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THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

A Study of Administrative Procedure in the CRTC

Prepared for the

Law Reform Commission of Canada

by

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Foreword

The CRTC has over the years been one of the most studied and publicly discussed of the administrative tribunals in Canada. This is partly because the matters it regulates, broadcasting and telecommunications, have a significant place in the lives of most Canadians. Other factors such as the policies it has adopted to implement the objectives of the *Broadcasting Act*, its extensive use of public meetings and hearings, and the media's continuous reporting of its activities have tended to keep public attention concentrated on it.

While the general public therefore reads and hears a considerable amount about particular decisions and policies of the CRTC, it knows little of the structure and procedures of this body. The following study attempts to simply describe how the CRTC functions. It focuses particularly on the procedures which the CRTC follows to process the applications which come before it and makes certain suggestions for improvements in these procedures. It is therefore hoped that the study will both help the public to better understand the CRTC's processes and assist the Commission itself in its on-going evaluation of its practices and procedures.

I wish to express appreciation to the officials in the CRTC and the Department of Communications who so willingly gave of their time for interviews and telephone consultations. A debt of gratitude is also owed to the members of the Law Reform Commission's Administrative Law Project for reviewing the text and providing many useful suggestions. Charles Marvin, the Project Co-Ordinator, Brian Crane, Q.C., consultant to the Project, and Dr. Gerard La Forest, Q.C., who at the time of writing was the Commissioner assigned to the Project, were particularly helpful in this regard. As well, I wish to thank others who read the draft text and provided me with detailed comments. These include Commissioner Roy Faibish of the CRTC, its General Counsel, David Osborn, Professor Hudson Janisch of the University of Toronto Faculty of Law and Robert Babe, Communications Consultant. Needless to say, though, the opinions and conclusions in the study are entirely my own.

I was also greatly assisted in my research by Mr. David Fox who spent many hours reading, summarizing and comparing transcripts of CRTC hearings as well as conducting interviews with CRTC and DOC officials. His enthusiasm and unfailing energy were of great benefit to the study.

The study was written in 1979 and certain of its observations and references may therefore not be as current as they should be. I believe, nonetheless, that most of them are still timely and hope that the study will be of value to readers notwithstanding this drawback.

Many of the statements and perceptions in the study came from my personal experience as a staff member of the CRTC from 1972 to 1977. Working in the Commission's Legal Branch, latterly as General Counsel, permitted me to observe the CRTC's processes, first hand. Despite efforts to remain as objective as possible, no doubt biases resulting from that experience have crept into the text. Hopefully, if such biases exist, they have been balanced by others arising from the experience gained since leaving the CRTC of representing the interests of clients regulated by it.

CHAPTER ONE

The Background of the CRTC's Present Regulatory Authority

The Canadian Radio-Television Commission (CRTC) came into existence on April 1, 1968 with regulatory authority over the broadcasting undertakings and networks of such undertakings which constitute the Canadian broadcasting system. The *Broadcasting Act* refers to these undertakings as broadcasting transmitting undertakings (radio and television stations) and broadcasting receiving undertakings (cable television systems). Broadcasting itself is defined to mean any radiocommunication in which the transmissions are intended for direction reception by the general public.[1]

Broadcasting jurisdiction is separate from that pertaining to private radiocommunication. The latter is licensed and regulated by the Minister of Communications.[2] The Department also plays a role in the licensing of broadcasting undertakings in that no licence may be issued by the CRTC until the Department has certified that the Department's technical requirements for such undertakings have been satisfied.[3]

Since April 1, 1976, the CRTC has also exercised authority over the federally regulated telecommunications carriers. The most important of these are Bell Canada, British Columbia Telephone Company, the telecommunications divisions of the Canadian National and Canadian Pacific Railways, and Telesat Canada. Whereas broadcasting regulation is principally concerned with licensing, the regulation of telecommunication carriers centres on the rates or tolls charged to the public for telephone, telegraph and various types of other business communications services. The sources and regulatory objectives of these two basic areas of jurisdiction are quite distinct and their backgrounds should be examined separately to determine whether their marriage under the same authority is a happy one.

A. Broadcasting

Since the first broadcasting licence was issued in 1919, six separate authorities have regulated broadcasting in Canada. These are: the Minister of Marine and Fisheries (1919-1932), Canadian Radio Broadcasting Commission (1932-1936), Canadian Broadcasting Corporation (1936-1958), Board of Broadcast Governors (1958-1968), Canadian Radio-Television Commission (1968-1976), and currently, Canadian Radio-television and Telecommunications Commission. These different bodies were established over the years to reflect changing philosophies on the appropriate structure for a regulatory body that would accomplish national, public policy goals and at the same time accommodate the private enterprise element of broadcasting. It is the combination of public and private elements in broadcasting that has made Canada's system unique. Finding the correct structure to effectively regulate this combination has not been easy. Frank W. Peers' comment on this problem in a book written more than 10 years ago is still relevant:

> Successive Canadian parliaments have decided that broadcasting should be an instrument of national purpose. For this they set up a publicly owned system, within which private and commercial broadcasting have always had a place. The clear intent was and still is to give the dominant role to the public service, yet the pressures of the private broadcasters are now, after 35 years, stronger than ever. There is still no settlement of the conflict between service and private gain as the guiding motive of broadcasting. What appear to be the same questions of public policy are fought and refought. Does Canadian broadcasting match Canadian needs? Are we prepared to pay for a system to meet them? Can Canadian broadcasters purvey increasing quantities of American mass entertainment without surrendering totally to its commercial ethos? What public controls should there be? How should they be exercised, and by whom?
>
> Inquiry succeeds inquiry; commissions report, and committees review the work of the commissions; finally governments act. Yet the debate goes on.[4]

