unions	Public Interest Org	Indi-viduals	Other
1	6	4	6	1	-	-	-
2	2	2	1	-	-	-	-
3	3	3	6	1	1	-	-
4	2	-	3	1	8	3	-
5	11	10	15	4	4	11	3
6	6	1	3	-	-	1	3
7	5	1	3	-	-	-	-
8	6	-	1	3	-	1	3
9	5	6	11	1	21*	8	1
10	15	18	1	7	6	22	7
11	54	52	2	19	14	-	5
12	24	56	0	6	6	0	6
13	41	52	6	1	1	8	40**

* Includes 10 Native Groups

** Includes 23 Marketing Boards

There are two useful generalizations that can be drawn from these numbers. First, public interest groups are not well represented. It should be remembered that these hearings are fairly important. There are many other hearings which the authors examined where public interest participation could be useful where no public interest groups were at all represented. Second, there is a relatively frequent and significant incidence of government intervention.

There are two factors which qualify the usefulness of numbers such as the ones in the above chart. First, the interests of some producers and consumers may coincide in a given case. For example, in the CRTC Interconnect case, consumer groups favoured interconnection. However, some firms which intervened in the case are also consumers of telecommunications services and they too favoured interconnection. This factor then indicates that the under-representation of public interest perspectives may not be as severe as the chart shows. The second factor, however, indicates the opposite. That is, public interest intervention in regulatory hearings often does not use as many resources as advocacy efforts by regulated producers. For example, a regulated firm may hire lawyers and highly qualified experts to prepare its case and appear at the hearing. A public interest group may have non-expert volunteers prepare and present its case. We turn now to a brief examination of the costs of regulatory intervention.

3. The Cost of Regulatory Intervention

The following chart shows some of Bell Canada's costs for its rate hearings.[16]

Year of Hearing	Expense
1968	$760,000
1970	$225,000
1972	$540,000
1973	$430,000
1974	$1,100,000
1975	$570,000
1977[17]	$860,000*
1978[18]	$1,250,000**

* estimated cost in 1977
** estimated cost in 1978

The above costs include: "printing and mailing, hotels and travelling, consultants' fees, newspaper advertizing, legal fees, transcripts, and various other miscellaneous out-of-pocket expenses."[19] They do not include some of Bell's expenses because:

> "The work connected with rate cases is performed to a greater or lesser extent by many various departments of the Company, and is treated as part of the general work of the employees who perform it. It is not possible therefore to determine the total expense related to any rate application."[20]

Clearly intervention in regulatory hearings is an expensive matter. A lawyer's appearance for one day at a regulatory hearing with two days preparation time can commonly cost about $2,000. Economists and other consultants often charge about $300 per day or more for their time. Often too, without this high priced expertise and legal talent, intervenors cannot make a persuasive case at a regulatory hearing.

It is interesting to compare these figures with the amount of funds that public interest groups can allocate for rate hearings. In the 1978 Bell Rate hearing the costs of various public interest groups were as follows:[21]

Consumers Association of Canada	$22,992.88
The Wa-Wa-Ta Native Communications Society	5,081.38
The National Anti-Poverty Organization	
Inuit Tapirisat of Canada	
Tagramiut Nipingat Inc.	55,594.62

These figures illustrate the point that regulated firms often spend a great deal more on interventions than public interest firms. Therefore, simply counting the different intervenors at a regulatory hearing may not give a true picture of the imbalance which exists.

4. Conclusion

Public interest groups are under-represented at regulatory hearings. This is true even at high profile proceedings. The high cost of regulatory intervention prevents underfunded groups from making persuasive presentations.

Chapter III

Footnotes

1. Supra., at p. 3.

2. Robbins, Melanie, Consumer Interest Groups Inventory, (Ottawa: Consumer and Corporate Affairs, August, 1978).

2a. Globe and Mail, Saturday October 25th, p. 11

3. Courtesy of David Fox, Law Reform Commission of Canada.

4. Ibid.

5. Ibid.

6. Ibid.

7. Decision No. 6099.

8. Decision No. 5539.

9. File No. 49844.

10. File No. 498491.

11. Knowles & Waddell, Mackenzie Valley Pipeline Inquiry, Mr. Justice Thomas R. Berger, Commissioner's Preliminary Materials; p. 239-244.

12. Royal Commission on Taxation, Summaries of Spring Hearings, 1963, (Toronto, CCH, 1963).

13. White Paper on Tax Reform, Summary of Public Hearings, 1970, C.C.H. Canada Ltd., 1970, p. iii-vii.

14. Stanbury, Business Interests and the Reform of Canadian Competition Policy, 1971-1975, Toronto, 1977, p. 153.

15. The Standing Committee on Finance, Trade and Economic Affairs, Fourteenth Report to the House of Commons Respecting Bill C.42, p. 123-127.

16. Interrogatories requested by Action Bell Canada on January 10, 1977, Item No. 4, C.R.T.C., Bell Rate Hearing, 15 February, 1977.

17. Vol. 10, P. 2206, L.16 to P. 2207, L.17; C.R.T.C. Bell Rate Hearing, 23 March 1977; Exhibit No. B-76-443.

18. Vol. 6, P. 1061, L.7 to P. 1063, L.25; C.R.T.C. Bell Rate Hearing, 15 May 1978; Exhibit No. B-78-542.

19. Supra., note 16.

20. Ibid.

21. Taxation Order: 1980-1, Canadian Radio-Television and Telecommunications Commission, Ottawa, February 19, 1980, p. 13-21.

CHAPTER IV

THEORETICAL ANALYSIS OF FUNDING MECHANISMS

1. Introduction

In this section we will explore the theoretical difficulties and advantages associated with the various funding mechanisms. The mechanisms are judged according to three criteria. First, how much independence does the mechanism allow the public interest proponent to have? Second, does the mechanism encourage the public interest proponent to be accountable to his constituency. Third, how well does the mechanism encourage a diversity of views. In Chapter V we will examine the real world operation of these mechanisms.

2. Ad hoc Cost Awards in Regulatory Proceedings

a) Introduction

Cost awards, in the present context, involve compensating a public interest group for some or all of the costs it incurs in appearing at a regulatory hearing. These cost awards can be made in two different ways. First, the agency can order a party or parties to the proceedings to pay the intervenor's costs. For example, at a rate hearing the agency could order the public utility to pay the costs of a consumer group that made submissions. Secondly, the agency itself can pay the intervenor's costs out of a fund it has for this purpose. For example, this has been done by various public inquiry commissions.[1]

Cost awards are made by courts in Canada. The law regarding costs in the courts has only limited applicability in the regulatory setting. It is interesting to note that in the United States cost

awards in civil litigation are the exception rather than the rule.[2] That is, when one party sues another, generally speaking, each bears his own legal costs. When the losing side pays the costs of the winning side, this is referred to in the United States as "fee shifting". As a result of the tradition of the American cost rule in the U.S. courts, there is a general reluctance to use "fee shifting" in regulatory agencies.[3] Rather, American attempts at regulatory reform based on cost awards have focussed on cost awards by the agencies from their own budgets.

In a court case in the common-law provinces in Canada, generally speaking, the losing side pays most (but usually not all) of the costs of the winning side. There are two types of cost awards. One is "party and party" costs. This is the usual award. Here the parties receive costs according to a fixed tariff of fees included in the court's rules of practice.[4] These party and party costs will, roughly speaking, provide two-thirds of the costs incurred by the winning side. Courts can in special circumstances award solicitor and client costs. Here the winning side receives substantially all of the legal costs it actually incurred.[5] Courts award party and party costs rather than full costs in order to encourage parties to settle out of court.[6] In most regulatory proceedings however, a hearing must take place by law. "Out of court" settlement is usually not possible. Therefore, full costs would seem to be more appropriate in regulatory hearings than partial costs.

Courts award costs to the winner as compensation.[7] A party who has been completely successful and who has not engaged in misconduct cannot be ordered to pay the costs of the other party.[8] In regulatory proceedings however, we do not award costs to compensate winners or punish losers. Rather, costs are awarded to a party to compensate this party for providing useful information to the proceeding.

Generally speaking, it is reasonable to make the regulated firm pay the costs of public interest groups. The firm will then pass on these costs to consumers in the form of higher prices. In this way, the consumers pay for intervenors to argue their case (and may pay lower rates overall as a result). Therefore at regulatory hearings costs should not be awarded according to who "won" or "lost". Furthermore, very often it will be impossible to determine who won or lost since the decision may represent a compromise between many different views.

As a result of the differences between the rationales for cost awards in courts versus regulatory agencies, the agencies are not bound to follow the cost rules of the courts. Agencies which have the statutory power to award costs can award or not award costs at their discretion. In properly exercising their discretion the board can consider all of the circumstances of the case and the purposes of the hearing.[9]

b) Advantages of Cost Awards versus other Mechanisms

There are advantages and disadvantages associated with using cost awards as a funding mechanism. The main advantage is that cost awards can be used as an incentive to insure that public interest groups do not unnecessarily delay proceedings. Associations can be funded only where they provide useful information and perspectives. These awards need not be made on an all or nothing basis. Therefore, an association could be given half their costs where their presentation was partially useful. Where a group's presentation was solely designed to delay proceedings and/or to embarrass the agency or the regulated firms, costs could be awarded against the group.

Earlier, in Chapter II, we argued that public interest funding should emphasize appearances at hearings rather than lobbying or other levels of decision making. Cost awards are useful, then, because they guarantee that funds are spent where they are needed most.

As well as influencing the forum in which groups intervene, cost awards are a low cost method of ensuring that funds are not spent improperly. Direct grants and similar methods of funding involve the inherent risk that the money will not be used wisely or properly. Conducting audits and requiring detailed reports can be very costly. However, at a hearing it is relatively easy for the agency to see where the money has been used. Of course, the costs may have to be taxed by an agency-appointed taxing officer. However, this should not be too costly since the truthfulness of the claims for costs can be assessed with reference to the submissions of the parties.

Cost awards are a useful device for funding associations of individuals who have no prior history of interventions. That is, most other methods of funding require that the eligible groups be selected according to some objective criteria. Public funds cannot be dispensed to any organization or individual. Therefore, by and large the organizations that are selected will be ones that contain individuals who have some history of responsible public interest advocacy. Cost awards allow funds to be given to groups who have no experience whatever in these matters. So long as their presentation was useful, they can receive funds.

Where costs are awarded against regulated firms, it is the consumer's of the firm's products that end up paying the costs. This is generally fair since they are the ones that benefit from the intervention. Furthermore, regulated firms already pass on the costs of their own advocacy expenses to their consumers. Regulated firms in rate hearings are allowed to add the costs of the hearing to their operating costs and hence to the rate base.

Where the cost awards are made out of public funds, it is of course the taxpayer who pays. However, this does not appear inequitable when one considers that the regulated firms can claim their advocacy expenses as a business expense. In this way, taxpayers subsidize 50% of the hearing costs of the regulated firms. Furthermore, such expenses

are a legitimate use of the agencies' funds. The agencies have usually been mandated to determine issues in the public interest. Funding public interest groups is an expense which it is necessary to incur to carry out this mandate.

c) Problems with cost awards

Cost awards may not go to those groups who truly represent large groups where each member stands to gain or lose a small amount. This is because smaller, better organized groups may seem more "legitimate", in the sense of being more sophisticated. Therefore, we may see funding going, for example, to an association of hotel owners in an air carrier fare hearing. This group might often want the same policies that consumers want. However, they probably already have the resources to make an effective representation. This problem can be solved by requiring groups to demonstrate a financial "need" for funds. As discussed in Ch. IV s. 2 d) (ii) below, this too presents problems. Financial "need" is a difficult concept to apply. An alternative solution is to limit the amount of funding that can go to business groups to some percentage of the total of all costs.

Another related problem is that the agencies may fund groups with appropriate contituencies (i.e., diffused) but with relatively uncontroversial attitudes. For example, agencies could tend to be more generous with groups which do not seek judicial review of agency decisions. Also agencies may be subject to the "weak" capture theory described in

Chapter II. That is, agencies may have certain preconceived notions about appropriate policies. They may then fund groups that will largely confirm these views rather than "rock the boat". There are two solutions to this problem. First, the funding authority can have some autonomy from the rest of the agency. This creates problems, however, since it frustrates one of the key functions of cost awards. Cost awards are designed to reward those groups that provide useful perspectives to the members of the agency that hears the appeal. It is therefore important that these members make general determinations about costs (leaving the detail to a taxing officer.) A second solution may simply be to use cost awards in conjunction with other funding mechanisms. The problem with biased cost awards still remains. However, groups who receive inadequate funds in the form of cost awards can obtain funds from these other mechanisms.

d) Tests to Determine Eligibility for Cost Awards

Many factors must be taken into account when designing a statutory test which directs agencies as to the proper method for awarding costs. Groups should be funded which (1) will provide useful views and (2) represent large constituencies with thinly spread interests.

(i) The Usefulness of the Views

There is some difficulty in describing what is and what is not a useful presentation in a regulatory hearing. For example, a certain presentation may forward a valid viewpoint that would go unrepresented but for a public interest intervention. The agency may

consider it, and find it helpful in thinking about the problem. In the final analysis, however, the policies advocated by the public interest group may not be accepted by the agency at all.[10] In one sense therefore, the presentation was ultimately not useful. However, it would seem that groups should be compensated for this type of presentation. We want to encourage public interest groups to bring all relevant perspectives before the agency so that it can make a proper determination.

The above scenario indicates that it is the uniqueness of the argument that should count rather than its ultimate weight. However, not all new perspectives are needed. Only those perspectives which are based on reasonably sound analysis are to be encouraged. However, the soundness of the analysis can really only be measured with reference to the analysis that the agency finally adopts in its decision.

We see then that uniqueness is a necessary but not sufficient condition for funding. Representations must be unique and relevant. However, applying these criteria to a given submission in a regulatory hearing may be a highly subjective process.

We feel that agencies should recognize the subjectivity of the decision to award costs. They can make this decision by considering the necessity of a particular representation in reaching a fair conclusion in a hearing. We could adopt, for example, the test suggested by the Consumers' Association of Canada.[11] They suggest that costs be awarded to groups that inter alia,

> "effectively represent an interest, representation of which contributed to or could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account the need for representation of a fair balance of interests."

By using a fairness criterion, the agency can consider the uniqueness and relevance of the submission. However, these two factors will not be weighed mechanically, considering only the impact of the submission on achieving a "better" decision. Rather they will be weighed subjectively, with the process tempered by a concern for balanced representation leading to a fair decision.

Two further aspects of the CAC test are worth considering. First, this test requires "effective" representation. "Effectiveness" here presumably refers to a requirement of professional competence in the presentation. For example, the submissions should not be too lengthy or confusing. In measuring "effectiveness" and indeed in measuring the fairness of awarding compensation, it is not necessary to make an all-or-nothing determination. Where an intervenor was only somewhat effective or where only part of its presentation was necessary, part compensation can be awarded.

It is also important to deal with the problems caused by having more than one public interest group representing the same constituency. For example, we may have two groups representing consumers' interests. As discussed in Chapter II this may be useful since more than one consumer viewpoint can exist. It may happen that there are some areas where the two groups are substantially in agreement in their

submissions. Similarly, a public interest group may advocate some views that are in agreement with some of the views put forward by a regulated firm. It can be said that each representation is not necessary for a fair disposition of the proceeding. We do not want to encourage unnecessary duplication. However, we also want each group to express its preferences fully and freely. We do not want each group to cut and edit its position leaving only material which is completely unique. By allowing costs for submissions which could reasonably be expected to contribute to a fair disposition of the proceeding, we give the funded groups a great deal of latitude while still taking some action to control unnecessary delay.

(ii) Funding the "Right" Group

We can affect the distribution of cost awards by putting percentage quotas on the amount of funds that go to commercial interests. However, not all non-commercial groups should be funded. As Chapter II indicated we want to fund public interest groups where the interest of each member of the group is small relative to the costs of intervention at hearings and the costs of forming an effective group.

Some tests used by regulatory agencies or proposed by policy analysts suggest that there should be a requirement that the intervenor does not have the funds to participate.[12] This creates a problem. Assume a group plans to intervene in ten hearings while it has the funds to participate in only five. At each hearing, however, the group may be denied costs because they have the funds to appear at that hearing. Now to solve this problem the group may be granted costs if it does

not have enough funds to appear at all the hearings it wants to appear at. Of course, this means that each agency must determine how many hearings the group, in good faith, plans to appear at. With this latter test, in our hypothetical example, the group would be receiving cost awards in all ten hearings. It would still retain the funds which could have paid for five hearings.

The impecuniousness of the group should be of secondary importance. That is, funds should be directed to those groups where the interests are so thinly-spread that the groups could raise very few funds for advocacy efforts in the absence of government funding. As we have already indicated (and as will become clear in later Chapters) cost awards should not be the only source of funds. Where methods other than cost awards are used to allocate funds for various reasons, the presence of these funds should not disqualify a group from cost awards. The one test should be: does this group represent a constituency where the interest of each member is low relative to the costs of intervention and the costs of group formation. Evidence of the financial resources of the group may be useful in answering this question. Again there is no need to make this an all-or-nothing test. Some groups may qualify for part compensation.

Some groups may not have the resources to intervene before a regulatory agency with only the hope of obtaining costs. This problem will be mitigated to some extent by providing sources of funds

for these groups through other mechanisms. Interim cost awards are an alternative solution to this problem. Agencies can dispense interim awards to groups who are likely to qualify for a final award.

A significant problem exists for ad hoc groups that form to deal with one particular issue by intervening in regulatory proceedings. These groups and newly formed groups could benefit from an interim cost award. However, with a recently formed group, with no history of prior interventions, there would be little information for the agency to use to determine the competence of the group. In other words, there is a danger involved in giving these groups money, in that the groups may not provide a useful intervention in return for this money.

3. A Government Advocacy Office

One proposal that has received a good deal of attention especially in the U.S., is the creation of a government advocacy office, for example an Office of the Consumer Advocate.[13] Such an office would conduct advocacy and lobbying efforts just like a public interest group. It seems that there would be considerable diseconomies of scale involved in having one office take care of all public interest constituencies. That is, skills needed in consumer advocacy and lobbying would be different from those required in environmental advocacy. More importantly, the office would have to assign different staff members to different public interest constituencies. This could create internal conflicts. It might be feasible, however, to have one or more of a consumer, an environmental, a health and safety, or a civil rights advocacy office.

The proposal then is, in effect, to have public interest advocates that are not only government-funded but are actually part of the government. The benefits and costs of government advocates versus public interest groups can be analyzed. First, which type of organization would be expected to attract more competent personnel? Many economists feel that private organizations can attract better employees because (1) they pay higher salaries in top management positions and (2) market forces provide an incentive to eliminate inefficient employees. To a certain extent these factors will be operative in public interest organizations as well. Currently, lawyers and experts working for public interest organizations on salary or on a per diem basis for particular cases, are paid modestly generally speaking). However, with funding increases, this could change. Public interest groups could hire and be staffed by the high-priced lawyers and experts that currently work for the regulated firms. It is conceivable that civil service ceilings on salaries and per diem rates could prevent the hiring of large numbers of highly qualified persons.

The second factor is also important. In one of the mechanisms we discuss, the tax credit mechanism, a type of market force operates. The tax credit mechanism is discussed below in detail. Put simply, though, those public interest groups that best satisfy their constituencies will receive more donations from their constituencies and hence will have more funds. A type of market mechanism operates with cost awards as well. Only those groups that make "effective" presenta-

tions will receive cost awards. This will encourage organizations to dismiss ineffective employees. With organizations funded by direct grants, and with a government-run office, we would expect there to be fewer pressures forcing these organizations to be efficient. Therefore, market-type forces will tend to lead to voluntary public interest organizations being staffed by more effective employees.

A government office may have less independence to express its views than would a public interest group. That is, an office will presumably be controlled at least in part by politicans and by key civil servants. There is always the danger that these people could respond to short-term political pressures from small, influential lobby groups and emasculate an office of the government advocate. Furthermore, the office may on occasion oppose the policies of other government departments. These departments could also seek to reduce the power of a government advocate. This would happen primarily by reducing the funding available to the office. There are three solutions that can be employed to increase the independence of an office of the government advocate. First of all, the head of an office can be given a position which is senior in the civil service hierarchy. This will make the office less susceptible to pressure from within the civil service. Secondly, the head of an office can be appointed for a term of years. This will allow him to act relatively freely without facing the possibility of losing his job. Finally, the funding of an office can be set for several years in advance. This will prevent an office from facing sudden cutbacks in funding.

Even with these three proposals, it does not seem likely that an office of the government advocate will be as independent as a public interest group. If these groups feel that their funding is being threatened, they can appeal to the public and the media for support.

We have considered the competence and independence of government advocates versus public interest groups. We must also consider the accountability of these groups and a government office. A government advocate is of course ultimately responsible to the legislature and hence the electorate. However, as we have said before, the electoral process can favour small, well-organized groups that are seeking protection. There is the possibility, then, that a government advocate's office may be emasculated by the same forces it was designed to counteract. In this way, the office may not be truly accountable to its client-groups.

