Law Reform Commission of Canada
Commission de réforme du droit du Canada

public participation in the administrative process

ADMINISTRATIVE LAW SERIES

STUDY PAPER

PUBLIC PARTICIPATION IN THE ADMINISTRATIVE PROCESS

Administrative Law Series

A Study Paper

Prepared for the

Law Reform Commission

by

David Fox

Une édition française de ce document
d'étude est disponible.
Son titre est:

LA PARTICIPATION DU PUBLIC AU
MÉCANISME ADMINISTRATIF

Available by mail free of charge from

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada K1A 0L6

or

Suite 2180
Place du Canada
Montreal, Quebec
H3B 2N2

Catalogue No. J32-3/24E
ISBN 0-662-10851-5

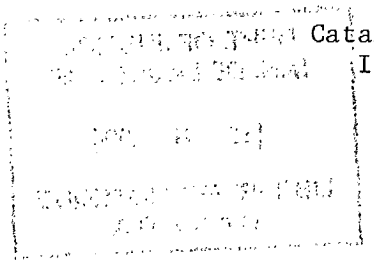

TABLE OF CONTENTS

PREFACE

The body of legal literature does not suffer from an acute lack of materials on the philosophy of public participation and participatory democracy. Unfortunately, there are a fewer number of works that address or evaluate procedures and practices, whether instituted or proposed, to increase the level of public involvement in the administrative process. The scarcity of such critiques was both a problem and a blessing for the author, for it forced and enabled him to engage in primary research in preparing this study. Determining the efficacy of various public participation and representation techniques was accomplished by reading hearing transcripts and internal reports; attending selected hearings and conducting numerous interviews with representatives of administrative tribunals, other government bodies, public interest groups and advocates. Prior to initiating this study, the author acted as research personnel for the Law Reform Commission's study paper on the Canadian Radio-television and Telecommunications Commission.

This paper would have been decidedly more difficult, if not impossible, to produce without the kind assistance of a great number of people. The list of those who donated their valuable time as information sources is too extensive to permit mention of individual names. Nevertheless, the author would like to express his appreciation to the staff and members of: The Atomic Energy Control Board; the Canadian Coalition for Nuclear Responsibility; the Canadian Environmental Law Association; the Canadian Radio-television and Telecommunications Commission; the Citizens' Communications Center, Washington, D.C.; Common Cause, New Jersey; Consumers' Association of Canada, Regulated Industry Program; Department of the Public Advocate, New Jersey; Energy Probe; the Environment Council of Alberta; the Executive

Department for the State of Oregon; the Federal Communications Commission, Washington, D.C.; the General Accounting Office, Washington, D.C.; the Institute for Public Interest Representation, Georgetown University Law Center; Media Access Project, Washington, D.C.; the Ministry of Transportation and Communications, Government of Ontario; the National Telecommunications Information Administration, Washington, D.C.; the New Jersey Public Interest Research Group; the New Zealand High Commission; the Norwegian Embassy; the Ontario Public Interest Research Group; the Ontario Telephone Service Commission; the People's Food Commission; the Public Interest Advocacy Centre; the Royal Commission on Electric Power and Planning; and the Swedish Embassy.

Very special thanks are owed to Stella A. McGreevy, Associate, Support Staff and transcriber extraordinaire.

INTRODUCTION

Most, if not all governmental activities are meant to be conducted "in the public interest"; the phrase abounds in statutes, regulations and rules for practices and procedures. Any body directed to operate "in the public interest" soon finds itself faced with the pre-emptive problem of defining where the "public interest" lies. While the phrase has soul-stirring connotations, it is a term which eludes concrete definition. What is the public interest? Is it the rights of industry? of government? of the various community, regional and national groups who often enunciate non-parallel, if not conflicting viewpoints, or is it the rights of the individual citizen? Obviously, if the term "public interest" is to mean anything, it must be an aggregate of all these different concerns. In order to avoid accusations of favouritism or "capture", the government body must make some attempt at balancing consideration of all interests within the community which it serves. In the past, the government alone was considered to be able to judge and weight these different rights and interests in isolation, without consultation with outside groups of individuals. However, more recently, it has become clear (at least to some parties) that the government runs a clear risk of formulating unresponsive, inadequate or inappropriate policies if operations are conducted exclusively <u>in camera</u>.

How is the government to ensure that all interests have been represented before reaching decisions?

> A variety of procedures have been advanced to aid in the discovery of the nature of the public interest. Jeremy Bentham, for example, although proclaiming that the public interest was ... merely a fiction, proposed that it could be calculated by adding the individual interests of the members of a polity, the accumulative interest which resulted

being the public interest. Yet Bentham's process ... is only valid to the extent that individual interests coincide ... A comprehensive procedure for giving meaning to the term public interest should be founded upon the recognition that society ... is composed of ... competing interests and diverse objectives. This notion is not a new one. It formed the basis of James Madison's remarks in Federalist No. 10 and is firmly embedded in the common law and the literature of political science and sociology. The public interest is best served when competing interest groups and individuals ably press their demands for redress ... Only when these requirements are satisfied, does the public interest take on a democratic tenor.[1]

The concepts of government in the public interest and the ability of citizens to express their views are firmly embedded in the principles of democracy. More than one party has achieved power by stressing to the electorate their commitment to some form of public participation. As Henry Chapin and Denis Deneau point out in Access and the Policy-making Process, the Trudeau government was elected in 1968 on a platform that concentrated on "participatory democracy".[2] This commitment to public participation was reiterated during the 1974 federal election campaign:

> In every area, there is not a lack of willingness on the part of individuals and citizens' groups to participate, and whether we like it or not, such participation is an irreversible fact in modern societies. And the only choice facing government at all levels is whether to invite such participation at every stage of the decision-making process, an atmosphere of cooperation, or whether to encounter participation after the fact, in an atmosphere of hostility. It is really no choice at all.[3]

As the operative phrase in this quote might be the words: "whether we like it or not", there may still be a need to justify public participation beyond the simple recognition that it represents the most basic means of strengthening the precepts of democracy. David M. Lenny has listed eight reasons for public participation in the governmental, and especially the administrative process:

1. Public involvement will tend to lessen regulator "capture" by regulatees, and will therefore produce more "balanced" decisions.

2. Since the administrative agency must take an objective position, it is necessary for the public or public interest groups to become involved so that some voice apart from the industry's will be heard, and therefore the traditionally "unrepresented" interests will have an influence on the decision-makers.

3. A greater ability on the part of an individual or group to participate in the process will have an immediate effect on the amelioration of public confidence, both in the process itself and the regulator involved.

4. Public presence in the administrative process provides a form of oversight in that the regulator, if subjected to public scrutiny, will become more efficient and produce policies and decisions more responsive to the needs of the public.

5. An "open" agency will be required to provide well-reasoned (and complete) decisions, and therefore justify its actions via established, identifiable policy (which should, incidentally, be also subject to public comment and evaluation).

6. The presence of alternative critics will provide what Lenny refers to as a "double-check" on health, safety, environmental and other standards set by the administrative agencies.

7. Public interest intervenors with the power to appeal or petition an agency decision will produce greater regulator accountability.

8. The capacity of an individual or group to intervene in the process not only reduces the amount of distrust generated by nonaccessible proceedings, it also reduces grievances and frustrations, and allows for challenge of illegal, ineffective or inappropriate actions before they come into force.[4]

Inherent in arguments for public participation is the assumption that the agencies can no longer be expected to represent the public interest alone. Many regulatory critics now call for procedural reforms which would encourage or augment public participation for this reason. As Jerre S. Williams, then Chairman of the American Bar Association's Administrative Law Section, pointed out in 1976:

> Only ten to fifteen years ago, the prevailing view was that the agency itself was the representative of the public interest. All this has now drastically changed. Through court decisions insisting that the public has the right to participate in the administrative process, and through recognition by Congress and within the agencies themselves that public participation in new and effective ways must be accepted, citizen participation in government has become a significant contemporary theme.[5]

Some critics have been perhaps overly severe in insisting that the agencies can no longer determine in isolation where the "public interest" lies.

> Instituted originally as watchdogs of the public interest, these agencies have not served to amplify the voice of the public, but have replaced it with the voice of the bureaucrat, a voice responding to very different pressures and demands, and with a definite private interest of its own to protect.[6]

Although the development of public participation in this country has been sufficiently incremental to prevent the designation of individual events as the "birth of public involvement in Canadian government", it would be appropriate to indicate some landmarks for public participation in Canada and point out the methods by which a Canadian citizen may currently attempt to influence administrative decision-making. In 1939, the Canadian Association for Adult Education and the C.B.C. jointly initiated Farm Radio Forum, a program which attempted to stimulate community action and citizen involvement in the improvement of rural life; this program was expanded in 1942 to become Citizens Forum, with the broader objective of promoting the creation of an active citizenry. During the construction of the St. Lawrence Seaway in 1954, local communities sent representatives to planning boards. In 1963, Sir George Williams University introduced the Centre for Human Relations and Community Study, an area of learning other universities and colleges were to concentrate on in the same decade. The National Film Board of Canada adopted the Challenge for Change program in 1967 as a popular education technique designed to provide communities and individuals with a means of informing decision-makers of local interests, viewpoints and problems. Since the Second World War, a number of Royal Commissions have encouraged public involvement in information gathering and advisory capacities.[7] Des Connor

has catalogued the traditional techniques available for citizens who wish to influence or have a voice in government activities: membership on advisory committees or policy-making bodies, referenda, hotlines, public meetings and hearings, information submission via correspondence, and reliance on public interest representatives such as Ombudsmen or public advocates. Of course, the citizen retains the opportunity to vote for a party or representative who expresses interests similar to his or her own.[8] Nevertheless, Canada cannot be said to have taken the lead in introducing public participation techniques or procedures.

The past two decades may have seen a growth of public interest groups and public participation, but this trend may owe more to the initiatives of these groups and individuals than to those of the government. To date, a Freedom of Information Act has not been passed by a Canadian Parliament, although both Messrs. Trudeau and Clark have avowed support of such a bill. Despite the efforts of Walter Baker, his private member's bill, C-255, which would require the registration of lobbyists, received first reading on October 30, 1978, but then died on the agenda. Canadian lobbyists, unlike their American counterparts are therefore under no compulsion to identify themselves openly. Canada does not have an Administrative Procedures Act which sets guidelines for independent agencies, nor has there been any noteworthy attempt on the part of the Canadian government to press for agency-wide awarding of costs or alternative intervenor financial support, despite the current activity in the American Congress on this issue (see the Chapter on Costs and Funding, below). Unlike Norway, Sweden, Australia and the State of Oregon, Canada has not instituted major popular education and referenda programs (see the Chapter on Surveys, below); at the time of writing, Canada has not introduced Referendum legislation. Although other countries introduced ombudsmen as early as 1713 (when an unofficial ombudsman was created in Sweden, see the Chapter on Public Advocates, below), Bill C-43, while it received first reading on April 5, 1978 during the 3rd session, it was not reintroduced in the 4th Session. No Canadian jurisdictions have introduced public advocate legislation similar to that in New Jersey. Few Canadian tribunals have illustrated any strong commitment to the concept of public involvement in the administrative process; the Canadian Radio-television and Telecommunications Commission is a notable exception.

Given this lack of impetus towards public participation, the aim of this paper is twofold. First, two case studies will serve to indicate the nature of public participation programs currently operative in two representative Canadian federal administrative agencies. The following section will contain studies of alternative techniques that have been introduced with success at the provincial level and in other countries. These studies will hopefully serve not only to address the two major arguments against public participation programs (i.e. that they produce inefficiency and serve a need that is not pressing, given the general apathy of the public) but also indicate to members of the public and government interested in this issue the various techniques for which they might lobby or study in attempting to influence greater Canadian acceptance and implementation of public participation in the administrative process.

Those opposed to public participation often cite the apparent apathy of the public as justification for a continuing lack of concentration in this area of procedural reform. I would suggest that any apathy on the part of public arises not because of an inherent unwillingness to become involved in the process which partly determines their standard of living, and the nature of their society. Rather, a lack of public involvement more often stems from a conviction that there are no available means by which the citizen can affect decision-making. The public's self-view as an essentially powerless component of the social structure culminates in the decision to remain outside the government process, a position which is often reinforced by the government's unwillingness to include the public and the evaluations of the citizenry both by the media and the government as disinterested, uninformed and incapable of representing their viewpoints in an appropriate and effective manner. If the government believes that participatory democracy is a worthy goal, some attempt must be made to negate the public's belief that they are unworthy of participatory rights and are isolated from the decision-makers. I believe that, given the opportunity, individual citizens or groups are likely to develop intervention skills and the impetus to voice their concerns in areas which may have either a direct or even a tangential impact on their daily lives. The purpose of this study, therefore, is to give some indication of the means by which other jurisdictions have succeeded in improving the public's self-evaluation, involving the citizen in the administrative process, and, by extension, recreating and strengthening a democracy which could truly be called participatory.

SECTION I - CASE STUDIES

CASE STUDY ONE

Canadian Radio-television
and Telecommunications Commission

A. INTRODUCTION

A number of Canadian agencies and commissions have traditionally encouraged public participation in the administrative process: the International Joint Commission, for example, has had the authority to hold public hearings on rule-making issues since its inception in 1909.[9] The Canadian Radio-television and Telecommunications Commission was selected as a Public Participation Case Study not because it is the only federal commission which has taken any initiative in developing public-oriented procedures; instead the CRTC is presented here as the most active and innovative independent agency in this area; it has also been selected because the Commission, not incidentally, presently enjoys a high public profile.

On April 1, 1968, the Broadcasting Act[10] came into force, establishing the Canadian Radio-Television Commission and granting that body the authority to regulate the broadcasting industry. The Commission was reformed on April 1, 1976 (by the Canadian Radio-television and Telecommunications Commission Act[11]) so that it might also regulate telecommunications. For an in-depth analysis of CRTC authority and function, the reader is referred to the Law Reform Commission of Canada's upcoming publication. The present paper is concerned only with procedures relating to public participation.

The case study will include:

1. a review of statutes which affect the CRTC; indicating where the Commission has been directed or influenced by legislation on public participation policy;

2. an examination of the Commission's regulatory activities; illustrating procedures which either may encourage or detract from public participation and the representation of public interests before the Commission.

Commission activities may be divided into three categories:

1. policy-making: ("rulemaking" procedures: formulation of regulations; initiation of practices and procedures);

2. supervisory and adjudicatory functions: (day to day regulatory activities, including hearings, complaint resolution, liaison with the industry and other interests and research);

3. enforcement: (court actions; regulatory activities outside of the in-Commission context).

Within each of these three areas the Commission may affect the quality and impact of public participation by introducing techniques relating to: popular education; animation and notification; provision of information services; restrictions relating to confidentiality; development of interest submission alternatives; designation of, and procedural guidelines for hearings; availability of special staff and participant funding (in a variety of forms). CRTC techniques will be illustrated and evaluated in light of their effectiveness in providing for public involvement and representation of a broad range of interests before the Commission in its decision-making capacity.

B. LEGISLATION

The House of Commons Debates on the Broadcasting Act gave little indication that the Canadian Radio-

Television Commission would improve the level of public involvement in regulatory decision-making. Although Secretary of State LaMarsh did indicate that the new Commission would be required to hold public hearings on an increased number of matters, her remarks implied that the part-time members of the Commission (not citizens or public or special interest groups) would be chiefly responsible for the representation of public interests at the hearings:

> ... the part time members will have an important role to play in participating in public hearings. It is essential that they should have free opportunity to express their views and to make representations on behalf of local and sectional interests ...[12]

Discussion on Bill C-5, the Canadian Radio-television and Telecommunications Commission Act proposal was remarkable for the absence of Liberal and Conservative commentary on public interest representation. New Democrats touched on this issue; David Orlikow noted on March 4, 1975:

> ... the CRTC has been an active, aggressive, socially conscious organization which has ... so far as it has responsibility ... consulted with the public, has engaged in dialogue with the public ... and has tried to chart a policy which would be of benefit to the people as a whole ...[13]

Cyril Symes echoed Orlikow's concern that the CRTC continue to encourage public participation rather than emulate its predecessor in telecommunications regulation:

> ... my colleague, the Hon. Member for Winnipeg North (Mr. Orlikow) pointed out earlier this afternoon the lamentable record of the Canadian Transport Commission in standing up for citizens' interests against corporation interests ... Suffice it to say that example after example has shown that when CPR or Bell Canada came before the CTC asking for a rate increase, usually they got it, and consumer groups attempting to put forward their case were hindered by lack of resources and lack of funds.[14]

Mr. Symes also pointed out a number of deficiencies in the new Bill:

> The bill has not provided for any consumer advisory group which would assist consumers to prepare briefs or oppose communication oriented companies seeking to increase rates. Such a bureau should be established to assist consumers, and to help them travel from various parts of Canada to attend hearings[15] here in Ottawa ...
>
> Perhaps my greatest reservation about the bill ... is the lack of provision for consumers to have a say in determining policy, especially as it relates to rate increases. One of the great criticisms with the old Canadian Transport Commission when it came to telephone rates was that Bell Canada had its battery of lawyers and experts and could produce stacks and stacks of very technical and detailed documents, but the ordinary consumer group of a dozen individuals or even some of the larger, national consumer groups did not have that kind of resource background nor the finances to present their side of the story.
>
> This has been a great weakness in our regulatory legislation, and it will remain a weakness in this bill.[16]

The Government Position Paper: "Proposals for a Communication Policy for Canada"[17], which had sparked the integration of broadcasting and telecommunications regulation under one agency, began with a noble paean to regulation "in the public interest", but did not suggest any procedures by which such a goal might be achieved. Nothing was said concerning consultation with the public, or public participation in the process, although various sections dealt specifically with industry consultation, and the rights of provincial and federal governments to intervene.

The Broadcasting Act provides some direction on public hearings and notification procedures. Section 3, which enunciates broadcast policy, indicates Parliament's definition of where the "public interest" lies. The only other reference to the public interest within the Act is a short sub-section which enunciates that resolution of disputes arising between the C.B.C. and private broadcasters should be conducted in the public interest, but paramount consideration should be given to the National Broadcasting Service (over and above, one would assume, the public interest).[18] Section 19 indicates when the

Commission may or must hold public hearings; the legislation does allow for the augmentation of public involvement by increasing the number of matters requiring a public hearing. Of course, no procedural directions are given on the extent to which such forums shall be truly public, or how the Commission should weigh public representations. Nevertheless, the CRTC is directed to hold hearings in connection with issuance, revocation or suspension of a broadcasting licence. Hearings may be designated, (if the Executive Committee is satisfied that it would be in the public interest) in connection with licence amendment, the issue of a temporary licence, or with regard to a consumer complaint. Furthermore, the Act states that hearings should be held on licence renewal applications unless the Commission is satisfied that no hearing is required. There is no indication of the criteria the Commission should employ in reaching that decision. The Commission has the discretion to decide where such hearings should be held (anywhere in Canada)[19] and how many commissioners both full and part time should sit as panel (although two members, one of which being full time is set as a minimum).[20]

CRTC notification requirements as stated in the Act extend beyond the minimal publication of application and notice of hearing in the Canada Gazette: the Commission is also to publish such notice in one or more newspapers "of general circulation" within the area served or to be served by the broadcaster.[21] Decisions, with written reasons, relating to revocation of a licence, or (at the decision of the Executive Committee) relating to suspension of a licence, are to be forwarded by prepaid mail to all persons who appeared at the hearing, and also published in the Gazette and newspapers.[22] These notification requirements are somewhat more rigorous than those found in other statutes. No other directions on public procedure policy are given by the Act.

On the Telecommunications side, the CRTC Act makes no mention of public participation, within or without the hearing context. Since the transfer of Telecommunications regulation jurisdiction, the CRTC has operated under the National Transportation and Railway Acts.[23] The National Transportation Act gives the regulator discretion to award costs, but otherwise leaves the formulation of procedures to the Commission.[24] The Railway Act, similarly, does not address the issue of public participation, save with regard to the provision of certain information to the public (again at the discretion of the

Commission); although there is a presumption of confidentiality.[25] The CTC General Rules, which the CRTC adopted until such a time as it might be able to formulate telecommunications practices and procedures, indicate that the Commission may dispense with proceedings in any manner it sees fit (including, one would suppose, public hearings).[26] In fact, the CTC gave the CRTC little in the way of encouragement for the introduction of public participation. Just prior to April 1st, 1976 the CTC had conducted a three day hearing on the subject of cost awards and funding for public participant intervenors, and had decided to reject these procedural proposals.[27]

Bill C-16, the most recent Telecommunications Act proposal, which will, if enacted, group all CRTC functions under one statute, has gone through its first reading (November 9, 1978).[28] C-16 addresses a number of public participation issues. In section 3 (which defines telecommunications policy for Canada), it is enunciated that the radio frequency spectrum should be "administered in the public interest". Similarly, the regulation of telecommunication is required to be:

> flexible and readily adaptable to cultural, social, and economic change and to scientific and technological advances, and should ensure a proper balance between the interests of the public at large, and legitimate revenue requirements of the telecommunications industry.[29]

Directive making powers given to the Cabinet under this proposal include the provision that the Governor in Council may release information to the public which the Commission has deemed to be confidential.[30] In Part 2 of the Act, which enunciates the powers of the Commission, the issues for which public hearings are required or may be held at the Commission's discretion have been broadened. Hearings must be held with regard to inter-connection decisions; prohibition of undertaking when the Executive Committee considers that actual or potential competition would not be in the public interest, and at any other time that the Governor in Council requires. This is in addition to directions on hearings for the issuance, revocation or suspension of a broadcasting licence. A public hearing may be held when directions are given to a carrier concerning permanent or temporary implementation of services or facilities; any decision is made relating to tariffs or complaints regarding tariffs;

the elimination of unjust discrimination, preference, or advantage in the provision of telecommunications service or whenever a hearing is necessary for the carrying out of CRTC duties and functions with respect to telecommunications carriers.[31] In line with the Bill's support of co-ordination between the federal and provincial bodies on regulatory matters, Section 27(6) directs that the Governor in Council may require the Commission to allow a provincial regulator panel status at a hearing. The CRTC is given authority to award costs at broadcasting as well as telecommunications hearings and may also designate as confidential any information it receives in the execution of its duties.[32] In Part 5, which deals with telecommunications carriers, notification requirements are expanded to the extent that the Executive Committee is directed to give notice to any member of the public who may be affected by an acquisition, disposal or incorporation within the industry.[33] Previously enacted notification requirements remain in force.

Virtually all provisions for greater public participation enunciated in the Bill have already been enacted by the Commission. The proposals may reflect a growing recognition on the part of the legislature that public involvement is an essential element in the regulatory process.

C. PRACTICES AND PROCEDURES

1. Policy Making

The CRTC occasionally formulates policy at hearings which are otherwise adjudicatory in nature. For example, CRTC policy on cost awards was introduced at the CN Telecommunications Newfoundland Rate Hearing, which was adjudicatory in nature.[34] Therefore, when procedures are equally applicable to policy-making and policy implementation processes, these procedures will be discussed within the context (policy-making or implementation) where they are most usually employed.

Although the Governor in Council has issued three policy directives to the CRTC (on ownership and educational television, for example),[35] the CRTC has, to a great extent, retained responsibility for broadcast and telecommunications policy-making. Some examples of policies developed by the CRTC:

1. Practices and Procedures for Telecommunications and Broadcasting matters

2. Canadian Content in television and radio programming

3. Advocacy Advertising

4. Children's Advertising in Television

5. The extent of permissible multiple ownership and transfer of control (both in Telecommunications and Broadcasting)

6. Pay Television

7. Methodology for determining the reasonableness of tariffs (the Cost Inquiry)

8. Service Quality (Telecommunications) in rural and urban communities

A number of these issues have been explored at hearings which were initiated by applications. However, the CRTC does formulate policy through issue hearings, based on submissions, seminars, symposiums and special research activities.

Popular education on CRTC policies is not provided by the Commission to the same extent as is the practice with regard to "adjudicatory" matters. However, the CRTC has sponsored or participated in a number of seminars which have elucidated policy proposals. CRTC Chairman Pierre Juneau was involved in the Telecommission, which not only discussed the ramifications of telecommunications for the Canadian public, but also allowed for brainstorming between citizens, regulators and government.[36] Since 1968, the CRTC has produced documents on: Canadian Ownership in Broadcasting, FM Radio and Cable Television Policy, Multilingual Broadcasting, Pay Television, Violence in Television, a survey of Metropolitan Toronto Senior Citizens' Media "Habits" and resource materials for communities or individuals interested in broadcasting.[37]

The CRTC has conducted three policy seminars. Between August 26 and 28, 1973, 22 broadcasters, musicians and critics were invited to a seminar on F.M. policy. Although the document produced by these consultants is

available to the public, no public interest groups or individuals were invited to the seminar, whether in the capacity of spectator or participant.

The CRTC regularly receives complaints regarding various aspects of programming, many of which concern the level of violence on television. For three days, in August of 1975, the Commission held The Symposium on Television Violence, organized by the Research Directorate. Psychologists, behavioural scientists, broadcasters, government representatives and public interest groups (including the Canadian Conference on Children and Youth and the Consumers' Association of Canada) were invited to this meeting. Although the participants discussed this issue in depth, and the observations of the invitees are currently available to the public, this problem area has not been resolved. Public complaints on violence in television programming continue to arrive: between September 1, 1976 and March 14, 1977, 174 such complaints were received.[38] The CRTC does not investigate these complaints, although they may forward the letters to the broadcaster, and later allow discussion during licence renewal hearings.

The F.M. policy and Television Violence seminars were designated by CRTC initiative. Although the Commission had long planned for a seminar on advocacy advertising, the actual proceeding, held on April 4, 1977, was organized chiefly because of complaints made by the Public Petroleum Association of Canada, which had produced ads discussing the use of advocacy advertising by the oil companies. PPAC had been refused commercial time by the major Canadian networks; the CRTC responded by holding a seminar on the issue of advocacy advertising. As with other symposiums, attendance was by invitation. The Media and Communications Law Section of the Canadian Bar Association, the Communications Law Program of the Faculty of Law at the University of Toronto and the CRTC requested the participation of advertisers, agencies, network representatives and a number of special and public interest groups.

The CRTC funds a number of public interest groups, which may hold their own seminars. The Commission is one of the founding members of the Children's Broadcasting Institute, which has conducted seminars on children's programming and advertising. Although the CRTC may send representatives to these seminars, responsibility for co-ordination rests with the public interest group.

During policy formulation, the Commission occasionally solicits comment from members of the industry on an informal basis, outside the seminar or hearing context. This practice is not objectionable in itself; it becomes so, however, when such consultation does not include public interest groups. If the Commission intends to introduce policies giving attention to "the public interest", it should seek the viewpoint both of the regulatee and the affected public.

CRTC research is conducted for the most part by the Commission's Research Directorate, but outside contracts are also used. Studies generated by these contracts concern Commission-generated interests, but the CRTC also provides research grants and contributions to members of the public who wish to investigate various aspects of broadcasting and telecommunications. A number of requests for CRTC funding have been for projects which might aid participants in the process, or improve the procedures for public involvement. Since 1970, 105 applications have been made to the Commission for research grants or contributions; five of these applications have been deferred or withdrawn; 50 have been approved by the CRTC Committee which oversees research funding. Of these 50 approved projects, ten are at least peripherally directed towards the study or encouragement of public participation, including maintenance aid for two "public interest" groups (The Canadian Communications Research Information Centre and the Children's Broadcasting Institute); studies on animation of community involvement in programming, compilations of materials on communications and articles in the Canadian Communications Law Review or similar journals on the subject of public participation. Between 1970 and fiscal year 1978/79, the CRTC has spent a total of $381,149.00 on all grants and contributions for research.[39]

Recently the Commission required B.C. Tel and Bell Canada to provide funding for research on the telecommunications system. The Commission may find it difficult to determine which sectors are most deserving of financial aid for research. Assistance to one interested party may provoke accusations of arbitrary and inequitable favouritism by others. In the past, the Commission has imposed certain conditions on funded researchers: grantees for example, were precluded from participating at hearings during the research period. This practice should be discontinued since it places the party in the unenviable position of having to sacrifice hearing

appearance for educational activities designed at least in part to improve the effectiveness of regulatory process involvement.

In Telecom Decision 78-4: CRTC Procedures and Practices in Telecommunications Regulation, the Commission mentioned that it would designate general issue hearings to consider potential policies. Procedures for such hearings will involve the preparation of documents outlining the discussable issues, then solicitation of comments from the regulatees and the public. Issue hearings will not preclude the raising of policy issues at adjudicatory hearings. Responses to the July 20th, 1976 CRTC recommendations for revisions in Telecom Procedures suggested issue hearings in areas such as non-urban telephone service, billing and collection practices, service quality, language requirements for tariffs, interconnection, customer-owned equipment, and the level of vertical integration within the industry. Although the following decision stated that notification of issue hearings would parallel adjudicatory hearing practice, the subsequently finalized Telecommunications Rules of Procedure themselves do not address procedures at issue hearings. The Commission has announced that costs will be unavailable at issue (policy) hearings, due to problems relating to determining against which party to award costs. Although issue hearings are not initiated by a single applicant, it is true that certain regulatees may benefit from such hearings; costs might be borne by these parties, or, in the alternative, by the Commission itself.

One issue hearing which is presently before the CRTC is the Cost Inquiry, which seeks to determine the methods by which telecommunications rate increase applications are to be judged justifiable and reasonable. This inquiry proceeds from a similar hearing series commenced by the CTC in 1972. The CTC had approached this policy-making process by initiating an "in-house" study; consultants then reported to the Telecommunications Committee.[40] Following transfer of jurisdiction, the CRTC required that carriers first submit reports on their costing practices; evaluated these submissions, then announced on August 15, 1977 (Telecom Public Notice 77-14), that it would consider this issue via sequential hearings. Intervenor notice was provided through the Canada Gazette, newspapers and the mailing list. Interventions were to be filed by a specified deadline. The Cost Inquiry consists of six public hearings.[41] Beyond notification, and the hearing itself, the Commission did

not produce popular education on this issue. No research grants were provided to public or special interest groups, nor was there any attempt to animate the involvement of these groups. Participation in the process therefore, was left to the initiative of the potential intervenor. The only public interest group which has been able to appear before the Cost Inquiry is the Consumers' Association of Canada. At an Issue Hearing, the Commission designates the parameters of discussion; control over the proceedings includes the ability on the part of the Commission to request consolidation of duplicative presentations. However, if an intervenor insists on appearing alone, the Commission would probably not prevent him or her.[42]

Another policy hearing considered the implementation of Pay TV in Canada. After Pay TV policy discussion in camera, the CRTC informed the public that the Commission was open to submissions; notice of a public hearing followed. Once again the Commission did not provide research funding for potential participants nor did it animate involvement outside the notice itself. Nevertheless, 140 citizen-generated comments were received and 26 intervenors appeared at the hearing, which was held on June 13th through 16th, 1977.[43] At the hearing, cross-examination was not allowed and costs were not awarded. After the hearing was concluded, the Commission published policy and background papers on Pay TV.[44] The popular education phase, therefore, followed the policy decision. Although the Commission is to be commended for holding this policy hearing and providing information on Pay TV, after-the-fact popular education cannot be said to encourage participation in the process.