While the creation of five different regulatory bodies to deal with broadcasting since 1932 gives the impression of an excess of legislative experimenting with regulatory mechanisms, there has been a consistent trend towards developing bodies with greater independence from the political process and from the operational side of the public element of the broadcasting system. In the beginning, broadcasting was licensed and regulated by the Minister of Marine and Fisheries who operated largely in the absence of any national policy in the field. Radio stations in Canada sprang into existence as the result of private enterprise. Regulations by and large took the form of responses to

entrepreneurial initiatives. Under these circumstances, politics quite naturally played an important role in the granting of licences and the regulation of licensees' activities. An increasingly chaotic situation prevailed throughout the 1920's as frequencies were largely unsupervised. In an address to the House of Commons in 1928, the Minister of Marine, Mr. Cardin, stated:

> We have made up our minds that a change must be made in the broadcasting situation in Canada. We have reached a point where it is impossible for a member of the government or for the government itself to exercise the discretionary power which is given by the law . . . for the reason that the moment the Minister in charge exercises his discretion, the matter becomes a political football and a political issue all over Canada. . . We should change the situation and take radio broadcasting away from the influences of all sorts which are brought to bear by all shades of political parties.[5]

Soon after this announcement, the first Royal Commission on Broadcasting was appointed on December 6, 1928. The Aird Commission, as it came to be known, interpreted its purpose as being "to determine how radio broadcasting in Canada could be most effectively carried on in the interests of Canadian listeners and in the national interests of Canada".[6] This purpose reflected a growing concern over the use of American programs, a concern that is just as evident today in the area of television programming. In fact, the issue of Canadian sovereignty over the broadcasting system has never abated. The mandate given to the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty ("Clyne Committee"), the most recent of the many bodies established over the years to study broadcasting, included a direction to produce specific recommendations on the means of more effectively safeguarding Canada's sovereignty over its telecommunications system, with particular reference to the role of broadcasting and the problem of the importation of foreign programming.[7]

The Aird Commission's report, delivered on September 11, 1929, stated certain fundamental principles which have been instrumental in shaping federal broadcasting policy since that time. The most important of these was the idea that broadcasting should be regarded as a national public service and that its ownership and operating structure should be organized to recognize this principle. The report noted the great potential of radio for fostering a sense of national spirit and sounded alarms about the impact of the increasing quantity of imported programs on Canadians' sense of their own identity and values.[8]

Following a reference to the Supreme Court of Canada and a subsequent appeal to the Judicial Committee of the Privy Council in

England,[9] which confirmed federal jurisdiction over radiocommunication, a special parliamentary committee was appointed to study the Aird Commission's report. The Committee held extensive hearings and made recommendations to Parliament which led to the enactment of *The Canadian Radio Broadcasting Act*[10] on May 26, 1932. This Act established the Canadian Radio-Broadcasting Commission, a body corporate consisting of three full-time commissioners. The Commission was given two main functions: to regulate and control broadcasting and to carry on the business of broadcasting in Canada.[11] Under the latter function, the Commission was empowered to originate and transmit programs, to lease or purchase existing stations, to construct new stations and literally to take over broadcasting in the Country.

These seemingly sweeping powers, as it turned out, were somewhat illusory. The Commission had very limited autonomy and was not provided the finances necessary to carry out its mandate. As a result, the private side of broadcasting continued to flourish and the Commission did not make a very significant impact on developing the public side.

Discontent with this situation, both inside and outside the Commission, led in 1936 to a new *Canadian Broadcasting Act*[12] which created the Canadian Broadcasting Corporation (CBC). The regulatory authority granted to the CBC was much the same as the preceding Commission. However, in its role as a provider of the national broadcasting service, the Corporation was granted more autonomy and more satisfactory financing even though funding continued to be largely accomplished through licence fees collected both from the broadcasters and from the owners of receiving sets.

While the CBC continued both to operate a national service and regulate the private service, private licensees began to argue for a different regulatory structure because of the inherent unfairness in combining in the same body, the roles of competitor and regulator. The CBC was sensitive to its position of potential conflict particularly since it relied on many privately owned affiliated stations to carry its network programming. As a result, and notwithstanding the complaints of private broadcasters, the CBC was criticised by subsequent royal commissions for being too lax in enforcing its regulations. The Canadian Association of Broadcasters urged both the Royal Commission on National Development in the Arts, Letters and Sciences (the "Massey Commission") in 1949 and the Royal Commission on Broadcasting (the "Fowler Commission") in 1957, to recommend the establishment of a new body, independent of the CBC, to regulate both public and

private broadcasting. The Massey Commission rejected this suggestion outright, but the Fowler Commission recommended a structural change in which the CBC would operate as a crown corporation and a second public agency, a Board of Broadcast Governors, would have responsibility for all phases of Canadian broadcasting, both public and private, including the direction of policy and supervision of the operation of the Corporation. This recommendation was carried into the 1958 *Broadcasting Act*.[13]

Neither the Board of Broadcast Governors nor its predecessors had the power to issue or revoke licences. These bodies did, however, hold hearings in connection with licensing matters and made recommendations to the appropriate Minister who had a discretion to follow or reject the recommendation. Licences were consequently issued or revoked by the Governor in Council.