Public interest groups may or may not be more accountable. That is, where direct grants or cost awards are used, there is no way for members of the client group to signal their disapproval of the actions of the public interest organization. However, with the tax credit scheme discussed below there is accountability since members of the client group can signal their approval or disapproval by making or withholding membership subscriptions.

A government advocate's office, then, will be less accountable to its constituencies than will public interest groups funded by the tax credit mechanism. As we pointed out above, it is important to have a diversity of views expressed for each client group. For example, there may be more than one consumer interest in a given problem. Therefore, even if a government advocate's office was established, there would still be room for public interest groups to advocate different and sometimes conflicting public interest perspectives.

There is a useful role for a government office however. This has been demonstrated by some U.S. offices that have initiated "outreach" programs. These programs are designed to aid potential intervenors who have no expertise in regulatory advocacy to intervene in a regulatory hearing. Earlier we mentioned that ad hoc and newly formed groups will have trouble funding their first intervention without interim awards. An outreach program mitigates this problem by lowering the start-up costs that these groups face. The advocate's office can explain the theories and procedures that intervenors will need to make their first intervention. In many ways a government office may be the best institution to provide an "outreach" service. The agencies themselves may not want to encourage new intervenors who will "rock the boat", and add to the length of regulatory proceedings. Other public interest groups may not want to help groups who may have opposing views. A government advocate's office can develop expertise in explaining to new intervenors the intricacies of regulatory advocacy.

4 Staff Counsel

Another way to represent unrepresented groups is to appoint staff counsel to each agency to perform the task of representing these groups. All of our comments regarding effectiveness, independence and accountability of government advocates apply to staff counsel in much the same way. However, there are some additional costs and benefits that are distinctive to the concept of staff counsel.

Staff counsel, even more than advocates in a central office, will feel pressure not to oppose the agency. The funds, tenure and salary of the staff counsel will be controlled by the agency. Furthermore, staff counsel will probably have close contact with his colleagues at the agency. These two factors will make it difficult for staff counsel to oppose vigorously previous agency decisions, or to appeal or seek judicial review of agency decisions.

There are also benefits associated with using staff counsel. Staff counsel, by working with the other members of the agency and being a specialist in the activities of the agency, could develop a high level of expertise in advocacy before the agency.[14] However, on balance, the potential lack of independence of the staff counsel would seem to outweigh the benefits associated with a potentially high level of expertise.

5. Government Grants to Groups

Public interest groups could be funded simply by awarding them grants. For example, the Ministry of Consumer and Corporate Affairs now grants funds to the Consumer's Association of Canada to conduct advocacy activities.[15] This apparently simple approach, however, creates many problems. As between many possible beneficiaries, who is to receive funding and how much should each group receive? The funds should presumably go to the groups that will put them to the "best" use. The granting authority could, therefore, grant funds to those groups who have a history of providing useful interventions. The problem with this approach is that this method perpetuates established public interest groups and makes it difficult for new groups to emerge. The granting authority could, therefore, grant funds according to the planned activities of the public interest group. However, this would involve considerable administrative costs as the agencies will have to police the activities of the public interest group to ensure that they do in fact carry out the activities in the manner which they proposed.

The funding authority perhaps should give more funds to those groups that have made and will make the most effective representations. This introduces the problem that the funding authority may bias its funding decisions in favor of uncontroversial or inappropriate groups. This is similar to the problems we saw in section 2. above, where agencies had incentives to bias their cost awards. Pressure from regulated firms and from within the government are the forces which could constrain the funding authority to bias its granting decisions.

In general, the funded organizations will suffer from many of the same problems as a government office of the advocate. That is, there is no strong market-type mechanism to encourage the organizations to be efficient. There is in addition a problem with independence as the organizations could be constrained to alter their views in order to receive more grants. For example, groups which advocate views which are at variance with those of the government could find that their funding is cut back or cut off completely. Small, well-organized business groups could lobby the government to reduce funding to public interest groups that were considered to be too hostile to the status quo.

Furthermore, the accountability of a public interest group is not ensured with this type of funding mechanism. That is, the members of the client groups have no easy way to signal their preferences. Public interest groups that advocate views which are representative of the preferences of the majority of their constituency may be poorly funded relative to groups that represent the preferences of only a small segment of the constituency. Members of the client group can petition the government and/or the public interest group, but there is no guarantee that their wishes will be respected.

6 Tax Credits

Public interest groups can be funded by means of tax credits. That is, a person who gives a contribution to a public interest group can be given a tax credit equal to say 75% of his contribution up to say $20.

The percentage and the maximum tax credit allowable could of course be set at any level. Ideally, however, the percentage credited should be high and the maximum allowable should be low. This will mean that the public interest groups will be funded by a large number of small contributions. The scheme is nalagous to the tax credit currently allowed for contributions to political parties.[16]

How do we identify the groups that are to be allowed to receive these tax deductible contributions? We may want to restrict the tax incentive to those organizations which are primarily involved in public interest activities. Where groups are partly involved in public interest activities and partly in other activities, there is the danger that the tax deductible contributions will finance these other activities. Therefore, groups that spend 90% of their resources on lobbying, advocacy and informing and mobilizing the public should be eligible. It is even possible to set minimum percentages for the amount of resources that are to be spent in each of these three areas. For example, legislation could prescribe that 60% should be spent on advocacy, 15% on lobbying and 15% on public information. This would ensure that the bulk of the resources are spent on advocacy before regulatory boards which Chapter II indicates is a sound approach. Of course, some administrative resources will be involved in ensuring that the funds were spent in the required proportions. However, there will be no need to check that the resources were spent in a particular way on a particular project.

The most significant problem associated with the tax credit mechanism is ensuring that the money goes to public interest groups and not to producer interests. That is, if the tax-credited contribution (TCC) could go to any representational organization, we would expect the same forces that favour producer groups in the electoral system to favour them here. In order to prevent this, we would ideally want to develop an objective method of identifying public interest groups. One possibility would be to provide that the TCC could go only to groups who do not receive contributions which are tax-deductible for business purposes. Another possibility is to simply restrict the availability of TCCs to e.g., consumer, environmental, health and safety and civil rights groups.

The problem with both of the above tests is that "sham" organizations could be set up which would qualify. For example, the widget producers could set up an organization called the Committee for Health and Civil Rights. This group would in fact lobby and intervene on behalf of widget producers. All the widget producers would know this and they would probably be the major contributors to the organization. The Committee would, however, pass both the above tests.

It seems that a completely objective test is impossible. It is necessary to add to our test the requirement that the organization cannot in substance be a producer organization. This requirement involves examining the donors, organizers and objects of the organization to ensure that it does in fact act on behalf of persons with interests which are small relative to the costs of intervening.

A system using tax credit funding would have a number of advantages. The first would be accountability. Each donor in effect, gets a vote. Those groups that are best able to satisfy the preferences of the largest number of people will get the most funding. Groups who are not in fact representing the wishes of their constituency will see their sources of funding dry up. In this way, public interest groups will be forced to represent the views of their client groups.

At the same time this mechanism will allow for a diversity of views. A group may, for example, represent the views of a small percentage of the population on environmental or consumer matters. However, this small proportion of the population will be represented to the extent that their aggregate TCCs allow. With other funding mechanisms, these less widely held views may not be represented at all.

This mechanism should allow the public interest groups to be more independent than would any other mechanism. That is, an office of the government advocate is subject to pressures from the government and from producer groups. Staff counsel can be constrained by their own agencies. Agencies can also constrain the independence of public interest groups through cost awards. With direct government grants, the granting authority can vary the amount of funds granted according to very subjective criteria. Especially zealous groups could be classified as "ineffective" and would then lose funds. With the tax credit system, the granting authority cannot vary the amount of funds, but can only decide on the eligibility of the organization. The process

by which eligibility is judged can be determined in a fairly objective manner. The only way in which the independence of the public interest groups can be jeopardized would be by classifying an overzealous group as "in substance a producer group", presumably a judicially appealable decision.

The tax credit system also fosters efficiency. That is, efficient public interest organizations will be able to use their resources to undertake more and/or better representational efforts on behalf of their client-groups than will less efficient groups. This will win them the support of the client-groups and hence they will attract more funds. The orgaizations therefore have an incentive to be more efficient.

7. Advisory Committees

In order to make sure that regulatory agencies have information and perspectives from unrepresented segments of the public, advisory committees can be set up. If advisory committees are used, their meetings and reports would need to be made public.[17] Otherwise, the parties at the hearings will not know the basis on which the decisions are being made.

Even with open meetings and public reports there could be difficulties. The parties at the hearings will not know how much weight is being put on the reports. They will therefore not know how much effort to put into refuting or reinforcing the views expressed in the reports.

The most significant problem, however, relates to selecting the membership of the advisory committee.[18] It seems pointless to pick a panel of experts. This is what the regulatory board is supposed to be. In cases where a level of technical expertise is required which is beyond that possessed by the board, presumably a staff study or an outside expert can be hired. To have a standing committee of experts would seem to create an unnecessary institution which itself may not always have the expertise required.

The committee could be composed of members selected not for their technical expertise, but rather for the views and perspectives they represent. For example, representatives of consumers and environmentalists could be chosen.

There are problems associated with using advisory committees to represent public interest perspectives. The "public interest" members will not be accountable to their constituencies. For example, consumers have no way of electing the consumer representatives. This means constituency representatives are open to the critisism that in fact their views reflect only their personal preferences and not the preferences of their constituency.

The independence of the constitituency representative is also jeopardized. The public interest representatives will work with the agency. This can be beneficial in that the representatives will have better access to information and expertise than will intervenors appearing before the agency. However, problems exist since the

representatives by working closely with the agency will be more reluctant to adopt a position which is adverse to that held by the agency members they deal with. Furthermore, advisory representatives whose views strongly diverge from the views of the agency may be dismissed. There is a problem then, in that the independence of constituency representatives in advisory committees is compromised.

The information and perspectives presented by advisory committees may not be presented in the most useful fashion. Unlike information presented at a hearing there is no cross-examination (or questions for clarification) which can help to sharpen the issues and point out flaws in the arguments. Furthermore, the presentation of an advisory committee is likely to be made in a less forceful manner than is required to overcome existing predispositions that may be held by members of the agency.

Finally, advisory committees will have no power to appeal agency decisions or initiate hearings on pressing problems. As a means of promoting the interests of under-represented groups in society advisory committees seem inferior to other mechanisms.

8. Constituency Representation on Agencies

The influence of under-represented segments of society can be increased by appointing "representatives" of these segments to sit as members of an agency. This approach has been used, for example, with marketing boards and professional self-regulating organizations. This approach however, involves many difficulties.

Firstly, simple arithmetic indicates that merely adding "public interest" representatives to the boards of regulatory agencies may not significantly change the outcomes of the agencies' decision making process. For example, assume one or two public interest representatives are added to a board containing ten members and that the eight non-public interest members generally decide issues the same way. Obviously, the two public interest members will seldom be able to influence the outcome of a vote. In effect, they could merely be "tokens."

Secondly, there is no guarantee that constituency representatives will be accountable to their constituencies. When the constituency is a large, diffuse group it is impractical to have the constituency select a representative by voting. Public interest organizations exist and members could be selected from within their ranks. However, these organizations are generally composed of a relatively small segment of the total constituency. Furthermore, the composition of the organization may not be the same as the composition of the entire constituency. There is no guarantee that a constituency representative will be sympathetic to the views of his constituency. Rather, the representative may come to accept the views of his colleagues on the board or of producer interests appearing before the board.

Thirdly, merely appointing constituency representatives will not effectively correct the imbalance of information which is central to the problem. Constituency representatives may in fact listen with a sympathetic ear to arguments which support the interest of their constituency.

However, they need supporting arguments and evidence before they can make decisions which will benefit the group they are supposed to represent. There is a need for evidence and legal and policy arguments which favour the diffuse and under-represented interests. This information can only come by funding advocates.

9. Conclusion

The theoretical analysis in this chapter has raised many issues that need to be empirically examined. We must determine how useful public interest interventions have been in adding information to regulatory and other forms. We must examine how the different mechanisms favour one type of group over another. For example, are established groups heavily favoured over newly formed groups?

A central issue is the independence of public interest groups. How do cost awards, direct grants and government offices facilitate the freedom of the advocates to say what they want to say without fear of having their funding reduced? This chapter has indicated that these three mechanisms will tend to hamper the independence of the public interest advocate.

Accountability is another central issue. How have the different mechanisms, where they have been implemented, encouraged public interest groups to represent the preferences of the client group? Our theoretical analysis indicates that no mechanism other than the tax-credit scheme will foster accountability.

It is important that more than one voice speak for each public interest constituency. We must examine the various funding programs to see whether they encourage or hinder this type of representation. The effectiveness of the funded groups is important. Our analysis shows that "market-type" funding mechanisms such as tax-credits and cost awards may encourage more efficiency and hence more effective representation.

Chapter IV

Footnotes

1. See for example the Report of the MacKenzie Valley Pipeline Inquiry, Vol. II, (Ottawa, Minister of Supply & Services Canada, 1977) at p. 225.

2. Study on Federal Regulation prepared pursuant to S. Res. 71, Committee on Governmental Affairs, U.S. Senate. Volume III, Public Participation in Regulatory Agency Proceedings, (Washington, 1977) at p. 97.

3. Ibid.

4. Cost Awards in Regulatory Proceedings, A Manual for Public Participants, Regulated Industries Program, Consumer's Association of Canada, October 1979, p. 9.

5. Ibid.

6. Ibid.

7. Supra., note 4, at p. 12.

8. Supra., note 4, at p. 11.

9. In re Municipal and Public Utilities Board, [1930] 1 W.W.R. 615.

10. Hearing before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, U.S. Senate, Ninety-Sixth Congress, First Session on S. 1020, to Authorize Appropriations for the Federal Trade Commission, May 2, 1979, at p. 14.

11. Supra., note 4, at p. 6.

12. U.S. Federal Trade Commission Improvement Act, 1974 15 U.S.C. ss. 2301; CRTC Telecommunications Draft Rules of Procedure, Rule 52(d); Ontario Task Force on Legal Aid (Toronto, 1979), Chapter 11 p. 100, 101.

13. Hearings before the Subcommittee of the Committee on Government Operations, House of Representatives, Ninety-Fifth Congress, First Session on H.R. 6118, (Washington, 1977); Hearings Before the Committee on Governmental Affairs, U.S. Senate, Ninety-Fifth Congress, First Session on S.1262, (Washington, 1977).

14. Supra., note 2, at p. 73.

15. Consumers' Association of Canada, Annual Report of the Regulated Industries Program, 1979-80.

16. Canadian Income Tax Act (S. 127(3)-127(4.1), Ontario Income Tax Act, s. 5.6(b)(4a).

17. Footnote 16 supra., p. 147.

18. C. Lloyd Brown-John, "Advisory Agencies in Canada: An Introduction," Canadian Public Administration, 1979, Vol. 22, No. 1, at p. 72.

CHAPTER V

Empirical Analysis of Funding Mechanisms

1. Introduction

In this chapter we examine the operation of various programs designed to increase public participation in agency proceedings. We will use the same criteria to judge the funding mechanisms as we used in Chapter IV. These are: independence, accountability and diversity of views. We will also look at "effectiveness". This criterion is used to evaluate the success of the particular program in fostering fairer and more informed decision making.

We do not examine Advisory Committees and Constituency Representation since our theoretical discussion indicated that these were not promising methods of correcting for the under-representation of public interest perspectives.

2. Cost Awards in Regulatory Proceedings

a) Introduction

In this section we look at cost awards as a mechanism for funding public interest groups. We look at the Canadian Radio-Television and Telecommunications Commission, the Alberta Public Utilities Board, the Berger Commission Inquiry and the U.S. Federal Trade Commission. The first two agencies award costs against the regulated industry. The Berger Inquiry and the FTC represent funding systems where the funds are paid out of a fund obtained from tax revenues.

b) The Canadian Radio-Television Telecommunications Commission

(i) The Rules

The CRTC (Telecommunications) and the Canadian Transport Commission have the power to award costs by virtue of s. 73 of the National Transportation act which reads:[1]

> (1) The costs of and incidental to any proceeding before the Commission, except as otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.
>
> (2) The Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.
>
> (3) The Commission may prescribe a scale under which such costs shall be taxed.

On July 20, 1976 the CRTC published the CRTC Telecommunications Rules of Procedure (the Draft Rules) which contained provisions regarding cost awards. Following a public hearing and after receiving written submissions, the Commission released Telecommunications Decision 78-4, entitled CRTC Procedures and Practices in Telecommunications Regulation.[2] The Commission stated that:

> "Costs to intervenors, which would only represent a small fraction of regulatory expenses would, in the Commission's view, contribute to a more effective representation of subscriber interests and to an improved record on which to base decisions. The awarding of costs will in no sense constitute a reflection on the applicant's case, but would simply be a means to ensure that essential points of view can be adequately canvassed in a meaningful way."

The Commission stated that it would award costs in rate hearings but stated it would not usually provide costs in issue hearings and made no general policy statement regarding other hearings. In fact, however, the CRTC has awarded costs in other than rate hearings.[3]

The test governing whether an intervenor shall be eligible for costs was originally governed by s. 52 of the CRTC Draft Rules of Procedure. However, on July 27, 1979 the CRTC Telecommunications Rules of Procedure were issued.[4] S. 44(1) of these rules reads as follows:[5]

> In any proceeding under this Part, the Commission may award costs to be paid by the regulated company to any intervenor who
>
> a) has, or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervenor or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;
>
> b) has participated in a responsible way; and
>
> c) has contributed to a better understanding of the issues by the Commission.

This section is substantially similar to s. 52(a)(b) and (c) of the Draft Rules.[6] However, s. 52(d) of the Draft Rules stated that the intervenor is entitled to costs only if it[7]

> "does not have sufficient financial resources to enable it to prosecute its interest adequately, having regard to the financial implications of the application for the intervenor, or, where the intervenor represents the interests of a group or class of subscribers, for each member thereof, and the intervenor requires the assistance provided by costs to do so."

Instead, we now have s. 44(7) which reads:[8]

> "The taxing officer appointed by the Commission shall take into account financial assistance from government or other sources in determining the amount of costs to be awarded under this section."

So the "financial need" requirement is no longer a prerequisite to obtaining costs. Rather it is a factor which may affect the quantum of costs. How should the taxing officer "take into account financial assistance from government..."?[9] More particularly, where a group such as CAC receives funds to participate generally in regulatory hearings of many agencies can they also receive cost awards from the CRTC? In Taxation Order 1980-1 (heard under the Draft Rules), this issue was dealt with as follows:[10]

> "...the Commission's position in 78-4 and the Draft Rules can be summarized as follows: informed participation in public hearings should be encouraged; the awarding of costs is a necessary, or at least desirable method of so doing; the costs awarded shall not exceed those necessarily and reasonably incurred by the intervener and, more particularly, those parties who have received some form of public funding to participate before the CRTC should not receive a double recovery by means of an award of costs.
>
> Much of the informed participation sought by the Commission has come from public interest groups with some government funding. Such interveners are not in a position to anticipate the timing, frequency or complexity of rate hearings. They depend on government grants to sustain their very existence, in order that they may be in a position to respond to a variety of demands as they arise, one of which may be an application to the CRTC which affects their constituency. To fail to award costs to such parties by virtue of the fact that they intervened without some other form of direct financial assistance would be automatically to preclude from awards of costs

> those interveners who may have made the greatest contributions to the Commission's decision-making process. Furthermore, I am sure that public interest groups could arrange their affairs so as to meet most of the arguments raised but, in my view, nothing would be gained by forcing counsel or advisers for such groups to submit bills to impecunious clients on the understanding that these debts would be forgiven or written off if costs were not awarded...
>
> ... I am confident that an award of costs to the CAC and PIAC will not result in double recovery in any reasonable sense of that term."

This taxation order is currently being appealed by Bell Canada to the Commission.

(ii) Interim Costs

Interim costs are provided for by s. 45 of the CRTC Telecommunications Rules of Procedure.[11] In order to get interim costs intervenors must satisfy s. 45(1)(a),(b) and (c) which are almost identical to s. 44(1)(a),(b) and (c). Intervenors must also satisfy 45(1)(d) which requires the intervenor to show that he does not have the funds to participate effectively in the proceeding in the absence of interim costs. An award of interim costs was made to the Consumer's Association of Canada on March 11, 1980.[12]

Awards of interim costs must be paid by the regulated company when the interim cost award is made. However, the interim award may not necessarily be confirmed in the final cost award. Therefore, in theory an interim award might have to be paid back.

(iii) Accountability

The rules seem to place very little emphasis on whether or not the intervenor is responsible to a defined constituency. Recall that s. 44(1)(a) of the CRTC Telecommunications Rules of Procedure requires only that the intervenor "is representative of a group or

class of subscribers that has an interest in the outcome of the proceeding."[13] The primary focus of the cost award provisions is ensuring that the CRTC has the information it needs in order to make effective decisions. The nature of the organization providing that information is less important although they must be "representative."