The CRTC has made a point of involving the public in its reconsideration of practices and procedures both in broadcasting and telecommunications matters. Soon after the transfer of jurisdiction, the CRTC published suggestions for procedural innovations in telecommunications regulation.[45] This document included a brief explanation of authority and outlined the manner in which the Commission would formulate these new policies. The recommendations paper was made available to interested members of the public upon request or through the CRTC mailing list.* Interested individuals either submitted

* The mailing list was the simplest and most efficient means by which a member of the public could receive CRTC-generated documents, including all press releases, notices and decisions which are regularly published in the Canada Gazette.

briefs or appeared at the public hearing, which was held between October 25th and 28th, 1976. Thirty-two submissions on practices and procedures were generated; eighteen parties appeared at the hearing. As with other issue hearings, costs were not awarded, nor was cross-examination allowed.[46] Cross-examination may be allowed at issue hearings in the future; this procedure is being considered for the final phase of the Cost Inquiry, for example. During the hearing, the Commission noted that it intended to designate a good number of such policy hearings in the future. This evoked a somewhat negative response from the industry. To quote Bell Canada:

> It is difficult to visualize the type of hearing which might take place under this heading. The danger of course, is the danger which regulators have seen and tried to avoid over the years in the telecommunications industry and that is the danger of meddling in the management of the business.[47]

The Canadian Telecommunications Carriers Association challenged the Commission's jurisdiction to consider modification of policy without parliamentary direction:

> If by the statement (that the Commission will be conscious of developing national telecommunications policy objectives), the Commission is suggesting that it intends to render its decisions on policies not yet legislated upon by Parliament, the Association respectfully submits that the Commission must base its decisions on existing laws.[48]

Nevertheless, support was given by the public interest groups, which included the Consumers' Association of Canada, Action Bell Canada, the Civil Liberties Association, Inuit Tapirisat, the National Anti-Poverty Organization, the Public Interest Advocacy Centre, and the Steering Committee on Telephone Receivers and the Hearing Impaired. Seven individuals also appeared.[49] The Commission's Draft Rules were published in May, 1978, and parties were allowed a final period in which to comment. The finalized CRTC Telecommunications Rules of Procedures (hereinafter called the Rules) were published in the Canada Gazette on July 27, 1979. These new procedures have not, to any great extent, introduced citizen-generated proposals. They have however, reflected public support of the Commission's original recommendations which might serve to augment public involvement. Copies of the July 20, 1979 Public Announcement and orders

relating to the new Rules and Tariff Regulations were made available to all parties who participated.

When the CRTC undertook to reform its broadcasting practices and procedures, a similar process was implemented. A public announcement indicating CRTC recommendations was released on July 25th, 1978; a hearing followed in November, and a final submission period has been designated for new submissions.

Participation in policy-making may be practiced outside of public hearings through file hearings. This procedure involves the generation of Commission prepared discussion papers; submissions are then invited by a public notice. File hearings have been recommended for quality of service review and consideration of carrier construction program proposals.

Liora Salter's survey of broadcast intervenors indicated that, among 199 policy intervenors questioned, the cost of a hearing appearance was $240.00, $94.00 more than the amount expended by adjudicatory hearing intervenors.[50] It is difficult to understand, therefore, why the CRTC Commission will award costs at adjudicatory hearings (which only decide specific applications and therefore are of interest only within a specific time frame), yet deny similar funding at issue hearings, which address policies of major importance and which determine the very nature of the regulatory process.

The CRTC is to be commended for introducing public involvement in policy; members of the Commission have expressed interest in holding policy hearings on Department of Communications policy; no response has yet been made by the Minister. As has been noted, notification for issue hearings is presently below the standard required for adjudicatory hearings; however, the CRTC may use monthly billings or broadcasts to publicize issue hearings in the future, when policies to be discussed are considered to be of general interest to the public. One would only hope that the CRTC continues to realize that the public has the right to become involved in the broadest range of policy and adjudicatory decision-making processes.

2. Supervisory and Adjudicatory Functions

Canadian Radio-television and Telecommunications Commission procedures are in a state of flux: although the Draft Rules for telecommunications came into effect on January 1, 1979, a number of procedural areas remain unaddressed. Similarly, on the broadcasting side, finalization of broadcasting reforms will await the publication of new Broadcasting Rules. Nevertheless, present procedures may be used to illustrate Commission policy in this area.

Originally, the CRTC mailing list provided access to popular education and intervention preparation tools: prior decisions, public notices and announcements and Commission statements on policies and procedures. Unfortunately, a recent policy change, necessitated by budgetary constraint, has virtually erradicated this important popular education tool.

As of January 1, 1980, individuals wishing to have access to CRTC decisions, orders, notices and announcements must subscribe either to a Department of Supply and Services mailing list or via the D.S.S. to the Commission's report series, Canadian Radio-television and Telecommunications Commission Decisions and Policy Statements ("CRT"). While the original mailing list materials were provided free of charge, a fee is now required. Bound copies of the decisions, notices and announcements are sent once per year. CRT is published in two parts, the first of which includes all telecommunications decisions, the second selected policy statements, notices and announcements. Because one may receive such materials up to one year after the effective intervention period, this hardly constitutes proper notice service for potential intervenors. Although CRT costs considerably less than the DSS mailings, the fee might still preclude large numbers of the effected public from subscribing.

The CRTC has discussed publication of digests of evidence for each hearing following the hearing; giving members of the public notice of areas already covered in past procedures, thus avoiding the possibility of evidentiary duplication. The CRTC is currently compiling standardized telecommunications rate application interrogatories; intervenors will therefore be aware of questions already responded to by the applicant when setting their own interrogatories. In the CRTC Proposals for Broadcasting Matters, the Commission suggested that

documents prepared by their staff which "add but do not evaluate" evidence would also be made available to the public.[51]

The Commission's Examination Room and Library at its central offices in Hull are available to the public. Regional offices at which the public may receive information about the regulatory process operate in Vancouver, Halifax and Montreal.

Legal advisors are not available at the regional offices, but the Legal Branch at the Central Office is available for intervenor counselling both within and outside of the hearing context. Chairmen Juneau and Boyle studied the use of hearings as an educative tool, offering an evaluatory framework for both spectators and participants. Popular education activities may be further augmented by expanded use of seminars.

The CRTC is improving notification techniques; on the Telecommunications side, applicants for general rate increases are now required to provide notice via monthly billings as a supplement to newspaper inserts and Gazette publications.[52] The applicant is also directed to supply information regarding the nature of the application, the reasons for the application, and the methods by which the intervenor may participate in the process.[53] On the broadcasting side, the CRTC has suggested that broadcasters publicize applications beginning one hundred days in advance of the scheduled hearing via broadcast announcements, or in the case of cable, via "crawl" or slides on "at least the two most popular basic service channels of the system", or by monthly billings.[54] Application notice may be supplemented by regular licensee announcement of regulatory responsibilities throughout the broadcasting year. The Commission has suggested that licensees would be further required to maintain a public file, including the licence, all CRTC decisions relating to its operations, the current promise of performance, audited financial statements, a list of current shareholders, officers and directors and the relevant law (the Broadcasting Act, CRTC Rules of Procedure and any applicable regulations). The CRTC would retain a duplicate public file at its head office.[55] Telecommunications carriers would be required to include similar information and their tariff schedules in telephone directories.[56]

Although the potential intervenor will be served with sufficient notice of CRTC activities, the Commission

does not undertake to animate involvement; this is left to intervenor initiative. It would be unreasonable to demand that the Commission take responsibility for assisting the development of selected public or special interest groups: this would generate claims of inequity from citizens and organizations not contacted. However, due to the high number of separate adjudicatory and rule-making activities, it is often difficult for an intervenor to determine which hearing appearance will be most advantageous. It might, therefore, be reasonable for the Commission not only to produce or fund a procedural handbook, including a compilation of regulations and related statutes in simple language, but also to provide reviews of potential impacts on consumers and subscribers of different regulatory activities.

At regional hearings, members of the Commission attempt to animate community involvement. On one occasion, the CRTC has aided the organization of a community group: following adoption of cable regulations which specified that commercials on community programming channels should be deleted, the Fergus-Elora Cable Television Company registered disagreement. At the direction of Chairman Boyle, members of the Commission travelled to Fergus-Elora and organized a public meeting, which served not only to gauge community viewpoints, but also advised the community on intervention procedures and assisted the formation of a community interest group. This body later intervened in the Fergus-Elora Cable T.V. application for exemption, heard on June 22, 1977.[57] The Commission noted that representation by the community group was of high quality. Unfortunately, the Commission has not used this procedure frequently; despite financial constraints, it would be to the Commission's advantage to re-introduce animation activities. The July 25th, 1978 statement announced that:

> The Commission is of the view that the effectiveness of the regulatory process, based as it is in large measure upon public hearings, can be greatly enhanced or diminished depending on the quality of the participation of intervenors ...[58]

The process, therefore, improves when intervenors are well-prepared and organized; this goal can be achieved through procedures similar to those practised in Fergus-Elora.

The availability of information has already been discussed; it should be noted in addition that research

conducted by Commission staff and contracted individuals is available, along with other documentation, through the Research Directorate. Despite access to information, there remains the concern that a majority of Commission data is drawn from the regulated industries. Of course, the lion's share of evidence related to applications must always proceed from the regulatee, but recent interventions have illustrated that a variety of interpretations are available for a majority of issues, including, for example, rate formulation. The CRTC is utilizing the Cost Inquiry to solicit a number of economic evaluations; it would be beneficial if the Commission made a point of inviting and disseminating information culled from non-regulatee sources.

During the October hearings on Telecommunications procedures, the CRTC noted that it would reverse the CTC policy on confidentiality, adopting a disclosure-oriented approach, except where the applicant could show good reason for keeping the document off the record. The regulatees argued that section 331 of the Railway Act required the Commission to maintain confidentiality procedures.[59] Nevertheless, section 19 of the Rules indicates that the Commission will presume non-confidentiality of any document furnished in connection with a proceeding unless the party asserts a claim for confidentiality, on the ground that specific direct harm would be caused by disclosure. The Commission added that other parties might challenge such applications; the applicant would be required to give reasons why an abridged version of the document could not be made public. Although the Commission Rules state that such discussion need not be the subject of an oral hearing, the CRTC retains the authority to require release of the document or any part thereof following deliberation. During Bell Rate '78, the CRTC adopted the Anti-dumping Tribunal procedure of allowing in camera examinations of confidential documents; the rules include this option. Although the in camera procedure appears to provide a good compromise, it is necessary that counsel viewing the document be independent. Counsel is also restrained from specifically mentioning the document in final argument or disclosing information on the document to the intervenor. This procedure creates major problems for the intervenor who is self-represented. Furthermore, if denied the opportunity to refer to the confidential document in final argument, the intervenor may find it preferable not to attend the in camera session rather than suffer restriction of presentation. Confidentiality procedures

for broadcasting are similar to those enunciated for telecommunications. In the July 25, 1978 recommendation, the Commission proposed that:

> ... audited annual financial statements ... of (the) licencee and any holding company shall be placed on the public file ... All relevant information filed in or in support of an application shall be made public except: (a) the names of prospective employees who are presently in other employment and (b) to the extent that the applicant establishes to the satisfaction of the Executive Committee of the Commission (i) that disclosure will cause specific direct harm and (ii) that such harm outweighs the benefit to be derived from public disclosure. Any application to allow confidential filing shall itself at least in part be placed on the public file.[60]

The recommendations therefore extend the applicant's burden of proof. At the hearing, broadcasters expressed dissatisfaction with this proposal, and while other participants welcomed the CRTC innovation, it was noted that the Commission gave no indication of what "relevant information" might include. Telecommunications technology research and development-oriented documents may, of necessity, require confidentiality: plans for proposed service improvements and new technologies should not be available to competitors. However, the CRTC might be able to allow accessibility to such information without destroying a corporation's prerogative to protect its technology by restricting disclosure to non-competitors. It has already been mentioned that the Commission may consider the release of staff documents which add evidence.[61] The Ontario Securities Commission allows cross-examination of its staff regarding evidence compiled on the applicant or party who is the subject of a hearing. The CRTC has shown no indication of adopting this procedure.[62]

Hearing appearance may be the most satisfying participation technique, but time and financial limitations prevent continuous involvement in the hearing process. This raises the necessity of developing alternative submission procedures.

Before the hearing, an interested party has the option of notifying the Commission of interests or concerns through the mail; these letters are catalogued by

Commission staff, and the points generated are compiled. At the hearing, CRTC counsel ensures that points suggested by the letters are addressed by the applicant and other parties. Members of the CRTC Legal Branch take an active role in proceedings: counsel are currently able to cross-examine on their own initiative, rather than merely supply back-up questioning for the panel. Counsel therefore has the opportunity to complete the record by enunciating concerns generated both by the above-mentioned letters or by the Legal Branch. Although the Commission has considered developing an independent trial staff system, similar to that practised by the American Federal Communications Commission, budgetary problems have precluded this innovation. In light of the present ability of CRTC counsel to forward public concerns, and the history of independent trial staff at the F.C.C., the introduction of this staff re-organization may be unnecessary. (See the Chapter of F.C.C. Trial Staff in the Representation Alternatives section, below). Consumers and subscribers may address letters of complaint or commendation to the Commission at any time. Usually, Information Officers, the Executive Director or the Secretary General's Office will process these submissions, forwarding them to the regulatee for resolution. If settlement is not forthcoming, a hearing may be designated. Although the Telecommunications Rules of Procedure indicate that this practice will continue, industry-wide complaints may be dealt with in the context of an issue hearing.[63]

Under Chairman Boyle, an unofficial complaints bureau developed in the Commission; one communications link was established between a member of the staff receiving telephone complaints or commendations and the Executive. This improved Commission awareness of the general nature of regulatee evaluation by the public. Unfortunately, this "Complaints Bureau" faded into obscurity; responsibility for complaint consideration is now within the jurisdiction of numerous Commission offices. Although these public submissions are compiled, they have never been introduced as evidence at any hearing. Applicants do, however, query the Commission about consumer and subscriber correspondence. If the Commission were to delegate authority for public contact to one office, individual letters could be easily catalogued and produced as evidence to indicate the public's ongoing perception of regulatee performance. The Commission proposed to require the publication of complaint procedures by regulatees.

The CRTC occasionally directs regulatees to conduct consumer surveys in order to establish service quality levels; this is often a prior requirement to a hearing. However, the Commission has yet to initiate its own surveys.

Since its inception, the CRTC has informalized hearing procedures: hearing rooms are selected which have a physical appearance more suggestive of a meeting place than that of a courtroom; witnesses, who are often grouped as panels, sit at tables, rather than in witness boxes. Nevertheless, witnesses are sworn in and, at telecommunications hearings, cross-examination is an integral part of the process. Broadcasting procedures are intentionally less adversarial: the Commission examines the parties; cross-examination has traditionally been denied. The CRTC defends this practice by arguing that Broadcasting procedures are designed to clarify submissions, rather than to challenge disputed facts. However, the Broadcasting Recommendations state that the Commission may allow cross-examination in the future if:

> ... an applicant or intervenor ... satisfied the Commission that the particular circumstances of the case warrant, in the public interest, the use of cross-examination. Such party will be obliged to explain with reasonable particularity the information which it proposes to obtain or test.[64]

There was considerable discussion at the October Telecommunications Procedures Hearing over the use of cross-examination and hearing informality. The Canadian Railway Labour Association noted that:

> Too much informality could be counter-productive ... a regulatory proceeding cannot be conducted in so informal a manner as to create the atmosphere of a high school debating society.[65]

The Consumer's Association of Canada added:

> The real value of "informality" is that it provides an atmosphere which is conducive to a relaxed approach rather than an atmosphere which intimidates those who may wish to participate ... the danger is that in the interests of informality ... the process rights of the parties ... may be compromised ... This is particularly important in regulatory matters where misplaced informality will

> favour the carriers and deprive intervenors of those essential procedural weapons without which they cannot hope to participate effectively.[66]

Bell Canada advocated cross-examination as: "the best method developed in Western Civilization for verification of 'all the facts'"[67], and the Public Interest Advocacy Centre also supported the procedure as a means for increasing the effectiveness of participation by lay persons.[68]

The CRTC has simplified standing requirements: although it is common practice at other administrative agencies to only allow individuals or groups with a property interest in the subject matter the opportunity of appearing at a hearing, Telecom Decision 78-4 specified that:

> While a person must have an interest in a particular proceeding in order to become an intervenor, the Commission will continue to interpret this interest broadly, in view of the large number of subscribers involved in rate cases and of the breadth and importance of many of the issues dealt with in most of the telecommunications cases ...[69]

Intervenors are advised to indicate their proposed stance in letters of intent, but the Commission makes no attempt to direct the intervenor on whether or not to support or oppose the applicant, or guide commentary and evidence produced by the participant. Procedural guidance is, of course, available at the hearing through the services of the CRTC counsel.

The Commission utilizes a variety of criteria in determining when to designate public hearings. Telecommunications applications are perused upon receipt and "tariff filings" are selected out. This category of applications becomes the responsibility of the Tariff Subcommittee, which makes the initial decision whether or not such application may be processed without a public hearing. If the filing concerns a competitive service, or if any public debate has been generated on the application, a public announcement will be produced, inviting interventions. Following the deadline for submissions, the Commission determines if the number of interested parties and the issues raised by intervenors warrant the designation of a hearing.

Procedure on non-tariff filing applications is essentially the same: the Commission may rely on response to a public notice as an indication of the necessity for a hearing. Other criteria are taken into account however: the amount of Commission information on the particular applicant; the number of public requests for a hearing; the controversiality of the issues raised and the need for providing the applicant with an opportunity to air its argument in public. The Commission utilizes similar considerations where it has the discretion to designate a hearing on a broadcasting application.

As of January 1, 1980 the CRTC has designated 22 public hearings (including the first and second phases of the Cost Inquiry) on telecommunications matters. At the 1978 Bell Rate application hearing, 12 intervenors participated at the central hearing; 73 parties made presentations at the regional hearings and approximately 3,600 written comments were sent to the Commission, 30 of which were in the form of petitions.[70]

The CRTC conducts regional hearings in tandem with rate cases to allow participation by individuals not prepared to travel to and participate in central hearings. Transcripts of regional hearings form part of the record for the entire proceeding. In the 1978 Bell Rate decision the submission of the Ontario Hospital Association (at the Toronto Regional Hearing), was granted consideration in the Commission decision.[71] In its Broadcasting Recommendations the Commission suggested the holding of special evening sessions during regional hearings as a further supplementary forum for individuals who have filed notice at least twenty-four hours in advance.[72]

The Commission retains the authority to limit both issues and interventions at broadcast and telecommunication hearings; however, it has demonstrated an open approach by allowing the majority of interested parties to appear.[73]

Prior to or during the main hearing the CRTC may designate a conference in order to settle procedures and special matters, simplify issues and allow for the exchange of exhibits and documents. Liora Salter has claimed that the Executive Committee has met on occasion with potential intervenors or applicants to discuss evidence, but has not sponsored similar consultation with members of the public or public interest groups.[74] During the Bell Rate '78 hearing, intervenors who had

previously attempted to address the full gamut of issues, specialized their presentations, thus developing expertise with regard to particular issues and gaining the opportunity to examine such concerns in greater depth. Although this co-ordination may continue at the intervenors' initiative, it would be most efficiently addressed at pre-hearing conferences. The CRTC has denied parties the opportunity since it is justifiably loathe to project the impression that the Commission is utilizing the conference to direct parties.

Following the hearing, the entire Commission, full and part-time members, consults on the evidence; the Executive Committee (in camera) then formulates the decision. Although other tribunals, (the Ontario Telephone Service Commission for example[75]) hold Executive Committee meetings in public, the CRTC has not done so. No official explanation has been offered for this practice, but it may be assumed that Commissioners would be constrained from expressing "unpopular" views if they were subject to public observation. Although it is reasonable that the Executive Committee be given the freedom to explore all issues in its deliberations, it could be suggested that opening the decision-making process to public view might improve accountability.

The major obstacle to participation at hearings is lack of financial resources. Although solutions to this problem will be discussed in greater depth in the following section on Representation Alternatives, the CRTC approach will be discussed here. During the CRTC hearing on the CNT Application for Newfoundland Rate Increases, the CRTC introduced cost award procedure. Previously, costs had been awarded to a single party during the Challenge Communications hearing in 1977,[76] however, the CRTC utilized the Newfoundland hearing to broaden the application of this practice. CRTC decision 78-5 announced that:

> ... costs would be awarded only where the intervenor represented the interests of a substantial number of subscribers, had participated in a responsible way and had contributed to a better understanding of the issues by the Commission, but would not be available to intervenors funded sufficiently in the Commission's opinion to enable them to participate in a hearing.[77]

Submissions on telecommunications and broadcast procedures indicated alternative methods for financial

support of intervenors, including direct government funding; consumer and subscriber support via a check-off system provided in monthly billings and the awarding of costs. Although some parties at the October hearing supported the "subscriber check-off system" (Action Bell Canada for example), the CRTC decision enunciated that while the Commission preferred government or Commission funding, the former approach was outside CRTC jurisdiction and the latter was inappropriate since the Commission did not have an adequate budget to cover funding.[78] However, the Commission did support the concept of cost awards, following precedent developed by the Alberta Public Utilities Board and the Ontario Energy Board. Costs would be available at rate hearings, and at other adjudicatory and rule-making hearings on an ad hoc basis.[79] Despite this welcome exploration of techniques for broadening public participation, the Draft Rules criteria for cost awarding led to a number of problems. The Public Interest Advocacy Centre challenged the use of "substantial number of individuals represented" as a criteria, suggesting in the alternative that the importance of the issues raised by the intervenor should be of paramount concern in determining when to award costs. The Commission responded by deleting this criterion in the finalized Rules. Applicants against whom costs have been awarded have utilized the "no outside sources of funding" criteria for challenging awards already set by the Commission. Bell objected to costs awarded during Bell Rate '78 for the Public Interest Advocacy Centre and the Consumers' Association of Canada, claiming that double recovery should not be allowed as both these parties already receive Department of Consumer and Corporate Affairs funding for regulatory intervention. The CRTC awarded costs against Bell Canada and B.C. Tel. to provide funding for consultant research in advance of a CRTC hearing on the TCTS Rate Increase application. Bell Canada appealed to the Federal Court, claiming that the CRTC was forcing regulatees to provide funding for what are essentially intra-commission administrative costs.

The CRTC and other agencies should encourage regulatees to consult with the public on an ongoing basis, outside the hearing context. Information seminars or open format "consumer voice" hearings might provide forums for such consultations. The Federal Communications Commission has encouraged broadcasters to study consumer needs by requiring licence renewal applicants to list ten areas of concern in the community served and then indicate programming designed to serve those needs.

For example, if a high percentage of the viewing public was of a certain ethnic background, the applicant would be required to indicate the extent of ethnic programming aired. This requirement puts pressure on broadcasters to consult with the community and may lead to better industry and public relations. Other agencies might be able to adopt this technique, making similar studies a condition of granting a licence or allowing a rate increase.[80]

3. Enforcement

CRTC has relied on court prosecutions to enforce policies when regulatees have ignored or only partially implemented regulations. In 1979, the CRTC prosecuted five broadcasters for failing to implement Canadian Content rules. Since the forum for enforcement is the courts, it is outside the jurisdiction of this paper to discuss public participation techniques in policy enforcement. However, if a member of the public wishes to forward evidence either in support or in opposition of the prosecuted regulatee there is no procedure for such action currently available; in fact, the Commission makes no attempt to notify the public of prosecutions.

Since enforcement is equally important to supervisory and adjudicatory functions in the regulatory process, it would not be unreasonable for the Commission to animate year-round public monitoring of broadcast programming or telecommunication services, so that if a prosecution is set, both the Commission and the regulatee might have access to evidence generated from those individuals who are in the best position to evaluate the regulatee's adherence to Commission policy. One method for developing this evidentiary source would be to implement Commission-generated surveys of the consumer public on issues such as Canadian content programming, or in the alternative to promote the formation of community monitoring groups who could submit annual reports on the nature of broadcasting programming or telecommunications service quality. If, as the broadcasters assert, the public is generally satisfied with the level of programming, it would be to the regulatee's advantage to promote the formation of monitory groups or implement surveys.

An objection to the submission of attitudinal surveys or monitoring reports might be that such testimony is essentially circumstantial and hearsay. The Manitoba Court of Appeal discussed the admissability of attitudinal surveys in R. v. Prairie Schooner News Ltd. and

Powers,[81] which concerned deliberation on a pornography charge. Judge Dickson stated:

> ... when it becomes necessary to determine the true nature of community opinion and to find a single normative standard, the Court should not be denied the benefit of evidence, scientifically obtained in accordance with accepted sampling procedure, by those who are expert in the field of opinion research. Such evidence can be properly accorded the status of expert testimony. The state of mind or attitude of a community is as much fact as the state of one's health.[82]

The quality of surveys is of paramount importance: Mr. Justice Dickson indicated that many studies, if ill-conducted, were liable to generate unreliable and misleading findings. However, if monitoring reports or surveys were implemented with the guidance of experts, evidentiary requirements would probably be satisfied. Monitoring groups might also be joined as parties with the respondent or the Commission.

D. CONCLUSION

On September 23, 1976, Chairman Harry Boyle addressed the Electrical and Electronics Manufacturers' Association of Canada on the topic of "the public interest". Although his remarks were made in the context of broadcasting regulation, the following excerpt provides an appropriate conclusion to this study of public participation at the CRTC:

> Since 1968, the CRTC has expended tremendous effort to give an opportunity to the Canadian people to be represented in the affairs of broadcasting ... We have heard representations from individuals to informal groups to associations. We have heard people from remote areas as well as from the main cities, from the farms and from the villages ... and from the far reaches of the North.

The style is slightly self-congratulatory, but the statement is, in essence, correct: the Commission has opened its regulatory process to the public. There are procedures that require further modification; the process, therefore, should continue, and be both studied and emulated by other independent agencies so that an increasing number of concerned Canadians may be heard.

CASE STUDY TWO

Atomic Energy Control Board

A. INTRODUCTION

The Atomic Energy Control Board was selected as the second public participation case study not because it is the only federal commission or board that operates with minimal public involvement, but rather because it represents agencies which may, but have not chosen to encourage public participation, and because its regulatory process currently receives extensive media coverage.

A number of administrative agencies are precluded from involving the public, both by statute and simple practicality. Only a minimal number of agencies are given the authority to hold public hearings or encourage public participation. Some administrative agencies deal with matters that necessitate privacy and confidentiality. For example, it would be extremely unreasonable to demand that the Parole Board or Pension Appeals Board open their deliberations to public intervention. Not only do such agencies officiate over matters which do not immediately affect society as a whole (save those seeking parole or pension), but, the financial integrity and privacy of individuals before these boards would be violated if certain information was readily available to the public at large. Corporations developing technological innovation would be subject to inequitable disclosure if procedures before certain boards were opened on an arbitrary and injudicious basis.

There are as well various agencies which have not developed public-oriented procedures, but may be partially excused in that they have not been the subject of major interest; no constituency has therefore demanded reform. The solution to this problem would be for such

agencies to undertake (at very least), a popular education program designed to inform the public that their regulatory activities have a major effect on the day to day workings of society.

The Atomic Energy Control Board deals on an ongoing basis with an industry concerned with keeping research and development safe from competitors. However, as has been mentioned above in the CRTC Case Study, confidentiality rules can be modified to protect the interest of the applicant while simultaneously allowing broader participation. Furthermore, society is presently extremely concerned about and interested in the ramifications of atomic energy development. There are numerous examples of atomic incidents that have brought the regulatory process and the industry itself before public scrutiny.

During the second week of March, 1979, the Nuclear Regulatory Commission (of the United States of America) was forced to close down five northeastern atomic energy plants when it became apparent that the computer-generated design had not taken seismological problems into consideration.[83] On March 28, 1979 the Three Mile Island Nuclear Power Plant near Harrisburg, Pennsylvania suffered a cooling pump failure, which caused clouds of radio-active steam to escape. Workers at the plant were exposed; the Nuclear Regulatory Commission referred to this occurrence as "one of the most serious accidents we've had".[84]

Unfortunately nuclear incidents have not been restricted to the United States. To give six brief examples of Ontario events: the 1973 Pickering Quarterly Technical Report describes the loss of the containment vacuum system on four occasions during the last four months of 1973 due to airlock door sealing failures. On June 29, 1974 a leak was discovered in the wall of Nuclear Reactor Unit 2 which "would have reduced the ability of the containment system to limit radio-activity release after any Unit 2 accident since the beginning of 1973", a period of eighteen months.[85] During the first three months of 1976 valves either jammed or were left closed which resulted in emergency core cooling system failures.[86] Events have also occurred at the Bruce Reactor. On July 28, 1977 a temporary loss of secondary coolant occurred when staff were unable to restart an auxiliary pump which had automatically shutdown. 1.7 metric tons of radio-active heavy water were discharged into the containment due to over-pressurization caused by

leaking valves and operator error on January 10, 1978.[87] On March 14, 1978 during reactor shutdown the welding of pipe caused an explosion of residual heavy hydrogen (deuterium) gas. Fortunately no one was injured.[88]

There are many Canadian public interest groups clamouring for input in the atomic regulatory process. An incomplete list would include:

- Energy Probe
- The Canadian Environmental Law Association
- Save the Environment from Atomic Pollution (SEAP)
- a series of community groups including the Lanark Committee for Nuclear Responsibility, People Against Nuclear Development Anywhere (Pontiac), Renfrew County Citizens for Nuclear Responsibility, to name a selection of groups located near the AECB's main office
- The United Church of Canada
- The Ontario Public Interest Research Group
- The Canadian Coalition for Nuclear Responsibility
- The British Columbia Medical Association
- S.U.N. (Stop Using Nuclear)
- CANTDU

Various academics have also expressed concern about the lack of non-industry involvement in nuclear regulation.

Here, then, is a regulatory area where it is absolutely necessary for information upon which decisions are based to be supplied by alternate sources to the regulatees. The total lack of public participation before the AECB constitutes not only procedural problems to be addressed by concerned academics, but quite simply a potential danger to the public, if only because there is no method by which the regulator may be made aware of deficiencies in regulatee activities, beyond research and monitoring conducted by the agency.

The case study will include:

1. a review of statutes that affect the AECB,

2. an examination of the Board's regulatory activities.

As with the CRTC case study, Board functions will be divided into three categories: policy-making, policy implementation and policy enforcement. Procedures relating to popular education; animation and notification; provision of information services, restrictions relating to confidentiality, development of interest submission alternatives; hearings and decision-making, availability of special staff and research funding will be discussed within the context of the applicable category.