In 1968, the *Broadcasting Act* was again revised. As varied by the *Canadian Radio-television and Telecommunications Commission Act*, (*CRTC Act*)[14] it remains the law today. Under the 1968 Act, the Canadian Radio-Television Commission was established with full regulatory powers over both the CBC and private broadcasters as well as power to issue, renew, amend, suspend and revoke licences. Its objects are stated to be the regulation and supervision of all aspects of the Canadian broadcasting system.[15] While the CBC is therefore subject to CRTC regulations and its licensing authority, the Corporation has its own board of directors and operates independently of the CRTC. In the current structure, therefore, the regulatory body is completely separate from the operational side of public broadcasting and is independent of the government in both its licensing and regulation-making functions.

B. Telecommunications

The regulation of telegraph and telephone companies coming under federal jurisdiction has a longer history than that of broadcasting but has involved fewer and simpler regulatory structures. The primary focus of telecommunications regulation has been on rates as an adjunct of railway rate regulation, uncomplicated by matters of cultural policy. This has permitted fairly uniform regulatory structures and approaches for more than 70 years.

In 1903, amendments to the *Railway Act*[16] created the Board of Railway Commissioners with power to regulate railway rates. In 1906, further amendments gave the Board jurisdiction over telephone and telegraph companies.[17] Before the creation of this Board, telephone rates had been regulated by the Governor in Council.[18] With the exception of a change of name in 1938 to "the Board of Transport Commissioners for Canada",[19] the structure of the Board remained the same until the creation of the Canadian Transport Commission (CTC) in 1967.[20] The CTC was organized into a number of modal committees[21] one of which, the Telecommunications Committee, exercised the jurisdiction of the former Board over the federally regulated carriers. These powers were transferred to the CRTC in 1976.

The regulatory powers granted to these various bodies has remained largely the same. The tests of justness, reasonableness and non-discrimination applicable to rates have remained unchanged as has the language in relation to secondary powers over such matters as the inter-connection of telephone or telegraph systems, the approval of capital stock issues, the placing of physical facilities and the reporting of financial and statistical information to the regulator. A major change in powers over rates occurred in 1970 when the *Railway Act* was amended to bring the tolls for all services provided by a telephone or telegraph company under regulatory scrutiny. Until then, the tolls for private line services and leased facilities connected to such lines were not subject to regulation. The amendments also extended the prohibition against discrimination and undue preference in tolls, to services and facilities provided by the regulated companies.[22]

C. Federal Proposals on Communications Policy

In 1973 and 1975 major policy proposals were announced by the federal government in documents entitled respectively, *Proposals For A Communications Policy for Canada* (the "Green Paper") and *Communications: Some Federal Proposals* (the "Grey Paper"). These policy papers were issued by the Minister of Communications, the Honourable Gérard Pelletier, and recommended that the CTC's jurisdiction over federally regulated carriers be integrated with that of broadcasting under a single agency. The papers made reference to the overlapping functions, both present and future, of cable and telecommunications carrier systems. This overlap, it was noted, gave rise to the possibility

of competitive services being offered by both, and pointed up the need for a unified agency. In a broader sense, it was recognized that the historic linking of telecommunications regulation with the railways and restricting it basically to the control of rates failed to take into account modern advances in technology wherein many new and interacting forms of telecommunications were being developed. It was therefore proposed that new telecommunications legislation be developed. In its first stage, it would simply combine the functions of the Telecommunications Committee of the CTC over the carriers with that of the CRTC over broadcasters. As a second stage, a new set of all-encompassing telecommunications objectives would take into account the relationships between cable and telephone systems as well as establish for the first time a set of national telecommunications policy objectives similar to those governing the regulation of broadcasting.

The first phase of the legislation was introduced into Parliament as Bill C-5 and was proclaimed on April 1, 1976. It re-constituted the CRTC as the Canadian Radio-television and Telecommunications Commission and expanded the number of full-time members from 5 to 9 (the "Executive Committee").[23] In addition to the Commission's existing powers under the *Broadcasting Act*, the Executive Committee and its Chairman were given the powers and duties vested in the CTC and its President by the *Railway Act* and the *National Transportation Act*.[24]

D. Proposed New Telecommunications Legislation

At this time, three bills have been introduced into Parliament to bring into effect the second phase of the new telecommunications legislation. Bill C-43, introduced on March 22, 1977, died on the Order Paper, as did its successors Bill C-24, introduced on January 26, 1978 and Bill C-16, introduced on November 9, 1978. These Bills do not differ significantly and for ease of reference, the latest version, Bill C-16, will be referred to in this paper.

Besides expanding the policy objectives contained in the *Broadcasting Act* to include the wider field of telecommunications, Bill C-16 granted to the CRTC broader powers of regulation with respect to telecommunications carriers. As well, the Bill reflected the position

that policy direction in such important fields as communications, transportation and energy should reside primarily in the Government rather than in the regulatory agencies. Accordingly, the Bill made provision for the Cabinet to issue directions to the CRTC respecting the implementation of the stipulated telecommunication policy objectives. This and a number of other powers granted to the Cabinet, such as the power to set aside or refer back decisions of the CRTC, to exempt any undertaking, facility or service from the provisions of the Bill, to direct the holding of hearings, and to require the Commission to invite members of provincial regulatory boards to sit at CRTC hearings, all indicated a much more active role contemplated by the Government in the regulation of broadcasting and telecommunications.