(iv) Independence

There is always the danger that when an agency grants costs awards, it will be more favorable to groups with which it generally agrees. However, members of public interest groups expressed their confidence in the impartiality of the CRTC to the authors. Furthermore, the decision to award costs is supported by written reasons. This provides a check on arbitrary action by the Commission. The decision to award costs is at the discretion of the Commission. However, administrative law provides judicial review (i.e., review by the courts) if the discretion is not exercised properly. More particularly, judicial review could overturn a discretionary decision where it was shown that the decision was based on irrelevant considerations such as the agency's disapproval of an organization's objects.[14]

(v) Effectiveness

It is too early to judge how effective the CRTC program has been in promoting more sophisticated public interest intervention at agency proceedings. However, one advantage of cost awards which

has become apparent is that the agency can exercise a great deal of control to ensure that unnecessary or ineffective public interest representations are discouraged. For example, in the Bell 1978 rate case the Commission held that one intervenor submitted useful interrogatories.[15] However, the Commission ruled that the intervenor's cross-examination of witnesses was "unnecessarily time-consuming and not helpful to an understanding of the issues in...[the] case."[16] Therefore, the Commission awarded costs with respect to the intervenor's "appearance at the pre-hearing conference and to expenses actually incurred in preparing the interrogatories which it submitted."[17] This degree of precision is not available with any other funding mechanism.

(vi) Conclusion

The CRTC is making an effort to fund public interest participation particularly in rate hearings. The current rules emphasize the usefulness of the information presented to the Commission rather than the impecuniosity of the organization. Where government funds are granted to a group generally and not specifically for intervention in a particular CRTC case, costs can still be awarded. There is always a danger (which has not materialized at the CRTC) that the independence of groups may be compromised by cost awards. This danger is minimized by the judicial nature of the decision to award costs and by the possibility of judicial review. Furthermore, this danger must be traded-off against the effectiveness of cost awards in discouraging delay and unnecessary advocacy activities.

c) Alberta Public Utilities Board

(i) Background

The Alberta Public Utilities Board (A.P.U.B.) regulates public utilities in Alberta as well as performing other regulatory, advisory and administrative functions.[18] The public utilities regulated include: electric, gas, water and sewer, telecommunications, railway compensation, oil and gas common carrier pipelines.[19] The Board has awarded costs to interveners since 1960.[20]

During the 1960's and early 1970's the Board had only a few members and a small staff. They, therefore, relied primarily on interveners to challenge the case put forward by the regulated utilities. In Decision No. 30202 written in 1971, governing a 1969 rate case, the Board stated:[21]

> "The Board believes it is essential to hear opposing and varying opinions of expert witnesses for the proper determination of the complex issues which arise in lengthy and involved hearings like those which were held in the company's application. In such hearings, the function of presenting expert witnesses whose opinions are at variance with the company's witnesses who support an application, rests with interested parties who oppose the company's application. Without the active participation of interveners represented by able counsel and without having the benefit of the testimony of expert witnesses whose qualifications are equal to those presented by the company, the Board would have an almost impossible task to adjudicate fairly."

Despite the encouragement of the Board, during the 1960's only large municipalities and industrial users were intervening before the Board. In 1971, the Alberta Government set up a

loans program whereby intervenors could borrow money to finance an intervention and then pay it off when their costs were awarded. As a result of this program, smaller municipalities, the Consumers Association of Canada, and the Rural Electrification Association began to intervene.

In 1975, however, the position of the Board changed considerably. This change coincided with the appointment of a new Chairman of the Board. The new chairman, who was trained as an engineer, has less enthusiasm than his predecessor for an adversarial system, according to some observers.[22] This attitude may explain what was clearly a shift in Board policy which has resulted in the virtual elimination of funded public interest involvement in proceedings before the Board.

In 1975, the Board released "Guidelines-Rate Hearing Costs".[23] Most of this document is straightforward enough. However, guideline 7 states:[24]

> "Generally, the costs of officials and employees of Interveners, and the costs of Interveners' consultants who do not give evidence will not be awarded against the Applicant."

This guideline was a severe blow to intervenors. Various hearings were in progress at the time and the intervenors at these hearings complained.[25] One of the complaints stated:[26]

> "... but in order to effectively carry out such cross-examination, it is certainly necessary to have the appropriate expert people available to assist in the preparation of that cross-examination, and subsequently, present at the hearings where they can be giving advisement on answers to the cross-examination. Despite the fact that this preparation

> has involved innumerable hours on their part, it appears that under the policy of this Board, unless they take the witness stand and contribute substantially in direct evidence, then ... interveners are not entitled to be covered for the costs of ... [their] consultants and experts in the intervention."

In its request for a hearing on the guidelines, the CAC stated: [27]

> "...the only fair inference that one can draw is that the Board does not recognize the absolute necessity of retaining consultants in order to assist in the preparation of cross-examination of highly qualified and experienced engineers, accountants, financial experts and rate of return expert witnesses. A lawyer is not qualified in any of these fields and cross-examination without the assistance of consultants would deprive the Board of the kind of assistance needed to assess a utility company's case."

Following the completion of an Alberta Government Telephones rate hearing, in progress while the 1975 Guidelines were released, three intervenors had their costs significantly reduced. On January 19, 1979, the Alberta Supreme Court, Appellate Division vacated the order fixing costs because insufficient reasons were given pursuant to s. 8 of the Administrative Procedures Act.[28] A new costs decision was held up due to an intervening bias action which was dismissed. A new costs decision is expected soon.[29]

On February 24, 1977, the Board released its Position Paper entitled "Interventions and Costs".[30] The paper is in some respects confusing. The Board in the paper states that it is concerned about

a "paradox".[31] The paradox is that despite "the present resistance, amounting almost to resentment, on the part of consumers to the imposition of new and higher customer rates there is an apparent lessening of the number of meaningful interventions".[32] The paper goes on to state that the "paradox" results from increasing costs of intervention.[33] The Board goes on to praise the importance of having an "aggressive, intelligent and informed intervention" rather than having staff counsel represent the public interest.[34] However, later in the paper the Board states that "there may be merit in a curtailment of the number of parties who can expect their costs to be passed on to the customers."[35] The board goes on to state further that since the Consumers Association of Canada represents all citizens of the province of Alberta, they should get provincial funding.[36] The board concluded by saying that since alternate funding was not available for the intervenors it would continue to provide costs to intervenors whose intervention benefits all customers.[37] This is certainly a perplexing requirement. It seems to indicate that if the CAC argued that industrial users were being unfairly subsidized by residential consumers, they could not receive costs because they do not represent all customers.[38]

The paper states that "this Position Paper, including the Appendices, consolidates and replaces all previous Guidelines in respect to costs."[39] However, there is no mention in the paper as to what the Board's current position is with respect to funding of

intervenors for experts that do not appear at the hearing.[39(a)] It is not surprising that, given the uncertainty surrounding costs, the CAC and most other intervenors have stopped intervening in rate cases.

(ii) The Funding Process

a) The Legislation

S. 60 of the Public Utilities Board Act gives the Board the discretion to award costs. It reads:[40]

> "60.(1) The costs of and incidental to any proceeding before the Board, except as otherwise provided in this Act, are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs are to be taxed.
>
> (4) The Board, may with the approval of the Lieutenant Governor in Council, prescribe the fees to be paid by local authorities or persons interested in the matters that come before the Board."

The board has never stated a test for intervenors similar to the tests used by the CRTC, the FTC, and the Berger Commission. However, it has made comments which indicate its position on some elements of the test. Tests for intervenor funding typically contain four elements. These are: effectiveness, necessity of the intervention, financial need, and interest represented.

b) Effectiveness

In Decision No. 30202 in 1971, by way of a test the Board indicated only that claims for costs must be reasonable.[41] In the 1977 Position Paper, the Board states inter alia that costs will be awarded if the intervention has been effective in testing the applicant's case and the costs have been reasonably and necessarily incurred.[42]

c) Necessity of Intervention

In Decision 30254, the Board stated that it would give consideration to the extent of participation and its value in assisting the Board.[43]

d) Financial Need

The Board never discusses whether it is relevant that the intervenor does or does not have the ability to pay for its intervention. The 1977 Position Paper states that:[44]

> "The Board notes with approval that many of the interventions by large industrial customers have not resulted in claims for reimbursement of costs via the rates. It assumes that these intervenors are particularly aware that their interventions are directed solely to benefits which will flow specifically to themselves or to the rate group to which they belong, and for this reason have not seen fit to ask the customers at large to finance them."

This statement indicates that the large industrial customers would be refused, not because they could afford to pay for their intervention, but because their intervention will not help customers at large.

e) Interest Represented

As discussed above, only when the applicant's case has been tested to the benefit of all customers will costs be awarded. Therefore the only interest that can be represented is all the customers.

(iii) Interim Costs

As mentioned above, the Alberta Government provided loans to intervenors. After the Rural Electrification Association had its costs significantly reduced due to unnecessary expenditures, the government stopped this program. However, it encouraged Alberta P.U.B. to award interim costs. Interim costs were awarded in Decision 30861.[45]

(iv) Independence

The story of the Alberta P.U.B. cost awards program is not over and so it is not possible to state precisely how secure or insecure the position of intervenors is. It does appear that the ability of intervenors to make effective interventions has been severely compromised. The board has created such confusion surrounding the cost awards that groups who need those awards are unable to intervene. This may not be the result of a dislike for public interest intervention by the Board. Rather, it may be due to a lack of confidence by the Board in the adversarial process.

(v) Accountability

Being accountable to a constituency group does not seem to be a necessary factor in receiving cost awards. As mentioned above the intervention must represent all consumers. In the Position Paper, the Board states:

> "A type of intervention which is of concern to the Board is that of a particular rate group, for example the Rural Electrification Associations (REA's), industrial consumers, and associations representing particular consumer groups. The direction such interventions take will be considered by the Board in determining costs.

This statement almost seems to indicate that groups that are accountable to a membership (which is a subset of all customers), and who represent the views of that membership will not receive costs.

(vi) Effectiveness

Cost awards coupled with loans or interim awards were effective in encouraging intervention, including intervention by public interest groups. As mentioned before, however, these interventions were greatly reduced when the availability of the cost awards was put in doubt.

(vii) Conclusion

The Alberta P.U.B. was the first Canadian regulatory agency to award costs to intervenors. Originally, the Board did not lay down many rules or principles but policy emerged on a case-by-case

basis. The Board's attempts to formulate guidelines leave the observer uncertain as to whether or not the Board is genuinely committed to awarding costs to interveners. The experience of the Alberta P.U.B. clearly calls into question the practice of having cost awards administered by the agencies themselves.

d) The Berger Inquiry

(i) Background

A number of commissions of inquiry have funded public interest intervention. These include the Alaska Highway Pipeline Inquiry (the Lysyk Commission) and the Ontario Royal Commission on Electric Power Planning (the Porter Commission), although the first inquiry to fund public interest groups was the Berger Commission.

On March 21, 1974 the Government of Canada appointed Mr. Justice Thomas R. Berger to conduct an Inquiry into the impact of the proposed Mackenzie Vally Pipeline.[46] A series of Preliminary Hearings was held in April and May of 1974 in Yellowknife, Inuvik, Whitehorse and Ottawa in order to determine the procedures to be followed in the Inquiry.[47]

After the Preliminary hearings, it was determined inter alia that there were to be two types of hearings.[48] Formal hearings would "involve testimony and cross-examination of expert witnesses from all parties."[49] Community hearings would be "more informal in

nature, to allow the people who live in the various . . . communities to inform the Commission of their views on the proposed pipeline."[50]

After the preliminary hearings it was decided that the Inquiry was to have eleven major continuing participants.[51] These were Arctic Gas, Foothills Pipe Lines, two major environmental groups, five major native groups, the N.W.T. Association of Municipalities, the N.W.T. Chamber of Commerce and Commission Counsel.[52] The N.W.T. Mental Health Association and Imperial Oil, Gulf Oil and Shell also made submissions at the formal hearings.[53]

At the preliminary hearings "it became apparent that the environmental groups and the native organizations. . . as well as the Northwest Territories Association of Municipalities and the Northwest Territories Chamber of Commerce, would require funds to prepare for and to participate in the hearings."[54]

(ii) The Funding Process

Mr. Justice Berger set the following criteria that groups would have to meet if they were to receive funding:[55]

1. There should be a clearly ascertainable interest that ought to be represented at the Inquiry.

2. It should be established that separate and adequate representation of that interest would make a necessary and substantial contribution to the Inquiry.

3. Those seeking funds should have an established record of concern for, and should have demonstrated their own commitment to, the interest they sought to represent.

4. It should be shown that those seeking funds did not have sufficient financial resources to enable them adequately to represent that interest, and that they would require funds to do so.

5. Those seeking funds had to have a clearly delineated proposal as to the use they intended to make of the funds, and had to be sufficiently well-organized to account for the funds.

The funds were provided by the Department of Indian and Northern Affairs. The intervenors submitted budgets explaining the funding they wanted and what they planned to do with it.[56] Mr. Justice Berger presented these budgets and his recommendations to the Department of Indian and Northern Affairs.[57] There was funding for the formal hearings only.[58] A total of $1,773,918 was spent on funding the intervenors.[59] The cost of the rest of the Inquiry was $3,163,344.[60]

Groups who had their funding requests reduced generally failed to satisfy criterion two, listed above. That is, it was felt that their intervention was not needed by the Inquiry. For example, it was decided that the N.W.T. Mental Health Association did not need to be represented by counsel at the hearing as an on-going participant. They were given some funds to do some research and intervened through Commission counsel.[61] Similarly the Association of Municipalities and the Chamber of Commerce were only funded to intervene in that part of the hearings which dealt with social and economic factors.[62]

(iii) Independence

Mr. Justice Berger made the following comments in his report:

> "In funding these groups I took the view that there was no substitute for letting them have the money and decide for themselves how to spend it, independently of the government and of the Inquiry. If they were to be independent, and to make their own decisions and present the evidence that they thought vital, they had to be provided with the funds and there could be no strings attached. They had, however, to account to the Inquiry for the money spent. All this they have done."[63]

The above quote does not imply that groups were not held to their "clearly delineated proposal" as set out in criterion 5 above. The money was handed out on an on-going basis with on-going supervision to ensure that groups followed the budgets they had submitted.[64] Rather the quote indicates that the groups were free to conduct the studies and hire the experts, etc., which they felt would be most effective.

As mentioned above, the Department of Indian and Northern Affairs had to approve the budgets. The Department was not willing to provide funding for counsel to appear at the hearing, although funds could be provided for legal research.[65] Therefore, all of the funded intervenors had to provide some funding themselves.

(iv) Accountability

Criterion three, listed above, touches on the issue of accountability. However, this criterion does not require

the groups to have a membership organization, but only to have a record of concern for and commitment to the interest they seek to represent. This indicates a concern for an assurance of competence rather than for accountability.

(v) Diversity of Views

Mr. Justice Berger was interested in having the environmental groups form an umbrella organization to represent environmental views.[66] Therefore the Northern Assessment Group was formed. This group included five environment groups.[67] Other interested environmental groups could intervene through the Northern Assessment Group.[68] There was another environmental group called the Environmental Protection Board. This group was funded by members of the oil and gas industry who were "the precursors of Arctic Gas and Foothills."[69] The Board "published a lengthy report that was, in many respects, critical of the Arctic Gas proposal."[70]

The Inquiry was willing to sacrifice having a diversity of environmental view points. According to the Special Cousel to Mr. Justics Berger this was done in order to provide an environmental intervenor with a great deal of expertise and funding.[71]

(vi) Effectiveness

Mr. Justice Berger wrote in his report,

> "The usefulness of the funding that was provided has been amply demonstrated. All concerned showed an awareness of the magnitude of the task. The funds

> supplied to the interveners, although substantial, should be considered in the light of the estimated cost of the project itself, and of the funds expended by the pipeline companies in assembling their own evidence."[72]

(vii) Conclusion

Funding by the Berger Inquiry was intended primarily to provide useful information to the Inquiry. Therefore, there was less attention paid to providing a diversity of views from groups which were accountable to a membership.

e) The U.S. Federal Trade Commission

(i) Background

The Federal Trade Commission (FTC) is one of the best-known U.S. regulatory agencies. The FTC was created in 1914 "to eliminate unfair competition in business and to protect the public from abusive or deceptive advertising and business practices by sellers of goods or services."[73] The FTC administers several federal statutes including the Federal Trade Commission Act (dealing with Competition Law), the Magnusson-Moss Warranty-FTC Improvement Act and several other statutes.[74] The FTC enforces these laws through various means. One mechanism is to set Trade Regulation Rules (TRR's). These are simply regulations which have the force of law and which prohibit certain business practices.[75] The Bureau of Consumer Protection (one of five bureau's in the FTC) conducts hearings to establish TRR's.

(ii) The Funding Mechanism

The FTC Improvement Act,[76] which came into force on January 4, 1975, provides for the funding of members of the public in TRR hearings. S. 202(h)(1) of the Act states:

> The Commission may provide compensation for reasonable attorney fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person
>
> (A) who has, or represents, an interest
> (i) which would not otherwise be adequately represented in such proceeding and
>
> (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole and
>
> (B) who is unable effectively to participate in such proceeding, because such persons cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submission in such proceeding.

The FTC has explained in a staff document prepared by the Office of General Counsel what the various elements in S. 202(h)(1) mean.[77]

a) "Otherwise be adequately represented"

Adequate representation of the interest is determined by looking first at the "efforts of the staff and other participants."[78] "The adequacy clause of the statute requires that replication of material already on the record or scheduled to be put on the record does not meet the standard."[79] Adequate representation also implies that "it is reasonably likely that the applicant can competently represent its interest."[80]

b) Necessity of Representation

Representation by more than one group with the same interest (e.g. the consumer interest) may be funded since there can be more than one consumer interest.[81] The "necessity of representation" is satisfied "if the proposed rule would significantly affect the interest."[82]

c) Guidelines

The Commission staff uses certain factors as guides in evaluating an application. Applicants are favoured if they:[83] (1) express a point of view that is not already represented; (2) specifically and clearly set forth their argument; (3) do not have a negative relationship with the interest they claim to represent (e.g., an industry group claiming to represent consumers); (4) are supported by members or by cash contributions from the public; (5) have experience or expertise in the substantive area; or (6) have experience in trade regulation generally; or (7) have competence in the activities they propose to carry out; and (8) are willing to spend some of their own money on the proceeding.

The General Counsel points out that "none of these factors is determinative in itself. These criteria simply set forth different considerations used in determining whether an application meets the statutory standard."[84] It would seem that factors (4) and (8) would discriminate against "latent" groups in the sense that Mancur Olson used the term.[85] However, groups that satisfy (4) and (8) are probably in some sense accountable to a recognizable constituency.

The guidelines [(1), (2), (5), (6), (7)] demonstrate that the overwhelming concern of the agency is ensuring that the submissions they receive will be useful. They are less concerned, it seems, with hearing groups simply because they represent previously unheard interests.

S. 202 (h)(1)(B) also directs the Commission not to fund persons unless they cannot afford to pay the costs of their intervention. First, the Commission has a three-pronged rest of impecuniosity. When the economic stake of the interest involved is small as compared with the cost of participation, this indicates that the participant will not be able to afford to participate.[86]

Second, where the stake of the interest is large but "is divided among many separate people so that each individual has little incentive to participate", then again it is presumed that the applicant cannot afford to pay his costs.[87] It would seem that the second criterion is sufficient to protect widely diffuse interests. The first criterion applies to groups where the interest of the group as a whole is small compared to the cost of participating. Perhaps it is a waste of resources to fund interests which have so little at stake (unless, of course there is a non-economic interest at stake). Thirdly, the resources of the applicant (as opposed to the resources of the interest he represents) cannot be substantial unless "its resources are already committed to other areas...or if other factors would preclude participation."[88]

Looking at all the judgments the Commission must make in awarding funding, it seems that many subjective evaluations of the abilities and

qualities of the potential participants must be made. Such evaluations, however, would seem to be unavoidable where an agency must select from a number of intervenors. It seems that the Commission is very sensitive to the whole issue of independence. In the booklet called "Applying for Reimbursement for FTC Rulemaking Participation," issued by the FTC we read "... neither the staff nor the Presiding Officer can commit the General Counsel to approving or rejecting a particular application." [89]

S. 202 (h)(2) of the Act limits the amount of compensation that can be paid to persons who (a) would be regulated by the proposed rule or (b) represent persons who would be so regulated. The amount of such compensation cannot exceed 25% of the total amount paid as compensation in any fiscal year.