B. LEGISLATION

The Atomic Energy Control Act went through first reading (as Bill 165) on June 3rd, 1946. Prompted by the stirrings of the Cold War, Parliament introduced an Act which "reflects a paramount concern for security where strategic materials are involved".[89] As a result, the Act makes no reference to the holding of public hearings or public participation, while confidentiality of proceedings is a major concern. Members of the opposition, while agreeing with the general thrust of the proposed legislation, indicated some apprehension that the Bill was being pushed through with unseemly haste. Howard Green, Conservative representative for Vancouver South, agreed with the preamble:

> Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy ...[90]

but registered dismay with the lack of education provided Parliamentarians and the public before the Bill was drafted:

> ... There is an almost complete lack of knowledge of this whole question, not only in this House, but, I submit, throughout the country. There have not been discussions on the radio or in open forum

> across Canada such as those that have taken place in the United States. Our people are not informed on all the facts in connection with atomic energy. It should be fundamental that the people as a whole have some understanding of these problems before legislation is passed in the House, otherwise our democracy is not functioning properly.[91]

Mr. Green went on to specify differences between the proposed Canadian and American legislation:

> I have pointed out in the U.S. legislation under the McMahon Bill ... they have a board of nine civilian advisors serving in honorary capacity ... appointed by the president. At page 140 of the Congressional Digest there appears the following explanation: "A board of civilian advisors to be appointed by the president is to meet at least four times a year and consult with the Commission on scientific and technical matters" ...[92]

Mr. Howe, Minister of Reconstruction noted that:

> "The Advisory Board in the United States is not in a position to regulate the authority of the Commission. It simply advises on scientific and atomic matters."[93]

and dismissed the adoption of such procedure in Canada.

Although the Act gives the Atomic Energy Control Board the authority to make rules regulating its proceeding, there is no direction provided on procedures within the Board. A number of sections provide for the maintenance of secrecy and confidentiality. Section 9 authorizes the Board to "make regulations ... for the purpose of keeping secret information respecting the production, the use and application of, and research and investigation, with respect to atomic energy, as in the opinion of the Board, the public interest may require". Section 18 requires all members, officers and employees of the Board to take an oath of fidelity and secrecy before a justice of the peace. This section prompted some discussion in the 1946 debates. Stanley Knowles, C.C.F. Representative for Winnipeg Centre requested clarification on the extent of Board "affairs" subject to the oath. Mr. Howe explained that the oath referred to "information relating to the affairs of the Board. If a man has learned a lot about atomic energy from a university or in books which

he has read, that is his affair, but if he indicates particulars of the work the Board is doing, he would be violating his oath".[94] William Case, Conservative Representative for Grey North, queried whether the oath would be operative only while such person was employed by the Board.[95] Mr. Howe responded:

> No it is not limited in time. If he disclosed the affairs of the board, whether employed by the Board or not, it would be a violation of the oath.[96]

During the Cold War years such a stringent requirement might have been valid, but more recently, members of Parliament have challenged the continuance of restrictive secrecy. On March 24, 1975, C. Lloyd Francis, Liberal Representative for Ottawa West asked if the oath extended to "information relating to public health".[97] The Minister of Energy, Mines and Resources, Donald S. MacDonald answered:

> The scope of application of this oath has not been the subject of interpretation.[98]

As will be seen in later discussion of Board procedures, the AECB has interpreted the oath and confidentiality directives as requiring severe application.

The Act does not provide for complaint procedures, nor for inquiries (at public request) into a licence revocation, suspension or any other matter falling within the jurisdiction of the AECB. The necessity for revision of statutes affecting the regulation of the atomic industry and technology has been felt both in Canada and the United States. Immediately before the transfer of jurisdiction from the United States Atomic Energy Commission to the new Nuclear Regulatory Commission, the AEC stated:

> . . . the public has not only the right to participate in regulation, but also the right to know what is going on.[99]

The AEC recommended the following procedural innovations:

1. public-generated written and oral submissions on rulemaking and adjudicatory matters.

2. informal consultations between intervenors and Commission staff at the early stage of application review processes.

3. open evaluation of inspection and enforcement problems and disclosure of Commission findings to the industry, the public and the licensee.[100]

On November 24, 1977, Bill C-14, the Nuclear Control and Administration Act received its first reading in the House of Commons. The Honourable Alastair Gillespie has described the new bill as giving:

> ... the federal government the necessary legislative and regulatory authority to deal effectively with all the present and forecast issues associated with the nuclear industry in Canada, while providing adequate means for public participation in the decision-making process with respect to nuclear energy.[101]

Under the present Act, the Board is not compelled to consider environmental issues when making decisions related to nuclear energy. This would be revised by Section 20 of the proposed Act, which includes the "preservation of health and safety of persons and (the protection of) the environment" as Board objectives. Dr. A. T. Prince, past President of the AECB, interprets this section as providing a clear mandate for response to environmental concerns;[102] but an Energy Probe/Canadian Environmental Law Association analysis of Bill C-14 points out that the bill gives no guarantee of environmental protection. Therefore, the authors recommended that:

> The Act should connect the Board's responsibility for health, safety and environmental factors directly to the issuance and withdrawal of licences for nuclear facilities, and should specifically require the Board to withhold a licence where issuance could be harmful, to revoke a licence where harm is threatened, and to attach conditions to licences where such conditions will mitigate potential harm.[103]

Another object of the Board under the new Act would be to "act as a source of information for the public on health, safety and environmental matters related to nuclear energy".[104] This is further enunciated in the withdrawal of the oath requirement, and the inclusion of various sections addressing information and confidentiality: Section 27 specifically provides for the dissemina-

tion of information; Section 36 reverses the presumption of confidentiality by directing the Board to make public "all documents in the possession of the Board that do not contain information that is within a class of information exempted from disclosure by the regulations". An applicant may request non-disclosure; the Board is directed to take into account the public interest and the competitive position of the applicant in determining whether or not to honour a claim of confidentiality. The holding of a public hearing on such a request is within the discretion of the Board. Sections 56(h) and (j) give the Board authority to exempt any class of information from disclosure. Dr. Prince believes that Board policy in this area would continue to follow that outlined in Cabinet directives 45 and 46: trade secrets, commercial, financial, privileged or confidential internal correspondence, personnel information and information relating to safeguards and physical security measures and any government-source generated documentation designated as confidential would be exempt from disclosure.[105] This power of exemption, therefore, authorizes the Board to remain confidentiality-oriented: as Probe/C.E.L.A. point out, not even the application for confidentiality is required to be made public.[106] Their analysis suggests that members of the public should have the right to comment on exemptions before they are adopted and that a stricter duty be imposed on the Board to consider all matters affecting the public interest before honouring confidentiality.[107] Under Bill C-14, all regulations would be published in the Canada Gazette at least sixty days before coming into effect. Although this would supposedly give members of the public an opportunity to comment on exemptions, it should be noted that the Gazette is an essentially ineffective method of public notification.

The Nuclear Control Board would be directed by Section 32 to hold public hearings in connection with the issuance of a licence, and have the discretion to designate public hearings on any other matters within its jurisdiction. Notices of such hearings, along with applications and decisions relating to the issuance, amendment, renewal, suspension or revocation of a licence would be provided in the Canada Gazette and (where applicable) a newspaper published near the proposed or operative nuclear facility. Probe/C.E.L.A. point out that the Act does not require that public hearings be held before the issuance of a licence, nor is any direction given on the procedures for hearings.[108] It recommends that such hearings be held not less than sixty days

prior to licence issuance or site approval, and that hearings be also available in response to public request or complaint.[109] Notification requirements might be improved by adoption of CRTC-like standards: the industry applicant might be required to submit press releases; operative facilities could alert the community through public meetings and special mailings, or designated public interest groups could be delegated the responsibility to aid in the dissemination of information related to a hearing. Dr. Prince has expressed interest in the formulation of hearing procedures:

> ... While maximizing the two-way communications aspects of public hearings, such forums will have to tread a very fine line between "town-hall informal" and the legally-strict courtroom.[110]

Without suggesting that hearing cross-examination is a panacea ensuring better regulation, it should be noted that both adversarial and information-gathering hearings would be suitable in the nuclear regulatory context.

Section 7 of the Atomic Energy Control Act gives the Minister the power to direct the Board; Bill C-14 would broaden the directive-making authority to include Governor in Council as well (at the recommendation of the Minister). The Board would still be required to comply with these directives. The Probe/C.E.L.A. Analysis expresses concern with the directive power:

> This may emasculate the Board completely. Amendments to the procedures of the Board or directives should be made through the usual channels of regulations and amendments to the Act. If amendments are made by regulations, these regulations should be published and made available for public comment.[111]

This would constitute an interesting innovation in Cabinet procedure.

C-14 fails to address a number of public participation-oriented procedures, chief of which is the lack of provision for intervenor costs or funding. In a report tabled by the Environmental Assessment Review Panel (EARP) on the Eldorado Uranium Refinery proposed for Port Granby, Ontario, the EARP addressed the issue of funding:

> Despite the good intentions and much hard work by individuals and interest groups ... the effectiveness of the participation (is) inhibited by the lack of financial means ... The Panel, therefore, recommends that a proposal be drafted by the Federal Environmental Assessment Review Office to provide funding and other assistance for the public participating in Panel reviews.[112]

Such a policy could be extended to the Atomic Energy Control Board, or its potential replacement, the Nuclear Control Board.

Although C-14 suffers from various defects, it illustrates that public participation is available, justified and appropriate in the nuclear regulatory process.

C. PRACTICES AND PROCEDURES

1. Policy Making

AECB policy is directed not by the Act itself, but through Ministerial and Cabinet "directives". Two directives which defined minimum confidentiality requirements have already been mentioned; Energy, Mines and Resources has also guided the Board on such matters as uranium policy (1974) and safeguard policy (1974).[113] The Non-proliferation Treaty and other nuclear-related agreements have also had an influence on the AECB. However, the Board retains the authority to formulate regulations regarding internal procedures.

Although the Board of the AECB consists of five members, this body rarely meets more than six times annually.[114] Day to day operations are administered and procedures are developed by the Management Committee, in consultation with several advisory committees. On January 1, 1978 the Board staff was re-organized, the Management Committee was enlarged, a Policy Advisory Committee was created, and for the first time an Office of Public Information was formally instituted.[115]

The Management Committee not only advises the President, it also acts on his or her behalf during periods of absence. The Policy Advisory Committee is

responsible for presenting policy recommendations to the five-member board. A better understanding of AECB's internal structure may be gained by reading Bruce Doern's Study Paper on the AECB, prepared at the request of the Law Reform Commission.[116] This paper is chiefly concerned with AECB procedures which might or do involve public participation.

Although the Advisory Committees are not responsible for decision-making, their recommendations have an immediate impact on policy formation. It is therefore somewhat disturbing to discover that while various government departments and the industry itself are represented on such committees, members of the public interest groups have never sat on the Advisory Committees or the Board itself.[117] It was not until fiscal year 1976/77 that Environment Canada had representation on what may be the most important of such committees, the Reactor Safety Committee.[118] The AECB must often hire staff from the industry, which constitutes the major source of individuals with nuclear energy expertise. Atomic Energy of Canada Ltd. (The Crown Corporation responsible for development of atomic energy and atomic research) staff and executive have often become AECB staff and board members. As Doern points out:

> ... the evolution of AECL via CANDU, into a nuclear entrepreneur now makes the historic cosiness of the AECB's-AECL relationship unacceptable both in appearance and in substance.[119]

Individuals from Eldorado Nuclear Ltd., the pre-eminent uranium mining and refining company in Canada have also become members and staff of the AECB.[120]

AECB internal procedures have undergone revision during the 1970-74 regulation revision period and more recently through the 1977-78 internal re-organization. Unlike the CRTC, the AECB did not open the process to public comment; neither public nor file hearings were held on revision recommendations.

On October 14th, 1975, C. Lloyd Francis asked the Honourable Mitchell Sharp, then President of the Privy Council, if the government consulted with environmentalists or other groups before developing nuclear energy policy. Mr. Sharp responded by indicating that although "no environmental protection organizations were taking any interest in this area" (in the mid-forties),

both AECB and the regulatees had made efforts to "keep the public fully informed".[121] Since 1973, the AECB has required all licence applicants to hold public information meetings during the application period. These meetings are designed to provide members of the community in which the construction is proposed with information regarding nuclear energy in general, and the proposed facility specifically. No licence has been denied on the basis of procedural or substantial weaknesses at such meetings.[122] It is the responsibility of the applicant to conduct these meetings; AECB staff attend, but do not direct these sessions. The extent to which the industry controls the popular education phase may be illustrated by the fact that while chairpersons of such meetings are intended to occupy a nonbiased position, appointment of the chairperson is the responsibility of the applicant. This has led to at least one embarrassing incident. At the Moncton public information hearing, held in September of 1977, it was discovered that the Chairman of the hearing (the Mayor of Moncton), far from being objective, had previously expressed support for facility construction.[123] The AECB has noted that public interest groups and concerned individuals have attempted to use such meetings as forums for presenting alternative viewpoints on nuclear development and regulation. As they are presently constituted, the public information meetings are not designed to provide the public with such an opportunity, with the result that the representation of non-regulated interests are further stymied. Public information meetings are only available with regard to policy implementation (i.e. licensing); similar forums are not held on AECB policy formulation. However, the AECB does occasionally appear before inquiries into nuclear energy, presenting submissions which are then subject to public scrutiny and examination at the inquiry. Members of the AECB have taken part in the Cluff Lake Board of Inquiry in Saskatchewan, the Royal Commission on Electric Power and Planning, the Ontario Environmental Assessment Board Hearings on Elliott Lake and the Federal Environmental Assessment and Review Process Panel inquiry into construction of a waste management facility at Port Granby, Ontario.

Information is available to the public on an ongoing basis through AECB mailings. Interested parties may request inclusion on Annual Report, "All Subjects" news release, and "Major Items of National or International Interest" lists. Information pertaining to specific facilities or activities such as the Bruce

Reactor, the Port Granby Waste Disposal facility or the various clean up programs are also available in separate lists. The "all subjects" news release mailings include all major decisions made by the Board; applications made to the Board are indicated in the Annual Reports. The licences are available for public inspection at the AECB library in Ottawa or at the offices of the licensee.[124] Unlike the CRTC, the AECB does not publish an "update bulletin"; nor has it recommended the introduction of a licensee "public file" system.

The AECB has never held public hearings whether on rule-making or adjudicatory matters. However, on November 28, 1978, the AECB initiated its first file hearing. The Inter-Organizational Working Group (IOWG), established by the AECB and composed of representatives from AECB, several provincial utilities and the Atomic Energy of Canada Limited, made recommendations on safety requirements for the nuclear industry.[125] As with the AECB Advisory Committees, there was no representation from environmentalist or nuclear energy oriented public interest groups on the IOWG. This prompted Dr. Gordon Edwards of the Canadian Coalition for Nuclear Responsibility to query Dr. Prince about this lack of balanced membership during the Royal Commission on Electric Power and Planning Debate Stage Hearings:

> Dr. Edwards: "Is there any particular reason as to why there is no public input in the sense of invitations to public interest groups that have already expressed an interest?"
>
> Dr. Prince: "I frankly don't think they are competent to deal with a matter of this kind."
>
> Dr. Edwards: "You don't think it would be good for them to be informed?"
>
> Dr. Prince: "Once the document is ready, and it would be a public document, then I would appreciate any commentary the public might have but, at the present time, no ... If there are inputs from outside sources after it becomes public, we are quite prepared to listen to them."
>
> Dr. Edwards: "I am saying, why are the public interest groups excluded?"

Dr. Prince: "Because I don't think, at this particular juncture, it is any of their business."[126]

When the AECB released the IOWG Report on November 28, 1978, they requested public reaction to the IOWG proposals, such submissions to be filed by January 31, 1979. Notice was sent to individuals and groups on the AECB mailing lists and also to nuclear critic groups which the AECB judged to be interested in the safety proposals. Copies were not sent to public libraries; nor was press coverage encouraged by the AECB, since the Board considered the proposal to be too technical to arouse the interest of the general public.[127] The IOWG Report was included in the mailing, along with a statement by the IOWG Chairman, Dr. W. Paskievici of the École Polytechnique of Montréal.

Although this statement gives a good outline of the report's aims, it ignores (as does the AECB release) one major recommendation on safety feature design limiting allowable radiation exposure in case of malfunction or failure of the nuclear facility. In the past, the AECB policy had been to set a 25 rem* limit on radiation exposure per individual in case of malfunction or failure and a general limitation on radiation exposure for the total affected population. The IOWG recommendation was to drop the latter requirement entirely and allow safety feature design which would only ensure an individual exposure limitation of 100 rems.[128] No pertinent background information that lead to this and other proposals was available in the report. The IOWG Paper did not indicate AECB existing permissible limits except to note that their recommendation constituted a lowering of such standards.

Although the AECB is to be commended for introducing this file hearing, it should be noted that in the interest of popular education and effective public response, the information upon which such a hearing is based should be explained in such a way as to allow participants to gauge the ramifications of the policy proposals. The IOWG Chairman's covering letter could have been a layperson-oriented synopsis of the Report

---

* A rem is a measure of radiation constituting a dose of ionizing radiation which would have the same biological effect as 200 to 250 kilovolts of X-rays. Atomic Energy Control Regulations, SOR/74-334, June, 1974, at p. 1784.

recommendations; in the alternative the AECB itself might have provided such information.

Another problem related to this file hearing was the deadline for submissions. Two months does not constitute sufficient time for an individual to undertake the necessary research required for responsible analysis. As a means of comparison, the CRTC is currently proposing to allow six months for intervenor response to telecommunications rate increase applications.[129] The two-month deadline prompted various nuclear critics to request an extension of up to six months. On January 31, 1979, the day of the initial deadline, an AECB press release announced a two-month extension and indicated more fully the ramifications of the IOWG radiation exposure limit proposal.

Virtually no background information was available to members of the public interested in making submissions on the IOWG Report. Restrictions on information disclosure even extended to Members of Parliament. On February 28, 1979 Allan Lawrence, Progressive Conservative for Northumberland-Durham, asked for copies of the IOWG Minutes. M. Pierre Bussières, Parliamentary Secretary to the Ministry of Energy, Mines and Resources, replied that these were internal documents and were therefore unavailable to the public.[130] Access to reports on the loss of coolant accident at Pickering Nuclear Generating Station, Bruce Reactor Safety, and minutes of Reactor Safety Advisory Committee meetings were also denied to Mr. Lawrence on the basis of confidentiality.[131]

File hearings on AECB policy would allow for commentary from sources no longer limited to staff and the industry, but it is obvious that major AECB revisions to this procedure must be introduced in order that the process be opened to effective and responsible public participation. Undoubtedly, the AECB will be able to improve procedures when future file hearings are implemented.

AECB research is conducted through the Research Directorate which, because of financial limitations, is not in a position to provide grants (although a grant program had been previously operative before a 1975 reorganization). The Directorate does offer outside contracts for specific research. In fiscal year 1976-77, fourteen of these contracts were given to universities: the other sixteen went to consulting firms, other government departments and Atomic Energy of Canada Ltd.[132] In

fiscal year 1977-78, thirteen contracts out of a total of twenty-eight went to universities.[133] Forty-nine percent of 1978-79 contracts awarded to date have gone to universities.[134] Research monies are augmented by a shared "bridge financing fund" provided by DSS to departments and agencies which are unable to initiate projects alone. Research project recommendations are submitted for Board approval at the beginning of each fiscal year; any contract exceeding $25,000. must be subsequently and individually approved.[135] Almost all research projects have been initiated by the AECB, although there have been a good number of requests from consulting firms and public interest groups for financing.[136] Unlike the CRTC Research Directorate, the AECB office does not provide information to members of the public or groups interested in the nuclear regulatory process. No internal procedural rules prevent this from occurring.[137] While the CRTC Research Directorate has provided funding for public participation oriented projects, AECB research has concentrated on the technical aspects of the nuclear industry.[138]

2. Supervisory and Adjudicatory Functions

To date, the Atomic Energy Control Board has made no attempt to involve the public in its day to day regulatory activities, which include the granting of nuclear facility licences and construction permits; the development of atomic energy technology and the promotion of atomic energy research. The Board is also responsible for the administration of the Nuclear Liability Act[139] and for setting strategic and security controls for certain prescribed substances (i.e., uranium, plutonium, thorium and heavy water).[140]

The unwillingness of AECB to hold public hearings was challenged by S.E.A.P. (Save the Environment from Atomic Pollution). This nuclear critic group applied to the Federal Court of Appeal under section 28 of the Federal Court Act to set aside a decision granting Eldorado Nuclear Ltd. the licence to continue using the Port Granby site for storage of radioactive substances. On March 18, 1977 the Court quashed S.E.A.P.'s application stating that:

> There do not appear to be ... any provisions in the Act or regulations requiring the Board, on an application for a licence, to sit in public, hold a

> hearing, give notice of the application, or follow or adopt procedures analogous to the judicial. We have concluded that the decision of the Board that SEAP seeks to have set aside is a decision of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, and consequently that this court has no jurisdiction to grant the relief sought by SEAP in its Section 28 application.[141]

Although the Atomic Energy Control Board is not directed to hold public hearings under the present Act, this problem would be resolved if the Nuclear Control and Administration Act were to be proclaimed. Nevertheless, the Board would retain the authority to develop hearing procedures. The Energy Probe/C.E.L.A. analysis of Bill C-14 raised a number of potential procedural issues: the authors also noted that the Act has not addressed "standing" requirements for hearing intervenors.[142] Although, as noted the CRTC has liberalized the "interested party" definition, it is feared that AECB may hold that in order for a member of the public or group to participate, they must fulfill traditional standing requirements: the potential intervenors must prove that they have a proprietary interest that would be affected by the hearing decision. Enforcement of this prerequisite to participation would violate the right of a Canadian citizen to have a voice in the formulation and implementation of nuclear regulation with potential effect not only on Canada's natural resources and energy needs, but also the health and safety of the citizen, especially if the individual resided near a nuclear facility or proposed construction site.

The AECB has no official Complaints Bureau or formalized complaint processing procedures. No method for resolving citizen/regulatee disputes has been developed. When a complaint is received by the Board, it is likely that the Registry will direct the missive to the most appropriate body within the agency. If no particular office has responsibility for the regulatory area with which the letter expressed concern, the Secretary of the Board will handle the complaint. Neither the Secretary of the Board nor any other officer receiving complaints is under any compunction to keep record of citizen inquiries.[143]

Since the incident at Three Mile Island, the Atomic Energy Control Board has received numerous telephone

calls and letters from the public.[144] It would be advantageous to develop formalized procedures for providing information and resolving the complaint; if such queries were compiled, the AECB would be provided with a means for developing an overview of public reaction to, and evaluation of the nuclear regulatory process and the nuclear industry. The AECB might use such records to develop a "quality of service" or "safety standards" evaluatory program similar to the project currently being introduced by the CRTC.

The basic AECB confidentiality requirements are enunciated in the legislation. However, the process by which the AECB administers confidentiality is guided by its own regulations and internal practices and procedures.

Section 26 of the Atomic Energy Control Board Regulations states that:

> No information that has been obtained by the Board by virtue of these regulations with respect to any business shall be disclosed without the consent of the person carrying on such business, except a) to any department or agency of the government of Canada or of a province ... b) for the purpose of any prosecution of an offence under the Act of these regulations; or c) for the purpose of any obligation under any international treaty or arrangement for the control of atomic energy to which Canada is a party.[145]

Without the consent of the regulatee, the AECB is powerless to provide information to the public. This can hardly be said to aid in the improvement of public knowledge concerning the nuclear field; nor can it increase public confidence in the industry and the regulator. In the document Environment on Trial, Messrs. Estrin and Swaigen note that the AECB:

> has been highly sensitive to adverse public opinion, especially on the issue of access to information. It has made every effort to set out what it is willing to disclose (or, in the case of the Annual Report, require to disclose) in some detail, and very clearly.[146]

Bill C-14 would allow the AECB to exempt from disclosure any materials which it deems to require confidentiality.

Interestingly, the exemption from disclosure is to be done "in the public interest".

The Atomic Energy Control Board rules must also be revised before the Board may achieve a respectable disclosure policy. Section 13(1)(a) of the Rules gives the President of the AECB the power to:

> authorize the destruction or disposal of any records required to be kept ... (and) (v) give the approval of the Board in respect to disclosure of any information ...[147]

No member of any agency should retain the unilateral power to authorize or direct the destruction of a document filed with respect to a hearing or any operative administrative proceeding, except in the case of a national emergency.

Other countries and states have implemented major popular education and public submission programs on a number of issues including nuclear energy. (See the Chapter on Surveys in Section II). Although the AECB, as presently constituted, may not have the budget to introduce massive referenda, there are numerous alternative methods available for the development of public participation in the nuclear regulatory process. These would include improved access to information, the holding of information gathering and/or adversarial hearings, the encouragement of regular consultation between the industry and the public and public interest groups, increased use of file hearings, implementation of a complaints procedure that would lead to resolution of citizen concerns and the development of more critical AECB regulation so that the nuclear field would be truly administered in "the public interest".

3. Enforcement

Section 19 of the Atomic Energy Control Act provides for the prosecution of any individual who "contravenes or fails to observe the provisions" of the Act or Atomic Energy Control Regulation. However, the AECB has relied on licence revocation and suspension to penalize corporations or individuals. The Atomic Energy Control Regulations state that the Board has the authority to designate to officers the power to inspect nuclear premises or records.[148] Inspectors may demand the

submission of licensee reports. If it is discovered that prescribed substances have been lost or stolen, some malfunction or failure has occurred at the facility, or if the regulations have been breached, the designated officer may also take "such action ... as he deems necessary to remedy the breach of these regulations or the condition of the licence, as the case may be, and to minimize the consequences, if any, of the occurrence."[149]

Current AECB procedures make it impossible for the public to become involved in enforcement. However, if the Nuclear Control and Administration Act comes into effect, it is hopeful that public participation will be both allowed and encouraged during consideration of licence renewal, suspension or revocation. Like the CRTC, the AECB could develop consultation with members of public interest or nuclear critic groups with expertise in the field to provide supplementary monitoring of nuclear facilities and regulatee operations. The AECB is presently forced to rely on the nuclear industry for volunteered information regarding both normal operations and potential breaches of safety and other regulations.

D. CONCLUSION

Unlike the CRTC, which appears to be dedicated to the encouragement of public participation, the AECB must revise its administrative philosophy and procedures before public involvement in, and democratization of nuclear regulation becomes a reality. The AECB, and many other administrative agencies, would be advised to take note of CRTC innovations in this area.

Even if the Nuclear Control and Administration Act were to come into being, there would remain a number of procedural areas left to the Board to develop and implement. This development would hopefully result in the creation of comprehensive procedures designed to increase public information and the ability of citizens and groups to participate.

Nuclear critic groups and individuals concerned about, and interested in the nuclear field can only hope that Dr. Prince's statement on the aims, objectives and ramifications of Bill C-14 (reproduced below) reflects the AECB's attitude towards the public and public participation:

The enactment of this new legislation will have important ramifications for the control agency, the nuclear industry and the general public. It will, in fact, mark the opening of a new era ... which should be characterized by a significantly greater awareness and understanding of the industry by the public at large.

The increased openness and visibility of the nuclear regulatory body will undoubtedly enhance the degree to which people feel confident in its control capabilities.

... In forcing a move after more than three decades, from the professionally-open regulatory process to a democratically-open one, the new legislation presents both a tremendous challenge and a marvellous opportunity.[150]

SECTION II -- ALTERNATIVE REPRESENTATION TECHNIQUES

Chapter I

INTRODUCTION

Even if an individual or group has received adequate notification of a regulatory proceeding, and has access to information regarding both agency procedure and the issue at stake, there remains the problem of determining how that individual or group's interests should be presented to the independent agency. This section of the paper will outline techniques available for the representation of those interests.

If potential intervenors are in a position to fund their own appearance before the Commission, they may choose to represent themselves, or hire an attorney from a public interest or regular law firm. However, the cost of intervention can be punitive. Following a survey of 610 interventions made before the CRTC on broadcast licensing matters, Liora Salter discovered that among intervenors who incurred costs (that is, those who chose to appear at the hearing, rather than sending written evidence alone), the average expenditure was $262.00.[151] Expenses for an intervenor with counsel would, of course, be substantially higher.

If financially unprepared to appear before the Commission, the individual or group must utilize other representation techniques, many of which are partially or totally unavailable in Canada. These techniques can be roughly divided into two groups: those that allow the citizen to participate in information gathering and presentation of evidence, and those that force the individual or group to rely on an outside party to represent their interests with little or no access to the direction

that intervention will take.* Figure 1 illustrates these techniques. Each will be explained and evaluated with reference to a model agency where it has been implemented.

A. CORRESPONDENCE

Instead of appearing at a hearing, one can, of course, address letters of concern or commendation to the agency. Unfortunately, most agencies do not have a proper complaints department or consumer information office, with the result that comments from consumer and subscriber are not compiled and there is no method of determining the overall nature of such submissions. Agencies cannot make decisions on policy or applications on the basis of individual submissions, and therefore this method of representation becomes little more than a means of inadequately venting public frustration over regulatee or regulator performance. Agencies would be advised to keep tally of the letters they receive from the public; an annual report on the basic nature of these submissions would give the regulator a broad overview of public evaluation in its area of regulation.

At present, many agencies rely on the Secretariat or the Executive Director to act as an unofficial ombudsman: considering consumer/subscriber complaints, then forwarding the submissions which are deemed to have merit to the regulatee. The Commission monitors the result, designating a public hearing if the regulatee does not respond properly to the complainant, or if the complaint reflects a major issue. The creation of an official who would be responsible for such activities might increase the efficiency of this process, and increase the resolution of regulatee-public disputes by the parties involved, without the need for time-consuming interference by regulators.

B. REPRESENTATION BY PUBLIC INTEREST LAW FIRMS

A second alternative to personal appearance is the engagement of a lawyer to represent the individual or

---

* Of course, the intervenor without financial constraints may rely on alternative techniques as well.

Figure 1

REPRESENTATION TECHNIQUES

TECHNIQUE	NECESSITATES CITIZEN RELIANCE	CITIZEN HAS ACCESS TO ARGUMENT PREPARATION	CITIZEN IS INVOLVED IN PRESENTATION	MODEL AGENCY
Submission of Written Evidence	No	Yes	Yes	N/A
Representation by Public Interest Lawyer	Yes	Yes	No	The Public Interest Advocacy Centre
Submission via Survey	No	Yes	Yes	Ontario Telephone Service Commission
Submission via Government or Independent, Information gathering Commission	No	Yes	Yes	Royal Commission on Electric Power and Planning, People's Food Commission
Class Action	Some	Some	Some	N/A
Reliance on Intervention by a Public or Special Interest Group	Yes	Some	No	Consumers Association of Canada
Reliance on Intervention by a Government Public Advocate	Yes	Some	No	Department of the Public Advocate
Reliance on Intervention by Independent Commission Counsel	Yes	Some	No	Federal Communications Commission Trial Staff

group. During the Conference on Administrative Justice (held in Ottawa, January 27-28, 1978), Peter Grant noted that the cost for a lawyer-represented intervention at a rate application hearing (based on an average 27-day appearance) was $50,000.[152] Certainly no intervenor would be forced to participate throughout the full hearing, but lawyer's fees were calculated by Mr. Grant to equal $700.00 per day.[153] Mr. Andrew Roman, General Counsel for the Public Interest Advocacy Centre (PIAC), noted at the same conference that PIAC expenses for intervention in Bell Rate '78 were $40,000, a figure that would have been considerably higher had not a number of witnesses participated on a voluntary basis.[154]

Obviously, very few members of the public can afford to finance full participation with counsel at an administrative hearing. One solution is to engage a lawyer willing to do pro bono publico work; another is to present the proposed intervention to a public interest law firm. An example of the latter is the Public Interest Advocacy Centre of Ottawa.

The PIAC, a non-profit corporation, began operation in October, 1976, with a $100,000 grant from the Department of Consumer and Corporate Affairs. The Centre provides representation to public, special interest and community groups without charge, prepares independent research on consumer advocacy in Canada, and is engaged in the dissemination of information regarding methods for, and quality of public participation (notably consumer-oriented) in Canada.