Bill C-16 also contained a mechanism for the delegation of federal powers over telecommunications to provincial regulatory bodies. Discussions between federal and provincial ministers of communications over the transfer of certain areas of regulation, particularly cable television, have proceeded on a fairly regular basis since the release of the Green Paper in 1973. At a federal-provincial conference of First Ministers held in February, 1979, a proposal was discussed whereby the two levels of government would have concurrent jurisdiction over cable distribution systems with each having paramount authority in areas of its primary interest.[25]

E. The Impact on the CRTC of Certain Jurisdictional Issues

In both telecommunications and broadcasting, the CRTC has encountered provincial jurisdictional claims which to a greater or lesser degree have impeded the Commission's ability to regulate. The following are the major areas where such issues have arisen.

1. Cable Television

Federal jurisdiction over broadcasting transmitting undertakings (radio and television stations) has been firmly established since the judgment of the Judicial Committee of the Privy Council in *In re Regulation and Control of Radio Communication in Canada* (the "Radio

Reference case''),[26] handed down in 1932. The technical characteristics of radio signals, which enable them to travel over vast distances, and the need for national and international management of the radio-frequency spectrum were reasons given for settling authority for radiocommunication on the federal government. Since that case, the provinces have not seriously debated the constitutionality of federal jurisdiction over radio and television undertakings, although Quebec has asked for a transfer of the federal powers in all areas of intra-provincial communications.

There have, however, been a number of challenges to federal authority over cable television beginning with *Re Public Utilities Commission v. Victoria Cablevision Ltd.* in 1965.[27] Cable television was, of course, unknown when the *Radio Reference* case was decided and those attacking federal jurisdiction in this area have argued that it is quite distinct from radio and television in that it is essentially a passive and local undertaking. No transmission of radiocommunication is involved. Although radio and television signals are received off the air by means of a head-end or receiving antenna, the bulk of the undertaking is an elaborate network of co-axial cables that travel over municipal rights of way and connect the receiving antenna to subscribers' homes. Since the *Victoria Cablevision* case, the courts have consistently upheld federal jurisdiction on the basis of the reasoning in the *Radio Reference* case. At the root of that reasoning was a refusal to separate the transmitting and receiving elements of radiocommunication for jurisdictional purposes. As Viscount Dunedin stated:

> The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and receiving instrument. In their Lordships' opinion, this cannot be done. Once it is conceded, as it must be, . . . that the transmitting instrument must be so to speak, under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and receiver. The receiver is indeed useless without a transmitter and can be reduced to a non entity if the transmitter closes. The system cannot be divided into two parts, one independent of the other.[28]

The issue of jurisdiction over cable television systems which receive and distribute radio signals broadcast over the air was finally laid to rest in two judgments of the Supreme Court of Canada pronounced on November 30, 1977.[29] For a period of several years before the judgments were handed down, the Province of Quebec had been exercising regulatory authority over cable systems in the Province through its Public Service Board (*La régie des services publics*). The result had been a double licensing system under which operators were

required to obtain permission from both the CRTC and *La régie* to operate their undertakings, to adhere to the sometimes conflicting regulations and policies of the two authorities, and to pay licensing fees to each body. Confrontation between the two authorities came to a head in the licensing of the towns of Rimouski and Mont Joli in 1974. The CRTC and *La régie* awarded licences to two different individuals, François Dionne and Raymond D'Auteuil. Dionne, the CRTC licensee, appealed the decisions of *La régie* on constitutional grounds and the matter was eventually resolved in favour of federal authority by the Supreme Court of Canada.

The experience of Quebec cable operators during this period clearly demonstrated the disadvantages of a double licensing system. Besides the increased costs involved in duplicate applications and licence fees, Quebec operators found themselves faced with conflicting regulatory requirements. They were put in the unenviable position of having to choose in some cases one authority's requirements over the other's, thereby risking disciplinary action from one of the authorities as a consequence.

Jurisdictional problems over cable television have also arisen in the context of conflicting policies over cable hardware ownership. The CRTC has traditionally required that cable licensees maintain some degree of control over the physical elements of their undertakings and to this end has made cable licences conditional on the licensees owning, at a minimum, the receiving antenna, the amplifiers in the cable distribution system and the drop wires linking the distribution system to subscribers' homes. In 1976, this policy collided with that of provincially owned telephone companies in Manitoba and Saskatchewan. These Companies insisted on owning and maintaining the entire distribution system and leasing to cable operators sufficient channels to satisfy their needs. When the CRTC invited applications for licences in these provinces, it drew the attention of potential applicants to its established policies on ownership. The telephone companies refused, however, to deal with applicants on any other basis than an arrangement under which they retained complete ownership of the cable distribution system. Applicants were therefore unable to complete their applications to the satisfaction of the CRTC and found themselves in the middle of a jurisdictional struggle. At the hearings both the telephone companies and representatives of the provincial governments appeared to argue the ownership position. In the case of the Saskatchewan cable hearings, an extra dimension was added to this confrontation by the inclusion of co-operatives strongly backed by the provincial government among competing applicants for each of the four

communities under consideration. The CRTC chose co-operatives as the licensees for two of these communities.[30] The unsuccessful co-operatives, backed by the Saskatchewan government, then commenced a closed circuit pay television system which operated in competition with the federally licensed, privately owned cable systems.[31]