S. 202 (h)(3) originally authorized a maximum of $1,000,000 to be paid as compensation in any fiscal year when the FTC Improvement Act was passed on January 4, 1975. The Act was amended (as a result of congressional hostility towards the FTC) and now authorizes only $750,000. Congress appropriated $500,000 for Compensation during 1976 and again in 1977.[90] In 1978, 1979, and 1980 $500,000, $750,000 and $400,000 was allocated respectively.[91]

Certain activities associated with a rulemaking proceeding are not compensated. There is no compensation for the preparation of a petition asking for a rulemaking proceeding whether or not a rulemaking proceeding eventually results. No compensation is allowed for participation in judicial review of a TRR. The costs associated with preparing an application for funding are not compensable.[92]

There are constraints on what compensation can be paid for certain costs. There are maximum fees that can be charged for a lawyer's time.[93] Similarly, consultants and experts can be paid no more than the Commission pays its own consultants and experts.[94]

Participants apply for funding, usually shortly after the initial notice of rulemaking is issued outlining why their participation falls within the terms of S. 202 (h)(1) and submitting a proposed budget.[95] Participants find out whether or not they will be funded before the hearing starts. In addition ,they can receive advances before and during the hearing. Also the Commission can award supplemental funding where groups underestimate their costs.[96]

(iii) Independence

a) Independence of the Participants from the FTC

Currently, all public participation funding is administered by the Office of the General Counsel which is separate from the Bureau of Consumer Protection. When the funding program began, however, it was the latter Bureau who made the funding decisions. When this institutional arrangement was in place, there were allegations that the Bureau staff were funding those groups which generally agreed with the Bureau's position. As a result of these allegations, authority to award funds was transferred to the Office of the General Counsel in the fall of 1978.[97] The applications for funding are initially evaluated by the Presiding Officer at the hearing who determines whether the proposed intervention will be relevant and whether it will

be duplicative of other testimony. His findings are submitted to a Committee composed of top FTC personnel (with expertise in survey methodology, economics, etc.) who evaluate the proposals and give written reasons.

Interviews with representatives of some public interest groups who have received FTC funding and observers of the FTC program indicate that a funding award is not influenced by the degree to which the applicants views correspond to those of the Bureau. Boyer writes,

"As the compensation program has evolved, then, the potential for staff influence or control may arise less in the structural process for deciding upon compensation applications than in the informal contacts between staff attorneys and representatives of groups which are applying for compensation."[98]

Critics of the FTC program, however, still assert that the compensation goes to those groups that agree with FTC position.[99] Given the nature of the FTC rulemaking proceedings, this should not be surprising. The industry-wide regulations are generally designed to aid consumers in the industry and can be expected to inconvenience the regulated firms. Consequently, when consumer representatives appear at the hearings, they will tend to favour the proposed rules. Groups who are opposed to the rules (i.e., industry representatives) will generally have too many financial resources to qualify for funding.[100]

In a study conducted by the Administrative Conference of the U.S.,[101] in 7 major rulemaking proceedings, 97% of the witnesses compensated by

funded consumer groups favoured the rule. In contrast, only 23.2% of the witnesses compensated by trade and professional organizations favoured the rule. The Conference points out, however,[102]

> "...the figures do not necessarily indicate that the FTC was making biased compensation decisions by systematically choosing rule supporters over rule-opponents. Very few applications were submitted by organizations which were fighting to kill or weaken a proposed rule, especially in the early days of the FTC compensation program, and a substantial proportion of the applications contained little or no information about the applicant's attitude toward the rule. Another limitation is the fact that the broad terms 'support' and 'opposition' can encompass a variety of positions regarding a proposed rule."

It would seem reasonable to infer that the FTC does not base it's funding decision on the attitude of the applicant. However, due to the nature of the rulemaking proceeding, the FTC will generally be in agreement with the organizations who will be eligible for funding. Consequently, it is understandable that the FTC generally endorses the funding program[103] and is willing to be impartial about who they select. Given an agency which is captured (in the weak or strong sense) by the regulated industry we might expect that independence could be a far more serious problem.

b) Independence of the FTC

The FTC has come under a great deal of criticism both from business lobbyists and Congress.[104] This criticism has been directed at FTC proceedings in general and at the Public Participation program in particular.

Initially the funding program was allowed a maximum of 1 million dollars. Each year the FTC has asked for and received $500,000. In 1979-80 the Commission asked Congress for an appropriation of 1 million dollars but only received $750,000. However, due to a lack of rulemaking activity, only $400,000 was spent.[105]

In 1980-81 the Commission received $400,000 for the program but again this should be more than sufficient for the number of rulemaking proceedings.

The criticism from business groups has resulted in a greater emphasis on funding small business participants. Funding for regulated businesses is no longer limited to a ceiling of 25% of the total budget. Rather a 25% floor is now set. If 25% of the budget is not allocated to regulated businesses, this money is returned to the Treasury.

The strong criticism levelled by the business lobby has not only resulted in a cut-back in the authorization for the FTC public participation program but it has also resulted in a lessening of FTC regulatory activity.

(iv) Accountability

The study by the Administrative Conference describes efforts by the funded groups to be accountable to their constituencies :

"Some groups held meetings with individual consumers who would be affected by the rule, or discussed the issues with other consumer organizations. Others conducted informal surveys of consumer opinion about particular rule provisions, or kept their positions tentative pending completion of research they were conducting in the proceeding. A number of groups required staff members who were working on TRR's to get approval from a Board of Directors, or would not adopt a position unless consensus would be achieved among staff members."[106]

As mentioned above, the FTC is very sensitive to the issue of accountability. In describing this issue in their staff guidelines, they write:

"It can be a favourable factor if the applicant is a membership organization or is supported by cash contributions from the public or from a particular constituency. The willingness of individuals to support the applicant provides some evidence that the organization is indeed responsive to their interests and raises a presumption that the group will continue to represent its constituency's interests in the future."[107]

(v) Correcting the Imbalance of Viewpoints

The following table is taken from the Administrative Conference Study of the FTC funding programs:[108]

Comparison of Mix of Witnesses Testifying Before and After Passage of the Magnusson-Moss Improvement Act

	Consumer Rep.		Industry		Gov't Officials	
All TRR Hearings	N.	%	N.	%	N.	%
Before Magnusson-Moss	112	15.8%	368	52%	105	14.8%

	Experts		Others	
All TRR Hearings	N.	%	N.	%
Before Magnusson-Moss	86.2	12.2%	37	5.2%

	Consumer Rep.		Industry		Gov't Officials	
All TRR Hearings	N.	%	N.	%	N.	%
First Nine Hearings	226	17.8%	465	36.5%	253	19.9%

After Magnusson-Moss	Experts		Others	
	N.	%	N.	%
	251	19.7%	78	6.1%

The figures show "no clear pattern that would suggest a substantial change as a result of the compensation program."[109] It would seem then that the additional funds allocated by the program rather than changing the relative numbers of participants, allowed consumer representatives to spend more on their participation. The Conference writes: "It seems doubtful that many consumer groups could have generated the resources to master the records in detail without financial assistance. In this respect, the compensation program seems to have made it possible for consumer groups to participate on a more or less equal basis with industry spokesmen."[110]

(vi) Diversity of Viewpoints

The FTC program, as discussed above, puts a premium on the expertise of the groups receiving funding. Naturally, this leads to the predominance of well-organized groups. Boyer found that "from the start of the compensation program through January of 1979, approximately 65% of all compensation funds obligated by the FTC went to just eight groups."[111]

To counter this problem the FTC rules have been changed so that there is a $75,000 limit per group per year and a $50,000 limit per group per proceeding.

(vii) Cost of Operating the Program

One full time staff member (the Special Assistant to the General Counsel for Public Participation) administers the funding program. She has one assistant. There is also an auditor and a clerk who work part of their time on the funding program. The four reviewers on the Committee to review the applications spend a few hours each week reviewing the applications and meeting to discuss them. A very rough estimate of the cost of administering the program (which gives out $500,000/year) is $75,000.[112]

(viii) Conclusions and Proposed Legislation

The FTC public participation program has increased the resources available to consumer groups who wish to intervene in rulemaking proceedings. A decision has been made to favour groups with expertise and an established constituency. This has led to the predominance of certain groups in the proceedings. The "solution" to this problem has been to set limits on the amount of funds that can be received by any one group. This solution may not produce the desired result if groups simply fragment themselves into separate entities so that each entity will be eligible for funds. More fundamentally, the decision to set a limit on funding reflects a latent concern for public participation funding as a mechanism for the fostering of a pluralistic decision making process.

If this concern is present, it should be factored into the decision making process at an early stage and not enforced ex post via arbitrary limits. For example, when deciding whether or not to provide funding, consideration could be given to the amount of funding the group had already received. Such a system would remove the possibility of the fixed limits, depriving a group of the opportunity to participate when it is the only group which is prepared to do so.

The key problem with the FTC program relates to the independence of the funding authority from the decision maker. This problem has been addressed by proposed legislation in the U.S. Senate and House of Representatives which has been approved in committee in the Senate but has been effectively gutted by the House. The Bill would make public participation funding available to all major regulatory agencies in the U.S. In this bill, the funding authority is to be a separate agency - the Administrative Conference of the U.S.[113] The Administrator rules on funding a participant after receiving recommendations from the agency involved. Clearly the Administrator, being distant from several regulatory agencies with widely disparate aims and purposes, will administer the programme at a higher cost than would the separate agencies. However, this cost would seem to be worthwhile given the need for an independent funding source.

f) Conclusion

The four cost award programs studied provide interesting insights. The FTC and CRTC appear to have gone the farthest in resolving technical difficulties and clarifying their procedures. The Berger Inquiry (of necessity) had a funding process which was rather informal.

The Alberta program appears to have encountered problems because the Board itself does not seem fully committed to the idea of public intervenor funding. The FTC program has the support of the FTC but not unqualified by the U.S. Congress. The CRTC and Berger programs are successes because both the Commissions and the government supported the programs. Where a cost award program has the support of the agency and the legislature it is an effective way of encouraging public interest participation.

3. A Government Advocacy Office

a) Introduction

In Canada, there has been no experience to date with an office of the Consumer Advocate. Many Canadian provinces do have Ombudsman legislation but an Ombudsman cannot intervene as a party before regulatory agencies or in the courts. There have been considerable efforts to establish an Office of the Consumer Advocate, or Agency for Consumer Protection (ACP), in the United States. These efforts have been unsuccessful to date. Since a great deal of effort went into planning the ACP we will examine the legislation that was proposed. We will also look at the New Jersey Department of the Public Advocate.

b) The American Agency for Consumer Protection

(i) Background

In 1961 a bill to create a Department of Consumer Affairs was unsuccessfully introduced in the U.S. Senate.[114] In 1965 a similar bill was introduced in the House of Representatives.[115] In 1969 a bill was again unsuccessfully introduced in the Senate to create a Department of Consumer Affairs with inter alia the authority to advocate consumer interests in Federal regulatory hearings.[116] A bill to create an independent agency (i.e., independent of the Executive Office of the President) oriented largely towards advocacy passed the Senate on December 1, 1970. However, the bill did not clear the House of Representatives Rules Committee.[117] In the 92nd

and 93rd congresses consumer protection agency legislation passed the House of Representatives with more than two-thirds of the total votes in favour, but failed in the Senate due to a filibuster.[118] In 1975 substantially similar Consumer Protection Agency legislation passed the House and the Senate but was not brought to conference[119] (i.e., there was no agreement between the two as to the final form of the statute). In 1977 the House held hearings on the creation of a Consumer Protection Agency as envisioned in H.R. 6118.[120] A bill incorporating some changes (H.R. 6805) failed to pass a House vote.[121] Observers in Washington are not optimistic about the possibility of a Consumer Protection Agency being created.[122]

(ii) Why the ACP was Not Created

A number of factors led to the failure of efforts to establish the ACP. There were extremely aggressive lobbying efforts by the business community in opposition to the proposed agency.[123] Grass roots support for the legislation was not present during later versions of the bill.[124] The general antipathy toward government regulation which was in a sense the genesis of the idea of the ACP led to public disapproval for the cration of yet another government agency.[125] Finally, as the debate surrounding the legislation showed the need for consumer input into agency decisions, the agencies initiated smaller programs to provide this input, thus lessening the need for ACP.

(iii) The Legislation

a) Functions

The proposed Agency for Consumer Protection (ACP) as formulated in H.R. 6805 would have six main functions. These are:[126] (1) representing the interests of consumers before Federal agencies and the courts; (2) conducting research studies and testing; (3) making recommendations to the Congress and the President; (4) publishing information of interest to consumers; (5) conducting conferences, surveys and investigations concerning the needs, interests and problems of consumers; (6) co-operating with state and local governments and private enterprise in the interests of consumers.

b) Advocacy

The bill gives the Administrator of the Agency the authority to intervene in formal hearings and to participate in informal activities and proceedings.[127]

The ACP can transmit relevant information or evidence at a prosecutorial-type Federal agency proceeding (i.e.,where a fine or forfeiture is imposed).[128] The ACP "to the extent that any aggrieved person may have such a right" can seek judicial review or intervene as a party in a judicial review.[129] The ACP is also authorized to request the initiation of a proceeding.[130] The ACP "is not authorized to 'intervene' in proceedings before State or local agencies and courts."[131] In short, the legislation gives the ACP the same powers

to participate in federal agency and court proceedings as any interested party would have.

c) Information Gathering

The Agency has powers which exceed those of an interested party with respect to gathering certain types of information. With certain exceptions, the ACP can request reports or other information from any person engaged in business to the extent that information is "required to protect the health or safety of consumers or to discover consumer fraud or substantial economic injury to consumers."[132] This power cannot be used to require the violation of any privileged relationship.[133] Information cannot be required from any small business concern (less than twenty-five employees or assets less than $5 million), unless it is "necessary to prevent imminent and substantial dangers to the health and safety of consumers and the ACP has no other effective means of action."[134]

These provisions give the agency considerable powers. They represent one possible advantage that a public advocate has over private public interest groups. It would be improper to invest private public interest organizations with wide-ranging information gathering powers with respect to other citizens and businesses. By granting this power to a public advocate, consumer interests can be protected more effectively.

Federal agencies must also provide the ACP with access to their records which the ACP deems necessary to its functions. "This access does not apply to matters that fall under exemptions to the Freedom of Information Act."[135] It seems that the provisions for allowing access to public files are similar to the rights that a citizen would have under the Freedom of Information Act. The legislation recognizes that access to information is crucial if the advocate is to perform his functions effectively.

d) Exemptions

The legislation exempts certain agencies with respect to their national security and intelligence gathering functions. The statute also exempts certain labour management disputes and agreements. The Committee on Government Operations explains the latter exemptions as follows: "If the proceeding is solely concerned with commercial transactions, whether or not a labour organization is involved, ACP participation is proper; if however, wages, hours, terms and conditions of employment are immediately and directly involved, the ACP should not participate."[136] This labour management exemption makes sense if one accepts the premise that labour legislation is not intended to promote the public interest (including the consumer interest) but rather is intended to improve labour relations. Some observers however, see the labour-management exemption as a political compromise necessary to procure enactment of the bill.[137]

Agencies involved with price support and subsidies for agricultural products and similar agriculatural legislation are also exempted. Staff personnel at eh House Committee expressed the view that these exemptions were granted in order to get votes in the House.

e) Cost

The legislation allocated the ACP a budget of $15 million for 1978 and $17 million for 1979.[138] Staff members at the House were of the opinion that this sum was purely a political compromsie which had very little to do with what it was thought the agency would need to perform some specified level of services. There was apparently little consideration given to how the budget was to be allocated among the different functions of the agency. However, the agency was intended to engage mainly in advocacy, primarily before regulatory agencies and also before courts.

Sections 14 and 15 of H.R. 6805 provide for the transfer of various consumer programs to the ACP. H.R. 6805 does not identify what these programs are. The legislation states:

> "The President is directed to submit to Congress a reorganization plan within 180 days of enactment of the bill which provides for the transfer to the ACP of Federal agency consumer-related programs which can be perfomed more appropriately or with greater efficiency by the ACP. . ."

These programs, according to staff members on the Committee on Government Operations, had budgets of approximately $10 million. Therefore the proposed Agency would only have received $5 million of "hew" funds in its first year.

The agency was perceived to be a "glamour" agency. There was a general feeling that the agency would therefore be able to attract high quality personnel.

f) Independence

Earlier versions of ACP legislation contained provisions which would give the Administrator of the Agency a ten-year term of office, whereby he could only be removed for performing his duties in bad faith or negligently. However, H.R. 6805 did not contain such a provision. It was thought that the head of the Agency must be accountable to the President. The Administrator therefore serves at the pleasure of the President and can be removed at any time for any reason.[139]

The Agency was to terminate in 1982, five years after its inception. The President was "to review the performance of the Agency and report to the Congress prior to September 30, 1981 on such findings . . ."[140] Congress, on the President's recommendations would either renew, reorganize or terminate the agency. It seems that this provision would also weaken the independence of the Agency from Congress and the President and make it more likely to cater to their wishes.

The Administrator of the Agency was to have a position in the civil service hierarchy equivalent to the level of the heads of many regulatory agencies in the U.S. Government.[141] This high position

would give the administrator prestige and proximity to the President and would therefore help to provide the agency with independence. There were no provisions to guarantee the funding of the Agency. To summarize, it does not seem that the ACP would have had enough independence within the government.

Section 3 of H.R. 6805 includes the following provision:

> "The Administrators, Deputy Administrators, General Counsel, and Assistant Administrators are prohibited from ever representing or advising a regulated party or association representing a regulated party on any issue with which they were involved in a decision-making capacity - and are similarly prohibited for a period of two years following their employment from representing such parties on any matter in which the agency participates before a Federal agency or in the courts during their employment.

The first of the above prohibitions is apparently concerned with preventing the disclosure of information which is of a confidential nature. However, the second prohibition would, by preventing top Agency personnel from working for regulated firms, thwart efforts to "capture" the ACP in the strong sense (as discussed in Ch.II).

g) Accountability

The legislation explicitly recognizes the need to assess the preferences of consumers. In S. 5 (5) of the legislation dealing with the functions of the agency we find that the agency may:

> "Conduct conferences, surveys and investigations concerning the needs, interests and problems of consumers which do not significantly duplicate similar activities conducted by other federal agencies."

This seems to be a realistic way for the agency to interpret the needs of its client group. Conducting surveys allows the agency to assess the "needs, interests and problems" of consumers on a wide variety of issues. Of course, true accountability is not assured since there are presumably no sanctions against the Administrator if he chooses to disregard the preferences of consumers as revealed in the surveys.

h) Presenting a Diversity of Views

One major problem that weakens the usefulness of the ACP is the difficulty of promoting more than one consumer interest when such a diversity of interests exists. There is, of course, some question as to how often this problem will arise. A 1977 U.S. Senate study of different methods of funding public participation, addressing this problem, cites testimony from Senate hearings with approval:[142]

"The former Chief of the Bureau of Consumer Protection at the Federal Trade Commission observed that:

> "On most consumer issues that I saw at the Federal Trade Commission, there was no underlying conflict. All consumers were pretty much on the same side in desiring and needing a certain form of protection. For example, I don't believe there is any consumer interest that favours false advertising or deceptive advertising and, hence an aggressive program at the FTC to deal effectively with false advertising can only serve all consumers' interest.

Similarly, with regard to another area of consumer unanimity, Peter Schuck of Consumers Union stated:

> While it is certainly true that the utility functions of consumers are richly diverse, it is also true that there is a consumer interest which the CPA can faithfully and unequivocally represent -- the interest in a free market economy characterized by vigorous competition, economic efficiency, and optimal consumer information."

The above testimony indicates that the presentation of a diversity of views may not be that serious a problem. Where problems do arise, the Senate study suggests two ways in which the ACP could resolve the problems created by a multiplicity of consumer views.[143] First, the ACP could propose a compromise solution that reconciles the different consumer interests. Secondly, it could explain all the different consumer interests to the regulatory agency.

Perhaps there is no solution to the problem. That is, the ACP cannot be seen as the sole advocate of the consumer interest. Public interest groups will still be needed to advocate on behalf of the consumer and like interests. Public interest groups will still be needed to advocate on behalf of consumers' interests which differ from those represented by the ACP.

(i) Conclusion

The ACP legislation has come close to being enacted in the United States on several occasions. Ultimately, lobbying by business interests and general resistance to the creation of another government agency prevented it from becoming law. The legislation gives the Agency broad powers to represent the consumer interest.

However, the Agency was primarily intended to perform advocacy functions. The ACP has much the same rights of participation in regulatory and court proceedings as any interested party. The consumer advocate, however, has extensive powers to gather information. Probably the most significant flaw in the concept of having a publicly run consumer advocacy agency involves the lack of independence that the advocate has from the rest of the government. Problems could also arise from the inability of the ACP to forcefully advocate conflicting views. Accountability to its constituency is enhanced by provisions in the bill for conducting surveys to determine the preferences of consumers. The bill seems thoughtfully written but it may have been unable to overcome the problem of lack of diversity which is inherent in a government office of the consumer advocate.

c) New Jersey Department of the Public Advocate

(i) Background

In 1974, the State of New Jersey enacted legislation creating the Department of the Public Advocate.[144] The existing office of the Public Defender was incorporated into the DPA[145] and the head of the Office of the Public Defender (Mr. Stanley C. Van Ness) was appointed to be the head of the DPA as well.[146] The Office of the Public Defender is the agency in New Jersey which administers legal aid for indigent people.