The Centre does not operate as an ombudsman. Nor does it provide Legal Aid; the no-fee services it offers (for groups desiring representation before independent agencies and legislative committees) are not presently duplicated by Legal Aid, and few individual cases are taken, unless they would constitute test cases on important legislation. Where possible, the Centre will help organize group self-representation, but if the nature of agency, court or committee procedures is sufficiently formal to require attorney involvement, the Centre offers legal representation services through its General Counsel, Andrew Roman. The Centre is administered by a nine-member Board of Directors, which also determines which groups will be represented or aided by the PIAC.[155]

PIAC activities fall into three categories: representation, consultation and information-dispersal.

Since its inception the PIAC has represented a broad range of groups. Most appearances have been before the CRTC. When McLean Hunter/Western applied for a transfer of cable licence, PIAC represented the interventions of the Canadian Broadcasting League, the Lower Fraser Valley Committee for Community-Based Cablevision Services, the Association for Public Broadcasters in British Columbia and the Capital Cable Co-operative.[156] The positions of the National Anti-Poverty Organization, Inuit Tapirisat, Taqramiut Nipingat, L'Association des Consumateurs du Québec and Stephen Rowan were advocated by Andrew Roman during the Bell Rate '78 and '77 hearings; the PIAC also petitioned the Governor in Council with regard to Bell Rate '77. PIAC presented their own brief on telecommunications and broadcasting practices and procedures when CRTC announced that it would revise these procedures. An appeal was made on behalf of the Canadian Broadcasting League and the Lower Fraser Valley Committee to the Federal Court on the issue of CRTC jurisdiction to regulate transfer of licences. Other agencies before which the PIAC have been active include: The Ontario Energy Board, (Ontario Hydro proposed Rate Structure Hearing), the National Energy Board (motion on behalf of the Canadian Wildlife Federation), the CTC and The Farm Products Marketing Council.

PIAC has also participated at the Porter Royal Commission on Electric Power Planning and an Environment Canada Hearing on the development of a west coast oil port.

The Centre offered consultative services to Inuit Tapirisat when that organization was preparing its briefs for an appeal to the Minister of Communications regarding a CBC licence application and a submission for the CRTC practices and procedures telecommunications hearings. The National Anti-Poverty organization was granted assistance with its briefs to CRTC, and its lay advocacy training program. As a follow-up to this activity, PIAC conducted a survey on the nature of such programs in Canada and has overseen the establishment of training clinics for law students at the universities of Victoria, Toronto and Laval. When the Union of B.C. Indian Chiefs was experiencing procedural problems with the Thompson Royal Commission and the National Energy Board, the PIAC gave legal advice. Similar aid has been given to the Alberta Wilderness Association on a proposed legal action against the federal government. PIAC has only represented individuals twice: in Veteran's Pension and Canadian Bill of Rights test cases.

At present a number of agencies have introduced informal hearing procedures so that lay people may participate directly. However, many administrative agencies must, or choose to follow court-like procedures (the Anti-dumping Tribunal and the National Energy Board, for example), so that representation by an attorney is still required. Andrew Roman has prepared a guide book on administrative procedures for public participants. (See Chapter below on CAC).[157] The PIAC therefore offers legal services and also advocates, where possible, the reform of procedures so that citizens may have the opportunity to represent themselves. In a November 8, 1978 brief to the CRTC on proposed broadcasting procedures and practices, PIAC endorsed CRTC recommendations for better notification of applications, decisions and regulatee performance; broader access to information, disclosure of Commission staff documents, and more intense regulator scrutiny during licence renewal periods. In addition, the PIAC suggested that the Commission should position private intervenors soon after the applicant so that they might, if they chose, "move out" before incurring unreasonable expenses; introduce safeguards against lobbying and conduct surveys. The October 11, 1978 brief on Telecom procedures included similar commentary. It also advocated preparation of mailing lists for Commission documents; better notice and access to information procedures; improvement of the complaints process; endorsement of cost and public aid practices and availability of staff digests to intervenors. Furthermore, the PIAC recommended that issue hearings be held with respect to service quality and to "industry-wide" complaints, expressed concern over the use of in camera procedures for confidential documents, and advocated the provision of "up-front" cost awards for intervenors who demonstrate an ability to participate responsibly, based on observations made by the Commission at prior hearings.

As has been previously mentioned, some agencies require that parties be represented by attorneys; what remains to be seen is whether or not representation by a lawyer produces better results than self-representation. In Colorado, Timothy Walker, Murray Blumenthal and John Reese conducted research on this question.[158] Eight out of the 141 Colorado state and local administrative agencies were studied. Two hundred and fifty questionnaires were sent out to parties, adjudicators and legal representatives. Unfortunately, three of the eight agencies did not allow citizen self-representation: the Public Utilities Commission, and the Real Estate and Motor

Vehicle Departments. Although admitting that the survey base might have been too small, the team said the data obtained indicated that the proportion of successful to unsuccessful appearances did not correlate to the type of representation. Nor did the party's satisfaction with the hearing outcome depend heavily on representation. In fact, the lowest level of dissatisfaction and the highest level of satisfaction occurred when the party represented his or herself. (See Figures 2 & 3).

The major problem facing public interest firms is a lack of stable funding. Edgar and Jean Cahn define these groups as "hot house flowers ... they are the product of limited, short-term foundation largesse"[159] and as Charles Reich points out:

> The major obstacle in the effort to provide full representation to underrepresented interests is the necessity for a massive infusion of resources into an area which promises little return through traditional fees. While established law firms have only recently begun to become involved in a systematic way, government and foundation grants, private contributions and reduced client fees have supported lawyers willing to accept salaries which are in most cases far below what they could earn in private practice.[160]

Some law firms have initiated pro bono publicum programs. The Cahns outline alternative formats for such programs:

> ... several approaches to public interest work have been developed by private law firms. They include the creation of a public service division with the firm; staffing of a satellite or branch office; development of referral arrangements for major public interest cases and projects; placing lawyers on loan with legal service and other public interest institutions; and select retainer relationships with specific community groups and national organizations.[161]

In Washington, the firm of Arnold & Porter allows one partner to work full time, and other lawyers up to fifteen per cent of their time on public interest cases.[162] In 1969, The Citizens Advocate Center and the Urban Law Institute (ULI) jointly initiated a program that would encourage law students, and by extension, law

Figure 2

TYPE OF REPRESENTATION AND FORMAL OUTCOME

OUTCOME OF HEARING	TYPE OF REPRESENTATION BY LAWYER	BY LAY PERSON	SELF REPRESENTATION
Win	12(35%)	3(33%)	33(35%)
Lose	14(41%)	5(55%)	38(40%)
Indeterminate	8(24%)	1(11%)	24(15%)
TOTAL	34	9	95

χ^2 = . 24, d.f. = 2, p > .05 (Indeterminate category not included in the Chi-square test)

Based on a similar Table, reproduced in the Walker/Blumenthal/Reese article at p. 335 (as Table 4).

Figure 3

PARTY'S SATISFACTION LEVEL WITH OUTCOME BY TYPE OF REPRESENTATION

PARTY'S PERCEPTION OF HEARING OUTCOME	TYPE OF REPRESENTATION BY ATTORNEY	BY LAY PERSON	SELF REPRESENTATION
Unsatisfactory	18(53%)	5(55%)	28(36%)
Satisfactory	9(26%)	3(33%)	28(36%)
Highly Satisfactory	5(15%)	1(11%)	20(26%)
Don't know	2(06%)	0	2(03%)
TOTAL	34	9	78

$\chi^2 = 4.469$, d.f. = 4, $p > .05$ ("Don't know" Omitted)

Based on a similar Table, reproduced in the Walker/Blumenthal/Reese article at p. 362 (as Table 12).

firms, to do pro bono work. Questionnaires were sent to law firms to gauge their level of activity in this area. The Citizens Advocate Center and the ULI have also suggested the publication of a directory of law firms which allow their attorneys to do public interest work.[163]

Richard Leone and others have discussed the need for an informed citizenry.[164] Public interest lawyers are expected to provide information. An effective intervention must be based on a thorough understanding of the regulatee's application, tribunal procedures and the often complex issues involved. As has been mentioned, Andrew Roman has produced a procedural guidebook, and the PIAC uses the media to publicize its activities. During Bell Rate '78 a discussion was initiated on the extent to which both Bell Canada and Andrew Roman had argued their positions in the media.[165] It remains to be seen if the PIAC will fall prey to following danger:

> In (an) effort to make such complex questions understandable to the layman, there is clearly a danger of oversimplification; thus not infrequently, public interest advocates have been, in an absolute sense, unfair in an attempt to arouse public ire. They are likely to dramatize; there is a bit of "theatre" involved in arousing public indignation and even outrage. On occasion, they hold up a mantle of righteous indignation which can be a mask for malice and carelessness.[166]

The potential intervenor faces an onslaught of propaganda, whether generated by the industry or other parties. It may be difficult to determine the actual issues at stake, and the facts surrounding them, as there are very few sources which have any motivation to be objective. An agency itself may be the only such source, and therefore should be responsible for providing public education on the field subject to regulation, especially before the designation of hearings where public participation is expected. There is a need for regulatory critics, legal or otherwise. Certainly the public must be aware of alternative arguments on regulatory issues. The PIAC and other public interest centres provide this service through their own argument and cross-examination of other parties'. It would be unfortunate, however, if pre-hearing "information campaign" competitions between the regulatee and the public interest advocate became so severe that the essential nature of hearing items were obscured from public view.

The Public Interest Advocacy Centre, and other public interest lawyers provide a voice for the expression of public concerns. Given the level of intervenor cost awarding in Canada (see Chapter VI) and the lack of an official public advocate, public interest law firms will continue to be one of the few means of developing expertise in the area of public interest representation. Unfortunately, few individuals are able to convince such firms that their interests deserve representation; an issue of major importance to a community or individual may not have province or nation-wide impact and, therefore, will be rejected. This occurs partly because there are very few public interest law firms, and also because operative firms must constantly justify their existence to their financial sources. A localized concern, no matter how needful of resolution, will not attract the media coverage required by the public interest law firm in its funding campaigns. These firms require more stable financing, available for extended periods of time. There is also a need for greater availability of pro bono publicum worktime at regular law firms.

C. COMMISSIONS OF INQUIRY

Hearing appearance has been the traditional method for public involvement in the regulatory process. Unfortunately, there are occasions when individuals or groups wish to make submissions concerning issues beyond the scope of individual applications; or even ultra vires the jurisdiction of a particular agency. Agency hearings afford some opportunity for the public to gain insight into the regulated field, and the adversarial nature of such proceedings may provide the spectator with diverse viewpoints, but pleadings usually concentrate on specialized issues and therefore do not fulfill broad educational goals. Few agencies conduct public hearings on proposed policies, and even those that do must restrict the items open to discussion. The CRTC, for example, has conducted rule-making hearings on telecommunications and broadcasting procedures.

In order to gauge the public viewpoint on broader issues than those normally considered by agencies, the government occasionally institutes Commissions of Inquiry. Although most special commissions arise because of specific problems or disputes, they afford an opportunity for interested parties to address the impact of

government policies. A current example is the Government of Ontario's Royal Commission on Electric Power Planning, being conducted by Dr. Arthur Porter.

This Royal Commission, in operation since July of 1975, has experimented with funding of public interest intervenors.[167] Research grants were first provided in 1975 to various coalitions of special, public and community interest groups throughout Ontario. For example, The Public Interest Coalition For Energy Planning, composed of such groups as the Conservation Council and Energy Probe were provided with $40,000.00[168] for research. Preliminary information hearings were held until the fall of 1976. Designated items for the Debate phase of hearings, which began in May of 1977, covered a broad range of potential discussion areas:

1. Energy demand
2. Conventional and alternative technologies
3. Transmission and land use
4. Financial and economic sources
5. Nuclear energy
6. Total electric systems (i.e. interconnection issues)
7. The decision-making and public participation procedures

Rather than hold regional hearings, the Commission chose to provide participation grants so that individuals and groups might travel to the Toronto hearings. The Debate phase extended until March, 1978. Throughout this period transcripts were made available to all participants and a staff person was designated to provide annotation and information dispersal services. Since 1975, copies of all exhibits and submissions have been sent to libraries in Ottawa, Thunder Bay, Sudbury and London. In addition, full records are maintained at the Toronto offices, which are open to the general public.

The Porter Commission is currently conducting the final phase of hearings which will be held in southwest and eastern Ontario in March and April of 1979. Research

grants have again been made available for groups preparing submissions. The Commission expects to table its report before the Ontario legislature in October, 1979.

Commission procedures are directed by the Public Inquiry Act, which specifies that evidence introduced into the record must be subject to cross-examination.[169] Members of the public unwilling or unable to undergo cross-examination may submit information briefs, but these cannot be relied upon by the Commission in making decisions. Hearing procedures have been informal: witnesses are not sworn in, participants are not required to submit multiple copies of briefs, and although legal counsel are available (at the participant's own expense), they are not required. The Commission originally scheduled evening hearings, but this procedure has been rejected as unnecessary.

D. PEOPLE'S COMMISSIONS

The Porter Commission has introduced welcome procedural innovations, creating a forum that has been oriented towards public participation. Nevertheless, many issues of general interest remain unaddressed, simply because the creation of inquiries such as the Porter Commission depends on a government initiative. An alternative to the Royal Commission is currently being developed in the form of "People's Commissions", which are instituted by the public and special interest groups themselves.

A number of Royal Commissions, Parliamentary Inquiries and government Task Forces have addressed food issues.[170] However, there has been little opportunity for the public to make recommendations to these bodies, and by extension to the government departments that oversee food policy. As a result, public and special interest groups have become concerned with producing their own information and evaluation forums. During a meeting held in May, 1977 to discuss food workshops, the concept of a national information-gathering and dispersing people's commission of inquiry was introduced.[171] The decision to institute such a project followed in July of 1977, spearheaded by the National Farmers' Union, Food co-ops, the Canadian Council for International Cooperation, church groups and the Ontario Public Interest Research Group.[172]

This proposal, given the title of The People's Food Commission, was to address food prices, primary producer economics, the growth of the food industry, nutrition and quality of food, and Canada's role in the global food system.[173] The process would encourage the common participation of consumers, workers, farmers and fishermen as well as individuals concerned about the impact of the Canadian food industry and food policy on the Third World.

The People's Food Commission (PFC) was designed to differ from governmental commissions. No one organization or interest group was to dominate; the Commission was not concerned with short term solutions. Nor was it envisioned as a forum for experts only, but rather it would allow submission by all citizens of experiential as well as researched evidence. Rather than concentrate on consumer, producer and worker interests separately the inter-relation of these interests were to be stressed. The PFC therefore, would be a broad-ranging, open model, public oriented commission of inquiry.[174]

Hearings were designated for sixty-five (65) communities across Canada, before which members of the public were invited to submit not only written briefs, but also slide-shows, plays, posters and verbal presentations.[175] Ten Commissioners (drawn from the Atlantic and Prairie regions, British Columbia, Québec and Ontario) were appointed to conduct hearings within their region of origin.[176]

The PFC organization is composed of local, regional and national working groups. Two national staffpersons, in consultation with the national working group, coordinate the entire project and administer fundraising, material production and liaison with other national groups. Regional staff and working groups, located in the Maritimes, Québec, Northern and Southern Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, perform similar functions at the regional level, and also develop local working groups. The approximately seventy (70) local working groups implement the hearing process itself.[177]

Five inter-regional meetings on objectives, budget and strategies have been conducted.[178] The PFC operates with an extremely small budget ($370,000)[179], which finances all activities. The public hearing phase began on September 19, 1978 (in Medicine Hat, Alberta) and

continued until the end of April, 1979.[180] Between May and September, 1979, the Commissioners prepared a report on their findings which formed a basis for national, regional and local dicussions of alternative follow-up actions. The report was therefore circulated to all participants, and was also forwarded to relevant federal and provincial bodies, including the various ministries of Agriculture, Resources, and Consumer and Corporate Affairs.[181]

The PFC was officially launched at the Federal Food Strategy Conference held in February of 1978.[182] This marked the initiation of the educational and organizational phase during which press conferences were held, media releases were circulated, and workshops were conducted throughout the country. Between March and April of 1978, Commissioners travelled to each community where a hearing was designated to outline procedures, encourage research and workshops and answer questions.[183] Beginning in May, 1978, cultural events on food issues were initiated throughout the regions; researchers and research areas were identified, and final preparations were made for the hearings. National, British Columbia, Alberta, Saskatchewan, Ontario and Atlantic monthly newsletters have been published to outline PFC activities; update the process; draw attention to local, regional, national and international concerns, and inform individuals of government action on food-related issues. Members of the public are also given notice of government activities where they may participate or lobby for public access to decision-making.[184]

As well as encouraging a broad range of groups to conduct research, the PFC has produced fact (not opinion) sheets on food issues and research, media exposure and hearing preparation kits.[185] Due to its limited budget, the PFC is unable to fund food research.

To date, hearings have been held in British Columbia, Ontario, Alberta and Saskatchewan and are planned for the Maritimes and Manitoba. If time and financial constraints permit, the hearings will be extended to include the Yukon and the Northwest Territories. Although the Quebec regional group has been active, food workshops are favoured over hearings.[186]

The PFC considered making application to the Department of Consumer and Corporate Affairs for incorporation as a non-profit organization, but owing to

problems with the government's definition of what activities a charitable organization may undertake, the PFC has chosen to work through the Canadian Council for International Cooperation, which already operates under charitable status.[187]

The author presented a brief to the PFC on November 27, 1978, during the three (3) days of hearings held in Ottawa. PFC procedures encouraged public involvement by emphasizing informality. Although provision of written evidence to members of the panel was appreciated, the participant was not required to furnish such copies at his own expense. Scheduling of presentations was done in advance, but the panel was flexible, rescheduling those who could not remain at the hearing. A chairperson was available to guide participants if procedural or presentation problems arose. Portions of the hearings deemed to be of major interest were videotaped.

Following the oral submissions (ten to fifteen minutes on average), the panel directed questions to the "intervenor". Most questions were in the form of clarifications, although the Commissioners did supply additional information to complete the record, or took this opportunity to aid the participant in resolving a concern they had enunciated. The speaker was then open to questions from the floor. Secretaries recorded panel and spectator queries, and the responses given.

Hearings were held throughout the day and evening so that individuals unavailable during normal working hours might appear before the Commission. In the alternative, written briefs alone could be submitted.

Information on food and related topics was available at the hearing in the form of handouts, posters and displays. The PFC provided information officers for consultation and in order to guide co-ordination of spectators and "intervenors" who had expressed interest in like matters.

The PFC's information and popular education operations have improved and will continue to augment public knowledge of food issues. The Commission has also provided a forum by which members of the public previously unaccustomed to hearing appearance and interest submission may not only enunciate viewpoints, but also gain confidence and preparation for similar representation activities before other commissions of inquiry and regulatory hearings.

The public would be well served if People's Commissions were organized for other issues. Communications, transportation and energy are just a few examples. The establishment of a People's Commission is of value to the regulatory agencies: it eliminates the need for reliance on regulator-only animation and education of the public, and provides an alternative and broader ranging means of gauging the public view. The saving in time and cost is inestimable. Furthermore, a People's Commission provides encouragement for the growth of contact between the public and regulated industry on an informed and responsible basis and may allow the regulator to slowly diminish control over certain regulatee activities.

The major problem facing People's Commissions is a lack of funding. The PFC relied on contributions from participants and support organizations. It might be advisable for regulatory bodies to aid in the financing of similar Commissions of Inquiry within their field of regulation, and also make their information resources available to such Commissions. An alternative to direct government funding might be the provision of tax incentives for members of the public willing to contribute to "People's Commissions". The Canadian Government however, has shown some unwillingness to relax the standards affecting charitable organizations. A revenue department circular released in early May, 1978 indicated that tax free status would only be afforded organizations which refrain from lobbying activities. Following protestations made by the opposition, the government assured charities that they could retain the right to lobby.[188] It was this memorandum however, that influenced the PFC decision to withdraw its application for tax free status.[189] Until such a time as public interest groups are allowed to become charitable organizations without suffering emasculation, funding will remain a major and often insurmountable problem. The government might consider encouraging public support by legislating that a high percentage of donations to such organizations be tax deductible. This would be preferable to direct funding as it would inspire those citizens financially supporting these organizations to become involved in the process itself. Involvement would improve public knowledge, and a capacity for self-representation in the regulatory process.

Thus far, I have dealt with representation techniques which involve public initiation or self representation. The following chapter will discuss the use of

Commission, regulated industry and government surveys, popular education programs and referenda. The remaining chapters in this section will evaluate alternatives which necessitate public reliance on an advocate, whether government, commission or special or public interest group based.

Chapter II

SURVEYS -- ONTARIO TELEPHONE SERVICE COMMISSION

The Ontario Telephone Service Commission (OTSC) regulates the operation of the thirty-three[190] independent telephone systems under Ontario provincial jurisdiction. Pursuant to the Telephone Act,[191]

> Ontario Telephone Systems must obtain Commission approval to revise rates, borrow money, issue capital, approve by-laws, sell or merge with another system, enter into agreements with other telephone systems, or make agreements for interchange of service.[192]

The Commission is composed of five members, a vice-chairman and a chairman. Staff include an Operations Executive Director, secretary/registrar, research officer, special advisor to the executive and accountant seconded from the Communications Division of the Ministry of Transportation and Communications. Engineering advice is also provided by the Communications Division.[193]

The Commission has been active in improving the involvement of the public in the regulatory process. For example, Executive Committee meetings (including decision-making meetings) are open to the public,[194] and public hearings (central and regional) are frequently held.[195]

Direct solicitation (survey) is one innovative technique the OTSC is currently developing to ensure broader representation of subscriber-generated information and opinion. At present, the OTSC employs two types of surveys: door-to-door and mail-in.

A. DOOR-TO-DOOR SURVEYS

The first door-to-door survey was conducted Sept. 15th-16th, 1977, and concerned a boundary dispute between Hurontario Telephone Ltd. and The People's Telephone Co. of Forest Ltd.[196] Sixty-three people living throughout the rural service area affected were consulted.[197]

The OTSC has only conducted two door-to-door surveys to date; as has been previously mentioned, the procedure is still at the formative stage. Nevertheless, the most recent survey illustrates OTSC's commitment to facilitate the representation of public interests during regulatory proceedings.

On May 12, 1977 Brooke Municipal Telephone[198] notified OTSC that a boundary dispute had arisen with People's Telephone Co. of Forest.[199] Warwick, a small community (population 119) located just east of Sarnia, lies on the border between these two companies' service areas. In Warwick, Brooke serves thirty-seven (37) households; People's serves 9; the two companies jointly serve five (5) and two households are served by neither.

Each telephone company claimed that the other was relying on the absence of a clear service boundary to encroach on their territory. Since there was a toll levied on calls made from a People's telephone to a Brooke's telephone, community members found themselves paying long distance charges for calls that an immediate neighbour could dial toll free. Subscribers were forced to use neighbour's phones to contact the alternative telephone company exchange.

The OTSC forwarded the Brooke letter to People's and in September of 1977 the executive committee found it necessary to direct the two companies to resolve the dispute by November 1 of the same year.

The companies were not able to reach agreement, and following an April 11, 1978 meeting[200] with OTSC Chairman David Duncan the companies were allowed to re-negotiate and May, 1978 was set as a new deadline.

The companies were directed to survey the Warwick community and determine both the subscribers' evaluation of service quality and their positions on the dispute. Subscriber complaints continued to arrive at the Commission.

The companies reached agreement in May, but the Commission remained concerned about the community's view of the problem. After considering the option of holding a public hearing, the OTSC opted for initiating their own survey. In early June, a letter was sent to each member of the community, indicating the problem, prior attempts at resolution and announcing the survey. Two Commission staff (Messrs. Percy and McDougall) were sent to Warwick with a Commission-prepared survey. Of the fifty-three (53) Warwick households, the surveyors were unable to contact ten. The remaining surveyee breakdown is as follows:

- 32 Brooke subscriber households
- 4 People's subscriber households
- 5 Jointly served subscriber households
- 2 Households without service

The surveyor requested information on the source of service, the subscriber's evaluation of service quality, and whether or not the subscriber concerned had frequent occasion to call alternative telephone company subscribers (subject to the toll charge). The survey also included an open comment question.

Messrs. Percy and McDougall reported their findings to the Commission on June 22, 1978. After considering a number of options, the Executive Committee reached a decision without further input from the applicant, the respondent, or the Warwick community.[201] A clear boundary was established in the community, and the companies were directed to continue service to their current subscribers, with the provision that any new household would be serviced by the company in whose area the household might be situate. The decision adopted the majority survey response.

After the decision, the OTSC sent a letter, dated July 31, 1978, to each Warwick household outlining the issue, attempts at resolution, options considered, and the final decision.

Although the Telephone Act directs the OTSC to hold public hearings on consumer complaints and rate applications,[202] there is no statutory provision for surveys. Instead, the OTSC used a variety of criteria in determining when it should conduct surveys. Undoubtedly the size of the community has influence in opting for a door-to-door survey, but the nature of the issue and its

importance to the community is also considered. It is interesting to note that the Hurontario-Forest dispute survey concerned a proceeding initiated by a consumer complaint. The OTSC is justifiably concerned that the surveyee be sufficiently informed before the survey is conducted. Subscriber education was accomplished through newspaper coverage, the company survey, the Commission's own pre-survey mailings, and spotchecks by the surveyors.

B. MAIL-IN-SURVEYS

The second type of survey used by the Commission is the mail-in. Questionnaires are posted to each subscriber along with monthly billings. Mail-ins are routinely used when the telephone company applies for a rate increase. Originally, the companies were allowed to prepare the survey, but the Commission has found that this produced biased questionnaire format. As a result, the Commission now prepares the survey while allowing the company to include a short outline of the increase sought and the reasons for the application. The Commission would probably not allow a public interest group or intervenor to attach comment as the survey is used not to present the case, but rather to elicit unbiased response from the public at large.[203]

Where rate increases are concerned, mail-in response is an alternative to public hearing appearance, but implementation of the survey does not preclude the holding of a public hearing. The survey is seen by the Commission as a means of reaching a subscriber who might be reluctant or unable to participate at a hearing. Despite informal procedures and the use of field hearings (i.e. hearings held within the service area) the OTSC recognizes that members of the public may be unable to make hearing appearances.* In preparing the mail insert the Commission again recognizes the need for an information base upon which the surveyee may formulate his or her response.

The most recent mail-in survey took place in the Northern Telephone service area. On December 15th, 1978,

---

* The individuals may be unused to public speaking, or cannot afford to excuse themselves from work.

upon the request of the Commission, Northern Telephone sent a short, comprehensive explanation of new services to be offered to Val Gagne/Monteith and Matheson subscribers. These included introduction of direct dialing, decreases in long distance rates, and modifications in directory service. Only Val Gagne and Monteith customers would be subject to higher monthly rates (an individual line rate would increase from $5.20 to $5.95 per month, for example). The Company requested consumers to indicate whether or not the proposal was acceptable, and included a postage-paid reply form. A deadline for submissions (January 15, 1979) was set, and a toll-free information number was introduced for those subscribers wishing further information.[204]

Most of the subscribers who responded to the survey lived in the Val Gagne and Monteith area, where the new services would be accompanied by increased rates. Out of a total of 264 Val Gagne/Monteith ballots, 141 were returned, the vast majority of which favoured the Northern Telephone proposal.[205]

When telephone companies apply to modify exchanges, the OTSC directs them to poll their subscribers. The company-prepared questionnaire indicates the issues, the proposed action and the apparent impact of the modification, then solicits comments. The OTSC may amend the questionnaire where necessary, following which copies are sent to each subscriber. In the past, responses were directed to the Commission via the company, but the OTSC is currently changing their policy and, in future, may request that responses to all such surveys be mailed directly to the Commission.

Response to mail-in surveys varies according to the issue at hand. A three percent (3%) response is considered normal for a rate application, however, in some cases subscriber response has been as high as 30%.[206] One must keep in mind that the mail-in, like the door-to-door survey, is a recent innovation. Evaluation of the effectiveness of surveys should be suspended until the public is more accustomed to the procedure. The OTSC considers the cost of surveys (both mail-in and door-to-door) to be both nominal and justified.

C. ADVANTAGES OF SURVEY AS SUBMISSION TECHNIQUE

As has been previously noted, the Commission is statutorily directed to hold public hearings on some applications. In all other instances, when determining whether or not to hold a public hearing following a mail-in survey, the Commission takes into account the nature of the issue, the length of time since the last field hearing, the number of consumer complaints received outside the application context, and the number of mail-in responses. If a large number of responses are received, the Commission may reason that subscribers are displeased with the company's performance and therefore a hearing should be held. However, if few responses are received, but the application concerns a major change for the subscriber community, a public hearing will still be designated.

In light of the growing cost of hearing appearance[207] and the recognition that only a small percentage of the affected public can participate at hearings, it has become apparent that submission alternatives should be developed.

Surveys ensure a broader sampling of public viewpoints than may be achieved at a hearing; surveys may also be introduced more easily, and at a lower cost than has been imagined. For example, the OTSC mail-in procedure could be applied quite easily by other tribunals. During Bell Rate 1978,[208] the CRTC required Bell Canada to give subscribers notice of the rate applications via monthly billings. A survey attachment to these billings, in the form introduced by OTSC, would produce a higher level of public response, and provide the CRTC with a better indication of subscriber positions. Regulatees often complain that, owing to the difficulties involved in travelling to hearings, preparing briefs, and hiring counsel, only those subscribers who are extremely dissatisfied will be motivated to participate in the regulatory process. The mail-in survey would provide satisfied subscribers (the "silent majority") with a simple and efficient means of contacting the regulator.

It must be noted that without the provision of a surveyee information base, the survey becomes an instrument for the submission of polarized, uninformed responses. Pre-survey education programs are the answer, whether accomplished by media coverage, company or commission seminars and mail-ins, or spot checks by the

surveyors. As has been noted, the OTSC utilized all these techniques to ensure that the surveyee is basing her or his response on facts and not merely opinion. Information inserts might also be included in telecommunications, cable T.V., electrical and travel billings. Broader availability of regulator information, including hearing transcripts, evidence digests and procedural handbooks, and better media coverage of the regulatory process would augment public education.

The re-introduction of high-impact (albeit expensive) programs such as the Telecommission,[209] or the funding of information gathering and disseminating "People's Commission", such as the Poor People's Commission or the People's Food Commission, might also revitalize public awareness of, and involvement in, regulatory activities.

When a communications link is established between the consumer and the provider, better service to the public and better performance by the regulatee, as well as a noticeable drop in regulation costs, is the result. To give a very simple example, the OTSC has noted that independent Ontario telephone companies which are in ongoing contact with their subscribers, are the very companies that require the least bureaucratic interference, and whose activities generate the least number of consumer complaints. The use of OTSC surveys has already produced some improvement in the regulatee-subscriber relationship. For example, at present when companies in rural areas wish to upgrade services, (remove multi-party services) they initiate subscriber surveys, forwarding the results to the OTSC.[210]

D. FOREIGN EXPERIENCE

Undoubtedly, the nature of OTSC regulatory jurisdiction promotes the implementation of surveys (for example: the entire affected public may be easily contacted), but similar education/survey/referendum programs have been implemented on a much larger scale in Oregon, New Zealand, Norway and Sweden.