Questions of jurisdiction have accordingly had an important and direct impact on cable applications in Quebec, Manitoba and Saskatchewan. These questions have placed an additional burden on existing licensees and applicants for new licences to find a method of operating that will satisfy the conflicting claims of federal and provincial authorities. In the case of Manitoba and Saskatchewan, operators newly licensed by the CRTC were caught in the middle of a dispute entirely beyond their control and would probably still not be operating had a compromise on ownership not been reached.[32]

2. The Licensing of Provincial Authorities

The potential of broadcasting for general educational purposes was recognized by the first Royal Commission which examined broadcasting. Largely because of this potential and uncertainties at the time as to which level of government had constitutional authority over broadcasting, the Aird Commission recommended that an authority in each province should have regulatory control over the programs broadcast in that province. The recommendation was not adopted by Parliament in the first *Broadcasting Act*. Up to the present time, federal governments have denied provinces any direct involvement in general broadcasting, either as regulators or licensees. However, on the basis of their exclusive jurisdiction over education, the provinces have continued to press federal governments for authority to operate broadcasting undertakings for educational purposes. The federal Cabinet responded to this pressure in 1970 by issuing a direction to the CRTC pursuant to section 26 of the *Broadcasting Act*. The direction required that cable licensees reserve at least one channel for educational programming purposes when so requested by a provincial authority.[33] In 1972, a further Cabinet direction permitted the Commission to issue broadcasting licences to "independent corporations", therein defined to mean corporations that the CRTC was satisfied were not directly controlled by provincial or municipal governments and were designated for educational programming, as also defined in the direction.[34] Such programming was described in part as that which, when taken as a whole, is designed to furnish educational opportunities and is

distinctly different from general broadcasting available on the CBC or privately owned broadcasting undertakings. As a result of this direction, independent corporations have been licensed to operate television and radio stations in the provinces of Ontario, Quebec and Alberta.

Establishing the "independence" of such corporations has not been easy in all cases in light of the fact that they are totally funded by their respective provincial governments. The Act establishing the Alberta Educational Communications Corporation, for example, makes all of the Corporation's dealings in programs subject to any directions that may be given by the "provincial authority", which in that case is the Minister of Education.[35] The desire of the Alberta Government to keep this kind of check on the Corporation stems from a concern that the Corporation not become so independent of the Department of Education that it begins to run its own province-wide educational system separately from that of the Department. From the CRTC's viewpoint, the existence of the direction power represents a potential for direct government interference with the independence of the Corporation and the Commission's various licensing decisions involving the Corporation have voiced this concern.[36]

A more serious regulatory problem, however, has been the tendency of these "educational" stations to enter the field of general entertainment broadcasting. The Ontario Educational Communications Authority, for example, with a network of stations spread throughout Ontario, regularly broadcasts movies and dramatic productions of wide audience appeal. Complaints by private broadcasters have been to little avail because of the extremely loose definition of educational programming contained in the cabinet direction that authorizes the licensing of these stations. The CRTC has found itself somewhat on the horns of a jurisdictional dilemma in that the provinces have exclusive jurisdiction over education and the manner in which learning experiences are provided in the provinces. It has been difficult for the Commission to challenge the educational value of a given program or series of programs. Underlying this difficulty is a broader question of the extent to which the Commission's programming regulations apply to the broadcasts of these stations.

These problems could be largely overcome, of course, if the federal government permitted such stations to enter the field of general broadcasting. In its report, the Clyne Committee supported a policy change in this respect and recommended that "the fiction about educational programming" be abandoned. The report noted that having

regard to the shortage of funds for program production in Canada, the provincial governments should be welcomed as contributors to Canadian production.[37]

3. Divided Jurisdiction over Telephone Companies

Jurisdiction over telephone companies is divided between the federal and provincial governments. The two largest telephone companies in Canada, Bell Canada and British Columbia Telephone Company, are declared in their Incorporating Acts to be "works for the general advantage of Canada"[38] and so fall within federal jurisdiction by virtue of Sections 92(29) and 92(10)(*c*) of the *B.N.A. Act*. The seven telephone companies serving the Atlantic and Prairie Provinces are regulated by provincial authorities in those provinces. These companies together with Bell Canada and British Columbia Telephone are associated in the Trans Canada Telephone System (TCTS) which provides long distance telephone, printed message and data communications services. A recent addition to TCTS is Telesat Canada whose domestic satellite communications system is integrated with the terrestrial systems of TCTS to provide alternate means of long distance service.

The rates for TCTS services are agreed upon by the members and are uniform across Canada. Revenues and costs of these services are divided among the members according to a complex formula known as the Revenue Settlement Plan. Adjacent member rates, that is for services between neighbouring members of TCTS, are excluded from this arrangement and such rates are negotiated as between the adjacent members. The practice, however, in nearly all cases has been to adopt the TCTS schedule of rates for adjacent member services.

The split in jurisdiction over the members of TCTS has produced an anomalous situation with respect to the regulation of TCTS rates. The revenues earned by long distance services help to keep the rates charged by each of the member companies of TCTS for local telephone service at reasonable levels. However, because TCTS is not regulated as an entity, there is no single body with the regulatory authority to oversee the balancing of the provincial interest in keeping basic rates low against the national interest of maintaining an efficient, reasonably priced long distance telephone system. When the members of TCTS decide on increases in long distance rates, each of the members files with its respective regulatory authority an application for the increases. Since the rates are uniform across Canada and set at levels

as between the different long distance services designed to satisfy the revenue needs of all members, the tradition has been for the regulatory bodies to simply approve the rates as filed. The revenue produced by such rates, however, in the case of each member is a significant factor bearing on its need for increases in its intra-provincial rates and this matter is of course carefully scrutinized at the time the member applies to its regulator for rate relief.