The Department of the Public Advocate Act of 1974 created four divisions whithin the DPA, and one office within the Office of the Public Defender.

The Office of Inmate Advocacy operates as a part of the Office of the Public Defender. This office represents inmates in disputes and litigation "as will ... best advance the interests of inmates as a class".[147]

The Division of Mental Health Advocacy represents indigent mental hospital admittees as individuals or as a class.[148]

The Division of Citizen Complaints and Dispute Settlement handles and investigates complaints.[149] This division also provides "mediation consultation and other third party services to community and civic groups, and municipal and county agencies".[150]

The Division of Rate Counsel represents the "public interest" in rate hearings before any state agency.[151]

The Division of Public Interest Advocacy represents the public interest in administrative and court proceedings others than those under the jurisdiction of the Division of Rate Counsel.[152] For the remainder of this section, we will concentrate on the latter two divisions.

(ii) Activities and Funding

a) The Division of Public Interest Advocacy

This division is powered to represent the "Public Interest" S. 30 of the legislation defines this term as follows:[153]

> "As used in this act, public interest shall mean an interest or right arising from the constitution, decisions of court, common law or other laws of the United States, or this State inhering in the citizens of this State or in a broad class of such citizens."

This division is required to canvass further considerations in deciding whether to represent an interest. The Public Advocate must consider: (1) "the importance and the extent of the public interest involved" and (2) "whether that interest would be adequately represented without the action of the department".[154] Included in this second consideration would be some assessment of the ability of the individual (or class) to represent himself (or itself).

On any given issue the lawyers in the Division of Public Interest Advocacy (D.P.I.A) decide (sometimes with the help of other divisions) where they think the public interest lies. They then conduct advocacy efforts to promote those interests which further their conception of the public interest. They will not

represent an interest simply because it is unrepresented.[155] For example, assume an issue involved an environmental interest which was opposed to a consumer interest. Assume also that the D.P.I.A. felt that the former interest should predominate. If the environmental interest was already adequately represented and the consumer interest was not represented, they would not represent either interest.

The D.P.I.A. currently employs ten lawyers.[156] They hire outside experts when needed. In 1979, their expenditures equalled $385,000. The lawyers are divided into major substantive areas, These include: health, employment, housing, energy and the environment.[157] The lawyers at the D.P.I.A. feel that their most important criterion for taking a case should be its impact in helping the disadvantaged and underprivileged groups in New Jersey.[158]

b) Rate Counsel

Rate Counsel generates its own funds because the legislation grants this division a power of assessment. This power is triggered whenever a regulated firm applies for a rate increase and the Rate Counsel intervenes to represent the public interest.[159] When this happens the Division of Rate Counsel (D.R.C.) can assess the business up to 1/10 of 1% of its revenue (from the product or services regulated in that hearing) for the past year. The power of assessment only allows the Rate Counsel to assess revenues to pay for expenditures actually made in intervening in a rate case.[160]

One problem with the power of assessment is that it can only be used where the regulated firm(s) initiate the proceedings. Therefore, Rate Cousel are effectively prohibited from initiating proceedings simce the power of assessment is their only means of raising funds.

The Rate Counsel has 23 lawyers on staff.[161] They intervene, inter alia, in hearings to set gas, electricity, water, insurance and hospital per diem rates.

(iii) Independence

The public advocate in New Jersey is a member of the Governor's cabinet.[162] One scholar has described this arrangement as follows:[163]

> "The New Jersey Department of the Public Advocate is clearly the strongest public advocacy office in the country because of its grant of authority and its organization,... Independent cabinet status maximizes the opportunity for publicity and allows the Department of the Public Advocate to establish its own identity as a unique agency within the state bureaucracy. Because of the protection that its independent status provides, the department can cope more easily with attempts by either private interest groups or other governmental entities to exert pressure on the public Counsel's activities."

The powers of the Public Advocate with respect to the Department of Public Interest Advocacy are described as follows:[164]

> "The Public Advocate shall have sole discretion to represent or refrain from representing the public interest in any proceeding."

Since the Public Advocate has the sole discretion, his discretion cannot be overridden by the Governor. Judicial review is limited to those situations where the Public Advocate's decision to institute litigation is so irrational as to render the decision

arbitrary and capricious.[165] Having this broad discretionary power increases the advocate's independence.

One institutional factor which decreases the Public Advocate's independence is his tenure of office. He serves, "at the pleasure of the Governor."[166] This means that the Public Advocate can be dismissed at any time. Clearly independence could be promoted by giving the advocate a fixed and lengthy term of office.

Independence from the legislature is a problem since the legislature must provide funding to the department each year. In 1975, the D.P.A. had its funding cut back by $750,000.[167] Funding was eventually eliminated for the Office of Inmate Advocacy which continues to operate with Federal funding.[168] There are always bills pending in the legislature which are designed to emasculate the public advocate.[169] However, these bills have never succeeded. Other than the funding cut-back in 1975, mentioned above, the funding for the program has always been solid.

How is it that a department which regularly sues municipalities and state government departments does not suffer funding cut-back at the hands of legislators who must be influenced by the interests being sued by the D.P.A.? There are three reasons. First, the governor and the majority of the legislature are members of the same party. The governor supports the program and the legislature is less likely to thwart the aims of a governor who represents their party. Second, and more important, the D.P.A. has considerable support from the media and the public. The Office of Inmate Advocacy was

not very popular with the public (simply because it aided inmates). This explains why this office had its state funding cut off.

Third, the D.P.A. is able to maintain its independance due to the high public profile and prestige of Mr. Stanley Van Ness, the man who has been public advocate since the program began. Various public interest groups expressed to the authors some doubts as to whether the D.P.A. would be able to maintain its independence when Mr. Van Ness was no longer the Public Advocate.

Rate Counsel is provided with a unique method of maintaining its independence, namely the power of assessment, described above. As Schroub has written:[170]

> "Assessment can produce a stable and adequate level of funding regardless of the prevailing political situation."

(iv) Accountability

There are no formal mechanisms by which surveys or polls are taken to determine the preferences of the public that the D.P.A represents. The Office of Citizen Complaints may refer a complaint to the D.P.I.A. or Rate Counsel and in this way these divisions have some information as to public preferences.

(v) Diversity of Views

The statute which creates the D.P.A. sets down the options available to the Division of Public Interest Advocacy, given more than one public interest, as follows:[171]

> "If the Public Advocate determines that there are inconsistent public interests involved in a par-

> ticular matter, he may choose to represent one such interest ..., to represent no interest in that matter, or to represent one such interest in the Division of Public Interest Advocacy and another or others through outside counsel engaged on a case basis."

In fact, as discussed above, the department will not advocate a view unless they feel that it is the best position having regard to their view of the public interest. Also the D.P.I.A. does not represent views which conflict with other divisions. Where there is a disagreement within a division or between the divisions, the lawyers resolve their differences internally.[172] The D.P.I.A. has never funded outside counsel to represent an unrepresented party.[173]

The D.P.A. does work with public interest groups, however, in preparing its cases. Rate counsel works with private individuals who appear at rate hearings and wish to make a statement. They will present these individuals as witnesses and will protect them against cross-examination.

(vi) Effectiveness

The effectiveness of the Rate Cousel division can be partly inferred from the following charts:[174]

SUMMARY OF RESULTS IN CASES BEFORE THE BOARD OF PUBLIC UTILITIES

	AMOUNT REQUESTED	RATE COUNSEL RECOMMENDATION	BOARD AWARD
1975 Total	309,003,125	58.6%	85.2%
1976 Total	825,590,981	22.3%	27.5%
1977 Total	129,121,852	19.5%	25.4%
1978 Total	481,664,453	37.7%	40.5%
1979 Total	769,695,916	45.7%	69.0%
Total 1975-1979	$2,515,076,327	36.7%	49.7%

NOTE - Amounts reflect only those cases in which Rate Counsel participated and recommended specific amounts in cases where the Board granted permanent relief. Interim awards are not included.

1979

SUMMARY OF RESULTS ACHIEVED BY THE DIVISION OF RATE COUNSEL IN MAJOR CASES HEARD BEFORE THE BOARD OF PUBLIC UTILITIES

NAME OF CASE	REQUESTED RELIEF	RATE COUNSEL RECOMMENDATION	BOARD AWARD	DATE
Hackensack Water Co.	$ 11,077,000	46.9%	46.9%	1/03/79
New Jersey Bell	148,800,000	6.4	34.4	1/31/79
JCP & L Phase II	69,200,000	50.9	50.9	1/31/79
New Jersey Water Co.	2,958,052	50.7	50.7	2/15/79
Commonwealth Water Co.	2,871,221	66.2	66.2	2/28/79
JCP & L	113,000,000	39.8	39.8	6/18/79
Atlantic City Electric Phase II	20,900,000	47.8	47.8	6/27/79
New Jersey Natural Gas	14,378,555	63.7	63.7	6/27/79
PSE & G	160,000,000	25.0	100.0	7/03/79
JCP & L	98,800,000	71.4	71.4	9/05/79
Elizabethtown Gas Co.	16,600,000	49.5	68.3	9/13/79
PSE & G	107,000,000	73.8	78.5	9/27/79
Elizabethtown Water	5,700,000	64.9	64.9	10/12/79
Atlantic City Electric	68,200,000	82.1	94.3	11/28/79
Monmouth Consolidated Water Co.	4,336,827	36.9	36.9	12/14/79

The opinions of scholars and public interest groups confirm Rate Counsel's effectiveness.[175]

The Division of Public Interest Advocacy has also been very effective. For example, in 1975, the D.P.I.A. successfully opposed the construction of an off-shore nuclear plant.[176] In 1976, the D.P.I.A. represented a woman who was denied compensation by the Violent Crime Compensation Commission. The Supreme Court of New Jersey ordered the Commission to reconsider the matter because she had received notice of her rights after the statute of limitations had run out. A New Jersey Supreme Court decision has strongly praised the Division of Public Interest Advocacy. In Township of Mount Laurel V. Department of the Public Advocate[177] a township and two of its taxpayers alleged that the D.P.A. was in violation of the New Jersey Constitution. The N.J.S.C. rejected this claim and went on to say:

> "The vital need to hold the government accountable to those it serves and the need to provide legal voices for those muted by poverty and political impotence cannot be overemphasized. The Public Advocate goes far toward satisfying these needs, thereby nourishing and revitalizing our political system. . . Although the public interest may elude a universally satisfactory definition,... we cannot say that the creation of the Department of the Public Advocate is unconstitutional. Indeed, the Public Advocate admirably furthers the principles embodied in our Constitution."

(vii) Conclusion

The New Jersey Department of the Public Advocate effectively conducts advocacy activities before regulatory tribunals and the courts. The D.P.A. works effectively with public interest groups. The Public Advocate has aggressively sued various Departments of the New Jersey government when the public interest required it.

The New Jersey D.P.A., then, is a success. The reasons for its success are not entirely clear, however. One important factor is the favourable media and public support the D.P.A. has received. Other factors include the effectiveness of the man chosen as Public Advocate. The current situation in the New Jersey legislature also seems favourable. If one or more of these factors change, then the New Jersey D.P.A. may become a less effective and independent institution.

4. Staff Counsel

a) Introduction

Public interest perpectives can be introduced at regulatory proceedings by lawyers appointed by the regulators. In addition, agency counsel can work with public interest groups to present public interest viewpoints. In this section we look at the role of agency counsel in promoting the public interest at two different agencies: the Ontario Energy Board and the Select Committee on Hydro Affairs of the Ontario Legislature.[178]

b) The Ontario Energy Board

(i) Background

The Ontario Energy Board conducts hearings, inter alia, when rate increases are asked for by Ontario Hydro. These hearings are not required by law and result only when the matter is referred to the O.E.B. by the Minister. The O.E.B. can only make recommendations to the Minister and the Minister can (and sometimes has) rejected these recommendations. There has been a hearing each year since 1974. These hearings are only concerned with bulk power costs (that is the cost of power to wholesalers) and not the retail cost of power.

(ii) The Role of Board Counsel

The Board counsel has two different sets of tasks to perform. First, he must advise the Board members on procedural and other legal matters that concern the Board. Secondly, he must challenge the case put forward by Ontario Hydro. This is generally done through cross-examination,

although evidence can be called. In order to avoid any appearance of conflict between the two roles during the hearings, Board counsel usually communicates to the Board members "on the record".

Public interest groups, such as the National Anti-Poverty Organization and Energy Probe as well as other intervenors (municipal utilities, industrial power consumers) take part in the hearings. What then is the difference between the activities of Board Counsel and the other intervenors? One lawyer who has often acted as Board Counsel felt that his duty was to bring out all of the relevant information. He tries to bring out both sides of all issues. Counsel for an intervenor, on the other hand, is largely interested in representing the views of his client as forcefully as possible. In other words, Board Counsel is constrained to be fair to all parties and therefore cannot strenously advocate one view.

(iii) Independence

Ontario Energy Board counsel at most hearings are not full-time staff members. Rather they are lawyers with private practices who are hired to be counsel for a particular hearing. This increases the independence of Board Counsel. A lawyer with a private practice does not depend on the O.E.B. for his entire livelihood and therefore will be less sensitive to the Board's preferences. The O.E.B. hires one of four or five different lawyers to act as counsel for its hearings. This too diminishes the pecuniary importance of the O.E.B. hearings to any one lawyer, thereby further increasing independence (while still ensuring that the counsel can build up expertise).

(iv) Diversity of Views

Board counsel assists intervenors who come to the hearings without counsel. He will protect them from cross-examination by the applicant's lawyers. Counsel will help the intervenors work out their ideas and will ask questions for them if they request it. Transcripts, library facilities and to some extent the O.E.B. staff expertise are made available to intervenors. In short then, the O.E.B. counsel does not monopolize the role of public interest representation. Other public interest intervenors are helped in making their presentations although they are not given funding.

(v) Effectiveness

Board counsel at the O.E.B. helps to correct the underrepresentation of public interest perspectives. Public interest representatives stress that Board counsel are fair, conscientious and very helpful. However, the lack of funded public interest advocates presents problems. First, the public interest viewpoints are usually not supported by expert testimony. Second, since the Board counsel is representing an amalgam of public interest views he cannot help but under-emphasize some points that public interest advocates would emphasize; the lack of funded public interest groups means that public interest perspectives are not aggressively and forcefully advocated. Public interest representatives expressed to the author the view that these deficiencies led to an under representation of the public interest.

c) The Ontario Select Committee on Hydro Affairs

(i) Background

The Select Committee is composed of fourteen members of the Ontario Legislature, representing all three parties. They have conducted hearings on such matters as electricity rates and the disposal of nuclear waste.

(ii) Role of Committee Counsel

Counsel for the Committee and a consultant hired by the committee work together setting up each hearing. They read the available literature, and talk to people involved with the subject matter of the hearing. This helps them to identify the issues and the key players. They then contact the key players and arrange to have them brought before the Committee as experts. They have been successful in the past in getting the leading experts in many fields at their hearings. Public interest groups are often asked to attend.

No public interest group or other intervenor has a right to make a presentation at the hearing. If the Committee counsel decided that an individual or group is not needed at a hearing, that person or group can go to the chairman of the Committee. The Committee will then decide whether the appearance is needed. This and all Committee deliberations are made in public.

No participant is allowed to ask questions at the hearings. All questions are asked by Committee members or counsel for the Committee. Given that no group has the right to appear at or

ask questions at the hearings, how is procedural fairness guaranteed? The make-up of the Committee is the safeguard in this case. The fourteen MP's represent different political viewpoints and geographical areas in Ontario. Therefore, if any participant at the hearings feels that there is a line of questioning that should be followed, he can approach a Committee member and ask him to develop this line of questioning.

The diverse beliefs and the responsiveness to the public of the politicians are also the safeguard with respect to ensuring that public interest groups can appear in order to make a presentation. The Committee composed of members with diverse views will presumably want to hear participants with a wide range of viewpoints.

(iii) Independence

The Committee counsel here is not especially independent from the Committee. He works with the Committee in setting up and conducting the hearings. Again, however, this is because of the unique character of the Committee. Fairness in this committee is not brought about by having independent advocates in an adversarial role. Rather, it is brought about by having a committee composed of members with diverse views conducting an inquisititorial proceeding with all deliberations made in public. Therefore, the fact that the Committee counsel works closely with the Committee is an advantage, not a disadvantage.

(iv) Diversity of Views

Occasionally, the Committee will hold special public meetings. For example, when hearings were held regarding nuclear safety, public meetings were held in a town where there was a nuclear power plant. When public meetings are not held, lay people typically have input by writing a letter to the committee. These letters are all filed and become part of the record.

Participants who are invited to come to the formal hearings (not the public meetings) will be paid airfare, hotel and an honorarium ($200 per day at the hearings) if necessary. Participants are not usually paid for preparation time. However, public interest groups will sometimes be paid for their preparation time in recognition of the fact that they have limited resources. Such payments are usually modest ($100 to $200 per day).

(v) Effectiveness

The Select Committee has produced a number of reports which are generally well received and have often been translated into government policy. A public interest representative contacted by the authors felt, however, that there are some problems. Since participants cannot ask questions, this limits their effectiveness. Not all viewpoints

are given a fair hearing at the proceedings. Finally, there is not enough publicity about the process entailed at the hearings. Therefore, many interested groups may not be aware that they could ask to be allowed to participate.

The public interest representative stressed that within the framework of the process, the MP's, Committee counsel, and the consultant worked as hard as they should to produce a fair and useful hearing. However, it was felt that, nevertheless, the hearing was not as effective as adversarial proceedings with funded public interest groups.

d) Conclusion

Board counsel can increase the representation of public interest viewpoints. Different institutional structures can be created which result in essentially fair and useful proceedings. However, the two examples described above indicate that only adversarial hearings with funded public interest groups produce the forceful advocacy needed for balanced public policy decisions.

5. GOVERNMENT GRANTS TO GROUPS

a) Introduction

In this section we will examine the most concerted effort to date to encourage public interest groups in Canada. This is the program of the Department of Consumer and Corporate Affairs (DCCA). We examine two public interest groups which receive almost all of their funding from DCCA. They are the Regulated Industries Program of the Consumers Association of Canada and the Public Interest Advocacy Centre. We will also take a general look at public interest groups in the United States. We take a closer look at two U.S. groups. These are the Centre for Law and Social Policy (C.L.A.S.P.) and the National Consumer Law Centre. The latter group is government funded. C.L.A.S.P. and many other U.S. groups are primarily funded by foundations. We examine these groups in this section because it is useful to compare government funding with foundation and other private funding sources.

b) The Department of Consumer and Corporate Affairs Program

(i) Background

Direct funding of consumer groups began in Canada in 1947. It was in that year that the Consumers Association of Canada (CAC) was founded in order to continue some of the activities of the War Time Prices and Trade Board.[179] This board was involved with overseeing price controls and rationing. The Association received funding from

the Department of Finance. The Department of Consumer and Corporate Affairs (DCCA) was formed in 1968-69 and took over the funding of CAC in that year. DCCA is now called Consumer and Corporate Affairs Canada (CCAC).

In 1972, DCCA decided to officially recognize the benefits of having consumer groups involved in advocacy efforts. Also, at the same time, the Department of Communications was interested in having a consumer voice heard at regulatory hearings. In 1973, DCCA announced that an interim experiment would be started whereby the CAC would receive $100,000 per year in order to expand its advocacy activities.[180] CAC allocated $35,000 of this amount to regulatory advocacy. In 1974, the experiment was continued and CAC received $116,000 to be used in advocacy efforts before regulatory agencies and in bringing test cases before the courts. Other consumer groups were funded in 1973 and 1974 but these groups were not primarily involved in advocacy.

In 1975-76, a full-fledged program to fund consumer groups was underway. This program dispensed $600,000 per year in 1975-76 and in 1976-77. 900,000 dollars was granted in 1977-78 and in each succeeding year to the present time. The program allocates 75% of the money to "national" groups and 25% to regional groups.

Each year the Department of Consumer and Corporate Affairs sets priorities to determine which type of groups should be funded. Currently, the priorities for national groups are: advocacy, consumer information, consumer assistance (complaint handling) and budget counselling.[181] Groups submit proposals for funding each year. These proposals are evaluated and funding allocated according to the expertise of the group, whether the project fits within the current priorities and the past performance of the group.

The groups must be non-profit organizations in order to receive funds.[182] The Department does not generally provide core funding to cover overhead expenses. Rather, they are interested in funding specific projects. Groups are greatly encouraged to seek other means of obtaining funds.

We will examine the two national programs which are funded by DCCA which are heavily engaged in advocacy. These are the Consumers Association of Canada and the Public Interest Advocacy Centre (PIAC).