In 1971, Governor Thomas McCall established a steering committee to conduct research into growth and conservation policy alternatives for Oregon. The result of the committee's activity was "Project Foresight", a

popular-education program of slide and sound shows illustrating the impact of industrial development and/or environmental planning for various regions. Between November, 1972 and March, 1973, members of state agencies presented these slide shows to 250 civil, educational and business groups, eliciting comment from the audiences. In 1973, the Oregon Legislature introduced Oregon Senate Bill 100, which created the Land Conservation and Development Commission. Before determining its goals, the Commission conducted state-wide mail surveys. Citizen response gave rise to, among other things, the establishment of regional Planning Councils throughout Oregon.[211]

The "Energy Scenarios for New Zealand" program initiated by the University of Auckland in 1976 produced scenarios on energy development. The scenarios were circulated and public response was invited. In May, 1978, the Ministry of Energy produced "Goals and Guidelines and Energy Strategy for New Zealand" which suggested alternatives and requested public comment on methods by which such goals might be achieved.[212]

Sweden has implemented referenda on a variety of issues to determine the public interest before formulating policy. In 1955, for example, a referendum was conducted on Traffic Right of Way. The government established two ad-hoc committees, granting each a 1 million krones* budget to develop argument for, respectively, retention of the status quo, and transfer of right of way.[213] Citizens responded by mail, following the same procedure used in Swedish elections. Fifty-three per cent of the Swedish electorate participated in this referendum.[214]

Norway regularly includes broad-ranging policy questions in its public opinion polls. In 1976 the Norwegian Administrative Agency which regulates nuclear developments used the polls to determine the electorate's views concerning atomic energy. 3,000 individuals were interviewed.[215]

---

* $236,600 Canadian (1955) using the 1955 exchange rate, established by the American International Investment Corporation (and taking into account the 1955 Canadian/American exchange)

These programs were instituted at great expense and need not be emulated to the fullest extent by Canadian independent agencies. However, they may be feasible in relation to major policy decisions or broad policy areas which cannot be addressed by a single hearing or by one agency.

Self-reliance cannot develop without a strong information base. Active consumers and subscribers must be aware of all the facts (including of course, those generated by the regulatee) before they can be expected to take a responsible position. Popular education and incremental re-introduction of a public mandate in the regulatory process is essential.

Chapter III

THE INDEPENDENT PUBLIC ADVOCATE, DEPARTMENT OF THE PUBLIC ADVOCATE, NEW JERSEY

What is a government to do when it finds itself flooded with citizen complaints, in charge of a bureaucracy it can no longer effectively oversee, out of touch with the electorate, and unable to rely on delegated authorities to guard the "public interest"? When the government realizes that the disadvantaged do not have access to the courts, a people's counsel may be established. The legislature may choose to create a separate government body to act as a complaint-resolver and public advocate. The Department of the Public Advocate (DPA) in New Jersey is such a body, operating both as Ombudsman and People's Counsel; but the DPA is greater than the sum of its parts. In order to place this New Jersey body in context, it is necessary to trace the development of both the Ombudsman and the "People's Counsel".

A. OMBUDSMAN

Walter Gellhorn has outlined the common characteristics shared by all Ombudsmen:

1. All are instruments of the Legislature, but function independently of it, with no links to the Executive Branch and with only the most general answerability to the Legislature itself.

2. All have practically unlimited access to official papers bearing on matters under investigation ...

3. All can express an ex officio expert's opinion about almost anything that governors do and that the governed do not like.

4. All take great pains to explain their conclusions, so that both administrators and complaining citizens will understand the results reached.[216]

In 1713, Charles XII of Sweden gave the Swedish Chancellor of Justice the power to perform Ombudsman-like functions.[217] The Swedish Constitution of 1809 separated the Ombudsman from other government bodies and gave him a broader mandate:

> ... to make certain that laws and statutes were adhered to by the courts and other authorities and to prosecute judges and other officials who in their office had committed unlawful acts or neglected their official duties.[218]

But how powerful is the Ombudsman? Kim Thorson notes:

> The jurisdiction of the Swedish Ombudsman extends over ... administrative agencies ... (However, the Ombudsman cannot attempt) to deal with a discretionary decision when discretion is allowed by law unless it is so abused as to fail to amount to a discretion at all. Other limitations are that the highest officials can be prosecuted only on order to Parliament, and superior judges can be tried only by a special Court of Impeachment; there have been no such cases in the past 100 years.[219]

Other Scandanavian countries followed the Swedish lead by introducing their own Ombudsman (Finland 1919, Denmark 1954, Norway, 1962).[220] The efficacy of the Ombudsman depends heavily on his statutory mandate. For example, the English Parliamentary Commissioner cannot receive complaints directly from the public;[221] the New Zealand Parliamentary Commissioner (Ombudsman) Act of 1962 prescribes that any complaint must be accompanied by a fee of 1 pound.[222] In Canada, nine provinces have enacted Ombudsman legislation;[223] and in the words of Arthur Maloney:

> At the Federal level the office exists in the Commissioner of Official Languages and the Correctional Investigator or ombudsman in federal prisons.[224]

B. PEOPLE'S COUNSEL

In the 1920s, Maryland introduced the first consumer advocate in the form of a "People's Counsel", who represented consumers before the state utility commissions.[225] The District of Columbia followed suit in 1926.[226] The Office of Public Counsel (OPC), created in 1973 (Regional Rail Re-organization Act), provided information on rail service and regulators to concerned communities, and represented individuals at hearings.[227] The present Office of Rail Public Counsel (an outgrowth of the OPC), advocates individual interests before the Interstate Commerce Commission.[228] Proposals for an American Consumer Advocate, with the mandate to intervene on behalf of consumers before federal administrative agencies, have not come to fruition. The Subcommittee on Oversight and Investigations recommended (in October, 1976) that state attorneys be given the authority to bring class actions on behalf of consumer groups, but this recommendation has not had statutory impact.[229]

C. DEPARTMENT OF THE PUBLIC ADVOCATE

In 1974, New Jersey Democratic Assemblyman for Bergen County, Byron M. Baer, proposed the creation of a public advocate who would "instigate action against (the government) itself, rather than just attempt to rectify wrongs discovered by someone else, such as a state ombudsman".[230] Although the state did not hold public hearings on the proposal, it was passed unanimously by the Assembly on March 25th, 1974.[231] The bill met some opposition in the Senate, where critics expressed concern over the cost of the department, the possible duplication of services, and the proposed Public Advocate's independence from the Legislature. Senator Joseph W. Tumulty suggested that the Public Advocate would "create a further bureaucracy" and "give rise to a wave of unfounded complaints".[232] However, with the level of public confidence in state government at low ebb, the Senate ratified, and the Department of the Public Advocate came into being on May 13, 1974.[233]

Governor Byrne had already decided to appoint Stanley C. Van Ness, the state Public Defender since November 1968, as the first Public Advocate. Mr. Van

Ness gave an early indication of the priorities of the newly-founded Department of the Public Advocate by describing the DPA as "an experiment to determine whether the government can do to itself what has been done against it by such citizen groups (as those) lead by Ralph Nader".[234] Howard Woodsman, the Democratic Assembly Speaker and a strong advocate of the bill, noted that the role of the new body would be to ensure that "the office was serving the public interest".[235] Governor Byrne stated that the department would become "a true spokesman for the public interest, as well as being responsive to the public will."[236]

The Department of the Public Advocate Act of 1974, N.J. Stat. Ann. 52:27E (Cum. Supp. 1975), separates the DPA into five divisions, with the Public Advocate himself administering the agency and retaining final discretion concerning whether or not to institute legal proceedings or interventions.[237] The Public Advocate is a cabinet-level post, appointed by the Governor with the consent of the Senate and holding office at the pleasure of the Governor or until the Governor's term ends.[238] In practice, Stanley Van Ness has remained the Public Advocate since 1974.

The five divisions of the D.P.A. are: the Office of Inmate Advocacy, the Rate Counsel, the Division of Mental Health Advocacy, the Division of Public Interest Advocacy and the Division of Citizen Complaints and Dispute Settlement.

The Office of Inmate Advocacy represents inmates as a class in disputes and litigation before any State, County or Local body.[239]

The Rate Counsel may serve as a "people's counsel" for individuals, or may intervene on behalf of the "public interest" before any state administrative tribunal.[240]

The Division of Mental Health Advocacy provides legal services for mental hospital admittees who would not be able to retain attorneys, and may also "advance the interest of indigent mental hospital admittees as a class" in any proceeding.[241]

The Division of Public Interest Advocacy may represent individuals or the public interest in any administrative or court proceeding, other than those falling under the jurisdiction of Rate Counsel.[242]

The Division of Citizen Complaints and Dispute Settlement operates as an ombudsman. Although this division has no advocacy power, citizen complaints are forwarded to government agencies, and the division may also initiate investigations, making recommendations to the responsible authority.[243] The Dispute Settlement subdivision may provide consultation services to any group in New Jersey, provided that such services are conducted at the group's request.[244] This power may be utilized to settle differences arising between communities and government agencies, thus avoiding the necessity of litigation.

The extent of the Public Advocate's discretion to instigate proceedings was clarified in the case of Delaney v. Penza,[245] where it was determined that this discretion was "sufficient to sustain (the P.A.'s) decision to have the Division of Public Interest Advocacy represent ... tenants' associations and individual tenants in 'private' litigation brought by landlords ... for libel, slander and malicious interference with business regulations". The decision has been interpreted as giving the DPA authority to participate in the broadest range of court and independent agency actions.

All the divisions, with the exception of Rate Counsel, operate on a budget established by the legislature. The Rate Counsel, however, has been given the power of assessment. Following participation in an administrative proceeding, the division "may assess the business, industry or utility up to 1/10th of 1% of its (intrastate) revenues derived from the calendar year last preceding the institution of such proceedings". A minimum and maximum allowable assessment ($500.00 and $500,000.00 respectively) are indicated.[246] Insurance companies and "non-profit services" compensate counsel according to a pre-arranged scale.[247] Authority to participate in hospital rate regulation was granted by the Attorney General in Decision Atty. Gen. F.O. 1976, No. 3. The provision of what amounts to legal aid services by the Division of Mental Health Advocacy, to mental admittees is given on the basis of financial need, determined by the Division itself in consultation with the Public Advocate.

The Act sets few major restrictions on the activities of the DPA apart from those already mentioned, but it should be noted that the Division of Public Interest Advocacy must weigh the importance to the state of any

litigation before initiating action.[248] The DPA cannot institute any suit against the legislature itself or any member thereof.[249]

1. Division of Rate Counsel

Division of the Rate Counsel, responsible for intervention before administrative tribunals, and active in the field of administrative law, was established in June of 1974, with a $100,000 starting budget.[250] Seventeen attorneys are currently employed, many selected on the basis of their expertise in an extra-legal discipline.[251] The department staff includes a physicist, two accountants, two MBAs, two engineers, a hospital administrator and a former nurse.[252] Each staff member is responsible for intervening before the administrative agency which regulates an activity or industry within their area of expertise. Rate Counsel also engages outside consultants in preparing for advocacy or for individual studies. One half the present $1,000,000. yearly budget is earmarked for such outside contracts.[253] Although the power of assessment allows Rate Counsel the freedom to take any stance, no matter how adversary, and proceed against government agencies without fear of budgetary retribution, the Counsel is periodically evaluated by the Auditor General, must report to the Public Advocate, and is, by extension, accountable to the ratepayers themselves.[254]

The Counsel has the same procedural rights as any other party, including the right to appeal, but has one distinct advantage: any utility or company seeking rate increases or modification in services must provide the Rate Counsel with the same information as is sent the regulator, with the provision that claims to confidentiality be available on certain documents.[255] Usually the Division of Rate Counsel intervenes in its own name, but on occasion individual subscribers' interests have been advocated. The Rate Counsel may also agree with other intervenors present at the hearing, but usually takes a broader overview of the interests involved than that argued by a special interest group. Legal Procedural guidance is given upon request and the Rate Counsel (whether in co-ordination with the Division of Citizen Complaints and Dispute Settlement or independently) does animate the involvement of outside groups, including public interest groups in the administrative process.[256] Argument co-ordination with other groups is not

practised, however. Rate Counsel will inform the press of the direction they propose to take, but there is more reliance on individual consultants than public response in preparing argument or gathering information.[257] At the hearing, the Department Head usually makes the opening statement on the first day, outlining the direction the Rate Counsel proposes to take, following which the individual attorney takes over.[258]

Both the Public Interest Advocate and the Rate Counsel are active before administrative tribunals; the latter, however, only participates in rate application hearings. Since 1974, the division has taken on 774 such cases. During this period, public utilities have requested rate increases totalling $1,745,380,000. The Rate Counsel has advocated that 32.8% of this amount constituted justified rate increases, while the regulator (the New Jersey Board of Public Utilities), awarded 41%. Similarly, Insurance companies have sought $504,656,000 in policy fee increases since 1974. Rate Counsel argued for 60% of this amount; the Department of Insurance, which has taken an extremely adversarial position vis-a-vis the industry, only awarded 57% of the total amount requested.[259]

The division does not concentrate solely on the application's merits; broader public interest issues and procedural matters may also be addressed by counsel during a hearing.

At a Public Service Electric & Gas Company hearing, Rate Counsel recommended a freeze on further increases until March of 1980, and expressed concern over the development of two offshore nuclear power plant schemes.[260]

Following the introduction of the Lifeline Act (P.L. 1977, c. 440) on March 2nd, 1977, which authorized investigation into the provision of special electricity and gas rates for the poor and elderly, Rate Counsel participated in public hearings, making procedural suggestions for the program.[261]

In May, 1977, the Public Utilities Board granted a $2.2 million increase to the Hackensack Water Company. By July, the company had made application for a further $11 million increase, $4 million to be provided immediately as "interim relief". The allowance of interim relief is considered by the Board without a hearing; the

procedure is meant to be applied only in cases of emergency. Hackensack Water had not adduced any evidence indicating that such an emergency existed. In opposing the new application, Rate Counsel urged the Board to insist upon full proof of emergency before granting interim relief. The Board reacted by assuring the public that it would retain stringent evidentiary requirements, then denied Hackensack's application.[262]

When Nationwide Mutual Insurance announced that it would refuse renewal on no-fault automobile policies because of financial difficulties, Commissioner James Sheeren initiated an estoppel action in court, pleading in the alternative that the company surrender its licence. Rate Counsel filed a brief in support of Sheeren, and argued that Nationwide should not be allowed to withdraw from the market without notifying policy holders, and allowing them to vote on the proposal.[263]

Rate Counsel is also active outside the hearing context. An independent study prepared under the auspices of the Division charged that one utility had misrepresented New Jersey's potential energy requirements.[264] The D.P.A. (in consultation with Rate Counsel) has sued utilities so that they would provide low-cost homeowner loans to finance insulation.[265]

Rate Counsel's activities are illustrated in the charts reproduced as Figures 4 - 7.

2. Division of Public Interest Advocacy

The Division of Public Interest Advocacy (PIA) began operations in August of 1974 and has a current annual budget of $373,000.00. Although the Division originally employed fifteen lawyers, budget cutbacks in 1975 required the deletion of three positions, so that now out of a total staff of twenty-three, the Division has 12 lawyers and two legal investigators. Outside consultants are contracted for specific cases.[266]

As is evident in the Act,[267] there is some overlap with Rate Counsel jurisdiction. When this occurs, the two divisions may co-ordinate pleadings, although they tend to appear as a single entity.

PIA is most active before administrative agencies. In 1975 PIA represented a coalition of citizens' groups

Figure 4

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

NAME OF CASE	RELIEF REQUESTED: PERMANENT OR INTERIM	REQUESTED RELIEF	RATE COUNSEL RECOMMENDATION	BOARD AWARD	DATE OF AWARD
Atlantic City Electric Co.	P	$16,500,000	30.9%	48.6%	1/19/78
Kinsleys Sanitary Landfill	P	$913,410	24.9%	24.9%	1/19/78
South Jersey Gas Co.	P	$8,650,000	0%	25.3%	3/02/78
Atlantic City Sewerage Co.	P	$2,282,000	83.3%	99.8%	3/16/78
Monmouth Consolidated Water	P	$3,060,760	28.2%	78.7%	4/27/78
Hackensack Water Co.	P	$4,242,860	0%	52.3%	5/19/78
Public Service	P	$394,995,000	38.8%	38.8%	5/19/78
Atlantic City Electric Co.	P	$35,700,000	41.5%	41.5%	7/13/78
Elizabethtown Water Co.	P	$5,261,467	18.9%	58.2%	9/28/78
Hackensack Water Co.	I	$4,044,000	0%	0%	10/19/78
Middlesex Water Co.	P	$2,594,329	50.7%	50.7%	11/01/78
City of Jersey City	P	$996,800	66.7%	86.8%	11/16/78

Figure 5

TOTAL UTILITY CASE RESULTS

	RELIEF REQUESTED	RATE COUNSEL RECOMMENDATION	BOARD AWARD
1978 Awards	$481,664,453	37.7%	40.5%
1977 Awards	$129,121,852	19.5%	25.4%
1976 Awards	$825,590,981	22.3%	27.5%
1975 Awards	$309,003,125	58.6%	85.2%

Figure 6

SUMMARY OF RESULTS ACHIEVED BEFORE THE DEPARTMENT OF INSURANCE

NAME OF CASE	AMOUNT REQUESTED	RATE COUNSEL RECOMMENDATION	BOARD AWARD	DATE OF AWARD
St. Paul Ins. Co. - Hosp. Prof. Liab.	14.4%	41.0%	41.0%	1/78
State Farm Mut. Ins. Co. - Auto	$12,630,600	71.0%	91.6%	2/78
Hartford Ins. Grp. Auto	$4,164,663	17.6%	17.6%	2/78
U.S. Fidelity & Guaranty Homeowners	$172,560	0	0	3/78
American Centennial Ins. Co. - Auto		Initial Filing-Rates in Accordance with Public Advocate Recommendation		3/78
INA Auto	$5,447,838	38.6%	38.6%	4/78
ISO Hosp. Liability	$421,766	No recommendation	100.0%	4/78
State Farm Homeowners	$1,893,433	91.8%	91.8%	5/78
Prudential Prop. & Casualty - Auto	$1,729,877	3.0%	56.8%	5/78
Prudential Prop. & Casualty - Homeowners	$654,206	12.7%	100.0%	5/78
American Asso. of Ins. Services - Homeowners	$633,537	76.2%	76.2%	5/78
American Natl. Fire Ins. Co. - Auto	$797,145	0	0	6/78
Safeco Ins. Co. Homeowners	$25,039	0	0	6/78
ISO Excess PIP Auto	$3,201,480	No Recommendation	100.0%	6/78
Travelers Ins. Group Auto	$5,808,907	53.1%	53.1%	7/78
Continental Union Homeowners	$1,013,291	0	0	9/78
Health Care Ins. Exchange - Hosp. Prof. Liab.	$944,483	(464.0%)	(464.0%)	10/78
Nationwide Mutual Auto	$5,046,161	34.3%	34.3%	10/78
Weighted Total for 1978	$40,961,740	35.6%	45.6%	

Figure 7

STATISTICAL ANALYSIS -- TYPES OF CASES
JUNE 1974 to DECEMBER 1978

	Open	Closed
Bus	4	26
Cable Television	2	26
Electric	6	9
Electric and Gas	1	2
Gas	3	9
Hospital Per Diem	141	75
Insurance		
Auto	19	68
Homeowner	7	38
Other	9	35
Landfill	7	10
Movers	3	4
Pipeline	1	2
Special Interest	10	15
Railroad	0	11
Sewer and Solid Waste	31	97
Telegraph	1	3
Telephone	3	4
Water	25	67
TOTAL	273	501

Based on similar charts, reproduced in the Annual Report of the Division of Rate Counsel for 1978 (January 11, 1979)

before the Nuclear Regulatory Commission. This hearing concerned proposals for construction of an off-shore nuclear plant. Environment and safety issues advocated by the PIA led to withdrawal of the application by Public Service Electric and Gas.

The PIA has challenged proposals for liquefied gas plants in New Jersey before the Federal Power Commission and its successor the Federal Energy Regulatory Commission. Although any department within the DPA may appear before federal tribunals, in practice the PIA is the only Division to do so.

PIA has also been active in rule-making processes. These include: hearings on the Lifeline Act (see above), and court actions on civil rights legislation; civil service employment procedures and Public Utilities Commission policies. The Division exercises its authority outside the hearing context as well: for example, they presented papers to the American Bar Association and the American Law Institute protesting that the Federal Nuclear Licencing Board was siding with the industry against public interest intervenors. PIA has also produced analyses on the New Jersey Coastal Development Master Plan and the Department of Energy Master Plan.

PIA has the authority to appear on behalf of individuals. In the summer of 1978, the Division represented Ms. Elizabeth White when she was denied compensation by the Violent Crime Compensation Commission. Ms. White had not been given notice of her rights until after the statute of limitations period had run out. PIA filed a brief before the Supreme Court of New Jersey, which then rescinded the Commission decision, and sent the matter back for reconsideration.

Unlike Rate Counsel, the PIA has the advantage of being able to initiate action rather than having to respond to applications made by the regulatee.

In order to determine which individuals or groups they will represent, the PIA have developed four areas where they have the expertise to advocate in a responsible and effective manner. These are: (1) urban affairs, (including land use and housing); (2) energy and environment; (3) public health and (4) employment. The Division does branch out into new fields, however, they are likely to delegate responsibility for advocacy when requests concern issues outside of the four areas listed above.

Once a request is received, it is assigned to a lawyer who then determines whether or not to take action. If the interest is a broadly shared one, which would not be adequately represented without the assistance of the Division, and is of major importance to the state community, the PIA is more likely to intervene. The complainant's financial situation is also taken into account. Even when the issue concerned does not have state-wide implications, if the individual's situation is desperate the PIA will represent the complainant. The Division must represent the broad perspective of public interests in pleadings; they cannot therefore provide legal aid, private counsel, or "public defender" services in the traditional sense.

Individuals or groups who initiate proceedings do not usually participate in information gathering; nor does the PIA animate involvement of other groups in regulatory procedures. Some popular education is accomplished through media exposure, (analyses and studies conducted by the staff are available to the press), but this is not a major function of the Division.

3. Office of Dispute Settlement

The Ombudsman activities of the Citizens' Complaint Office have already been briefly described, but the Office of Dispute Settlement deserves closer scrutiny.

As the final addition to the DPA, this office was established in mid-1975 and operates with an annual budget of approximately $150,000.00.[268] Dispute Settlement does not animate the involvement of the public in regulatory proceedings directly; rather, it provides training in negotiation techniques for these groups, and mediatory services when disputes arise between organizations (whether government, community, special interest, or business). Essentially, the Office is concerned with eradicating the necessity of court or tribunal activities. Recently, New Jersey introduced a "Citizens' Dispute Resolution" program. Complainants to municipal courts are requested to resolve problems through mediators. Dispute Settlement provides training for these mediators.

The Office is generally more active in criminal and civil law than in administrative law. However, advice given to groups on problem resolution extends to instances where complaints are levelled at a regulated industry.

On December 8, 1977, an explosion occurred at the Logan Township industrial waste disposal plant operated by Rollins Co. Six workers were killed and thirty were injured. The New Jersey Department of Environmental Protection closed the facility, but a township community group formed a movement to have the plant permanently closed. The Office of Dispute Settlement intervened on December 15, 1977 and mediated the dispute with the result that on June 9, 1978 Rollins re-opened, introduced new safety measures and established broader community participation in setting safety standards.[269]

The Office has also been involved in resolving differences between communities and utilities. In one instance a Brick Township community group protested rate increases by a municipal utility. Dispute settlement involvement included bringing in an independent auditor to determine if the rate increase sought was cost-justified.[270]

The Office of Dispute Settlement has the mandate to provide information and clear up misconceptions which give rise to disputes. Internal staff are relied upon for such research, although resources are seconded from state and federal agencies. Like the Division of Inmate Advocacy (see below) the Office of Dispute Settlement has undergone a financial crisis. In 1977 their budget was officially eliminated and it was only by the grace of reallocations made by Mr. Van Ness that the Office was able to continue operations.[271]

The Office does not provide procedural guidance for groups or individuals who wish to appear before administrative tribunals, but in June of 1979 the Office held a major conference at which community groups were invited to discuss budgetary problems, exchange information and explore the capacity of such groups to participate in dispute proceedings of all types (including one would hope, those involving regulated industries).[272]

D. CRITIQUES OF THE DPA

The DPA has experienced a number of problems since its inception. During the 1975 Session, the New Jersey Legislature cut off funding to the Division of Inmate Advocacy,[273] prompting Mr. Van Ness' comment: "... that

demonstrated beyond peradventure that the Legislature can knock your block off if they don't like what you're doing".[274] Only a federal grant saved the Division, which now operates at a reduced scale.

During the same session, Legislative Republicans demanded the abolition of the DPA, while Democrats recommended budget cuts. Governor Byrne's bid for continued appropriations barely cleared the Assembly and the Senate.[275] Common Cause urged against the budget cuts, claiming that without the DPA, the New Jersey government would be in danger of becoming "... unresponsive, inefficient and corrupt".[276] Ralph Nader praised the DPA as representing "... a philosophic as well as a practical turning point in the citizen's struggle to control government decisions".[277] Although the DPA survived this trial by fire, industry groups still press for its dissolution. In January of 1979, the Governor's Commission on Budget Priorities (a body composed of Banking, Telecommunications and other industry executives) recommended that the DPA be eliminated.[278]

New Jersey public interest groups' evaluations of the Department have been extremely positive. The DPA worked alongside Common Cause in opposing the introduction of the Energy Facilities Siting Act (Senate Bill 11-79), which would have given the Commissioner of Energy unilateral power to direct the siting of energy facilities.[279] The DPA has also been involved in the enforcement of the Open Public Meetings Act (P.L. 1975, c. 231), which came into effect in January of 1976.[280]

Although animation of public interest organizations by the DPA is frowned upon by the Legislature,[281] the department does co-ordinate with other groups at their request. Rate Counsel has not traditionally used public interest groups as consultants, save on specific issues, but a current innovation may modify this situation. In January of 1979, the Public Advocate met with the New Jersey Public Interest Research Group to establish an advisory committee, which would generate better Rate Counsel awareness of citizen interests.[282] Mr. Van Ness could not guarantee, of course, that Rate Counsel would follow the committee's recommendations, but it is apparent that the DPA is attempting to gauge the public interest by direct contact, rather than relying on isolated, ivory tower formulations of "what is best for the people".

The Public Interest Advocacy Division has animated the involvement of outside groups in administrative proceedings, and has consulted with the New Jersey Public Interest Research Group on a number of cases.

Undoubtedly, the DPA has more credibility and better resources than most public interest groups; with the Public Advocate as a member of the cabinet, reforms may be more directly accomplished than by reliance on litigation alone. Unfortunately, the existence of the DPA has created some problems for public interest participation. Citizen Groups and individuals have expressed concern that the Rate Counsel is too quick to compromise with the Utilities Board and the regulatees.[283] The Public Utilities Board has denied standing to intervenors because of participation by the DPA at hearings. This occurred most recently during a Raw Materials Adjustment hearing by application of the Public Service Electric and Gas Company in September of 1978.[284] The citizen denied standing appealed to the courts, and the DPA filed a brief on his behalf.[285]

When the use of a monthly-billing check-off plan was suggested by Nader's organization in order to provide funding to public interest intervenors, the Public Advocate opposed the implementation of such a procedure in New Jersey. Given the present New Jersey Legislature, which is both conservative and austerity-conscious,[286] the DPA feared that a new funding scheme, if introduced, would prompt the dissolution of the DPA.[287]

In 1974, the New Jersey Public Interest Research Group testified that the designation of the Public Advocate as a cabinet post might compromise the department.[288] Rate Counsel has chosen not to appeal administrative decisions to the courts on an ongoing basis, but this may be due to tactical considerations rather than a philosophic or ethical predicament: the New Jersey courts do not often overturn administrative decisions.[289]

The DPA concentrates on cases and hearings with state-wide implications, and attempts to represent the broad perspective of the "public interest". Save for the Mental Health Advocate, the divisions often cannot or will not represent individual or regionalized interests. A member of the public would therefore be best advised to consult a special, local or public interest group in order to determine that a private interest be represented.

Criticisms of the DPA often cite the inability of a government public advocate to take adversarial positions, especially against other government agencies. Comparing DPA -- like government public advocates to independent public and special interest groups, Ernest Gellhorn notes that "... they (government public advocates) are more likely ... to be subject to political pressure and lose the flexibility and integrity of less structured methods".[290] Finkelstein and Johnson attempt to place the government public advocate in context:

> Without any doubt, public counsels are not panaceas for public participation. But the concept does bear extraordinary promise as an effective model of governmental reform.[291]

Fortunately, the DPA has given no indication of becoming inflexible or overly subject to outside pressure groups, whether governmental or special interest. Instead, the Department has proven to be an excellent means of simultaneously increasing representation of public interest before the agencies, and encouraging governmental reform. This effectiveness will only continue so long as the DPA has sufficient funding to increase its expertise, offer low or no cost representation services and maintain a broad intervention mandate.

E. THE DPA AS PROTOTYPE

Since 1974 thirty other states and numerous international bodies have studied DPA activities and procedures;[292] the Department may also serve as a prototype for a federal consumer advocate. Unfortunately, the Agency for Consumer Advocacy proposal has not been successful in Congress. Although similar bills date back into the 1920's, support for ACA legislation has only become prominent since 1969.[293] Richard Leighton offers a short legislative history:

> There probably never was a Congressional proposal which has come so close to enactment so many times ... (in 1970), the Senate ... passed a consumer agency bill ... a similar bill, however, was prevented from reaching the floor of the House of Representatives ... In 1971, the House revised and passed its consumer agency bill ... only to see a

> threatened 1972 filibuster prevent passage of a new Senate verson ... In 1974 (the House) passed a further revised consumer agency bill ... a filibuster erupted in the Senate ... and again the tactic was successful in preventing passage.[294]

Most recently, the House voted against H.R. 6118 on February 8, 1978.[295] In total, forty separate bills advocating the federal consumer advocate have been introduced, only to die on the agenda, or be filibustered out of existence.[296]

The author strongly recommends the implementation of a federal-level Canadian Public Advocate. In the alternative, a public interest advocacy division might be added to the Department of Justice. Furthermore, the Department of Justice and other government bodies might investigate the extension of legal aid to cover administrative law services. The federal and provincial governments would establish a cost sharing program to cover the expenses of this new form of Legal Aid.

Introduction of education programs and participation-oriented procedures for Canadian administrative agencies would encourage the development of self-representation, but until sufficient expertise and funding is available in the private sector, there is a need for independent public advocates with the authority and motivation to take representative and adversarial actions before the Commissions. Parliament would be advised to study the DPA as a model for implementation of similar agencies in Canada.

Chapter IV

INDEPENDENT COMMISSION COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Federal Communications Commission (FCC) "Trial Staff" (that is, attorneys within the Commission who appear at FCC hearings) must be differentiated from those lawyers within the General Counsel's office, who advise the Commission on legal matters, aid in policy-making, and represent the FCC in the courts.