In a sense, therefore, the split in jurisdiction has produced a regulatory void in which no authority has wished to tamper with the TCTS rates as filed because of the impact that would be felt in other jurisdictions if it were to refuse to approve the rates or make substantial changes in them. The CRTC recently decided to break this impasse and called a hearing to investigate in full the applications filed by Bell Canada and BC Telephone in 1978 for increases in their TCTS rates. The terms of reference for the hearing were extremely broad and involved a detailed examination of the manner in which TCTS organizes itself and shares the costs and revenues arising out of long distance services.

There has naturally been a good deal of concern expressed by the provincially regulated telephone companies and their regulators over this action. The Commission attempted to finesse the jurisdictional issue by establishing an "inter-regulatory committee" comprised of representatives of the various regulatory agencies to offer advice concerning the terms of reference of the hearing and any concerns the provincial agencies may have had concerning the TCTS rates.

In its public announcement of August 4, 1978 announcing the hearing and the establishment of the inter-regulatory committee, the Commission stated its awareness of the need for the development of coordinating mechanisms between regulatory agencies in the communications field. It noted that the impact of TCTS rates and practices is felt directly or indirectly by every telephone company in Canada and that it considered that the applications before it by Bell Canada and BC Telephone were particularly appropriate for liaison with interested provincial agencies.

The inter-regulatory committee was an imaginative attempt to overcome the jurisdictional problem and is a practical example of the initiatives for cooperation between federal and provincial authorities urged by the Green and Grey papers. Whether it succeeded in its purposes for this hearing and will have a continuing life will depend

largely on how the members perceived their own effectiveness and the impact they had on the CRTC.

F. The Scope of this Study

Jurisdictional issues such as these have had in some instances a direct impact on the regulatory practices of the CRTC. However, it is not the intention of this paper to make recommendations on whether or not jurisdiction in certain areas should be transferred, or on structures of regulatory bodies that might conceivably satisfy the competing claims of the two levels of government. Such constitutional considerations lie well beyond the scope of this study. Similarly, although the regulation of broadcasting and telecommunications gives rise to many economic and cultural considerations, this paper will not attempt to judge the CRTC's exercise of its authority in these terms.[39] The purpose of the paper, in line with the others in the Law Reform Commission's series on the federal administrative agencies, is to examine the extent to which the practices and procedures adopted by the CRTC have assisted it to carry out its statutory mandate, and to make recommendations where appropriate.

This study has been greatly assisted by the CRTC's own work on this subject and its series of published proposals for changes in both broadcasting and telecommunications proceedings.[40] Throughout its history, the CRTC has demonstrated an admirable willingness to innovate and be flexible in its procedures with a view to developing high standards of fairness and openness, and involving the public as much as possible in the hearing process.