(ii) Consumers Association of Canada

a) Background

In 1975 the CAC set up the Regulated Industries Program (RIP).[183] This program has its own board of directors, although it is ultimately responsible to the CAC. The program's term of reference allow it to engage in advocacy activities which concern regulated industries. RIP's funding from DCCA has been as follows:[184]

Year	Funding	# of Lawyers
1973-74	$100,000	1
1974-75	$116,000	2
1975-76	$215,000	2
1976-77	$100,000	1
1977-78	$120,000	1
1978-79	$175,000	3
1979-80	$150,000	2

b) Activities

The RIP program will only intervene in a regulatory matter when there is a consumer interest at stake. Major initiatives are taken only after the RIP board of directors consults with and instructs the staff lawyers.

c) Accountability

The Regulated Industries Program is under the authority of the Regulated Industries Policy Board. The Board consists of from 6 to 10 members. Appointments to the RIP Board are made by the CAC National Executive after recommendations by the existing RIP Board. Appointments are made so as to take into account geographical representation and so as to reflect "a variety of backgrounds."[185] "The RIP Board, through its Chairman or designee, will report to the National Executive (of the CAC) at National Executive Meetings and will be ultimately accountable to the National Executive for its actions."[186]

There is then accountability of a sort to consumers. The RIP program is accountable to the CAC National Executive. The National Executive is elected by the membership of the CAC who number some 150,000. In Winners and Losers in the Modern Regulatory System. Must the Consumer Always Lose?[187] (Trebilcock, 1975) this issue is addressed as follows:

"The question of the constituency for whom consumer advocates speak poses more fundamental problems. Just as disproportionately few citizens

will find it worthwhile to join a consumer organization offering collective goods, so also will most of those who join find that it is unlikely to be worthwhile to participate extensively in collective goods decision-making. Thus, in C.A.C., only a handful of members find it worth the effort even to vote for membership of the association's small Board of Directors, let alone involve themselves further in the formulation of the association's policies."

> In other words although a formal mechanism exists to provide accountability, in practice this accountability is highly attenuated. In fact, only about 250 members vote.[188]

d) Independence

Personnel associated with the RIP program asserted to the authors that their relationship with DCCA did not constrain their freedom to act independently.[189] They felt free to advocate any policies even if these policies were in direct conflict with the views of DCCA. In fact, the Consumers Association of Canada, prior to the establishment of RIP, but while funded by DCCA for advocacy activities, criticized DCCA for their regulations and policies regarding children's car seats. Officials DCCA were highly critical of CAC's position in this matter. However, the incident did not jeopardize CAC's funding by DCCA.

The RIP program receives its funding from DCCA by signing a contribution agreement which outlines the activities RIP must perform in order to become eligible for funding. However, the "project" that RIP must complete is phrased in the widest possible terms.

The relevant section of the May 31, 1979 contribution agreement reads as follows:[190]

> "The Department of Consumer and Corporate Affairs and the Consumers Association of Canada (CAC) recognize the need for representation of the Consumer interest before regulatory boards and tribunals, before committees and in the courts.
>
> In response to that need the CAC will continue its Regulated Industries Program (RIP) whose activities include interventions in regulatory proceedings, the preparation of briefs and submissions and advocacy-related research. All of these activities are carried out to ensure the consideration of the consumer interest in decisions which could have an impact on consumers."

There is of course, always the hypothetical possibility that the program could have its funding cut off in response to pressure from lobbying groups. In the event of this happening,however, an appeal could be made to the media. In August of 1978 it was announced that the entire DCCA grant program was to terminate. CAC went to the media and received extremely enthusiastic support.[191] As a result the grant program was continued. This incident shows that the RIP program (and high-profile public interest groups in general) can rely on media support to guarantee a certain amount of independence from government funding sources.

The personnel at DCCA who were spoken to supported the grants program. Their decision making process was based on funding those groups whose projects fit within the priorities and requirements of the funding program and not on an analysis of the positions taken by the groups on various issues.

It is interesting to note an exchange of correspondence which took place in the spring of 1978. Mr. A.J.de Grandpre, Chairman of Bell Canada wrote to the President of the Treasury Board (Hon. Robert Andras). In his letter he stated that funding public interest groups to appear at rate hearings was proper and led to "better regulatory results." However, "when the Minister funds four different groups of intervenors, it is my view that he floods the carburetor and shows that he has no control over his department's expenses." He related that CAC, PIAC, the Quebec branch of the CAC and the Director of Investigation and Research were intervening in the Bell rate case. The first three of these groups were funded by the Department of Consumer and Corporate Affairs and the Director is an officer of DCCA.

Basing his figures on newspaper articles, Mr. de Grandpre expressed the view that $120,000, $105,000 and $48,000 of funding respectively for these three groups represented a "dilapidation of public funds" not conducive to keeping the expenses of the government under tight control. Mr. Andras referred the letter to Mr. Warren Almand, the Minister of DCCA. Mr. Almand replied that:

> "The total commitment of funds to consumer organizations on this matter is. . . $108,000. I would ask you to compare this amount to Bell Canada's expenditures on the preparation and presentation of this case and advise me of the respective expenditures of both sides of the case presented to the CRTC. I would also draw to your attention that $108,000 represents only .027% of the potential annual revenue issue being discussed at these hearings.
>
> . . . Since the consumer interest is made up of many different interests, my Department feels justified, and perhaps even compelled, to recognize the varying points of view in its program of support to consumer organizations."

Thus, it would seem that in this instance, DCCA displayed resistance to criticism by regulated firms of the policy of funding public interest groups. However, perhaps complaints by the Regulated Sector such as this one led to the attempted cut-backs discussed earlier.

e) Cost of Running the Program

Currently the RIP program receives $150,000 per year. With this money the program employs 2 lawyers, one researcher during the summer and one administrative assistant. A large part of the budget goes towards hiring experts.[192] Many of the consultants and experts who work for RIP do so for a reduced fee. Often they will reduce their fees by one-third. RIP is able to maintain a high profile in part because of the free services rendered to it by academics, board members and CAC volunteers. Very approximately, General Counsel for RIP estimates that 1/3 of RIP's resources are devoted to hearings, 1/3 to lobbying and 1/3 to other activities (e.g., research).

The RIP program receives almost all of its funds from the DCCA program. Approximately $1000 per year is raised from the sale of its publications. Fund raising and public donations account for approximately $10,000 per year. Cost awards are potentially a large source of revenue. RIP has been awarded costs in four CRTC proceedings. These awards are currently under appeal but they could lead to up to $70,000 in additional revenue.

f) Effectiveness

In the Canada Law Reform Commission study entitled "Public Participation in the Administrative Process,"[193] we read:

> "CAC/RIP activities have provided for, and encouraged, the vocalization of Canadian consumer interests. Although the RIP came under the fire from past CAC President Beryl Plumptre for devoting too much time and energy to Bell Rate Increase Hearings, program enterprises have become increasingly diverse, despite budgetary constraints. . .
>
> The effectiveness and credibility of RIP research and argument may lead to greater acceptance of public interest groups by regulators and government. The respect that members of RIP may have gained may be illustrated by the recent appointment of RIP General Counsel and Project Director Greg Kane as the CRTC Associate General Counsel for Telecommunications.
>
> RIP Counsel have been able to guide regulators in dealing with the contentions arising between other parties. During the Bell '78 Hearing, commentary made by Greg Kane aided CRTC resolution of differences arising between PIAC and Bell Canada over media propagation of viewpoints. More recently, the Minister of Transportation supported the RIP's request for a CTC Air Transport Committee Hearing on the 1979 Air Fare Increase applications made by Air Canada, CP Air and the five regional Canadian Air Carriers."

RIP interventions in regulatory hearings have generally been well received by regulatory agencies. The Chairman of the Canadian Transport Committee Rail Transport Committee recently commented on the intervenion by RIP and their expert witness Dr. R. House:[194]

> ". . . the panel feels that we must not lose this opportunity to say to you and to Dr. House and to those who worked with both of you on the preparation of your brief how much we appreciate all of this; and we would like you to know that we regard it as being of the highest quality to say nothing of course of the explanatory evidence you have had yesterday and today. . . We appreciate this very very much. It has been of tremendous help to us.

The RIP program has in many cases influenced the decisions of regulatory agencies. The CRTC in particular has been responsive to

their advocacy efforts.

It is worth describing some of RIP's successes in saving consumers' money. Bell Canada made $270 million dollars profit on work it did on the Saudi Arabian telephone system. RIP intervened in the CRTC hearing to decide how these profits should be treated.[195] The CRTC decided to treat this revenue as the product of the companies' regulated enterprise and therefore as revenue for rate-setting purposes. This would save Canadian consumers $270 million over the next five years. Bell has appealed this decision to the Federal Cabinet and RIP has opposed the appeal.

Bell, on February 19, 1980, requested a general rate increase to go into effect on September 1, 1980 and interim relief of $24.5 million to go into effect on May 1, 1980. RIP described its response with respect to the interim increases as follows:[196]

> "We submitted written comments on the interim proposal strongly opposing any increase prior to a public hearing. We argued that Bell had not demonstrated any special circumstances to justify interim relief within the abridged time. Consequently, we felt that the Commission's normal rules requiring a public hearing and sufficient time between an application and a rate increase to allow careful scrutiny were being ignored. The Commission agreed with our position and denied the entire interim rate increase application."

In November 1978, Canada's 7 major air carriers "applied for general fare increases averaging 5%" to be effective January 1, 1979. RIP issued a public statement containing an analysis of the fare increases and calling for a public hearing.[197] The CTC's Air Transport Committee suspended

the increases until April 1, 1979.thereby saving consumers up to $16,900,000. RIP's Annual Report states, "after a written reply supporting our call for a public hearing was issued by the Minister of Transport, the Air Transport Committee called a public hearing to commence on March 26, 1979."

g) Conclusions and Problems with the Program

The staff at the RIP program and officials at DCCA feel that a great deal of paperwork is involved in running the program. RIP files an annual report, four progress reports, and 8 financial reports (four prospective and four showing the results). As well there is an audit and auditor's report each year. Officials at DCCA felt that the amount of paperwork was heavy relative to the amount received but that Treasury Board rules required these reports.

In conclusion, the RIP program seems able to function with a great deal of independence from the funding authority (DCCA). Cost awards are a possible avenue by which RIP can develop alternate sources of funding. Relying on staff and unpaid volunteers RIP has been able to provide useful advocacy and lobbying services to the Canadian consumer. Unfortunately there are few formal means by which RIP is accountable to consumers.

(iii) The Public Interest Advocacy Centre (PIAC)

a) Background

The Public Interest Advocacy Centre was started in October 1976.[198] Like the RIP program it is funded by the Department of Consumer and Corporate Affairs (OCCA). PIAC in 1979 consisted of two lawyers and a "Training and Research Coordinator" who has legal training.[199] They have an office in Ottawa and one in Toronto.

The Centre is a federally-incorporated non-profit organization. PIAC's policies and priorities are determined by its Board of Directors.[200]

b) Activities

The Public Interest Advocacy Centre, as its name suggests, is in effect a law firm that represents clients free of charge. They represent groups who do not have the resources or expertise to advocate on their own behalf. They have represented groups such as the National Anti-Poverty Organization, the Inuit Tapirisat of Canada, the Canadian Arctic Resources Committee and the Canadian Broadcasting League, to name just a few.

In very approximate terms PIAC's activities can be broken down as follows: Advocacy (mostly regulatory) - 50%, Training - 30%, Research and Writing - 10%, Fundraising - 10%.[201] PIAC does not engage in lobbying and will only take cases before the courts when they are test cases.

In its regulatory advocacy activities the Centre decided initially to concentrate on telecommunications, energy utilities and social assistance.[202] The majority of its advocacy work has been before the CRTC.[203]

PIAC is able to maintain a high level of advocacy activity in part because it receives a large quantity of services for free or for reduced fees from experts, lawyers, academics and its own Board of Directors.

In its training activities PIAC gives seminars in which it instructs law students and members of public interest organizations in the techniques of regulatory advocacy. The seminars last a week or less. The material presented includes information regarding intervenor's rights, preparing motions and interrogatories, finding and presenting expert witnesses and appeals.

c) Funding

The main source of funds for PIAC is the Consumer and Corporate Affairs Canada (CCAC) grant program. CCAC contributed $165,000 in 1980, $125,000 in 1978 and $147,000 in 1979.[204] PIAC has also received research contracts from CCAC amounting to $45,000 in 1978 and $5,000 in 1979. It has received $95,000 from the Donner Foundation for 1980-81, and 1981-82 to support training activities. It has also received donations from firms to support training activities, totalling $25,000 for 1980-81. As well, two contributions of $5,000 each, were received from private individuals. PIAC has applied to receive funding from the Ontario Legal Aid Plan.

d) Accountability

Groups such as PIAC in a sense ensure a type of accountability. That is, they provide legal advocacy services to various groups. These groups consist of members who convey their preferences to the organizers of each group. The organizers convey these preferences along with their instructions to PIAC, who represent the groups at regulatory hearings. If this sequence occurs, the position that PIAC puts forth at a hearing is truly representative of the views of a client group.

The above sequence however, does not always take place. First, the groups that PIAC represents may be amorphous groups with only a poorly organized membership. Secondly, the organization may have an unclear understanding of the regulatory process in question and may therefore give PIAC a carte blanche to represent the organization as they see fit.

Associate Counsel at PIAC explained that when this latter event occurs they work with the group to find out what legal representation they desire. PIAC attempts to help their clients "put their thoughts together" without "putting ideas in their heads". The fact that a group does not have clearly defined goals with respect to the regulatory intervention does not always detract from the accountability that the PIAC model provides.

For example, a consumer group may want lower rates but may not understand the economics and accounting principles associated with rate of return regulation. When PIAC represents this group they are representing the wishes of the members if their instructions are little more than "get lower rates for us."

PIAC generally always has a client when appearing before a regulatory tribunal. They will not contact a new client and offer to represent them. However, if they have an on-going relationship with a client, PIAC will keep the client informed of regulatory activities which are of interest to them and will let the client know that they are prepared to represent them.

e) Independence

Associate Counsel at PIAC stressed that they had complete independence to act as they pleased despite the fact that they are funded by DCCA. Counsel stated that if their advocacy activities put them in conflict with a government department or agency that funded them they might be more diplomatic than otherwise, but that the substance of their actions would be the same.[206] This is true despite the fact that, like RIP, PIAC's contract with DCCA allows DCCA to cancel their support at any time.

Counsel also felt that there can be implicit pressure from agencies that award costs. This subtle pressure encourages public interest groups to advocate positions which the agency

would like to see advocated. Counsel felt that PIAC had resisted this pressure.

f) Effectiveness

PIAC concentrates on issues which are national in scope. It will take cases which concern a province or region if similar issues affect the rest of the country.

A summary of a few of PIAC's activities will demonstrate how effective it has been in many areas. Representing the National Anti-Poverty Organization (NAPO), PIAC urged the CRTC to find a way to provide a cheap "no frills" telephone service. The CRTC ordered Bell to study the feasibility of a 4-party line service. On the basis of this study Bell was ordered to offer 2-party line service at 4-party line rates and to advertize the new budget service.[207]

PIAC also represented NAPO when NAPO intervened to request a rollback of pay telephone rates from 20¢ to 10¢. This was granted.[208] PIAC represented Inuit Tapirisat of Canada in their intervention before the CRTC seeking improved phone service to the North. As a result of this intervention, the CRTC denied rate increases for the North and ordered Bell to improve their service to the North.[209]

PIAC has represented NAPO in its interventions before the Ontario Energy Board. Recently the O.E.B. awarded costs to PIAC, which indicates that the O.E.B. appreciated the usefulness of the intervention.

PIAC has also acted on behalf of Ms. D. Cornish-Hardy requesting a full and fair decision-making process to govern forgiveness of UIC overpayments in hardship cases.[210] The UIC Board of Referees held that they had no jurisdiction to review the Commission's decision. An appeal to the Federal Court of Appeal has been unsuccessful. The case is being appealed to the Supreme Court of Canada.

g) Conclusion

PIAC's model of providing free legal services to organizations who need representation in the administrative process appears to be very useful. PIAC's effectiveness can be seen, inter alia, by its success in receiving cost awards at the CRTC and O.E.B. A public interest law firm, perhaps more than most mechanisms (other than tax credits), fosters accountability. Also, this model is useful in promoting a diversity of views.

c) Public Interest Law Firms in the U.S.

(i) History

The growth of public interest law firms in the U.S. began primarily in the late 1960's.[211] These groups proliferated because of two main factors: (1) the courts were willing to grant standing (both in court-rooms and at regulatory agencies) to these groups more readily,[212] (2) civil rights groups and others had scored impressive voctories in the courts.[213]

(ii) Number of Firms and Funding

The Council for Public Interest Law has conducted surveys to determine the number and nature of public interest law firms in the U.S.[214] The Council defines a public interest law centre as follows:[215]

> "... a non-profit, tax-exempt group that devotes a large share of its program to providing legal representation to otherwise unrepresented interests in court or administrative proceedings involving questions of important public policy. This definition is further quantified by requiring a group to have at least one attorney on staff and to devote at least 30 per cent of its total effort to legal work in order to be included in the tabulations."

The Council identified 117 centres employing 711 attorneys that fell within this definition.[216] Seventy-six of these centres were "client-defined groups representing disadvantaged minorities (primarily involved with civil rights issues.)" Forty-one centres were "cause-defined groups working on issues affecting the general population". For this latter group, the following table is useful:[217]

	# of Centres	Lawyers	Income
Consumer	6	41	1,935,907
Environmental	8	66	-7,562,443
Business Oriented	8	43	3,769,647
Multi-Issue	8	62	4,312,031
Other	11	49	5,376,436

The following table outlining the sources of funding for these groups by percent is also useful:

	Foundations	Membership Dues	Contributions and Gifts	Federal	Public Participation (cost awards)	State Local	Court Fees	Other
Consumer	9	1	14	60	2	-	-	14
Environmental	45	22	26	3	-	-	3	1
Business-Oriented	39	17	41	-	-	-	-	3
Multi-Issue	32	1	4	36	-	2	14	11
Other	31	40	15	1	-	-	1	12

(iii) Funding

a) Foundations

Foundation grants are an important source of funds for public interest law firms. However, "this level of support is expected to decline sharply in the 1980's because of the Ford Foundation's decision to scale down its financial support of public interest law centres. Historically, the Ford Foundation has been the largest single foundation contributor .... it appears that financial support is declining from the larger foundations that have contributed to public interest law in the past. The responses (to the survey) further imply that there is growing support from smaller, and often locally-oriented, foundations."[218]

The decline in foundation funding has caused a great deal of concern among public interest law centres. Some of these centres are heavily reliant on these funds which are now disappearing. There are two explanations for the reduction of foundation funding. The Council for Public Interest Law wrote in 1975: "The foundations themselves view this planned withdrawal as wholly consistent with the traditional role of private foundations in fostering the early years of innovative initiations and institutional change, and then leaving others to decide whether the results are worth preserving and to find the means of doing so."[219] Alternatively various sources, speaking "off the record", felt that foundations were stopping the funding of public interest centres because these centres had been advocating positions contrary to business interests which have a great deal of influence in foundation decision making.

b) Taxes

In 1970 the U.S. Internal Revenue service suggested that public interest law firms may not be granted charitable status.[220] However, after intense pressure from the media and the legal profession the IRS "agreed to accept a definition of a charitable public interest law firm framed in terms of giving access to the legal system for interests that could not practically secure private representation."[221] However, the rules .... prohibit public interest law centres from accepting client-paid fees, even at rates unarguably below the market (price)." This prohibition has created difficulties for public interest centres that could obtain additional funds by charging some clients for some services.

As charitable organizations, originally public interest centres were not allowed to lobby legislatures. However, "lobbying" does not include all activities before the legislature. Appearing before a legislative committee to provide information is educating the legislature rather than lobbying. However, activities which involve public relations and persuasion are lobbying. Groups that do conduct lobbying originally divided into separate organizations. One organization would be funded by "soft-dollars" (i.e., tax-deductible) and the other funded by hard-dollars (i.e., not tax-deductible).

However, the tax regulations were recently changed so that lobbying can be 20 per cent of the activities of a public interest group. Therefore, careful records must be kept by groups engaged in lobbying.

(iv) Accountability

One persistent criticism of U.S. public interest groups is that they are not accountable to the constituencies they are supposed to represent. Staff at the Council for Public Interest Law felt that public interest centres should more actively try to solicit funds from the public.[222] However, the centres included in the survey of the Council have not been too successful in generating revenue through membership dues, contributions and gifts. "While the centres surveyed received 37 per cent of their total income from this source in 1975, only 26 per cent was provided from this source in 1979."[223]

Accountability could also be increased if public interest law firms worked more closely with citizen groups. Various sources in Washington complained that too many public interest lawyers find a case which interests them and then go out to find a client who they can represent. The client then becomes little more than a "rubber-stamp."