Trial Staff are located in the Hearing Divisions of the Common Carriers and Broadcast Bureaus, and the Compliance and Litigation Task Force. The Task Force, which was established in November of 1977, is one in a series of such offices designed to generate research and provide trial staff for specific hearings. A predecessor was the American Telephone and Telegraph (AT & T) Task Force, created to represent the Commission during an AT & T Rate Hearing, Docket 19129.

The budget and employment figures for these offices are reproduced in the chart labelled Figure 8.

In 1971, acting in response to protests made by various business-subscriber intervenors at an AT & T proceeding, the FCC undertook to reduce Commission counsel influence on decision-making.[297] Now, once a hearing is designated, counsel are separated from the rest of the agency and are intended to act independently until the regulatory decision is made. This procedural innovation was not, therefore, promulgated by a need for better representation of the public interest.

Figure 8

BUDGET AND EMPLOYMENT FIGURES FOR F.C.C. "TRIAL STAFF" OFFICES

OFFICE	BUDGET	TOTAL NUMBER OF EMPLOYEES	BREAKDOWN (BY PROFESSION)
Compliance and Litigation Task Force	$453,125[a]	17.5	7 attorneys 1 law clerk trainee [b] 2 accountants 4 economists 1 public utilities specialist 3 support staff
Hearing Division, Common Carriers Bureau	$465,000	15.5	9 attorneys 1 law clerk trainee[b] 1 legal technician 2 economists 1 electrical engineer 2 support staff
Hearing Division, Broadcast Bureau	$860,000	30.0	21 attorneys 1 para-legal 2 law clerk trainees[b] 3 electrical engineers 4 support staff
	Total projected F.C.C. Budget for same period: $64,754,000 Total Number of F.C.C. full-time, permanent employees: 2151		

[a]Independent figures are not available for the Task Force. This estimate is based on the budget for the Office of the Bureau Chief, Common Carriers, (of which the Task Force forms a part) pro-rated according to the percentage of employees working within the Task Force.

[b]Part-time employees.

Budgets are based on projected figures for Fiscal Year 1980, Congressional Budget Figures. Employment Figures are based on Office Documentation, and are accurate as of January 29th, 1979.

Counsel still co-ordinates with other Commission offices before the hearing in order to help develop the agenda and gauge the direction the Commission is likely to take during the regulatory proceeding. This co-ordination is often essential: counsel argument at the hearing may be used by the agency to test the reactions of other parties to a proposed policy, or a recommended application adjudication.

Apart from a potential for greater expertise, better access to research and more stable funding, Trial Staff have no advantage over the intervenor. They do not enjoy special status at hearings, although the Administrative Law Judge may position them last in order that they may establish a full record by covering gaps left by other parties, and undoubtedly more weight is given to Trial Staff argument.[298] Nor do Commission counsel have greater access to the decision-making process than other parties. While Trial Staff challenge the initial decisions of the Administrative Law Judge with the same regularity as other parties, and may object to the Judge's final decision and that of the Review Board as well, they cannot appeal to the courts.[299] Other parties, obviously are not barred from doing so. Commission counsel at the National Labour Relations Board may appeal to the courts, but FCC procedure in this area is not expected to change.[300]

The Trial Staff often have extensive background in the regulatory field: most are drawn from within the Commission, or directly by law school recruitment (where past interest and experience in Communications is an asset). Industry or Public Interest Group representation experience may be advantageous, but few attorneys are hired from these sectors.[301] A multi-disciplinary background is a definite asset. Task Force personnel for example have experience in the economic and technical aspects of the industry.

An individual or group cannot rely on Trial Staff to represent "special" interests at the hearing: FCC lawyers make no attempt to argue on behalf of "private" interests, although they may agree with other intervenors. Instead, Trial Staff advocate a "compromise" position, which, hopefully, constitutes a broad overview of the various viewpoints. Counsel may take an independent stance, but the extent of this "independent adversarial position" is dependant both upon the personality of the counsel involved, and the Bureau concerned.

Common Carrier counsel have been more active in advocating the public interest than their Broadcast Bureau counterparts. During Comsat Rate Hearing 1971 (Docket 16070)[302] Trial Staff filed a pleading calling for reduction of Comsat rates; a position adversary to that of the Bureau Chief. Unfortunately, it is unusual, even for Common Carrier trial staff, to take such a firm position. FCC counsel claim that even when an adversary position is taken, there is no fear of retaliation from above. Glen Robinson, ex-Commissioner, expresses some doubt:

> A public representative who occupies a special office (such as an office of "consumer affairs" or "public counsel") within an agency itself is unlikely to provide a strong voice for the public interest ... Unless the office performs independently from, and frequently at odds with, other agency staff, it is largely redundant. Yet an office that continuously so functioned would have greater difficulty obtaining support from the agency itself ... A final drawback to an "inside" public counsel is that such an office, presumably unable to appeal the agency's actions (i.e. to the Courts), would lack an important device available to outside litigants ... I believe that the more effective way (to expose bureaucracies to new ideas) is to support direct public involvement without screening it through another layer of bureaucracy. In a very real sense, the separate agency approach fails to honour the full logic of participatory democracy.[303]

J. Jonathan Schraub, after noting that Connecticut had rejected in-house public counsel for utilities regulation, stated:

> An active public advocacy role probably will not survive in any in-house model because the possibility of direct pressure from the agency imperils any independent action taken by the in-house public counsel that the agency does not agree is in the public interest. The broadest statutory authority is of no avail to the public counsel if it must operate in a restrictive and threatening environment.[304]

The Citizens' Communication Center and the Media Access Project (public interest advocacy groups active in the

field of broadcast regulation) also reject the idea that trial staff is free to take any position without fear of Commission reprisal.[305]

Counsel may participate fully at any hearing held by the Commission, but the quality of their participation varies according to the nature of the proceeding and the counsel involved. Apart from exploring the technical and engineering aspects, Broadcast counsel is not active in licensing hearings. The Broadcast Bureau counsel have found that extensive participation in comparative hearings is not "cost-effective".[306] However, counsel are more prosecutorial during renewal or revocation hearings; they oppose renewal roughly as often as they argue in support. The vast majority of Common Carrier hearings since 1971 have not dealt with individual-subscriber rates or service quality. Most hearings have concerned business subscribers, who are expected to advocate their own positions without help from the Commission. Docket 19143,[307] which explored Equal Opportunity Employment at Bell, did involve general public interests. Common Carriers counsel consulted interest groups (including N.O.W.), contacted independent citizens who showed interest in giving testimony, and prosecuted on behalf of Bell employees.[308] Judging from their performance at this hearing, it would be reasonable to suppose that Common Carrier counsel would follow much the same full-participation approach if a general-subscriber rate hearing was designated in the future.

While representation of public interests at adjudicatory hearings may be both advantageous and necessary, "the area of greatest opportunity for public participation ... appears to be not adjudication or comparable proceedings, but rule-making, where policy issues predominate".[309] It is important for public interests to be enunciated when a policy is formulated which will direct all future adjudicatory hearings. While there have been policy hearings where a number of public interest groups appeared (Example: the 1973-1976 hearings on Broadcast ascertainment which began with Docket 19153: "Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses"),[310] two critics note a general lack of public interest involvement or representation in the FCC policy-making process:

> "... FCC policy is paradoxical: public interest is determined with no direct public input into the policy-making process."[311]
> (Patrick McDonough)

"Citizen participation in the FCC's decision-making processes is virtually non-existent ..."[312]
(Nicholas Johnson, ex-Commissioner)

Despite the importance of broad interest representation at rule-making hearings, this is the regulatory area where trial staff appears least active in advocating the public interest.

The Broadcast Bureau Hearing Division is obligated to follow Commission precedent in policy areas, and leaves modification of policy to public interest and industry intervenors. Common Carriers counsel, while more independent, still checks policy problems with General Counsel and the Bureau Chief rather than formulating an independent stance. Even during adjudicatory hearings, Broadcast counsel involvement in policy areas is shaped by Commission interests. For example, the FCC is concerned with network affiliation, commercial content, fraud, and misrepresentation of evidence by the licensee. As a result, counsel is active and aggressive on these issues. Despite development of community-need ascertainment programs for broadcasters, the FCC has not traditionally viewed programming as a major hearing issue. Therefore, even when programming is of paramount community interest when the licensee applies for renewal, Broadcast counsel will not take responsibility for investigating this area.[313]

Trial Staff cannot completely ignore designated items, but it has become apparent to public interest groups active in broadcast regulation that counsel cannot be relied upon to advocate the public interest with regard to programming questions.[314] Yet, counsel claim that they are separate (at least in part) so that they may fully participate at all hearings, and advocate all issues, especially those which are of major importance to the public.

Regulatory critics have expressed concern that the regulated industry sometimes becomes the major, or sole source of regulator information.[315] As the advocate of interests broader than those of the industry alone, Trial Staff should utilize a number of research sources when evaluating applicant information or preparing argument on a designated item. The Compliance and Litigation Task Force does devote fifty to one hundred thousand dollars annually for contracting non-FCC researchers.[316] Unfortunately, unless a hearing has been initiated by a

complaint, it is unlikely that Trial Staff will consult subscribers, consumers or public interest groups to determine non-regulatee views on issues, applicant submissions or proposed policies. In preparing for a complaint-related hearing, counsel may search out consumers and public interest groups as information sources. Unfortunately, there are few telecommunications-subscriber or broadcast-"consumer" oriented groups in the United States.[317]

If a member of the public wishes to alert the Task Force of a special area of concern in an upcoming hearing, there is no communications link available. A somewhat tenuous information-relay chain leads to the Hearing Divisions. The Office of the Consumer may forward a complaint to the responsible Bureau's Complaint Office, which may, in turn, relay the information to counsel. It should be noted that although such a procedure exists, no FCC personnel consulted could remember a time when it had been implemented.[318] Once again, personalities rather than procedures dictate the quality of public interest representation by Commission counsel.

Richard Leone notes:

> The first task of public interest advocates is to educate. They must develop materials which break complex issues down into a form which is comprehensible to the public.[319]

As a public advocate, Commission counsel's responsibilities might extend to clarifying issues for the public, animating participation, and assisting other intervenors at hearings. FCC Trial Staff do give legal and procedural advice at hearings, but no attempt is made to coordinate interventions or improve the quality of argument made by other parties. Although counsel is not meant to be in a position adverse to other public interest advocates, Broadcast counsel believe themselves to be constrained by Commission policy from sharing research with other parties. To give a brief example: recently, the FCC denied all eight (8) licence renewal applications made by the Alabama Educational Television Commission (AETC). As there were no alternative applicants at that time, the Commission chose to allow continued AETC operation, but sent an advisory group to recommend programming and other changes. When AETC rejected the findings of the advisory group, the Citizens' Communications Center (CCC) stepped in to represent the group during the

present comparative hearing[320] (the Alabama Citizens for Responsible Public T.V. Inc. had applied as an alternative licensee). Broadcast counsel has rejected the CCC's request for FCC research materials on their client.

While counsel may encourage citizens to submit testimony at hearings, they will not animate the involvement of public interest or community groups. FCC Trial Staff may utilize such a group to contact individuals wishing to participate at a hearing, who might not otherwise be able to co-ordinate with a group presentation. Unfortunately, Trial Staff cannot protect their sources from subpoena, with the result that the individual may withdraw from the proceeding rather than risk retaliation from a communications-industry employer. As has been noted, counsel makes no attempt to gauge the trend of public opinion. This prevents Trial Staff from claiming to represent a broad base of public opinion in any real sense, and may lead to submission of witnesses with polarized positions at the hearing. The Administrative Law Judge may then reject such testimony as non-representative of the public at large. Trial Staff do not rely on submission of witnesses' testimony or evidence as a matter of course, often preferring to concentrate on cross-examination of other parties' evidence. The adversarial nature of such cross-examination is directly proportional to the presence or absence of other intervenors, and the level of Commission interest in the area concerned.

Any evaluation of the FCC Trial Staff must lead to the question: what role should independent Commission counsel play? Can they become the sole advocates of the public interest, or should they act only in a supplementary capacity, leaving representation of public interests to the public? The courts of the United States have developed a position.

In F.C.C. v. Sanders Bros. Radio Station,[321] Scripps-Howard Radio Inc. v. F.C.C.,[322] Scenic Hudson Preservation Conference v. F.P.C.,[323] and Office of Communication of United Church of Christ v. F.C.C.,[324] the courts dealt with the issue of standing before independent agencies. Referring to the latter two decisions, Albert Butzel notes:

> In both cases, the courts ... held that the particular agencies involved had not in fact been able to

> adequately represent or protect the public interest, and further, the public intervenor ... had as a consequence, a key role to play.[325]

Judge Warren E. Burger, then of the U.S. Court of Appeals for the District of Columbia, noted in United Church of Christ:

> The theory that the Commission can always effectively represent the lesser interest ... without the aid and participation of legitimate listener representatives ... is one of the assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does now, that it is no longer a valid assumption which stands up under the realities of actual ... reference, neither we nor the Commission can continue to rely on it.[326]

Later, in the same decision, Judge Burger added:

> ... experience demonstrates that consumers are generally among the best vindicators of the public interest.[327]

When some members of the public do not wish to rely on a public or special interest group to represent their interests, and cannot mount an individual intervention, Trial Staff provide a means for bringing the citizen before the agency. In this capacity Commission counsel undoubtedly play an important role. Unfortunately, taking into account the courts' recognition that the public must be directly involved in regulatory proceedings, the inability of counsel to play an active adversarial role at all proceedings, animate public involvement, utilize a broad range of information sources, or gauge public concern with regard to specific issues, it must be concluded that separated Trial Staff cannot be relied upon as an alternative to public interest representation by non-FCC groups or individuals. Furthermore, as the marked difference between Broadcast and Common Carrier counsel performance illustrates, the quality of representation may become dependent on the personalities involved. Commission policy and procedures do not motivate adversary stances, consultation with the public, animation or involvement of public witnesses. In many instances, FCC policy appears to block the establishment of truly independent Commission counsel who might become real advocates of the public interest.

The CRTC is currently encouraging the development of a public interest concentration within its legal branch. This approach would constitute a more effective and less expensive means of ensuring public interest representation through commission counsel than the FCC's trial staff program.

Chapter V

PUBLIC INTEREST GROUPS -- CONSUMERS' ASSOCIATION OF CANADA

The past two decades have seen a proliferation of special and public interest groups both in the United States and Canada. Recently, Consumer News Incorporated produced "Help: The Useful Almanac"[328], a compilation of all such American organizations including a comprehensive guide for citizens requiring problem resolution or seeking input into government decision-making. No similar Canadian document exists, although in August of 1978, Melanie Dobbins, working for the Department of Consumer and Corporate Affairs, compiled a list of Canadian consumer groups: those that offer consumer service or advocate interests, whether by lobbying or intervention.[329] The latter category of organizations provides another alternative for interest representation. The public interest group advocates usually operate in restricted fields of expertise, which are defined by the goals of the group. As with government and commission advocates, the public must rely on the public interest group to represent their interests with far less impact on the preparation of argument than would be the case if self-representation or surveys were employed. The public interest group advocate, in claiming to represent a large group of citizens (by whatever status they are defined: occupation, sex, race, or interest), must, like their government counterparts, attempt to interpret the broad range of public viewpoints. Unless membership surveys are employed before action is taken by the group, the group cannot advocate individual citizen interests, except when an individual is represented in the form of a test case.

The nature and activities of these public and special interest groups vary; it would be impossible to

select any one as representative of the whole. Therefore, the Consumers' Association of Canada (CAC) has been chosen as an evaluatory model because it has attained a relatively high profile, and is active in a large number of areas, not because it is a "typical" public interest group.

The CAC, which has approximately 100,000 members, is the only national Canadian consumers' organization. It grew out of the activities of the Women's Section of the Wartime Prices and Trade Board, which was active in supervising price controls and rationing throughout the Second World War. After the war ended, sixteen women's organizations met and, in September of 1947, created the Canadian Association of Consumers. The Association's stated objectives were:

> ... to develop a more enlightened opinion on economic affairs and consumer interests, and to express this opinion in such a way as to benefit the home, the community and the nation.[330]

The Association was incorporated in 1962 under non-profit status, as the Consumers' Association of Canada. The CAC continues to work in a variety of consumer-related areas, including the environment, health, education, financial institutions and food production and marketing. The Canadian Consumer and Le Consommateur canadien are magazines published by the CAC every two months, with a readership of an estimated half-million (500,000) Canadians. The magazine provides consumer reports on a variety of products, based on CAC testing done at their independent laboratory, established in 1977. The CAC operates provincial offices in every province and territory, as well as eighty (80) local groups. The CAC is meant to function as "a bridge between the consumer and industry on one hand and government and the consumer on the other"[331] and, therefore, traditionally attempts to introduce consumer reform through direct consultation with the industries. It is only if such voluntary methods fail that lobbying or intervention is undertaken.

The CAC is composed of a Board of Directors, an Executive Committee and five separate departments: Finance and Administration, Association Affairs (which oversees public relations and consumer services, and liaises with the provincial and local offices), Testing and Publications, Issues and Public Policy and the Regulated Industries Program. The latter department

represents consumer interests before regulatory bodies, legislative committees and the courts.

The Regulated Industries Program (RIP) was introduced as the Advocacy Program in 1973.[332] The number of staff employed by this Program has ranged between six (two lawyers, an articling student and three support staff), and two (one lawyer and one support staff).[333] At present, RIP operates with three lawyers and two support staff.

The 1976/77 fiscal year budget was $200,000.; this dropped in 1977/78 to $150,000. (plus $50,000. earmarked for a brief on costs).[334] Since 1974, RIP has relied on the Department of Consumer and Corporate Affairs grants; during 1978, after a period of consultation with the Minister, the program was able to obtain a five year funding commitment from the Department. The budget is augmented by intervenor costs when awarded.

During fiscal years 1977/78 and 1978/79, RIP advocates have appeared before the CRTC, the CTC, the Federal Court and small claims courts, and have been active in petitions to Cabinet. Projects included briefs to the CRTC on Pay Television policy; recommendations for the revision of broadcasting and telecommunications procedures; intervention at Bell Rate '78 and CN/CP Telecommunications rate hearings and the CRTC Cost Inquiry. Following involvement in the CRTC consideration of Telesat's application for membership in the TransCanada Telephone System (TCTS), the CAC participated when Telesat/TCTS petitioned the CRTC decision to Governor in Council. When the Cabinet reversed the Commission decision, RIP appealed to the Federal Court:

> CAC strongly objected to the Governor in Council entertaining the appeal on two grounds: first, the Governor in Council had already determined the matter and it is a strong tradition in law that a judge should not sit on appeal from his own previous decision; and secondly the appellants had not indicated any reviewable error on the part of the CRTC.[335]

The CAC argued that Cabinet had stepped beyond the bounds of their authority by "substituting (their) view of the public interest for that of the CRTC when the legislative power was to 'vary or rescind' the decision".[336] On April 6, 1978, the Federal Court (Trial Division)

dismissed CAC's appeal; the CAC responded by launching a new action before the Federal Court of Appeal. These activities may have an effect on the proposals for standardization of petition procedures.

The CAC also submitted a brief to the Department of Communications when that body initiated a review of Satellite Earth Station Ownership policy.[337]

RIP uses test cases and briefs on specific procedures to illustrate required reforms in policy areas, and influence re-interpretation of administrative procedures so that the public interest will be better served or public participation augmented. The CAC, for example, appealed CRTC notification procedure before the Federal Court of Appeal, prompting Chief Justice Jackett to note:

> To be such, a public hearing (under the Broadcasting Act), ... would ... have had to be arranged in such a way as to provide members of the public with a reasonable opportunity to know the subject matter of the hearing, and what it involved from the point of view of the public, in sufficient time to decide whether or not to exercise their statutory right of presentation and prepare themselves ... (for) presentation.[338]

The CRTC responded by initiating a revision of the Broadcast Procedures; inviting submissions both in the form of written briefs and oral presentations at hearings held in Ottawa between November 22 and 24, 1978.[339] In its brief on Broadcast Procedures, (October 20, 1978), the CAC supported the CRTC's recommendations for better notification of applications and decisions; regular notice throughout the year; improved access to information; stiffer evidentiary requirements for confidentiality claims; Commission staff document disclosure; scheduling of evening sessions; and use of regional hearings. CAC opposed the CRTC policy of disallowing cross-examination at broadcast hearings, and the Commission's rejection of competitive licence hearings. The Association claimed that simultaneous consideration of renewal applications and competing applications would create more incentive on the part of the licensee, and avoid duplication of Commission and industry time and resources.[340] The brief suggested that applications should also provide the public with an indication of areas they might address, and specify that comments be sent to the Commission; it was further recommended that submissions sent to the

licensee be compiled by broadcasters and forwarded to the Commission. The keeping of CRTC records at public libraries and federal government depositories, the production of a pamphlet explaining the Broadcasting Act and Commission procedures in simple language, and the granting of costs at Broadcast hearings, were also advocated.[341]

These recommendations were similar to those expressed in the CAC Brief on telecommunications procedures (September 14, 1978), which also suggested that the Commission publicize the availability of Andrew Roman's guide to intervention procedures. With regard to the complaints process, the CAC recommended that a Complaints Bureau be established and "travelling roadshow" type regional hearings at which consumers could represent themselves, might be used to resolve consumer-industry disputes. After rejecting the provision of intervenor grants, the CAC suggested that the CRTC provide interim cost awards upon application at the pre-hearing stage. Furthermore, it was held that intervenors should not be deprived of costs due to outside funding except where such funding would allow effective hearing participation. CAC supported a check-off funding scheme (see Chapter III above) as an alternative to the awarding of costs.[342]

Before the CTC, RIP has submitted briefs on transcontinental and Maritime rail passenger services, has continued to advocate the expansion of ABC charters within Canada, and opposed the Air Canada acquisition of Nordair. When the CTC Air Transport Committee allowed Air Canada's application, the CAC petitioned Cabinet, taking this opportunity to point out the need for revisions in the "Cabinet appeal process". Cabinet deliberations resulted in denial of the Air Canada bid. The CTC requested an adjournment of the 1979 CTC Air Transport Committee hearing on General Domestic Air Fare Increases; this was denied by CTC decision March 27, 1979. This resulted in a CAC appeal to the Federal Court under section 28 of the Federal Court Act for writs of prohibition and certiorari to quash the CTC decision. Although Judge Mahoney agreed with the natural justice and notification requirements enunciated by Chief Justice Jackett in the London Cable Case, he held that the Commission has authority to modify the notice period and, therefore, dismissed the application on April 2, 1979. When insurance was declared unavailable for charter class fares with Canada, the program initiated a Small Claims Court action as a test case challenge.

As has been previously indicated, RIP is active outside the hearing context; briefs made to Departments and appeals before courts have already been mentioned; RIP consulted with the provincial offices in recommending policy review for rail services, and consumer representation on the Board of Via Rail Canada was advocated. RIP members have appeared before Cabinet and legislative committees: one of such activities being a brief to the House of Commons and Senate Standing Committee concerning Bank Act revisions. RIP has also made submissions before the Clyne Commission established on November 30th, 1978 by the Minister of Communications to study the implications of telecommunications for Canadian sovereignty.

RIP conducts popular education programs: advocating policy reviews which would aid public involvement; and has also produced the procedural guidebook, and participated in seminars and conferences at which consumer interests are examined and enunciated. The RIP "Cost to Intervenors and Alternate Funding Project" is a comprehensive review of alternative methods for providing financial assistance to intervenors practiced in both the United States and Canada, and including proposals not heretofore implemented.

The RIP Board is guided by certain principles in determining when to intervene before an independent agency. The program is more likely to act if intervention would result in improvement of regulatory procedure (allowing for greater public involvement and access to information, for example); a requirement for a consumer voice at the hearing record; and if the application is of general importance to the Canadian consumer.[343]

Although the RIP is more autonomous than other CAC departments, a considerable amount of consultation occurs before the decision to intervene is made. The CAC board liaises with the RIP Board; provincial board members may make comments regarding activities; RIP Board meetings have been held in provincial capitals since June of 1976 so that provincial and local groups may have input through shared information. The RIP also contracts outside researchers and consultants when preparing argument. The general public has had a voice in directing certain RIP activities. For example, RIP appearance at the CRTC London Cable hearing was initiated by London CAC local. The resulting intervention was made in the name of the local: essentially, RIP provided counsel services.

Passengers stranded by the August 1978 Air Canada strike complained to the CAC that while the Corporation had offered to subsidize hotel expenses, no reimbursement was available for alternative return transportation. The RIP consulted with Air Canada on behalf of these consumers. As a result, Air Canada agreed to consider claims for replacement transportation and incidental expenses.[344]

When the CRTC designated a hearing on a CN/CP Telecommunications application for telegram rate increases, the RIP contacted various CAC locals for information. A local volunteer survey was implemented to determine service quality: the findings of these surveys had a major impact on the RIP position.[345]

Although the preparation of argument is the responsibility of RIP counsel, information provision by consumers, local and provincial groups does affect RIP submissions; issue concentration directives are also provided by the RIP Board on a regular basis.[346]

Time and financial limitations have resulted in ad hoc hiring procedures at RIP, but regulatory experience, familiarity with the regulated industries and economics background are of considerable importance in applicant evaluation.[347]

Animation of participation by other groups is an expanding priority. Both at and outside of hearings, RIP contacts various public interest groups. Although the establishment of the Public Interest Advocacy Centre (see Chapter I, Section B) has lessened the need for RIP legal assistance services, the program continues to offer procedural guidance to other intervenors and will refer concerned individuals to the PIAC. In preparing for hearing appearance RIP co-ordinates with other groups on research and provides "work in progress" schedules to interested parties.[348] The RIP recommended the creation of a public interest/consumer newsletter to provide potential intervenors with information on regulatory activities; publication is now being considered by the Department of Consumer and Corporate Affairs.[349] Provincial public interest groups have also received RIP aid in locating witnesses and improving advocacy skills. Public interest groups with whom the RIP has ongoing contact include the National Anti-Poverty Organization, Inuit Tapirisat, Transport 2000, The Manitoba Legal Aid Plan and the PIAC.[350] At CAC annual meetings the RIP Board and

staff conduct workshops for the encouragement of provincial intervention initiatives and for information sharing.[351]

Ken Rubin of Action Bell Canada lists five basic problems that face public interest groups:

> ... the built-in bias of (the) regulatory process, the limitations of public participation in regulatory decision making, scarce resources ... public participation procedural problems ... and public interest groups' organization problems ...[352]

Although the RIP has developed an efficient organization, and may enjoy a relatively stable funding base, it must occasionally reduce activities owing to financial constraints. During fiscal year 1977/78, the RIP was forced to withdraw from the Telecommunications Equipment Inquiry (Restrictive Trade Practices Commission), the Shipping Conferences Inquiry (CTC), the Interprovincial Tariff and Tolls Hearing (NEB), and could not make representation to the Royal Commission on Financial Management and Accountability.[353] Availability of cost awards at an increased number of regulatory agencies might improve RIP effectiveness, but increased public contribution would also be of benefit.

Until such a time as popular education and animation lead to a growing recognition on the part of the Canadian public that support of RIP and other public interest groups is not only in their best interest, but is also invaluable in promoting regulatory decision-making in the public interest, the establishment of a strong Canadian public interest group sector will remain a hope rather than a reality. This goal might be achieved in part by the agencies, if they undertook to inform the public of the existence and activities of such groups as the RIP.

CAC/RIP activities have provided for, and encouraged the vocalization of Canadian consumer interests. Although the RIP came under fire from past CAC President Beryl Plumptre for devoting too much time and energy to Bell Rate Increase Hearings,[354] program enterprises have become increasingly diverse, despite budgetary constraints (see above).

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 have gained may be illustrated by the recent appointment of RIP General Counsel and Project Director Greg Kane as the CRTC Associate Counsel for Telecommunications.

RIP counsel have been able to guide regulators in dealing with contentions arising between other parties. During the Bell Rate '78 Hearing, commentary made by Greg Kane aided CRTC resolution of differences arising between PIAC and Bell Canada over media propagation of viewpoints.[355] 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.[356]

Coverage of RIP activities by the press and broadcasters increases public information on the regulatory process; the work of RIP may also encourage the formation of, and government/public financial support for other public interest groups, a desirable effect, given the scarcity of public interest advocates in Canada.

Chapter VI

COSTS AND FUNDING

Even if all the innovative techniques discussed were to be implemented by the Canadian government and administrative tribunals for the encouragement and development of public participation, one major obstacle would continue to prevent the growth of a public interest advocacy sector. This obstacle is, of course, lack of funding.

Several alternative methods are available for the creation of stable public interest group budgets and financial support of individual participants; unfortunately, many of these methods are either unavailable in Canada or have not been fully developed. This chapter will outline and evaluate these methods.

A. GOVERNMENT, FOUNDATION AND PUBLIC FUNDING

Undoubtedly, the most enduring and well-financed of all funding programs are those initiated by the government. The CAC Regulated Industry Program and the Public Interest Advocacy Centre, for example, would undoubtedly suffer severe, if not total cutbacks if Consumer and Corporate Affairs funding were to be withdrawn. Governments are able to provide long term funding to public interest groups which operate on national, provincial and even local levels. Unfortunately, owing to the current "austerity", government funding may soon be reduced; therefore, it will probably be necessary for public interest groups to develop other sources in order to maintain an effective and active advocacy role. Individuals are only infrequently eligible for direct govern-

ment funding; citizen intervenors must, therefore, rely on cost awards for participation support. (see below.)

A number of groups have developed internal funding solicitation programs. CAC's budget is augmented by the sale of publications and subscriptions to the Canadian Consumer. In the United States, the Nader Organization and Common Cause have utilized mail contribution requests. Nader has also been able to increase the organizational budget through speaking engagement fees and income from book sales.[357] Nevertheless, this type of funding drive may result in a narrowing or restraining of activities.

In the United States, in order for an organization to be designated as charitable, it must obtain exemption under section 501 (C)(3) of the Internal Revenue Code. This imposes restrictions on the charitable organization which include provisions against lobbying.[358] Similar directives regarding the activities of charitable organizations have been made in Canada, despite the assurance of the government that public interest groups will not be required to restrict advocacy or lobbying pursuits, (See the chapter on the CAC, above). The National Voluntary Organization has suggested that revisions should be made in the Canadian tax laws. It proposes that:

> 1. Individual taxpayers should be given the option of claiming charitable gifts as deductible from taxable income (the present situation), or, of deducting 50% of the value of charitable gifts from income tax payable (a tax credit) ... 3. The present $100.00 standard deduction for medical and charitable purposes should be amended to apply only to medical expenses. A gift to a voluntary organization should be given in order to be claimed for tax purposes ... It may be that the above reform will lend fresh impetus to the redefinition of voluntary action and charity under Canadian law. The National Voluntary Organization will support this organization of the concept of charity.[359]

Although mail solicitation is preferred by groups with a nation-wide base, local public interest groups have introduced door to door contribution request programs with some success. The Connecticut Citizen Research Group implemented such a project with the aid of a Chicago consulting firm. Approximately 20 canvassers were hired to solicit door to door. The group reports

that this campaign has resulted in an increase of several thousand dollars a month, which has allowed for the expansion of a Citizen Action Group.[360]

Foundations also provide funding for public interest and advocacy groups, although there are a greater number of such sources in the United States than in Canada. Despite the fact that foundations such as the Ford Foundation are able to supply massive financing, there are problems related to this funding technique. For example, foundations may prefer to support groups with objectives similar to their own, or groups may be selected because they are organized by individuals who have personal contact with the members of the foundation. Organizations that have enjoyed foundation grants may undergo termination if such grants are subsequently withdrawn, due to an unreasonable, if understandable reliance on the foundation. Foundations also tend to favour national groups over regional or local ones.