CHAPTER TWO

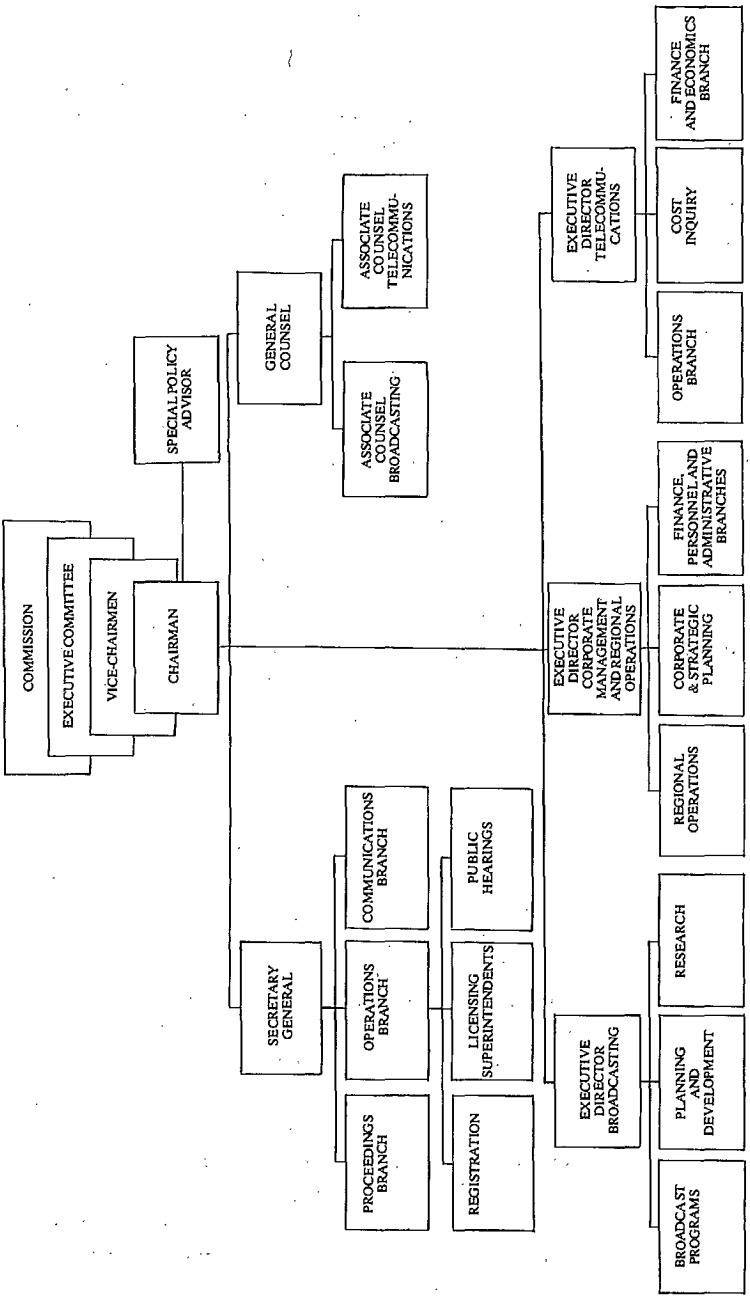
Broadcasting Regulation

The *Broadcasting Act*, as amended by the *CRTC Act*, provides for the appointment of nine full-time members of the CRTC, who are referred to in the Act as the "Executive Committee", and ten part-time members. The full-time members may be appointed for terms not exceeding seven years and hold office during good behaviour.[41] With the exception of the two specific powers referred to below, the Executive Committee has a nearly exclusive decision-making power in broadcasting matters and exclusive powers in telecommunications matters.

The part-time members are appointed for terms of up to five years and also hold office during good behaviour. They are appointed on a regional basis and participate only in broadcasting matters. Their decision-making powers are limited to the enactment of regulations and revoking of licences. While such members must be consulted on the various types of licensing applications at a meeting of the Commission, the Executive Committee makes the final decisions in such matters. The participation by part-time members in public hearings without the power to make final decisions creates certain anomalies which are discussed in Chapter Four.

The staff of the CRTC are federal public servants appointed in accordance with the *Public Service Employment Act*. They function within one of five major divisions of the CRTC: secretariat, broadcasting, telecommunications, legal and administration. The staff numbers some 400 people with approximately 25% working under the Secretary General. The secretariat is primarily responsible for moving broadcasting matters through the CRTC from the initial application to the publishing of the decision. It includes the Licensing Branch, whose regional superintendents oversee the processing of all applications originating from within their geographic areas, and the Public Hearings

Branch, which plans and co-ordinates public hearings, as well as all of the agendas, decisions and other forms of public notices issued by the CRTC.



A. The Powers of the CRTC in Broadcasting Matters

The *Broadcasting Act* vests in the CRTC very broad powers which are carried out primarily through its licensing functions. Section 15 of the Act requires the Commission to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in Section 3 of the Act. The policy objectives set forth in that section are cast in very wide terms.[42] The Commission's licensing powers under section 17 and regulation making powers under section 16 must be carried out "in furtherance" of these objectives. It has a good deal of discretion, however, in the manner in which it chooses to implement them. Section 17, for example, states that such conditions may be attached to licences "as the Executive Committee deems appropriate for the implementation of the broadcasting policy enunciated in section 3". Section 16, which sets out the specific subjects upon which the Commission may make regulations, concludes with a clause granting power to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects". The CRTC has not declined the invitation of such sections to exercise its discretion expansively. The breadth of the Act's language has tended to insulate the Commission against legal attack. In cases where the use of its discretionary powers has been challenged, the courts have supported a broad interpretation of such powers.[43]

The majority of the applications made to the CRTC in broadcasting matters are for the issue, amendment or renewal of broadcasting licences. The Commission also has the power to suspend or revoke licences[44] but has rarely used it. The maximum term for which a licence may be issued is 5 years[45] and this provides an opportunity for the CRTC to periodically review the performance of licensees. If the performance is found wanting, the Commission may fail to renew the licence. Again, this has seldom happened.[46]

The Commission also receives a substantial number of applications dealing with transfers of ownership in broadcasting undertakings. Standard conditions attached to each licence require that all share transfers in companies whose shares are not publicly traded require

prior approval by the CRTC. In companies whose shares are publicly traded, the requirement applies only to transfers of effective control of the undertaking. This distinction has been made in recognition of the realities of security trading on the public exchanges and the fact that a requirement for approval of all share transfers in such cases would be too great a regulatory intrusion into the market place.[47]

The other broad categories of functions exercised by the CRTC under its supervisory powers are policy-making and dealing with complaints. Over its history, the Commission has been very active in formulating policy principles as a guide to its licensing decisions and publishing these as white papers. The public and broadcasters are then given an opportunity to comment on the proposed policies. This has helped to create a more certain and consistent regulatory environment in an area where, as noted, there is a great deal of discretion.

Complaints flow in regularly to the CRTC from members of the public. These are usually dealt with by referring them to the licensee involved with a request to reply directly to the complainant and keep the CRTC advised. Under the *Broadcasting Act*, responsibility for programs rests with the licensees who broadcast them.[48] The CRTC takes the attitude that licensees must therefore be accountable to the public and be prepared to resolve programming complaints. A record of all such complaints is kept by the CRTC and may affect its decision on whether to renew a given license. The Commission has the power under the Act to hold a public hearing on any complaint but rarely does so.[49]

B. The Processing of Licensing Applications

During its fiscal year ending March 31, 1979, the CRTC received 2,122 licensing applications. In the same period 1,356 applications were placed on public hearing agendas.[50] Maintaining the flow of such a volume from initial analysis through to the publishing of decisions is a formidable task and one that has stretched the resources of the CRTC to their limit. Over the past two years, the Commission has been experimenting with new administrative procedures for handling its application and public hearing load designed to both streamline the processing of applications and improve the quality of briefing materials prepared for commissioners in advance of hearings.