(v) Independence

As shown above public interest groups have difficulty raising contributions from the public. Groups which represent causes which concern emotional rather than economic issues are more successful raising funds from the public. For example, environmental groups have had some success in raising funds from the public. In order to solicit public funds it is necessary to get the public interested in the cause. Off the record comments by some public interest groups indicated that this can lead to oversimplification of issues by public interest advocates.

When groups are funded by foundations they may not have total independence. In Balancing the Scales of Justice, the Council writes:[224]

> "The Council has ... received reports that some public interest law centres have failed to win or keep a foundation's support because the centres' work involved the representation of interests in cases or areas of the law that infringed too closely on the interests of the foundation. For example, an environmental law centre is convinced that it failed to secure the renewal of a grant from a major foundation because of a suit it filed to prevent clear-cutting in a national forest. Another centre told the council it is sure that it lost a grant from a foundation after it had filed a discrimination suit against a college whose president sat on the foundation's board."

(vi) Summary

American public interest law firms represent a not insignificant number of lawyers working for under-represented groups. Foundation funding has recently been cut back, placing some of these groups in jeopardy. Funds from public contributions are hard to raise and the level of these contributions has been declining. Groups may have difficulty maintaining their independence when funded by foundations. The public-interest law centres have not been particularly successful in establishing a constituency to which they are accountable.

(vii) Case Studies

a) The Centre for Law and Social Policy

Background

The Centre for Law and Social Policy (CLASP) was created in 1969.[225] The Centre is currently involved in six different areas:

(1) Health care; (2) the International Project (involving trade and the protection of the international environment); (3) Women's Rights;

(4) Mining (involving the health and safety of miners and the environmental interests of mining areas); (5) Employment; and (6) Media Access.

The centre uses the following criteria in selecting its cases:[226] (1) an important public interest is at stake; (2) the individuals and groups seeking representation do not have sufficient financial resources or pecuniary interests in the matter to retain and compensate counsel; (3) no other legal institution is likely to provide effective representation; (4) the area of law has not been adequately explored; (5) opportunities for innovation are present; (6) the subject matter is one in which the staff of the centre has competence; (7) the resources required of the centre are commensurate with the gains likely to be achieved.

Funding and Costs[227]

The Centre has a budget of $900,000 per year. It has a staff of thirteen lawyers. Each year it operates a clinic program which involves twenty students per semester (i.e,, 40 per year) who obtain a law school credit by working at the centre. There are nine support staff. Several law firms do work for them on a pro bono basis. As well, several researchers, economists and scientists do free work for it.

The Centre feels that direct mail solicitation is difficult since it is not well known by the general public. This is due to the fact

that it represents a wide range of interests and not a single issue such as environmental concerns. However, it is attempting to start a membership organization and is confident that this will be a new, significant source of funds.

The group has relied heavily on money from foundations. Funds from the larger foundations is now diminishing but the Centre is confident that a large number of grants from smaller foundations should enable them to maintain its current level of operations.

Funding is needed to maintain the staff and to hire experts. It feels that without expert economists and scientists interventions before many regulatory agencies are ineffective.

Accountability

The Centre's charter requires it to have a client for almost all the advocacy it does. With groups with which it has a continuing course of conduct, it will communicate with them regarding important regulatory activities and suggest that the Centre could represent them. However, it will not approach an organization in this fashion unless it has an on-going relationship with them.

Independence

Staff at the Centre stress that their independence is not compromised by foundation funding. The foundations allow them complete freedom to

advocate any position they choose. CLASP has received small amounts of money for doing research contracts for the government. It is reluctant to do much of this work as it feels that excessive reliance on government contracts can lead to a loss of independence.

b) The National Consumer Law Centre[228]

Background

The National Consumer Law Centre is funded by the Legal Services Corporation. This Corporation receives all of its funds from the federal government. It is administered by a Board of Directors selected by the President. Most of its funds are given out to support local legal services programmes (legal aid clinics). Some of the funds go to support centres, most of which are designed to provide expertise in a particular area.[229]

The National Consumer Law Centre (NCLC) is one of these support centres. Local legal services attorneys can use the support centres which provide them with manuals, etc. The NCLC does advocacy as well as providing support services. The advocacy involves consumer and energy law and is directed towards helping the poor. It is restricted to working for people earning less than 25 per cent of the poverty line level of income.

Funding and Costs

The NCLC headquarters is in Boston where fifteen lawyers are located. There is also an office in Washington that employs four lawyers. The Boston office does not do much advocacy while the Washington office almost exclusively does advocacy. NCLC has an annual budget of 1.5 million dollars. The centre is a privately incorporated non-profit organization. Although most funds come from the Legal Services Corp., it also receives funds from the Community Services Administration

(a branch of the federal government) and has done funded research for other government departments. The NCLC does advocacy before regulatory agencies, the courts and legislatures.

Independence

The NCLC is largely left to its own discretion by the Legal Services Corporation. It has to regularly file reports explaining its activities. It is restricted to work in the energy and consumer law areas. Staff at the NCLC admitted that their independence is constrained such that, for example, they would be cautious about suing the Community Services Administration from whom they receive some funds. They would be more inclined to use persuasion rather than taking legal action. If legal action were required they would probably ask a local legal services program office to sue.

The Legal Services Corporation protects the independence of the individual centres by acting as a buffer between Congress (which provides the funds) and the centres. Staff at NCLC feel the Corporation is often lobbied by various interests encouraging it to do less work in certain areas. NCLC staff feel that the Corporation resists these pressures.

In "Balancing the Scales of Justice" we read:[230]

> "There have been disturbing limitations placed by Congress on the Legal Services Program, such as restrictions on the representation of clients in criminal, abortion, school desegregation, and selective service cases. And there may also be a temptation for some politicians to use federal

> grant recipients and their clients as a target of political attack. This happened to the Legal Services Program in a number of states, and was an unfortunate feature of the Nixon-Agnew years ... In 1973, when the Administration's bill to establish a new Legal Services Corporation was pending in the House, conservative members identified the [special support] centres as 'the cutting edge of social change'. On the floor, after little serious discussion, an amendment was added to the bill that stripped the new Corporation of the power to fund research, training, technical assistance and clearinghouse activities by grant or contract. Although both houses and the Conference Committee later rejected the amendment, President Nixon insisted on its inclusion in the final bill. The new Corporation was therefore forced to inform the centers that in the future they would be allowed to litigate, but not to publish; to provide co-counsel, but not to train".

The support centres have had these powers restored.[231] This episode though, shows that the lack of independence inherent in a government funded program, is a real problem.[232]

Accountability

For all work that the NCLC does, it is required to have a client. This is true of its legislative lobbying activities as well as its regulatory and judicial advocacy activities. It feels that it needs a letter of retainer from the client or from a local legal services attorney. Its clients are generally individuals or organizations representing the poor. Often, the staff attorneys at NCLC will see a promising issue and then contact an organization with a view to representing them.

NCLC has made use of surveys to determine what issues its clients are interested in with respect to its consumer law activities. These surveys are mailed out to local legal services attorneys and organizations representing the poor.

(viii) Summary

The case studies emphasize basic difficulties inherent in public interest advocacy. Groups have not successfully coped with the perhaps intractable problem of accountability to their constituency. Uncertainty of funding is a problem shared by both government and foundation funded groups. Having a membership organization can mitigate both of these problems. Although some groups have established a membership, it is not an easy solution.

d) Conclusion

Public interest groups need a source of funds which guarantees their independence. The studies in this section indicate that groups that receive government funds can be independent. However, equally importantly public interest organizations need a stable source of funding. Both government and foundation funding can be subject to uncertainty.

6. Tax Incentives

a) Introduction

In this section we will analyze empirical evidence to assess the effectiveness of tax incentives in encouraging contributions to public interest groups. First, we will examine the current tax regime. Then we will look at the level of donations that the current tax incentives elicit. Finally, we will estimate the impact of various changes in the tax system on contributions to public interest groups.

b) The Current Regime

Contributions to charities are tax deductible, while the donations received by charities are not taxed as income by the charity in Canada.[233] However, it is not clear that public interest groups are charities. Currently, public interest groups such as the Consumer Association of Canada are registered charities.

Charities are not defined in our tax law and therefore we must look to the common law to determine what is and what is not a charity. The leading case in this regard is the Pemsel case.[234] According to this case a charity must have as its object one or more of the following:

1) the relief of poverty;
2) the advancement of religion;
3) the advancement of education; or
4) other purposes of a charitable nature beneficial to the community as a whole.

According to the common law a political object is not a charitable object.

Our tax law states that the income of a charity is not exempt from tax unless all of the charity's resources are spent on charitable activities.[236] Therefore, from Pemsel, (1) a public interest group cannot be a charity if one of its primary objects is political. From the Income Tax Act (2) a public interest group that is a charity cannot devote any of its resources to political activities. Revenue Canada confirmed that this was their interpretation of the law in Information Circular 78-3.[237] Furthermore, I.C. 78-3 describes political objects as follows:[238]

> "An object normally is said to be 'political' if its ultimate intention is to influence the policy making process (as opposed to the administrative process) of any level of government . . . In this context, an organization whose object is to promote a change in the law or to promote the maintenance of an existing statute is considered to operate for a political objective ..."

I.C. 78-3 describes political activities as follows:

> "An activity is considered political if it is designed to embarrass or otherwise induce a government to take a stand, change a policy, or enact legislation for a purpose particular to the organization carrying on the activity."

The Information Circular states that an organization can present a brief to a government "provided it does not undertake a program to promote its recommendations."[239] In general, a charitable organization can educate the public and the government but cannot lobby or persuade. Drache writes:[240]

> The issuance of this circular touched off a storm of controversy because it effectively prohibited virtually any attempt to put forward a political view, even if the view was within the purview of a charity's legitimate charitable activities. In the ensuing weeks, the debate became so heated that Prime Minister Trudeau announced that the Circular would be withdrawn. But noteworthy is the fact that he stated that the withdrawal of the Circular was "meaningless" because it reflected the view of Revenue Canada as to the legal situation in Canada. In other words, the withdrawal has not made any difference to the policy position of the government.

The law in this regard should receive some clarification shortly. Canadian Dimension is a magazine published in Winnipeg which advocates left-wing views. It supports no political party. The foundation which funds the magazine has been deregistered and is appealing to the

Federal Court of Appeal.[241] The deregistration of the magazine would seem to be in keeping with I.C. 78-3 which states:

> "A registered charity may publish a magazine, a review or a newspaper, etc. on a political subject provided that an impartial and objective coverage is given to all facets of the subject matter. Coverage of only one viewpoint is a political activity since it represents the political principles of one faction in particular."

In general, the position as set out in I.C. 78-3 could be unworkable in practice. For example, if the United Church campaigns for more liberal immigration laws will it be deregistered? Perhaps we could do well to follow the approach taken in the United States. There, public interest groups can devote 20 per cent of their resources to lobbying without losing their status.

c) The Current Level of Donations

It is interesting to look at the efforts of the RIP program of the Consumers Association of Canada to solicit contributions.[242] Three advertisements were placed in the Canadian Consumer, the monthly publication of C.A.C. This advertisement ran a full page describing the activities of the RIP Program. Accompanying the ad was an addressed postage paid, perforated card. RIP paid CAC only the incremental cost of this ad (close to $1,500). Only about 50 contributors responded. The return was slightly less than the cost of the ad. Since then two more ads have been placed and the net result of the three ads is that RIP has come close to breaking even.

CAC has conducted a survey of its readers. According to this survey 56.3 per cent of the respondents said they would be prepared to make a financial contribution to support regulatory interventions at hearings dealing with telephone rate, airline fares, food prices and the invasion of privacy.[243] Of those willing to contribute the following table shows the amount the respondent would be prepared to pay:

AMOUNT	
Under $5	25.7%
$5 - $10	50.8%
$10 - $15	9.3%
$15 - $25	11.5%
$25 - $50	2.2%
More than $100	.5%

RIP has recently started a campaign to solicit funds by direct mailing to:

(1) a sample of 2000 Canadian Consumer subscribers;
(2) a list of 2000 subscribers to another magazine; and
(3) a list of former contributors to CAC.

In the past CAC (not RIP) has attempted to solicit funds by placing ads in newspapers, but this has not been successful.

Conversations with fundraisers and other public interest groups were conducted by the authors. The general consensus is that advertizing in periodicals is not an effective fundraising technique. "Personal" contact is important. Therefore, mail solicitation is better than magazine advertizing. Direct contact is best of all. A fundraiser

for an environmental group stated that a great deal of their funds were raised because of personal contacts with wealthy individuals and corporations. Thus, by knowing and cultivating a relatively small group of patrons, the public interest group receives a small number of large contributions.

It is also generally believed that it is much easier to raise money for highly emotive issues. For example, one source said that environmental groups can raise money to advocate on behalf of dolphins but not marginal cost pricing.

d) The Impact of Various Changes in the Tax Laws

(i) The Elasticity of Charitable Giving

How important is the current tax deduction in stimulating charitable donations to all charities? Some authors have asserted that the deduction is not that important (i.e., that the supply of charitable donations is relatively inelastic to the "price"). There are two possible reasons for this: (1) contributions by businesses must be made for public relations reasons;[244] and (2) contributions by individuals are made in order to receive status or prestige.[245]

However, even if these factors are determinative for the infra-marginal contributor, a variation in the tax system may have a significant impact on the marginal contributor.

Several studies in the United States have estimated the price elasticity of charitable giving. The "price" of a donation

depends on one's tax bracket. That is, if charitable donations are deductible, a person taxed at 80 per cent can contibute a dollar by paying a "price" of 20¢. A person taxed at only 10 per cent, pays a price of 90¢ for a one dollar donation. United States estimates put the price of elasticity in the range of -1.0 to -2.5.[246] These estimates suggest that for every extra dollar of tax revenue the government forgoes, more than one dollar is contributed to charitable organizations. Some charitable giving would take place even without the charitable deduction. One study estimated that eliminating the deduction would reduce total itemized giving by 28 to 56 per cent.[247] It should be remembered, however, that (1) some studies have found lower elasticities,[248] (2) all the studies had data and other limitations[249] and (3) these figures apply to the United States. The one Canadian study finds a much lower elasticity (-.6).[249a]

(ii) The Political Tax Credit

Contributors to public interest groups may behave similarly to contributors to political parties. In 1973, changes were made to the Federal Income Tax Act which allowed tax credits for contributions to political parties. These credits equal:[250]

75% for the first $100
50% for the next $450
33% for everything over $550

to a maximum fo a $500 tax credit.

These credits increased the number of donations made to political parties. No reliable data exists to show what the level of contributions or number of contirbutors was before the changes. However, only slightly more than 1 per cent of Canadian voters now contribute to political parties despite the tax credits.[251] The Department of National Revenue estimates that the tax credit generated revenue losses for the 1978 tax year of $3,973,000. The Chief Electoral Officer reports 111,632 individual contributors to federal political parties in 1979, a 48 per cent increase in individual donations over 5 years.[251a] If contributions to public interest groups are as responsive to tax incentives as contributions to political parties, then we would not expect a tax credit scheme to lead to an avalanche of contributions.

(iii) Policy Options

(a) The Standard Charitable Deduction

Canadian tax law has one significant feature regarding charitable donations. This is the standard $100 deductible for charitable and medical expenses. This standard deduction means that unless a person is willing to spend more than $100 on charitable donations (assuming no medical expenses), he will receive no deduction. Currently, 90 per cent of tax payers in Canada take the standard deduction.[252] The elimination of this deduction would increase contributions to charities. The removal of the standard deduction would significantly affect those who are currently making large deductions. It would presumably foster many small charitable donations by those who now take the standard deduction.

(b) Tax Deductions vs Tax Credits

Other than removing the standard charitable deduction, tax incentives could involve either tax deductions or tax credits. Tax deductions promote giving by those in the higher end of the income distribution. This is because these donors face a lower "price" for charitable donations since their marginal tax rate is higher. Tax credits on the other hand encourage charitable giving by those in the lower end of the income distribution.

Do donors in the different parts of the income distribution contribute to different types of charities? Unfortunately, no data exist for Canada. However, U.S. research shows that those with lower incomes donate more heavily to religious organizations.[253] High income donors favoured educational institutions, hospitals and other charities.[254] Therefore a tax credit would tend to benefit religious organizations and reduce the contributions received by the other charities. It seems possible to suppose, then, that if the current tax deduction for charities was changed to a tax credit, even assuming they fell within the definition of charities, public interest groups might not receive any more funding. Of course, a special tax deduction or tax credit could be set up for public interest groups.

e) Accountability

Financing public interest groups through tax incentives would increase accountability. At first glance, it might appear that the costs of using the tax system are quite low. That is, the foregone revenue would presumably equal the subsidies granted under another mechanism. Furthermore, the administrative costs of the tax mechanism may not be much higher than the costs associated with other mechanisms. With regard to this latter point, however, there are costs associated with each donation. The public interest group incurs the costs of soliciting contributions and issuing receipts. Revenue Canada incurs costs processing and policing these contributions. In a system designed to foster accountability we would want to encourage a large number of small contributions (e.g., a $30 maximum contribution). Clearly as the size of each individual contribution falls, the total administrative costs rise (given a fixed foregone revenue). Therefore, it may be true that fostering accountability could lead to significant administrative costs. On the other hand, Revenue Canada could perhaps lower their administrative costs by abandoning the requirement for receipts and relying instead on random sampling of taxpayers with fines for offenders.

There are other costs associated with using the tax system to foster accountability. In effect, it requires millions of people to invest in information regarding public interest groups, rather than having e.g., a few government officials incurring these information-

gathering costs. The result could be that the full spectrum of public interest groups may not receive funding. That is, as discussed above, donors may minimize information costs by donating to groups representing highly emotional issues rather than favouring groups who advocate in regulatory forums where highly tehnical issues are decided.

Another related cost may result if public interest groups alter their behaviour in response to the lack of information possessed by the donors. Public interest groups may engage in "grandstanding" and oversimplification of issues. This would occur since the quantity of funds they would receive would be related more to the amount of publicity an issue generated than to the final outcome of the issue.

Traded off against these costs we must consider the benefits of using the tax system to foster accountability. We want to foster accountability so that the viewpoints that the regulators are considering reflect the preferences of the relevant constituencies. However, the regulatory agency can conduct a public opinion poll to determine this information. These polls, which are regularly used by politicians and bureaucrats, would be a more statistically valid way of determining preferences. Signalling through tax-credited contributions would not take into account the preferences of persons <u>not eligible for the credit or deduction</u> (that is those that pay no tax). More importantly, a tax credited contribution represents a signal on a whole variety of issues. Polls could determine public perceptions regarding one particular issue.

There is also some question as to the necessity of representing the preferences of various constituencies with some types of regulatory issues.[255] That is, where the issue is largely a technical one public preferences are not that important. For example, if a regulatory agency was determining how to control one kind of air pollution and a public interest group brought forth a study outlining the most efficient, least cost, method of doing so, it would not matter how many supporters they had. When the decisions are more political in nature (e.g., whether to impose any pollution controls at all) then preferences are important. However, as noted, conducting polls may be the lowest cost method of assessing preferences.

We must not, however, be too quick to dismiss accountability. Most of us intuitivlely dislike the notion of public interest groups who are little more than "one-man shows". There is good reason for this. The vast majority of regulatory decisions are neither purely technical nor purely political. The political issues involved may not be susceptible to analysis via a public opinion poll. Furthermore, the individual issue being decided may not be understood by the public. However, if the public has conferred its support on the general objects of a public interest group, then this group can advocate before the agency on behalf of the constituency.

Therefore accountability is important in legitimizing a public interest group. Using tax incentives to promote accountability may

confer benefits on the regulatory process that may not be realized through public opinion surveys, even assuming regulation would be prepared to commission the latter.

f) Independence

Tax incentives will promote independence in the sense that public interest groups will not have an incentive to change their positions to conform to the views of the government, in order to attract more funds. However, there is still the danger that the government could cut off funds altogether. At first glance the tax mechanism would provide neither more nor less protection against this action. It may be just as easy for the government to remove the tax incentive as it would be for them to remove a subsidy program, although the necessity for legislative amendment may make such a change more visible.

Because the tax mechanism is highly visible and directly involves the public unlike the other mechanisms, its removal might generate a greater public outcry. Therefore, governments might be more reluctant to remove the tax mechanism which would further the independence of public interest groups.

g) Diversity

One of the most significant advantages of the tax incentive system is that it can promote a diversity of views. To the extent that contributors have different preferences regarding public policy and to the extent that information costs are sufficiently low to

permit informed choice, contributors will support a variety of different causes. As mentioned above, high information costs will mean that rather than invest resources in information, contributors will merely support organizations with very emotional platforms. This tendency will diminish the diversity of views expressed. If public interest groups experience large economies of scale, the number of different organizations will be limited. Judging by the effectiveness of small groups such as RIP and PIAC however, it seems unlikely that high economies of scale will be a problem.