A final source for funding may be the regulatory body itself. Inquiry bodies such as the Berger and Porter Commissions have provided for intervenor grants (see the first chapter in this section, above). Independent agencies have also provided grants; CRTC directed Bell Canada and TCTS to supply individuals with research grants during the initial phase of the TCTS rate increase application process;[361] the Alberta Utilities Board also maintains an intervenor funding program.[362]

B. CHECKOFF LEVY SYSTEM

While funding provides ongoing support of public interest activities outside of the hearing context and unrelated to specific participation activities, a checkoff funding system may be developed to finance specialized or individual interventions. Essentially the checkoff system involves the mailing of donation requests to consumers and subscribers. Solicitations may be included in monthly billings sent by the industry, whether at the initiative of the regulatee or the regulator. The Nader Organization "Public Citizen" has proposed the development of Residential Utility Consumer Action Groups (RUCAG), responsible for intervention and advocacy related to state public utility regulation. RUCAGs would be financed by the inclusion of customer checkoff cards

along with utility bills. The regulatee would then contribute the subscriber-indicated amount to RUCAG; auditing of the process would be done by the state. RUCAG bills have been introduced in New York, Connecticut, Ohio, Massachusetts and Illinois.[363] Although the proposal has raised considerable public interest, no enabling statutes have been enacted to date. In California, a RUCAG-like Bill "An Act to Add Division 8 to the Public Utilities Code relating to utility consumers" (Assembly Bill No. 1289, California), has been placed before the legislature.[364] Unfortunately, Bill No. 1289 has not been proclaimed.

Despite the fact that a checkoff system would encourage public support of interventions and activities having immediate impact on the donor, it would be necessary for the public to become informed of the objectives of the recipient. Otherwise, it would be unreasonable to require the citizen to choose between the myriad public interest groups that might be serviced by such a program. Donee groups could not rely on checkoff as the only source of funding: under this system the consumer/subscriber would be free to withdraw support at any time. Hopefully, checkoffs would encourage direct citizen participation in recipient group activities, if only so that the donor might "get their money's worth" out of the contribution.

C. COSTS

Intervenor cost awards are now available at CRTC adjudicatory hearings, but other Canadian agencies do not make cost awards, either because the enabling statute does not give them this authority (the National Energy Board argument), or simply because the agency is unprepared to implement this practice. At the CTC hearing which discussed the possible availability of cost awards, the Consumers' Association of Canada and Gaylord Watkins and Sandra McCallum of the Law Reform Commission of Canada urged that some form of funding for intervenors was required. However, the CTC determined not to revise its policy of not awarding costs.[365] More recently, the CAC applied for costs following the CTC Rail Transport Committee hearing on Transcontinental Rail Passenger Service. In a decision dated December 28, 1978, the CTC denied the CAC's application.[366]

In contrast to their Canadian counterparts, a good number of American administrative agencies are currently studying or introducing cost award procedures:

1. The Department of Agriculture announced on January 29, 1978, that it would establish a public participation plan, and that $220,000. had been allocated for DOA's new Office of Public Participation. Intervenors appearing before the Department would be eligible for funding if they complied with requirements set by the American Comptroller General: "... if (the intervenor) does not represent an interest which is already adequately represented ... (if) his representation will substantially contribute to a fair determination of the proceedings, and (if) he lacks sufficient resources to participate effectively in the proceeding absent funding".[367] Similar requirements have been adopted by the following agencies and departments.

2. The Civil Aeronautics Board's compensation program became effective on November 28, 1978. Applications for costs are considered by the Public Participation Evaluation Committee which consists of the Managing Director, the Director of Economic Analysis and the General Counsel.[368]

3. Since May 21, 1978, reimbursement for individuals and groups intervening in proceedings before the Consumer Product Safety Commission has been available. Although this program was originally instituted on an interim basis, permanent adoption is expected. Costs will be available at both rulemaking and adjudicatory hearings.[369]

4. The Department of Energy announced on October 11, 1978, that it would soon finalize a public participation funding program.[370]

5. The Environmental Protection Agency provides funding at proceedings under the Toxic Substances Control Act (15 U.S.C. 2605 (c) (A)), although this procedure may soon be used at all agency hearings.[371]

6. The Federal Communications Commission is currently considering the provision of intervenor funding; it is likely that the revised Communications Act now before the House, will, in final

draft form, include guidelines for cost awards and alternative methods of public interest group and individual intervenor financing.[372]

7. To date, the Federal Energy Regulatory Commission has reimbursed two consumer groups, although no formal procedures related to costs have been promulgated.[373]

8. The National Highway Traffic Safety Administration interim funding program has been extended: an appropriation of $150,000. has been provided for fiscal year 1979.[374]

9. The National Oceanic and Atmospheric Administration (Department of Commerce) introduced a funding program on April 26, 1978.[375]

10. The State Department has authorized funding, based on a budget of up to $250,000.[376]

Regulations regarding cost award and funding procedures are also expected to be passed by the Department of Transportation and the Internal Revenue Service.[377] Of all the departments and agencies which have formally considered implementation of such programs in the United States, only the Economic Regulatory Administration, the Food and Drug Administration, the Interstate Commerce Commission, the Department of Urban and Housing Development and the Nuclear Regulatory Commission have decided to withhold cost awards or have referred the matter to future reconsideration.[378]

The Federal Trade Commission has developed what may be the most extensive and successful public participation program of all those operative at American independent agencies. The Magnuson-Moss Warranty FTC Improvements Act of 1975 not only allows for cost awards in rulemaking proceedings, but gives the Commission the power to allocate up to one million dollars per fiscal year for intervenor compensation.[379] The FTC eligibility test is similar to that of other agencies, but the FTC has actively encouraged public participation and intervenor applications for cost awards. Eve Galanter of the Center for Public Representation in Wisconsin was provided with contract funding by the FTC to produce "A Citizen's Guide to Participation in FTC Proceedings".[380] This document not only provides a comprehensive synopsis of FTC authority (statute and regulation derived) and functions, it

explains all FTC procedures, reproduces the FTC budget for participants and gives step by step instructions for potential funding applicants. Galanter has also reproduced the maximum billable rates for participating attorneys, all charges that may be included in cost awards and a declaration that public participation is indispensable in FTC regulation. Statutes relating to freedom of information are explained in condensed form.

The FTC also provides funding for survey implementation, research, hiring of expert witnesses and reimbursement of attorneys.

> As of June 1, 1978, the FTC had allocated $1,199,746.79 for public participation compensation. Sixty groups have participated in this program in 16 different proceedings; awards have ranged from $173. to an Iowa consumer group leader to pay his fare to an FTC hearing, to $91,000. to the National Consumer Law Center for its participation in the investigation of unfair credit practices.[381]

Unfortunately, two United States court decisions may have deleterious effect on the awarding of costs to public interest participants in the administrative process. In a May 1975 decision, the Supreme Court of the United States declared that federal courts would not be able to award costs to public interest plaintiffs if Congress had not given statutory authorization.[382] This decision may not have direct impact on independent agencies, but a more recent decision of the Federal Court of Appeal, Second Circuit, upheld a Federal Power Commission refusal to award costs to an intervenor. The Greene County Planning Board had applied for compensation from the FPC after participating at a hearing. Following denial of this application, Greene County appealed to the Second Circuit, which held that the FPC lacked authority to provide compensation.[383] Nevertheless, when Linda Heller Kamm, General Counsel for the Department of Transportation, queried John M. Harmon, the Assistant Attorney General, whether or not the Greene County decision constituted a precedent concerning cost award programs at other departments and agencies, Harmon replied:

> ... we think it clear that no department or agency ... other than possibly FERC (the Federal Energy Regulatory Commission, successor to the FPC) is bound by that holding. Nor do we think that the

> Second Circuit in reaching its conclusion regarding the Federal Power Act, announced a principle of law broad enough to cover other departments and agencies.[384]

Attempts are also being made to introduce cost award and funding guidelines for all American federal agencies. On January 30th and February 6th of 1976, Senator Edward Kennedy chaired a series of hearings on Senate Resolution 2715, a proposal for the reform of the American Administrative Procedures Act which would:

> Require(s) agencies to determine the eligibility of persons for the award of reasonable costs of participation in all rulemaking, rate making, or licencing proceedings and in certain other proceedings involving issues which relate directly to health, safety, civil rights, the environment, and the economic well-being of consumers ... In order to receive an award, a participant: (a) must reasonably be expected to make a substantial contribution to a fair determination of the proceeding ... (b) the economic interest of the person is small in comparison to the cost of effective participation, or the participant does not have sufficient resources to participate effectively ... Awards will normally be decided prior to the proceeding and payment will be made after the proceeding but advance payments may be made on a showing of need.[385]

Follow-up bills have been introduced in the Senate and the House to encourage public participation. Senators Mathias and Kennedy introduced S-270, The Public Participation In Federal Agency Proceedings Act of 1977 in the Senate; Congressmen Rodino and Koch brought H.R. 3361 before the House of Representatives.[386] Senator Kennedy describes the objectives of these bills:

> First: (they) would authorize Federal agencies to encourage and support increased public involvement in government decision-making by providing compensation for the expenses of attorneys' and expert witnesses' fees, and other costs of citizen participation in agency decisions. Second: (they) would promote greater agency accountability by allowing federal courts to award fees and costs to successful plaintiffs in actions for judicial review of agency decisions, where the litigation serves to vindicate important public policy ... The (Senate)

> Bill contains a three-year authorization, with $10 million to be divided among the agencies each year.[387]

Although these proposals have not come to fruition, a major sector in the United States, including regulators, representatives and lawyers continues to encourage amendments to the administrative process. Of course, in Canada there is no Act that suggests or sets guidelines for regulatory procedures. Although it is important that individual agencies retain the authority to promulgate procedures appropriate to their particular activities, given the apparent unwillingness of many Canadian administrative bodies to include the public in decision-making, a federal Act with the object of encouraging such consideration might be fitting.

D. INTERVENOR LOANS

Even if cost awards were introduced throughout the administrative process, two problems would remain unaddressed. First, if cost awarding became a popular procedure, it is likely that the individual awards would be insufficient and second, even if the participation of a particular individual or group was important and their representation substantial, if the Commission determined not to take the submission into account, costs would still not be awarded. As a solution to these problems, the Council for Public Interest Law has recommended the establishment of a "Loan Fund For Public Interest Law".

This fund would:

> ... lend money to lawyers or clients to cover the cost of particular legal disputes where attorneys' fees and costs are recoverable by statute. Such a loan fund would support cases that fall within a broad range of legal areas ...: employment, housing, and sex discrimination; environmental pollution; consumer credit and consumer fraud; and civil suits under the Freedom of Information Act ... The loans should cover both direct, out-of-pocket expenses and the indirect costs of maintaining the case ... primarily in areas of the country where there currently is little public interest representation ...[388]

Chapter VII

CONCLUSION

It should be noted that the present government structure contains an unprecedented number of separate bodies that regulate an ever expanding range of industrial and social activities. As delegation of power is followed by sub-delegation, it becomes increasingly difficult for the ordinary citizen to effectively influence the government merely by the exercise of the vote. P. S. Elder notes:

> I reject as farcical the notion of so-called "contemporary democratic theory" that voting is in any way a meaningful form of participation in decision-making.[389]

Participation in advisory committees or task forces may be the most direct means of voicing interests or viewpoints, but few individuals have the time or financial resources to devote themselves to this type of activity. Selection of representatives for such bodies also tends to favour those who already have access to the decision-making process. One argument against public participation techniques has been that most of the methods developed favour members of the educated, articulate middle or upper classes who have a background in the area of regulation concerned and enjoy basic training in self-representation. If this is true, then the solution must be an increased concentration on popular education and the stimulation of potential intervenors in all strata of society.

Education and animation activities are a prerequisite to public participation. Without an information base and the competence that stems from the ability to

express oneself, a participant is only able to ineffectively vent frustration with little or no hope of affecting decisions. I would challenge the belief that intervenors on the whole merely exploit public forums to irresponsibly express their anger, but the answer to ineffective participation cannot be a dismissal of public involvement. Rather, effectiveness and responsibility will increase in proportion to the availability of balanced information sources. Similarly, those who reject participatory techniques on the basis that they may favour special interest groups with experience in the field should consider the fact that an unbalanced forum is corrected not by denying access to all parties, but rather by expanding the number of participants, whether by providing counselling services, procedural handbooks or where possible, simplifying procedure or creating alternative submission techniques such as correspondence records, file or non-adversarial hearings.

This study makes no attempt to advocate the interests of one group over another. This would negate the very basis of public participation, which is the development of government in the "public interest". The author has instead indicated a variety of techniques by which administrative bodies might allow greater representation of diverse interests in their policy-making, policy implementation and policy enforcement activities.

There are a great number of techniques that might be studied or effectively implemented by independent agencies; it is therefore difficult to cite one as the ultimate solution to be adopted by every administrative body. Different fields of regulation and mandates necessitate different approaches to public participation. Therefore, the author believes that it is up to the individual agencies to determine which methods are most suitable, whether in the area of popular education, animation and notification, information services, disclosure, submission alternatives, intervenor financial support, or development of public interest advocates (independent or governmental). Nevertheless, of all methods studied, the author favours the following:

- Increased use of surveys based on well prepared and conducted popular education programs.

- Improvement of disclosure procedures.

- Development of correspondence tallies and the designation of specialized staff as internal consumer ombudsmen within the agencies.

- Government and agency support of "people's commissions" and the formation of more public interest groups.

- Study and adoption (in modified form) of government public advocates similar to the Department of the Public Advocate in New Jersey.

- Availability of intervenor funding, preferably by a checkoff system, but alternatively by means of increased use of cost awarding by all agencies that may permit public participation.

- Increased intensification of pro bono publicum activities within law firms and the development of public interest law firms or centres similar to the Public Interest Advocacy Centre.

Given the current austerity programs being practised by governments, the implementation of some techniques discussed in this paper may have to await budgetary rethinking. Nevertheless, there are many options that require little or no increased expenditure. One example is the modification of tax credits for support of public interest groups proposed by the National Voluntary Organizations. Another is the need for government and agency support of independent "people's" commissions of inquiry. Simple endorsement of the People's Food Commission by the government may have given that inquiry even greater credibility and may have encouraged more public contribution. The sharing of agency information with "people's" commissions inquiring into related areas of regulation would also be of benefit.

Even if the remaining procedures and techniques discussed necessitate government expenditure, it may be argued that regulation with public involvement, which results in the formulation of appropriate and effective decisions is less costly than constant revision of policies initially instituted without diverse interest participation which then give rise to vocal protests from those groups and individuals not consulted.

A responsible, capable public will not develop before that public first becomes able to defend their

rights and views in the present context; the responsible advocacy skills required in a deregulated environment should be developed now through increased opportunities for public participation in the current administrative process.

Although the creation of public interest advocates within the independent agencies would be a welcome innovation, the author would not endorse reliance on government advocates as sole representatives of the public interest. I believe that even if independent commission counsel were developed in every administrative body and legislation for a central government public advocate were to be passed, there would remain a need for procedures by which the individual citizen might have direct access to the decision-making process.

The case studies in this paper give some indication of the level of public participation at Canadian independent agencies. The Canadian Radio-television and Telecommunications Commission may occupy the front position among agencies expressing interest in public involvement. As such, it should be studied and emulated by other regulatory bodies. It is sad to note that while some special interest groups in Canada have always enjoyed access to government authorities, this access remains substantially restricted; it is not shared with the majority of interested groups and individuals in this country. It remains to be seen if independent agencies in Canada will choose to develop public participation and thereby ensure better regulation "in the public interest".

Appendix I

FEDERAL STATUTORY REFERENCES TO THE PUBLIC INTEREST

The following is a list of all federal Statutes which include sections referring to "the public interest". Where possible, all sections have been indicated. However, if the act contains numerous sections enunciating "the public interest" only representative sections have been included.

1. The Aeronautics Act, R.S.C. 1970, c. A-3, ss. 10 and 16.

2. The Anti-Inflation Act, S.C. 1974-75-76, c. 75, s. 33(2).

3. The Atomic Energy Control Act, R.S.C. 1970, c. A-19, ss. 8 and 9(e).

4. The Bank Act, R.S.C. 1970, c. B-1, s. 63(9).

5. The Bank of Canada Act, R.S.C. 1970, c. B-2, s. 24(4).

6. The Quebec Savings Bank Act, R.S.C. 1970, c. B-4, s. 55.

7. The Broadcasting Act, R.S.C. 1970, c. B-11, ss. 3(h), 16(2), 18(2), 19(2) to (7), 20(2), 21, 23(2) and (3), 24 and 27(2). For a more complete revue of the Broadcasting Act, see the CRTC Case Study, above.

8. The Canada Deposit Insurance Corporation Act, R.S.C. 1970, c. C-3, ss. 29(1) and 30(2).

9. The Canada Pension Plan Act, R.S.C. 1970, c. C-5, s. 108.

10. The Canada National Railways Act, R.S.C. 1970, c. C-10, s. 39.

11. The Central Mortgage and Housing Corporation Act, R.S.C. 1970, c. C-16, s. 31(6).

12. The Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 13, 19(2) and 29(3).

13. The Department of Consumer and Corporate Affairs Act, R.S.C. 1970, c. C-27, s. 6(1)(a) and (2).

14. The Consumer Packaging and Labelling Act, S.C. 1970-71-72, c. 41, s. 15(2).

15. The Canada Cooperative Associations Act, S.C. 1970-71-72, C-28.5, s. 7(1).

16. The Canada Corporations Act, R.S.C. 1970, c. C-32, s. 26.

17. The Customs Tariff Act, R.S.C. 1970, c. C-41, s. 16(1).

18. The Canada Development Corporation Act, S.C. 1970-71-72, c. 49, s. 42(3).

19. The Currency and Exchange Act, R.S.C. 1970, c. C-39, s. 5(3).

20. The Defence Production Act, R.S.C. 1970, c. D-2, s. 3.

21. The Defence Services Pension Continuation Act, R.S.C. 1970, c. D-3, s. 3.

22. The Divorce Act, R.S.C. 1970, c. D-8, ss. 9 and 13.

23. The Dry Docks Subsidies Act, R.S.C. 1970, c. D-9, s. 3(2).

24. The Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.), s. 70(6).

25. The Environmental Contaminants Act, S.C. 1974-75-76, c. 72, ss. 6(5) and 11(2).

26. The Excise Act, R.S.C. 1970, c. E-12, s. 8.

27. The Excise Tax Act, R.S.C. 1970, c. E-13, s. 18(e).

28. The Experimental Farm Stations Act, R.S.C. 1970, c. E-14, s. 4(c).

29. The Expropriation Act, R.S.C. 1970, c. 16 (1st Supp.) ss. 4 and 8.

30. The Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65, s. 8(2).

31. The Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.) s. 41.

32. The Financial Administration Act, R.S.C. 1970, c. F-10, s. 17(1).

33. The Fisheries Act, R.S.C. 1970, c. F-14, ss. 20, 24(3), 28(1), 52(a) and 53.

34. The Food and Drugs Act, R.S.C. 1970, c. F-27, s. 38(2).

35. The Foreign Investment Review Act, S.C. 1973-74, c. 46, s. 19(3).

36. The Government Railways Act, R.S.C. 1970, c. G-11, s. 91.

37. The Canada Grain Act, S.C. 1970-71-72, c. 7, ss. 6(3), 80(1)(b), (2)(a)(b), (3), (4) and 81.

38. The Grain Futures Act, R.S.C. 1970, c. G-17, ss. 6 and 8(3).

39. The Hazardous Products Act, R.S.C. 1970, c. H-3, s. 9(6).

40. The Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 2, 40 and 52.

41. The Indian Act, R.S.C. 1970, c. I-6, s. 46.

42. The Canadian and British Insurance Companies Act, R.S.C. 1970, c. I-15, preamble.

43. The Foreign Insurance Companies Act, R.S.C. 1970, c. I-16, preamble.

44. The Investment Companies Act, S.C. 1970-71-72, c. 33, ss. 3(2) and 6.

45. The Judges Act, R.S.C. 1970, c. J-1, s. 40(5).

46. The Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 37(2).

47. The Canada Labour Code, R.S.C. 1970, s. L-2, s. 72.

48. The Law Reform Commission Act, R.S.C. 1970, c. 23 (1st Supp.), s. 12(2).

49. The Fair Wages and Hours of Labour Act, R.S.C. 1970, c. L-3, s. 3.

50. The Livestock and Livestock Products Act, R.S.C. 1970, c. L-8, s. 32.

51. The Loan Companies Act, R.S.C. 1970, c. L-12, ss. 7(1) and 37(5).

52. The Narcotic Control Act, R.S.C. 1970, c. N-1, s. 14.

53. The National Energy Board Act, R.S.C. 1970, c. N-16, ss. 11, 22, 37, 44, 59, 60 and 83.

54. The National Film Act, R.S.C. 1970, c. N-7, s. 11.

55. The National Harbours Board Act, R.S.C. 1970, c. N-8, s. 13.

56. The National Transportation Act, R.S.C. 1970, s. 23(1).

57. The Navigable Waters Protection Act, R.S.C. 1970, c. N-19, s. 21.

58. The Northern Islands Waters Act, R.S.C. 1970, c. 28, (1st Supp.), ss. 12, 15, 24 and 27.

59. The Nuclear Liability Act, R.S.C. 1970, c. 29 (1st Supp.), s. 18.

60. The Official Languages Act, R.S.C. 1970, c. O-2, ss. 4 and 5.

61. The Official Secrets Act, R.S.C. 1970, c. O-3, s. 7.

62. The Patent Act, R.S.C. 1970, c. P-4, ss. 20(5) and 67.

63. The Pension Act, R.S.C. 1970, c. P-7, s. 72.

64. The Petroleum Administration Act, S.C. 1974-75-76, c. 47, ss. 9 and 12.

65. The Petroleum Corporations Monitory Act, S.C. 1977-78, c. 39, s. 6.

66. The Pilotage Act, S.C. 1970-71-72, c. 52, ss. 6, 14, 18 and 23.

67. The Post Office Act, R.S.C. 1970, c. P-14, ss. 22, 23, 24, 27, 31 and 32.

68. The Prisons and Reformatories Act, R.S.C. 1970, c. P-21, s. 68.

69. The Public Service Employment Act, R.S.C. 1970, c. P-32, s. 3(4).

70. The Radio Act, R.S.C. 1970, c. R-1, s. 8.

71. The Railway Act, R.S.C. 1970, c. R-2, s. 254(2)(3).

72. The Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, s. 10.

73. The Royal Canadian Mounted Police Pension Continuation Act, R.S.C. 1970, c. R-10, s. 7.

74. The Canada Shipping Act, R.S.C. 1970, c. S-9, ss. 482 and 635.

75. The Small Businesses Loans Act, R.S.C. 1970, c. S-10, ss. 3 and 7.

76. The Statistics Act, R.S.C. 1970, c. S-16, s. 5.

77. The Statutory Instruments Act, S.C. 1970-71-72, c. 38, ss. 12 and 27.

78. The Tax Review Board Act, S.C. 1970-71-72, c. 11, s. 10.

79. The Telegraphs Act, R.S.C. 1970, c. T-3, s. 33.

80. The Trade Marks Act, R.S.C. 1970, c. T-10, ss. 21, 49 and 51.

81. The Transport Act, R.S.C. 1970, c. T-14, ss. 5 and 33.

82. The Trust Companies Act, R.S.C. 1970, c. 47 (1st Supp.) s. 2 (see 6.1 added).

83. The Veterans' Land Act, R.S.C. 1970, c. V-4, ss. 28 and 35.

84. The Veterans Rehabilitation Act, R.S.C. 1970, c. V-5, ss. 7 and 89.

85. The Visiting Forces Act, R.S.C. 1970, c. V-6, s. 20.

86. The Marine and Aviation War Risks Act, R.S.C. 1970, c. W-3, s. 7.

87. The Dominion Water Power Act, R.S.C. 1970, c. W-6, s. 9.

88. The Western Grain Stabilization Act, S.C. 1974-75-76, c. 87, s. 27(3).

89. The Criminal Code, R.S.C. 1970, c. 34, (various sections).

Appendix II

FEDERAL STATUTORY REFERENCES TO PUBLIC HEARINGS

There are only twenty federal Acts which provide for, or refer to the holding of public hearings:

1. The Anti-Inflation Act, S.C. 1974-75-76, c. 75, ss. 12(1)(e) and 33.

2. The Broadcasting Act, R.S.C. 1970, c. B-11, s. 19.

3. The Canadian Radio-television and Telecommunications Commission Act, S.C. 1974-75-76, c. 49, s. 11.

4. The Expropriation Act, R.S.C. 1970, c. 16 (1st Supp.), ss. 8, 9 and 11.

5. The Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65, s. 8.

6. The Great Lakes Fisheries Convention Act, R.S.C. 1970, c. F-15, Schedule: Article V.

7. The Canada Grain Act, S.C. 1970-71-72, c. 7, ss. 20(d) and 80.

8. The Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 40(6).

9. The National Energy Board Act, R.S.C. 1970, c. N-6, s. 20.

10. The National Parks Act, S.C. 1974, c. 11, ss. 10(3) and 11(2).

11. The North Pacific Fisheries Convention Act, R.S.C. 1970, c. F-16, s. 9.

12. The Northwest Atlantic Fisheries Convention Act, R.S.C. 1970, c. F-18, Schedule: Article V, s. 2.

13. The Northern Inland Waters Act, R.S.C. 1970, c. 28 (1st Supp.), s. 16.

14. The Northern Pipeline Act, S.C. 1977-78, c. 20, (which amends the Northern Inland Waters Act by adding s. 15(c)).

15. The National Transportation Act, R.S.C. 1970, c. N-17, s. 27(4).

16. The Official Languages Act, R.S.C. 1970, c. O-2, s. 15.

17. The Pilotage Act, S.C. 1970-71-72, c. 52, s. 14(5).

18. The Railway Act, R.S.C. 1970, c. R-2, s. 16(3)(e).

19. The Railway Relocation and Crossing Act, S.C. 1974, c. 12, ss. 16(3)(e) and 17(3)(e).

20. The Canada Water Act, R.S.C. 1970, c. 5 (1st Supp.), s. 4(b).

ENDNOTES

1. McLachlan, Michael E. "Democratizing the Administrative Process: Toward Increased Responsiveness" (1971), 13 Arizona L. R. 835, at 838-839.

2. Chapin, Henry and Denis Deneau, Access and the Policy-making Process (Ottawa: Canadian Council on Social Development, 1978), at 1.

3. Ibid., at 2.

4. Lenny, David M. "The Case for Funding Citizen Participation in the Administrative Process" (Summer, 1976), 28 Ad. L. R. 483, at 490-494.

5. Williams, Jerre S. "Chairman's Message" (Summer, 1976), 28 Ad. L. R. v, at x.

6. Sheldon, Karin P. "Public Interest Law: A Step Toward Social Balance" (1971), 13 Arizona L. R. 818, at 819.

7. Draper, James "The Evolution of Citizen Participation in Canada" in Involvement and Environment Barry Salder ed. (Edmonton: Environment Council of Alberta, 1978), at 26-30.

8. Connor, Desmond M. "Models and Techiques" in Involvement and Environment Barry Salder ed. (Edmonton: Environment Council of Alberta, 1978), at 60-66.

9. Hearings began soon after the adoption of the I.J.C. Rules of Procedure in 1912. See "International Joint Commission Rules of Procedure", (Ottawa: IJC Document, 1965), Sections 20-23.

10. R.S.C. 1970, c. B-11.

11. S.C. 1974-75-76, c. 49.

12. House of Commons Debates, 1967-68, 2nd Session, 27th Parliament, November 1, 1967. Secretary of State J. LaMarsh, at 3753.

13. House of Commons Debates, 1975, 1st Session, 30th Parliament, March 4, 1975, at 3762.

14. Ibid., at 3772.

15. Ibid., at 3773.

16. House of Commons Debates, 1975, 1st Session, 30th Parliament, April 21, 1975, at 5043.

17. "Proposals for a Communications Policy for Canada: a position paper of the Government of Canada" (Ottawa: Information Canada, March 1973).

18. See supra, note 10, s. 3(h).

19. Ibid., s. 19(6).

20. Ibid., s. 19(4).

21. Ibid., s. 20(2).

22. Ibid., s. 24 (2)(a)(b).

23. See supra, note 11, s. 14.

24. The National Transportation Act R.S.C. 1970, c. N-17, ss 17-19, 43-82.

25. The Railway Act, R.S.C. 1970, c. R-2, ss. 335(3), (5).

26. CTC General Rules, Rule 490.

27. CTC Hearing on Costs, April 1975. Held at C.A.C.'s request. Nine regulatees, the C.A.C. and staff from the Law Reform Commission of Canada appeared.

28. Bill C-16: An Act respecting Telecommunications in Canada. 4th Session, 30th Parliament, 27 Elizabeth II, 1978.

29. Ibid., s. 3(r).

30. Ibid., s. 10(2).

31. Ibid., s. 27.

32. Ibid., s. 29 (2), (3).

33. Ibid., s. 59 (3), (4).

34. See Telecom. Decision CRTC 78-5 "CN Telecommunications, Increase in Telephone Rates in Newfoundland", at 22-25.

35. Direction to the CRTC (on Canadian Ownership) SOR/69-590, SOR/71-33, SOR/75-102.
Direction to the CRTC respecting reservation of cable channels SOR/70-113.

36. See the Telecommission publication "Instant World", Information Canada, Ottawa: 1971.

37. CRTC Annual Report, 1977-78. Appendix: CRTC Publications, at 25.

38. Hansard Written Questions, Thursday, March 31, 1977, Question No. 2,146.

39. "Grants and Contributions, 1970-71 to present" CRTC Document.

40. For a brief outline of Cost Inquiry Procedures, see CRTC Telecommunications Bulletin, Volume 2, Number 1, January 15, 1978, at 8-11.

41. Ibid.

42. Based on interviews conducted with CRTC Legal Branch staff.

43. "Report on Pay-television" CRTC (Ottawa: CRTC, March 1978), at 13, 55-56. A number of organizations appeared jointly.

44. "Report on Pay-television"; "Pay-per-program pay-television"; "Pay-television" (CROP Inc.); "Subscription pay-television" and "Universal pay-television" (Ottawa: CRTC, March 1978).

45. "Telecommunications Regulation-Procedures and Practices" (Ottawa: CRTC Statement, July 20, 1976).

46. For a brief outline of the hearing procedures, see CRTC Telecommunications Bulletin, Volume 2, Number 1, January 15, 1978, at 11-12.

47. "Submission by Bell Canada", October 1976 at 50.

48. "Canadian Telecommunications Carriers Association: Submission in Response to C.R.T.C. Statement re Telecommunications Regulation", at 4.

49. See supra, note 46.

50. Salter, Liora Public Intervention Project: Intervention in Broadcast Regulatory Proceedings (Burnaby, B.C.: unpublished, August 31, 1977) at 45.

51. Proposed CRTC Procedures and Practices Relating to Broadcasting Matters (Ottawa: CRTC Public Announcement, July 25, 1978), at 18-19.

52. CRTC Telecommunications Rules of Procedure SOR/79-554, ss. 37(3) and 39(1)(b), at 2778-9.

53. Ibid., Form 6, at 2793-2796.

54. See supra, note 51, at 9-10.

55. Ibid., at 14-15.

56. CRTC Tariff Regulations SOR/79-555, s. 13(f), at 2807.

57. "Fergus-Elora and Salem, Ontario" Public Hearing #2, Volume 2, Item # 15, Ottawa: June 22, 1977.

58. See supra, note 51, at 16.

59. Janisch, Hudson N. Impressions of the Canadian Radio-television and Telecommunications Commission Hearings on Telecommunications Regulation -- Procedures and Practices (Halifax: unpublished, October 1976), at 22.

60. See supra, note 51, at 17. (emphasis mine).

61. See supra, note 51.

62. Based on interviews conducted with members of OSC staff. For statute directions on OSC procedures, see The Securities Act, R.S.O. 1970, c. 426, s. 5.

63. CRTC Procedures and Practices in Telecommunications Regulation (Ottawa: Telecom Decision CRTC 78-4, May 23, 1978), at 24.

64. See supra note 51, at 25.

65. "Canadian Railway Labour Association: Submission to C.R.T.C. on Telecommunications Regulation -- Procedures and Practices", September 27, 1976, at 21.

66. "Consumers' Association of Canada: Submission to the C.R.T.C. on Telecommunications Regulation -- Procedures and Practices", October 13, 1976, at 33.

67. "Submission by Bell Canada", October 1976, at 44.

68. "Public Interest Advocacy Centre: Brief on the C.R.T.C. Telecommunications Procedures and Practices", October 13, 1976, at 12.

69. See supra, note 63, at 35.

70. "Bell Canada, Increase in Rates" Telecom Decision CRTC 78-7, Ottawa: August 10, 1978, at 6, 9.

71. Ibid., at 91-93.

72. See supra, note 51, at 24.

73. Ibid., at 21-22.

74. Salter, at 11.

75. Based on interviews conducted with members of the OTSC (Commission and staff).

76. See Challenge Communications v. Bell Canada (Ottawa: Telecom Decision CRTC 77-16, December 23, 1977).

77. See supra, note 34, at 22-23.

78. See supra, note 63, at 38.

79. Ibid.

80. For a thorough discussion of the FCC practice, see the FCC Primer on Ascertainment of Community Problems by Broadcast Applicants and the series of

hearings on broadcast licence renewals which began on October 16, 1973: Renewal of Broadcast Licenses, Federal Communications Commission Hearings, (Number 199) 38 Federal Register 28762; (Number 247) 38 Federal Register 35398 and (Number 93) 41 Federal Register 19536.

81. (1970), 1 C.C.C. (2d) 251; 12 Crim. L.Q. 462; 75 W.W.R. 585 (Man. C.A.).

82. Ibid., at p. 266, C.C.C.; p. 477, Crim. L. Q.; p. 599, W.W.R.

83. For a discussion of this incident, see (for example): "Deliberating on Oil Decontrol", TIME, March 26, 1979 (Vol. 113, No. 13), at 36.

84. "Nuclear Leak Spawns Cloud of Radiation", The Gazette, Thursday, March 29, 1979 at 1. See also: "Radiation Leaked at U.S. Nuclear Plant", The Globe & Mail, Thursday, March 29, 1979 at 1.

85. Pickering Generating Station Quarterly Technical Report 2nd Quarter, 1974.

86. For a more thorough discussion of these events, see Pickering Generating Station Quarterly Technical Report 1st Quarter, 1976.

87. For a more thorough discussion of this event, see Ontario Hydro Significant Events Reports 78-4.

88. For a more thorough discussion of this event, see Ontario Hydro Significant Events Reports 78-22.

89. Doern, Bruce G., The Atomic Energy Control Board: An Evaluation of Regulatory and Administrative Processes and Procedures (Ottawa: Law Reform Commission of Canada, 1977), at 5.

90. The Atomic Energy Control Act, R.S.C. 1970, c. A-19, preamble.

91. House of Commons Debates, 2nd Session, 20th Parliament, Hansard, Vol. III, June 11th, 1946, at 2371.

92. Ibid., at 2372.

93. House of Commons Debates, 2nd Session, 20th Parliament, Hansard, Vol. III, June 14th, 1946, at 2485.

94. Ibid., at 2503.

95. Ibid., at 2504.

96. Ibid.

97. House of Commons Debates, Hansard Written Questions, March 24th, 1975, Question No. 1,716.

98. Ibid.

99. Villanueva, A. B. "Nuclear Power, Private Attorneys General, and the Regulatory Process" (Fall 1975) 18 Canadian Public Administration 399, at 400.

100. Ibid.

101. Information Energy, Mines and Resources, News Release: "Nuclear Control Act Tabled" No. 7/59.

102. Prince, A. T., Bill C-14 The Democratization of Nuclear Energy and the Regulatory Process (Ottawa: Atomic Energy Control Board, May 9, 1978), at 12.

103. Energy Probe and the Canadian Environmental Law Association, An Analysis of Bill C-14: The Nuclear Control and Administration Act (Toronto: Energy Probe and C.E.L.A., November 1978).

104. Bill C-14: Nuclear Control and Administration Act, s. 20(a)(i).

105. See supra, note 102, at 13.

106. See supra, note 103, at 22.

107. Ibid., at 13.

108. Ibid., at 19.

109. Ibid.

110. See supra, note 102, at 12.

111. See supra, note 103, at 13.

112. Report of the Environmental Assessment Panel on the Eldorado Uranium Refinery Port Granby, Ontario, Ministry of Supply and Services Canada, May 1978, at 42-43.

113. Doern, at 9.

114. In fiscal year 1977-78, the Board met five times (AECB Annual Report, Dept. of Supply and Services, Ottawa: 1978 at p. 2). In fiscal year 1976-77, the Board met six times, five times at the head office in Ottawa, and once at Port Hope, Ontario (AECB Annual Report, Dept. of Supply and Services, Ottawa: 1977, at p. 3). " ... members meet about six times each for day-long meeting. A quorum of three is required ... All Board Meetings are held in camera, as are the meetings of its advisory committees." (Doern, at 18).

115. AECB Annual Report 1977-78, at 2, 17.

116. See supra, note 89.

117. Estrin, David and John Swaigen, Environment on Trial, a Handbook of Ontario Environmental Law (Revised Edition) (Toronto: Canadian Environmental Law Research Foundation, 1978), at 294.

118. Ibid.

119. Doern, at 23.

120. Dr. C. J. Mackenzie (President of the AECB: 1948-1961) was also president of AECL in 1952-53.

Dr. George C. Laurence (President of the AECB: 1961-1969) was Director of Research and Development at AECL prior to the AECB appointment.

Dr. D. G. Hurst (President of the AECB: 1969-1974) was Director of Reactor Research and Development at AECL prior to his appointment.

The President of Eldorado Nuclear was a member of AECB until March 1974.

(Doern, at 23, 35).

121. Hansard Written Questions, October 17th, 1975, Question No. 2,763.

122. Based on interviews conducted with AECB staff.

123. Ibid.

124. Ibid.

125. See: AECB Releases Report on New Proposals For the Licensing of CANDU Nuclear Power Plants (Ottawa: A.E.C.B. News Release 78-12, November 28, 1978).

126. Royal Commission on Electric Power and Planning Debate Stage Hearings Transcripts (Toronto: February 23, 1978, Vol. 199), at 31, 230-31, 232.

127. See supra, note 122.

128. See: Proposed Safety Requirements for Licensing of CANDU Nuclear Power Plants: The Report of the Inter-Organizational Working Group (Ottawa: AECB-1149, November 1972), at 4, 7, 18-19, 21-24.

129. See supra, note 52, s. 37(2)(c). at p. 2778.
"... Except where special circumstances apply, the proposed directions on procedure filed under paragraph (1)(a) shall provide for the following time periods from the date of filing of the application ... (1) at least 180 days for the proposed effective date of the rate changes."

130. House of Commons Debates, 4th Session, 30th Parliament, Vol. 122, Number 80 at 3687.

131. Ibid.

132. AECB Annual Report, 1976-77, at 24-25.

133. AECB Annual Report, 1977-78, at 26-27.

134. See supra, note 122.

135. Ibid.

136. Ibid.

137. Ibid.

138. See supra, notes 132 and 133.

139. R.S.C. 1970, c. 29 (1st Supp.).

140. AECB Annual Report, 1977-78, at 3-17.

141. S.E.A.P. (Save the Environment from Atomic Pollution) v. Atomic Energy Control Board and Eldorado Nuclear Limited, (April, 1977), Vol. 6, No. 2 Canadian Environmental Law News 36 (F. Ct. of Appeal), at 37 (per Kerr, D.J.)

142. See supra, note 103, at 24.

143. See supra, note 122.

144. Ibid.

145. Atomic Energy Control Regulations, SOR/74-334, June 4, 1974, s. 26, at 1797.

146. See supra, note 117, at 296.

147. Rules for Regulating the Proceedings and the Performance of the Functions of the Atomic Energy Control Board (Ottawa: BMD 75-182, 1-3-1-6, (Approved December 4th, 1975)).

148. See supra, note 145, s. 12, at 1789-90.

149. Ibid.

150. See supra, note 102, at 15.

151. Salter, Liora Public Intervention Project: Intervention in Broadcast Regulatory Proceedings (unpublished, August 31, 1977), at 45.

152. Transcripts, Conference on Administrative Justice (unpublished).

153. Ibid.

154. Ibid.

155. "A Brief Description of The Public Interest Advocacy Centre" (unpublished PIAC document), at 1-3.

156. All the activities of the PIAC listed here are taken from the PIAC document: Services Provided (unpublished, June 9, 1978).

157. Roman, Andrew Guidebook on How to Prepare Cases for Administrative Tribunals (Ottawa: C.A.C. publication, February 1977).

158. Walker, Timothy; Blumenthal, Murray and Reese, John "An Empirical Examination of Citizen Representation in Contested Matters before State Administrative Agencies: The Colorado Experience" (Summer 1977), 29 Ad. L. Rev. 321.

159. Cahn, Edgar S. and Jean Camper "Power to the People or the Profession? -- The Public Interest in Public Interest Law" (1969-70), 79 Yale L.J. 1005, at 1007.

160. Reich, Charles "The New Public Interest Lawyers" (1969-70) 79 Yale L.J. No. 1069, at 1105-6.

161. Cahn, Edgar S. and Jean Camper, at 1036-7.

162. Reich, at 1107.

163. See supra, note 161.

164. Leone, at 50, for example.

165. For the CRTC's discussion of this issue, see: Bell Canada Increase in Rates, Telecom. Decision CRTC 78-7, at 105.

166. Leone, at 51.

167. Based on an interview with the Royal Commission on Electric Power Planning staff.

168. Ibid.

169. R.S.O. 1970, c. 379, s. 3(5).

170. 1934-35 Royal Commission on Price Spreads, 1958-59 Royal Commission on Price Spreads, 1968 Royal Commission on Consumer Problems and Inflation, 1973 Government Committee on Trends in Food Prices (two-thirds of briefs submitted to the Committee came from the food industry and representatives of food companies), 1969 Task Force on Agriculture (no member of the Task Force had experience in farming).

The Need for a People's Food Commission (PFC Background Brief), at 1.

171. Media Kit For Local Working Groups (PFC Document, May 1978), at 16.

172. Ibid.

173. The Need For A People's Food Commission, at 2.

174. The People's Food Commission (PFC Brief), at 1.

175. See supra, note 171.

176. See supra, note 174, at 2.

177. People's Food Commission: Progress Report (PFC Document, June 1978), at 1-2.

178. Ibid.

179. See supra, note 171, at 17.

180. PFC Newsletter, Issue 11, October 1978, at 1.

181. See supra, note 171, at 17.

182. See supra, note 177, at 3.

183. See supra, note 174, at 5.

184. See, for example, PFC Newsletter, Issue 10, September 1978. On page 2 the newsletter reported that Peace River, British Columbia citizens were expressing concern about the effects a proposed hydro dam would have on food production in their area. PFC Newsletter Issue 13, January 1979 informed citizens of Ontario Municipal Board hearings on urban development within the regional municipality of Niagara, and indicated that although consideration of urban development proposals in other regions were expected, hearings had not yet been scheduled.

185. See supra, note 177, at 5-6.

186. Based on an interview with PFC staff.

187. See supra, note 177, at 7.

188. "Charities Stand Eased" (May 8, 1978), Volume 13, Number 71, Commerce Clearing House Ottawa Letter 383, at 384.

189. See supra, note 186.

190. As of January 1st, 1979. Ontario Telephone Service Commission Annual Report, 1978, at 1.

191. The Telephone Act, R.S.O. 1970, c. 457.

192. Ontario Telephone Service Commission Annual Report, 1977, at 1.

193. Ibid., at 2.

194. Apart from the Annual Reports, and limited coverage in the Canadian Communications Reports and Ontario newspapers, no government or academic critiques have dealt with, or evaluated OTSC surveys. Interviews were conducted within the OTSC in preparation of this chapter. Interviews were conducted "off the record" in the interest of candour. Footnoted statements without reference to statutes, annual reports or other information sources were drawn from these interviews.

195. See supra, note 194.

196. Hurontario Telephones Limited and People's Telephone Company of Forest, Limited Boundary Dispute. Order Number 3578, December 12, 1977.

Hurontario Telephones Limited: P.O. Box 1011, Woodstock, Ontario. 2 exchanges. 1,504 telephones.

(OTSC Annual Report, 1977, Appendix I, at 3).

197. See supra, note 194.

198. Brooke Municipal Telephone System: P.O. Box 40, Inwood, Ontario. 3 exchanges. 1,588 telephones.

(OTSC Annual Report, 1977, Appendix I, at 1).

199. The People's Telephone Company of Forest, Limited: P.O. Box 700, Forest, Ontario. 3 exchanges. 4,104 telephones.

(OTSC Annual Report, 1977, Appendix I, at 4).

200. See supra, note 194.

201. The Telephone Act, R.S.O. 1970, c. 457, ss. 9(2), 106(2).

202. See supra, note 194.

203. Ibid.

204. "A Proposal for Changes in Service and Rates for Val Gagne/Monteith/Matheson", prepared by Northern Telephone Limited, Dec. 15, 1978.

205. Ontario Telephone Service Commission figures.

206. See supra, note 194.

207. Ibid.

208. Bell Canada, Increase in Rates (Ottawa: Telecom Decision CRTC 78-7, August 10th, 1978).

209. The Telecommission, established by the Honourable Eric Kierans, Minister of Communications (as he then was) on September 18th, 1969, gathered information based on consultations with a broad range of interests on the state of telecommunications in Canada. Forty separate studies were conducted, and six conference/seminars were held, at which the public was invited in determining the impact of telecommunications. The reader is referred to the Telecommission publication: Instant World, published by Information Canada in 1971, and currently available through the Canadian Government Publishing Centre, Department of Supply and Services, in Hull, Québec, at a cost of $3.75 (plus 30¢ shipping charge).

210. See supra, note 194.

211. Based on an interview with the information officer of the Executive Department for the State of Oregon.

212. Based on an interview with an information officer at the New Zealand High Commission.

213. Referendum on U.K. Membership of the European Community (English Government White Paper, February 26th, 1975), at 16.

214. Ten Years with Right Hand Traffic (Stockholm: Swedish National Traffic Safety Board 1977), at 1-16.

215. Based on an interview with an information officer at the Norwegian Embassy.

216. Gellhorn, Walter "When Americans Complain" (Cambridge: Harvard University Press, 1966), at 9.

217. Colon, Frank T. "The Ombudsman, or The Myth of the White Knight" (Oct. 1973), 64 Social Studies 202, at 203.

218. Bexelius, Alfred "The Swedish Institution of the Justitieombudsman" (1961) 27 Intl. Review of Administrative Sciences 243, as quoted in: Sheppard, Claude-Armand "An Ombudsman for Canada", (1964), 10 McGill L.J. 291, at 294.

219. Thorson, Kim "What About an Ombudsman" (1963), Sask. B. Rev. 169, at 171-2.

220. Sheppard, op cit., at pp. 300, 302 and 306.

221. Burbridge, C. T. "Problems of Transferring the Ombudsman Plan" (1974), 40 Intl. Review of Administrative Sciences 108.

222. Powles, Sir Guy "A Citizen's Rights Against the Modern State, and Its Responsibilities to Him" (March 1974), 26 New Zealand Journal of Public Administration, 1, at 17.

223. Alberta: The Ombudsman Act, Stats. A. 1967, c. 59.
British Columbia: Ombudsman Act, S.B.C. 1977, c. 58.
Manitoba: The Ombudsman Act, R.S.M. 1970, c. 045.
New Brunswick: Ombudsman Act, Stats. N.B. 1967, c. 18.
Newfoundland: The Parliamentary Commissioner (Ombudsman) Act, R.S.N. 1970, c. 285.
Nova Scotia: The Ombudsman Act, S.N.S. 1970-71, c. 3.
Ontario: The Ombudsman Act, 1975, S.O. 1975, c. 42.
Québec: Loi du Protecteur du citoyen, S.Q. 1967-68, c. 11.
Saskatchewan: The Ombudsman Act, 1972, S.S. 1971-72, c. 87.

224. Maloney, Arthur E. "The Function of the Ombudsman's Office" (1976) 10 Gazette 110.

225. Montan, Nils v. "The Agency for Consumer Advocacy" (1977), 26 Am. U. L. R. 1062, at 1063.

226. Ibid., at 1064.

227. Finkelstein, Nathan I. and Johnson, C., "Public Counsel Revisited: The Evolution of the Concept for Promoting Public Participation in Regulatory Decision-Making" (Spring 1977), 29 Ad. L. R. 167, at 191.

228. Ibid., at 168.

229. Federal Regulation and Regulatory Reform, Subcommittee on Oversight and Investigations of the Committee of Interstate and Foreign Commerce, House of Representatives, 94th Congress, Second Session (Washington D.C.: Subcommittee Print, U.S. Government Printing Office, 1976), at 4.

230. The New York Times, March 26, 1974, New Jersey Pages, 3.

231. Ibid.

232. Ibid., April 16, 1974, New Jersey Pages, 3.

233. Ibid., May 14, 1974, New Jersey Pages, 4.

234. See supra, note 230.

235. Ibid.

236. See supra, note 233.

237. The Department of the Public Advocate Act of 1974, N.J. Stat. Ann. 52:27E (Cum. Supp. 1975), s. 4.

238. Ibid., s. 3.

239. Ibid., s. 12.

240. Ibid., s. 18.

241. Ibid., ss. 24, 25.

242. Ibid., s. 29.

243. Ibid., s. 36.

244. Ibid., s. 41.

245. 151 N.J. Super. 455; 376 A2d 1334 (1977).

246. The Department of the Public Advocate Act of 1974, s. 19.

247. Ibid., s. 19(b).

248. Ibid., s. 31.

249. Ibid., s. 43.

250. Interviews were conducted "off the record" in the interest of candour at the DPA (Divisions of Rate Counsel, Public Interest Advocacy and Citizen Complaint and Dispute Settlement) as well as Common Cause, New Jersey, and the New Jersey Public Interest Research Group. Footnoted statements without reference to articles, statutes or journals are based on information garnered from these interviews.

251. See supra, note 250.

252. Ibid.

253. Ibid.

254. Ibid.

255. Ibid.

256. Ibid.

257. Ibid.

258. Ibid.

259. Annual Report of the Division of Rate Counsel for the year of 1978 (internal memorandum), January 11, 1979, at 1.

260. Ibid., at 2.

261. Ibid., at 2-3.

262. Ibid., at 5.

263. Ibid., at 8.

264. Goldstein, Tom "Public Advocate, The People's Defender" New York Times, November 14, 1976, Section 11, at 4.

265. Ibid., Section 11, at 1.

266. Information on PIA activities was gathered from the Division's Annual Report (November 30, 1978) and interviews (see supra, note 38).

267. The Department of the Public Advocate Act of 1974, s. 29.

268. See supra, note 250.

269. Ibid.

270. Ibid.

271. Ibid.

272. Ibid.

273. Goldstein, Section 11, at 4.

274. Ibid.

275. The New York Times, May 18, 1975, at 65.

276. The New York Times, April 8, 1976, at 79.

277. Goldstein, Section 11, at 1.

278. See supra, note 250.

279. Ibid.

280. Ibid.

281. Ibid.

282. Ibid.

283. Ibid.

284. Ibid.

285. Ibid.

286. Ibid.

287. Ibid.

288. Ibid.

289. Ibid.

290. Gellhorn, Ernest "Public Participation in Administrative Proceedings" (January 1972), 81 Yale L. J. 359, at 398.

291. Finkelstein and Johnson, at p. 192.

292. See supra, note 250.

293. Leighton, Richard J. "The Consumer Advocacy Agency Proposal ... Again" (1975), 27 Ad. L. Rev. 149.

294. Ibid., at 150.

295. Montan, at 1099.

296. Ibid., at 1067.

297. Although a General Accounting Office evaluation of FCC procedures is expected in late 1979, and a number of articles have addressed the subject of public advocacy within administrative agencies, no government or academic critiques have dealt with, or evaluated FCC Trial Staff specifically. Available articles have been utilized, and an extensive number of interviews were conducted both within and outside of the FCC in preparation of this chapter. Interviews were conducted "off the record" in the interest of candour. Footnoted statements without reference to articles were drawn from these interviews, and were verified by a number of FCC personnel.

298. See supra, note 297.

299. Ibid.

300. Ibid.

301. Ibid.

302. Communications Satellite Corp. 36 Federal Register No. 37 at pp. 3436 - 3438 (Wed. Feb. 24, 1971) and Communications Satellite Corp. 36 Federal Register No. 83 at pp. 8089 - 8090 (Thurs. Apr. 29, 1971).

303. Robinson, Glen O. "The Federal Communications Commission: An Essay on Regulatory Watchdogs" (1978) 64 Virginia Law Review 169, at 234-236.

304. Schraub, J. Jonathan "The Office of Public Counsel: Institutionalizing Public Interest Representation in State Government" (1976), 64 Georgetown Law Journal 895, at 899.

305. See supra, note 297.

306. Ibid.

307. 27 FCC Rpts. 2nd, 309 (Jan. 21, 1971).

308. See supra, note 297.

309. Murphy, Terrence Roche, and Hoffman, Joel E. "Current Models for Improving Public Representation in the Administrative Process" 28 Administrative Law Review 391, (Summer 1976), at 401.

310. 38 Federal Register No. 247 at 35398 - 35416.

311. McDonough, Patrick J. "Public Interest, Convenience, and Necessity: the Myth of the F.C.C." 2 New Dimensions in Legislation 188, (Summer 1972) at 213.

312. Johnson, Nicholas "The Public Be Damned" 161 New Republic 14 (September 27, 1969).

313. See supra, note 297.

314. Ibid.

315. To give three brief examples:
"It is evident that it is not what the public wants that is transmitted through the airways, rather it is what the public authority wants. The latter can be traced back to the industry -- it is they who garner the information ... There is a need for the F.C.C. to respond to the needs of the people -- not through information garnered by the industry, but directly, from the people to the Commission."
McDonough, at 222, 225.

"On questions of rate regulation ... regulatory decisions frequently are made on the basis of

industry figures and forecasts ... in the area of product testing, regulators must depend heavily on the results of industry tests. In fact ... many agencies must depend on the goodwill and good intentions of industry ... in order to accomplish the missions assigned to them by legislative bodies."

Leone, Richard C. "Public Interest Advocacy and the Regulatory Process", (1972) 400 American Academy of Political and Social Science Annals 46, at 49-50.

"The problem of misleading information is compounded by the agency's uncritical reliance on regulated industries (and other persons with a special interest in particular decisions) for information and analysis."
Robinson, at 219.

316. See supra, note 297.

317. Media Access Project and Citizens' Communications Center have been active in broadcasting regulation but remain, to date, financially unable to extend participation to telecommunications matters. To give a brief example of the extent to which public interest groups participate in broadcast rulemaking hearings, the following parties filed pleadings for the "Renewal of Broadcast Licenses" hearings which began on October 16, 1973 (Docket 19153, 38 Federal Register No. 199, at 28762-28793):

Action for Children's Television
American Civil Liberties Union
American Women in Radio and Television, Incorporated
Student Task Force Against Telecommunication Information Concealment
Office of Communication of the United Church of Christ (United Church)

318. See supra, note 297.

319. Leone, at 51.

320. Alabama Citizens for Responsive Public Television Inc. and Alabama Educational Television Commission (Dockets 20675 and 20676) 42 Federal Register No. 24 at 6888-6895 (Fri., Feb. 4, 1977).

321. (1910), 309 U.S. 440; 33 P.U.R. NS 135.

322. (1942), 316 U.S. 4; 44 P.U.R. NS 449.

323. (CA2d 1965), 62 P.U.R. 3d 134; 354 F2d 608, cert. denied (1966), 381 U.S. 911.

324. 359 F2d 944 (CA DC 1966).

325. Butzel, Albert K. "Intervention and Class Actions Before the Agencies and the Courts", (September 28, 1972) 90 Public Utilities Fortnightly 80 at 81.

326. Office of Communication of United Church of Christ v. Federal Communications Commission, Note 28, supra, at 1003, 1001.

327. Ibid., at 1005.

328. Rowse, Arthur E. and Linda S. Yakovich HELP: The Useful Almanac (Washington D.C.: Consumer News Incorporated, June 1976).

To briefly illustrate the number of public interest groups operative in the United States: The Public Interest Research Group (PIRG) network, only one of the numerous American public interest groups, operates thirty two state offices; each state office in turn oversees a number of local PIRGs located at University campuses.

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

Ms. Dobbins surveyed Canadian consumer groups, requesting information on group objectives, services, target populations, promotional techniques, activities and interest areas. Of the 198 groups that responded, 40 did not complete the questionnaire; 59 provided consumer guidance services only, and 3 national and 32 provincial groups offered "mediation services". By including any group which lobbyed for, intervened on behalf of, or advocated consumer interests by any means, the total of so called advocacy oriented consumer groups listed by Dobbins was: 20 at the national level; 44 at the provincial or local level. The survey definition of "advocacy", "lobbying", or "intervention" was

vague at best; most of these 64 groups probably do not offer interest representation services to any great extent.

330. CAC -- A History of Accomplishments (Ottawa: CAC Document, April 1978), at 1.

331. Ibid.

332. Based on interviews conducted with RIP staff.

333. Ibid.

334. Budgetary information is based upon interviews and the 1977-1978 RIP Annual Report at 1-3.

335. RIP Annual Report 1977-78, at 25.

336. Ibid., at 26.

337. All other information on CAC activities during the 1977/78 fiscal year is drawn from 1977-1978 Annual Report.

338. In re Canadian Radio-television and Telecommunications Commission and in re London Cable T.V. Limited, [1976] 2 C.F. 621, at 624.

339. For a review of CRTC Broadcast Procedure recommendations see: Proposed CRTC Procedures and Practices Relating to Broadcasting Matters (Ottawa: CRTC Public Announcement, July 25, 1978).

340. "Consumers' Association of Canada Submission to the CRTC on Proposed CRTC Procedures and Practices Relating to Broadcast Matters", October 20, 1978 at 37.

341. Ibid., at 3.

342. "Consumers' Association of Canada: Submission to the CRTC on Telecommunications Regulation -- Procedures and Practices", October 13, 1976, at 27-28.

343. See supra, note 332.

344. 1978-79 RIP Annual Report at 11-13.

345. See supra, note 332.

346. Ibid.

347. Ibid.

348. Ibid.

349. Ibid.

350. Ibid.

351. 1978-79 RIP Annual Report at 58.

352. Rubin, Ken Problems Faced by Public Interest Groups in Regulatory Interventions: A Personal Viewpoint (Ottawa: Science Council of Canada, March 7, 1977) at 5.

353. 1977-78 RIP Annual Report at 48-49.

354. Roseman, Ellen "Be less militant, Plumptre urges consumers' group" Globe & Mail, May 27, 1977.

355. See Bell Rate 1978 Hearing Transcripts (available at CRTC Examination Room, Terrasses de la Chaudière, Tour Centrale, Hull, Québec), at 5413 and following.

356. 1978-79 RIP Annual Report, at 19.

357. Naradzy, Bonnie "Creating a Consumer Movement" (Winter 1978), 8 G.W. Forum 8, at 9.

358. Balancing the Scales of Justice: Financing Public Interest Law in America, (Washington D.C.: Council for Public Interest Law, 1976), at 237.

359. National Voluntary Organizations "A Proposal to the Government of Canada: Tax Treatment of Gifts to Voluntary Organizations: Reform of the Tax Act", 2 NVO Bulletin 1, at 3.

360. Council for Public Interest Law, op. cit., at 260.

361. See CRTC Case Study, above, at 47.

362. Rubin, Ken Problems Faced by Public Interest Groups in Regulatory Interventions: A Personal Viewpoint (Ottawa: Science Council of Canada, March 7, 1977), at 16.

363. Council for Public Interest Law, op. cit., at 328-330.

364. Ibid.

365. For an explanation of the CTC decision, see the Report by Commissioner Gray, released by the CTC on August 19, 1975.

366. Rail Transport Committee decision in the matter of an application by the CAC for costs resulting from hearings of the CTC on Transcontinental Rail Passenger Service, Rail Transport Committee decision, File No. 49893-2, 257-4, December 28, 1978.

367. Dribble, Nancy "Summary of Public Participation Funding Programs at Federal Agencies", (Washington D.C.: unpublished December, 1978), at 1.

368. Ibid., at 2.

369. Ibid., at 3.

370. Ibid., at 4.

371. Ibid.

372. Ibid., at 5.

In decision: Station WSNT Inc., FCC Docket No. 19167, February 12, 1974, File No. br. 3267, the Commission claimed that they did not have the authority to grant cost awards to private party intervenors.

373. Dribble, at 5-6.

374. Ibid., at 7.

375. Ibid., at 8.

376. Ibid., at 9.

377. Ibid., at 7 and 10.

378. Ibid., at 4, 5, 7 and 9.

379. Ibid., at 6.

380. Galanter, Eve A Citizen's Guide to Participation in FTC Proceedings (Madison, Wisconsin: Center for Public Representation, September 1978). Accurate as of December, 1978.

381. See supra, note 367, at 6.

382. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

383. Greene County Planning Board v. Federal Power Commission, 559 F. 2d 1227, cert. denied, February 21, 1977 (No. 77-481).

384. Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Washington, (March 1, 1978) to Linda Heller Kamm, General Counsel, Department of Transportation, at 2.

385. Steptoe, Jay "Administrative Proceedings" in Court Awarded Fees in "Public Interest" Litigation (Volume II) (New York, N.Y.: Litigation and Administrative Practices Series, Course Handbook Series, No. 124, Practising Law Institute, September -- October 1978), at 615-616.

Bill S. 2715: A Bill to Promote Public Participation in Federal Agency Proceedings, Subcommittee on Administrative Practices and Procedures of the Senate Committee on the Judiciary, U.S. 94th Congress, 2nd Session.

386. Kennedy, Edward M. "Beyond 'Sunshine': Promoting Effective Citizen Participation in the Federal Administrative Process" (June 1977), 13 Trial 41, at 44.

387. Ibid.

388. Council for Public Interest Law, at 322-323.

389. Elder, P. S. "The Participatory Environment in Alberta", [1974] 12 Alberta L.R. 403, at 404.