However, it would seem that the tax mechanism is highly visible and directly involves the public unlike the other mechanisms. Therefore, if it was removed we might expect a greater public outcry. Therefore, governments might be more reluctant to remove the tax mechanism which would further the independence of public interest groups.

h) Conclusions

Currently, it is not clear whether public interest groups can be classified as charities. Moreover, public interest groups have difficulty soliciting funds even when they are classified as charities. In general, tax incentives do promote charitable giving. If tax credits are instituted for all charities (including public interest groups) this might encourage giving to religious institutions and decrease support for public interest groups. The costs of soliciting and administering charitable/public interest group contributions can be high which detracts from the utility of having a large number of small contributions. Tax incentives can promote accountability although the costs

may be high relative to the benefits. They may also foster independence and diversity.

Chapter V

Footnotes

1. National Transportation Act, R.S.C. 1970 (N-17) S. 73

2. CRTC Procedures and Practices In Telecommunications Regulation, C.R.T.C. Decision 78-4; p. 40.

3. See for example the B.C. Tel - G T E Automatic Electric acquisition, Telecom Decision CRTC 79-17 (Ottawa: CRTC, September 18, 1980).

4. CRTC Telecommunications Rules of Procedure, SQR/79-554 (Ottawa: CRTC, July 27, 1979)

5. Ibid., S. 44(1)

6. Supra., note 2.

7. Ibid.

8. Supra., note 5.

9. Ibid.

10. Taxation order: 1980-81 (Ottawa: CRTC, February 19, 1980) at p. 10-11.

11. Supra., note 5.

12. Telecom Order: CRTC-80-130 (Ottawa: CRTC, March 11, 1980).

13. Supra., note 5.

14. Smith and Rhuland Ltd. v. The Queen, (1953) 2 S.C.R. 95.

15. Taxation Order: 1980-81 (Ottawa: CRTC, February 19, 1980) at p. 17.

16. Ibid.

17. Ibid.

18. Alberta Public Utilities Board, Annual Report 1979 (Edmonton, Alberta Public Utilities Board, March 21, 1980) at p.6.

19. The Alberta Public Utilities Board (A Brief Overview) (Edmonton, Alberta Public Utilities Board, June, 1977) at p.4.

20. Kane, T. Gregory, Consumers and the Regulators, Intervention in the Federal Regulatory Process, (Montreal, Institue for Research on Public Policy, 1980) at p. 102.

21. Albert Public Utilities Board Decision 30202, March 29, 1971 at p. 7-8

22. In the interests of candor, the authors conducted various interviews "off the record".

23. Public Utilities Board Rate and Hearing Costs Guidelines, (Edmonton, Alberta Public Utilities Board, December 23, 1975).

24. Ibid., at p. 2.

25. Re Green, Michaels & Associates Ltd. et al and Public Utilities Board (1979), 94 D.L.R. (3d) 64) (Alta. S.C.A.O.) at p. 643.

26. Ibid., at p. 643-44.

27. Ibid., at p. 644.

28. Ibid.

29. The Board's decision (Order No. E80104) was issued July 30, 1980. The Board did not vary its cost awards.

30. Position Paper, Interventions and Costs, (Edmonton, Alberta Public Utilities Board, February 24, 1977).

31. Ibid., p. 2.

32. Ibid.

33. Ibid., p. 3.

34. Ibid.

35. Ibid., p. 11.

36. Ibid., p. 13.

37. Ibid., p. 15.

38. See Kane, Supra note 20, at p. 103.

39. Supra., note 30, at p. 18.

39a. In Order No. E80052 (April 14, 1980) the Board stated that it had reservations about paying consultant's fees when the consultant filed no evidence and did not appear as a witness. Therefore, in this event, the Board will require a detailed summary of the work done and an explanation as to why the consultant did not appear.

40. Public Utilities Act, R.S.A. 1970, Chap. 202, s. 60.

41. Supra., note 21, at p. 9.

42. Supra., note 30, at p. 15.

43. Canadian Utilities Limited v. Alberta Union of REAS, Decision No. 30254, Alberta Public Utilities Board, March 29, 1971.

44. Supra., note 30, p. 12

45. Decision No. 30861, Alberta Public Utilities Board, October 4, 1974.

46. Knowles, E.L. and Waddell, I.G., Mackenzie Valley Pipeline Inquiry, Preliminary Materials, 1975, p. 1.

47. Ibid., p. 2.

48. Ibid., p. 3-4.

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50. Ibid., p. 4.

51. Ibid.

52. Ibid.

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54. Mr. Justice Thomas R. Berger, Northern Frontier, Northern Homeland, The Report of the Mackenzie Valley Pipeline Inquirey: Volume Two, Terms and Conditions, (Ottawa: Minister of Supply and Services, 1977), at p. 225.

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70. Ibid.

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72. Supra., note 54, at p. 226.

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84. Ibid., p. 14.

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141. Supra., note 120 at p. 25.

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CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions

In this study, we hypothesized that free rider and transactions costs problems would lead to an under-representation of public interest perspectives in the regulatory process. Our analysis of appearances at regulatory and similar hearings indicates that this hypothesis is in fact well-founded. In fact, the extent of the under-representation of public interest perspectives may be more serious than the data indicates. This is because such public interest advocacy as exists does not enjoy the same intensity of resources as advocacy by regulated firms.

Our examination of the various methods that have been used in this country and in the United States for increasing public participation yields many lessons. The overriding message is that no mechanisms can guarantee continued public interest advocacy in the face of determined political, bureaucratic, or regulatory opposition. For example, cost awards work well with the CRTC. However, the Alberta Public Utilities Board experience indicates that cost awards cannot guarantee public interest advocacy. Similarly, the New Jersey Department of the Public Advocate is a government agency which has successfully defended the public interest. However, the termination of state funding for the office of Inmate Advocacy within the DPA and the failure of the American Federal Agency for Consumer Protection to win legislative approval indicates that here too political opposition can block the goal of public interest advocacy. Where the funding source consistently supports the concept of public interest

advocacy as with the Department of Consumer and Corporate Affairs grants programme the funding mechanism works well. The U.S. experience with foundation funding is also illuminating. Foundations have supported and probably will continue to support the concept of public interest representation. However, this source of funds may be drying up as the foundations move towards other goals and priorities. Tax incentives may provide a useful means of funding public interest groups. However, here too if these tax incentives were cut off at any point the public interest movement would find itself in jeopardy. The main lesson to be learned from these examples is that public interest groups should not be dependent on any one source of funds. Rather, a mix of funding mechanisms seems called for if independence is to be promoted.

Experience yields another valuable lesson. The examples cited above where successful public interest funding mechanisms have been employed have one factor in common. The public interest representatives have all enjoyed a great deal of support from the public and the media. This factor can be most sharply illustrated by recalling the experience of the DCCA grants programme. This programme was about to be cut off when reactions from the public and the media forced the government to ensure its continuance. This factor suggest that funding mechanisms should involve the subsidization of private public interest groups rather than the creation of government advocates. Government advocates, except in

exceptional circumstances, will not be able to appeal to the media and the public for their continuance given political opposition. The need for public support also favours the use of tax incentives to fund public interest groups. Tax incentives force public interest groups to inform the public of their activities in order to encourage contributions. This mechanism therefore ensures that the public will be made aware of the activities of the groups which are representing them.

We have seen that it is very difficult to ensure that public interest representatives are accountable to their constituencies. Government advocates and public interest groups can take surveys and polls to determine the preferences of their client groups. However, the funding mechanisms cannot readily ensure that these preferences will be respected. Public interest groups which are sufficiently well defined and with a sufficiently small membership can be considered to be accountable to their members. Government grants and cost awards can favour such groups. Tax incentives can also promote accountability by forcing organizations to compete for tax-subsidized memberships.

Funding mechanisms should encourage a diversity of public interest views. This can to some extent be accomplished by using cost awards or direct grants. Government advocates by themselves will have difficulty representing a range of public interest perspectives, as will staff counsel, although in each case it is possible that they can work with public interest groups and thereby ensure the expression of a range of public interest viewpoints. Tax incentive schemes appear to have strong attractions in terms of their ability to promote a diversity of viewpoints,

although there seem legitimate concerns that such schemes may tend to favour highly emotive, one-issue interest groups, rather than interest groups engaged in more complex public policy advocacy.

Notwithstanding the fact that no funding mechanism can be guaranteed to be successful in the face of determined political and other attempts to undermine it, and notwithstanding the fact that all funding mechanisms that we have examined in this study seem to have operated successfully in at least some environments, our analysis would seem to indicate that, measured against the criteria of independence, accountability, and diversity, constituency representation on the boards of regulatory agencies, advisory committees to regulatory agencies, staff counsel, and government advocacy offices cannot be relied on as centre-pieces in a policy designed to redress representational imbalances in the regulatory process. The recommendations that follow reflect this judgment.

2. Recommendations

a) Introduction

In our view, subsidization of public interest group representational efforts must be analyzed and prescribed for in two separate but related contexts. First, there is a need to ensure adequate representation of public interest groups in the shaping of policy within the bureaucracy, amongst politicians and before legislative committees, Royal Commissions and the like. The Economic Council's proposals, in its interim report, for elaborate ex ante and ex post assessments of regulatory impacts

will increase the need for effective public interest participation in the various processes of regulatory assessment contemplated by the Council. Second, there is a need to ensure adequate representation of public interest groups in formal regulatory proceedings. As a general proposition, participation in the first set of governmental activities poses fewer costs for such groups than with respect to the second. Influencing policy at the legislative stage often entails fewer information costs for interest groups and lower organization costs, as the issues are often more visible and the course of decision making less protracted and less resource intensive than in formal regulatory decision making. This differential in the resources required for effective participation in the two contexts should be reflected in funding proposals. However, it should be emphasized that funding proposals cannot focus too sharply only on formal regulatory proceedings, given the ability of governments to substitute other instruments of intervention, which, in the absence of similar opportunities for participation, would undermine the purpose of the initial subsidy policy.[1]

b) General Representational Activities

(i) Direct Group Grants

With respect to general representational activities (our first class of case), two broad options, in the way of funding approaches, seem to warrant consideration. The first entails direct government grants to groups engaged in representational activities. We have, of course, pointed out that direct grants leave a good deal to be desired in terms of all three of our key criteria for judgment - the impact of

this funding technique on the independence of groups; its capacity to promote accountability of group spokemen to their constituency; and its capacity to contribute to the articulation of a diversity of viewpoints.

However, administratively, direct grants are probably the most straightforward and efficient form of subsidy to implement. The question of the independence of groups from the funding source is the most serious disadvantage. One possibility in this respect would be to contemplate a pan - Department agency, perhaps something like the Canada Council, which would make grants to qualifying groups on a periodic basis. This possibility raises several concerns. How would "qualifying groups" be defined? Broad-gauge criteria of the kind found in the F.T.C. Improvement Act but in this case applied across the entire spectrum of government activities would leave the granting agency with an extremely open-textured mandate. Because of this, and because the ultimate point of the exercise is after all to alter the distribution of political influence, great pressure would develop around the appointment processes to be followed for membership of the granting agency. Qualifications for membership of such an agency would be much less easily settled than membership of e.g., the Canada Council, or the Social Sciences and Humanities Research Council, where the worth of academic research proposals is appropriately thought to be a matter for judgment by academic peers. But the judgments to be made by the granting agency under dicussion in our context would be primarily political (and certainly not academic). It is conceivable that the major political parties could be given a right for each to nominate a certain

number of members of the agency. On the other hand, this would almost certainly guarantee a highly politicized process for allocating grants. Moreover, the remoteness of a centralized granting agency such as this from the particular institutional and policy contexts in which the various applicants for support would be functioning would make it very difficult for the agency to make informed judgments about comparitive need and effectiveness and may exacerbate any underlying tendency to the crassly political in grants decisions.

For these reasons, we believe that it is difficult to improve upon the basic Department-oriented concept of direct group grants presently in place. These are serious dangers, we recognize, of Departments only funding groups whose views they want to hear. We believe these dangers can be patially mitigated. First, it seems crucial to us that groups should not have to depend on year-to-year funding decisions. This substantially increases the vulnerability of groups to day-to-day political pressures, and makes rational policy planning and personnel development extremely difficult. It ought to be possible for Departments to devise three- to five-year contractural arrangements with groups guaranteeing minimum levels of funding for these periods. A second and related change would be for designated government departments with major regulatory responsibilities to commit themselves (at least in a bench-mark sense) to a permanent aggregate level of support to public interest groups, e.g., 1 per cent of total budget, to offset a tendency to treat grant money as "soft money" that is first to be cut in any budget contractions. Finally, disappointed interest

groups should be given some sort of public forum where they can ventilate their grievances in the event that they feel they have been unfairly treated. Perhaps the Public Accounts Committee of Parliament or a provincial legislature would be an appropriate forum. Thus, a set of procedures that ensured some stability of funding in particular cases, some on-going commitment to a given level of aggregate financial support to public interest groups, and a public forum where a Department, through its Minister, can be held to account for its administration of direct group grants, would seem a leat partially responsive to concerns over group independence.

(ii) A Tax Incentive Scheme

This leads us to the second broad approach to the funding of general representational activities - a tax incentive approach. We believe that this approach holds out substantial attractions in terms of all three of our key criteria. It promotes group independence, it promotes accountability of group spokesmen to their constituencies, and it encourages diversity of group viewpoints. We believe it should be considered as a serious policy option.

Within this option, two choices seem to present themselves to analogize public interest groups wither to charities or to political parties. Extending charitable status to public interest groups (leaving aside definitional particulars for the moment) would not be without merit. But two substantial concerns would be left unresolved. First, because contributions to charities ar a tax deduction and not a tax credit. The change would be regressive. This seems a particularly undersirable feature of a mechanism designed to enhance public participation in collective decision making processes. Given that in our political system voting entitlements are distributed on an equal basis, principle dictates that access to non-vote forms of political and regulatory influence should also be predicated on approximate equality. In this sense, a subsidy scheme should, as nearly as possible, be wealth neutral. We simply cannot assume that the political preferences of high and low income citizens are identical. Second, many of the major public interest groups are already certified as charities. Extending charitable status to public interest groups notwithstanding their involvement in political activities would in many cases do little more than remove ambiguities in the status quo and at best have a marginal impact on the level of public support available to such groups. We have already observed that present levels of support leave these groups seriously under-represented in collective decision making. Stronger incentives to support public interest groups are needed than the charitable deduction is likely to impart.

To meet the case for subsidizing these groups, we recommend that consideration be given to adapting and extending the present tax treatment of contributions to political parties. This would entail a tax credit for membership contributions of e.g., 75 per cent of contributions up to $30 per person per year.

In order to operationalize such a scheme, several concerns would need to be resolved.

First and foremost, the question of the definition of qualifying groups would have to be addressed. The most expansive approach would be to treat as qualified groups spending e.g., 90 per cent or more of their revenues (similar to the present rule applicable to charities) on representational activities before government or any of its agencies. "Representational activities" and "government and any of its agencies" would in turn need to be defined, but expansive definitions would seem fairly readily formulated. A somewhat less expansive approach would disqualify groups otherwise satisfying the above definitions if membership fees or contributions are already deductible as a business expense (effectively disqualifying producer interests from claiming this subsidy).

We are attracted to this last approach, although this would still leave the concern that highly emotive, one-issue, groups would succeed in attracting most of the subsidized memberships, leaving thinly-spread interests, such as consumer and environmental interests, which we have treated as our paradigmatic public interest groups throughout this study, still substantially under-represented in the policy/regulatory process.

If this concern is regarded as a serious one, qualifying groups could be defined restrictively so that only groups (other than producer groups) engaged in e.g., representational activities pertaining to the regulation of (a) goods and services commonly purchased for personal use or consumption and (b) the quality of the environment, would qualify for public interest group status under the proposed tax credit regime.

While this would seem a defensible approach to adopt, political opposition from all kinds of groups thus denied assistance would have to be anticipated.

Notwithstanding these difficulties, we consider that a tax credit scheme compares favourably to all alternative funding mechanisms, including direct government group grants, in terms of our criteria of independence, accountability and diversity. Compared to direct grants, the one dimension where tax credits would seem to compare unfavourably is administrative cost. A tax credit scheme may entail the allocation of substantial bureaucratic resources to the investigation of claims by

groups for public interest group status as a prelude to certification as such, the issuance of appropriate receipts by groups to members, the monitoring by the tax authorities that revenues are in fact being spent on representational activities, and the validation of membership receipts submitted with tax returns. These cumulative costs are unlikely to be trivial and may make this a very high cost form of subsidy.

c) Formal Representational Activites Before Regulatory Agencies

(i) Ad Hoc Cost Awards by a Central Agency

In the case of formal representational activities before regulatory agencies, two basic alternative approaches commend themselves for serious consideration.

The first approach is the analogue to the "Canada Council" approach to group funding in the general representational setting. At the federal level, this would entail creating a centralized agency to hear and determine applications for interim and final costs awards from groups seeking to intervene in the proceedings of any federal regulatory agency. To assist it in coming to determinations, recommendations might be solicited, but not necessarily accepted, from the agencies to which applications related.

The advantages of this approach would seem to be some consistency in the exercise of ad hoc cost award powers, capacity to pull "foot-dragging" agencies into line, and some reduction in the danger that a cost power vested in particular agencies may be abused by only being exercised in favour of groups supportive of an agency's own views.

The principal disadvantage would seem to be a very limited ability on the part of a central agency to make reliable judgments on the worth, potential or actual, of contributions by widely disparate groups across the entire regulatory spectrum of the government's activities. This inability may, as with this model in the general representational context, exacerbate tendencies to a highly politicized decision making process, and as a result a highly politicized approach to appointments to the central agency charged with this cost award function.

(ii) Ad Hoc Cost Awards by Individual Agencies

In large part for these reasons, we favour vesting cost award powers with individual agencies. The advantages of this are several. They are best able to assess the worth of contributions to their particular deliberations. They are best able to constrain excessive or irrelevant interventions. More generally, given the relative lack of experience with alternative institutional mechanisms for funding public interest advocacy, it would be advantageous to avoid forcing policy determinations relating thereto prematurely into a firm, centralized mould. A period of innovation and diversity of approaches would seem to have virtues in the shaping of public policy on funded participation in the regulatory process.

In order to induce a measure of consistency amongst regulatory agencies in the present context, it would seem appropriate to amend their statutes to put beyond doubt that their cost powers extend to awarding interim and final costs in favour of public interest groups

and against regulated industries in adjudicative proceedings. The CRTC cost rules appear to lay down broadly appropriate procedures in this respect. In addition, we recommend that in the case of the three major federal regulatory agencies (the C.T.C., the C.R.T.C., and the N.E.B) an explicit budget increment be committed to them of e.g., $200,000 each a year out of which to fund public interest group participation in rulemaking and like proceedings (where specific industries are not seeking adjudicationas bearing directly on their interests and those of others). We have confidence that these two steps would signal fairly unambiguously to the regulatory agencies in question that they should take serously the task of ensuring public interest group participation in their proceedings.

As to which groups should qualify for cost awards on either basis, the criteria currently employed by the C.R.T.C. in Canada and the F.T.C. in the U.S. (under the F.T.C. Improvement Act) seem generally well-directed and useful guides to the developmentof more widely applicable criteria.

It is important to add here that direct cost barriers are not the only barriers to effective public participation in regulatory proceedings. The right to lead evidence, cross-examine witnesses, issue interrogatories, etc., are also issues that bear on the ability to particpate effectively in such proceedings, and the Economic Council will want to satisfy itself, independently of this study, that non-cost barriers to effective public participation are minimized.

d) Conclusion

In summary, we conceive of a policy which ensures that thinly-spread interest groups will be encouraged to participate in regulatory decision making by either a direct government group grant programme or a tax credit scheme (our preferred choice) in the case of general representational activities, and by ad hoc cost awards made by individual regulatory agencies in the case of formal representational activities before regulatory agencies. We emphasize that these proposals are complementary. In the event that some agencies do not exercise their cost powers with appropriate sensitivity to the need to promote representation of thinly-spread interests, the availability of base-funding for some group through a direct grant or tax credit programme will mitigate the consequences. To the extent that a direct grant or tax credit programme does not well accommodate new groups or groups organized around discrete or time-specific issues, ad hoc cost awards provide at least the potential for assistance in formal regulatory proceedings. We see substantial dangers in a funding policy towards public interest groups that revolves entirely around one funding mechanism.

We view our proposals as balanced and moderate. They foreswear some of the more grandiose features of reforms proposed in this context in other jurisdictions. But they should be capable of being operationalized without undue administrative difficulty or undue social cost. Failure to take such steps as we have proposed will fuel a persistent and ultimately corrosive social perception of the regulatory process as a game played by regulator and regulatee, with an empty chair as symbol of the fact that

other interests, while centrally affected by its outcomes, are systematically disenfranchised from effective participation in that process.

Chapter VI

Footnotes

1. See generally, Trebilcock et al., The Choice of Governing Instruments, Economic Council of Canada, Regulation Reference (forthcoming).