Each application received at the CRTC is channelled to a registration and control section of the Secretariat where it is given a number and, with the assistance of a computer, a tentative public hearing date. If the application is for a new licence and in certain other instances, a technical brief must accompany the application which is sent to the Department of Communications. The *Broadcasting Act* states that no broadcasting licence shall be issued, amended or renewed unless the Minister of Communications certifies to the Commission that the applicant has satisfied the requirements of the *Radio Act* and will be issued a "technical construction and operating certificate" by the Department.[51]

Each of the regional licensing superintendents has the primary responsibility for shepherding applications originating from his region[52] through to the decision stage. This involves, among other things, overseeing the analysis of applications, obtaining comments on them from the other branches, acquiring additional information from the applicants, deciding which applications need a hearing, briefing the Commissioners, acting as secretary at the hearing itself, assisting in the preparation of decisions and generally acting as the co-ordinating and moving force behind the processing of applications. These responsibilities place an extremely heavy load on the five superintendents who are also charged with the administration of their branches, maintaining a continuing liaison with the broadcasters in their regions, and looking after a large number of requests from licensees and the public respecting specific licensing applications.

The superintendents have been able to cope with this load provided the Commission followed its traditional practice of holding one or two hearings a month on a rotating regional basis so as to give each superintendent a breathing space between hearings involving his region. However, in early 1979 the Commission experimented with a new system of hearings involving the use of smaller and more numerous panels. This resulted in as many as eight or ten hearings taking place in various parts of Canada in a two month period. While this system expedited the hearing of applications, it required the removal from the superintendents of their direct responsibilities in this area.

The major cog in the processing wheel during this period was the "hearing manager", an individual appointed for each hearing after consultation between the Secretary General, the licensing superintendents and the directors of the other branches. This person was chosen in the light of the predominate nature of the group of applications slated for a given hearing. If, for example, the tentative agenda

for a hearing was comprised mostly of renewal applications for F.M. radio stations, then a member of the Programs Branch might be selected. Usually, however, the hearing manager was a licensing analyst working in the regional division which had responsibility for the applications under consideration. After his appointment, made well in advance of the hearing, this individual would assemble a team of representatives from each branch who would work together in analysing the applications, preparing comments on them for the Commissioners, auditing the hearing and preparing post-hearing analyses.

This system has recently been abandoned because of certain operational difficulties inherent in it and a shortage of Commissioners available for broadcasting hearings. The latter problem has been caused by vacancies in the Executive Committee and a very heavy telecommunications workload. Primary responsibility for a consequently reduced broadcasting hearing schedule has therefore fallen back on the superintendents. It is to be hoped that these problems can be overcome and a system of more numerous and localized hearings can be re-introduced. Besides speeding up the consideration of applications, such a system facilitates public access to hearings.

After applications are registered, they are now circulated to the branch directors for analysis and comments. The branch responses are then sent to a licensing analyst within the appropriate region who incorporates them into a "letter of deficiencies". These letters call for additional information or clarification in order to complete the applications to the satisfaction of the Commission staff.

When all the required information is obtained, the application may be dealt with administratively or by means of a public hearing. Under the *Broadcasting Act*, a public hearing must be held for the issue of a new broadcasting licence or where the Commission or the Executive Committee has under consideration the revocation or suspension of a broadcasting licence.[53] In all other matters, the Commission has a discretion to determine whether a public hearing is required. The practice has been to place on public hearing agendas all applications for renewal of licences, for amendments which raise significant policy or public interest issues and applications for the transfer of control in broadcasting undertakings. As noted below, the placing of an application on a public hearing agenda does not necessarily mean that there will in fact be a hearing on that matter. Many applications are designated as "non-appearing" items in which the parties' presence is not required.

1. Notice of Applications

Section 20 of the *Broadcasting Act* requires that the Commission give notice in the *Canada Gazette* of any application for the issue amendment or renewal of a broadcasting licence and of any public hearing. The Act also requires the Commission to publish a notice of these matters in one or more newspapers of general circulation within the area normally served or proposed to be served by the broadcasting undertaking in question. The Commission's Rules of Procedure state that the notice in the *Canada Gazette* must be given not less than 50 days before the day fixed for the commencement of a public hearing.[54] The notice in the local newspapers is normally placed within that time as well. The Rules also require licensees to broadcast notice of their applications over their facilities during prime time periods.[55]

2. Interventions

These notices state that any interested parties may intervene to support, oppose or ask for modifications of the applications during a period up to 20 days prior to the commencement of the hearing.[56] Intervention is accomplished by serving a copy of the submission on the applicant and filing it with proof of service with the CRTC. Applicants have an opportunity to reply within 10 days of being served.[57] This, however, is a discretionary right and the applicant may respond orally to an intervention at the public hearing whether or not he has filed a written reply.[58]

3. Appearing and Non-Appearing Items

One of the measures the CRTC uses to cope with the large number of applications it receives is to divide its public hearing agendas into "appearing" and "non-appearing" applications. Whether an item is designated as an appearing item depends in part on whether interventions have been filed in response to the notification procedures that raise significant issues or whether, regardless of interventions filed, the application is deemed by the CRTC to raise such issues. As mentioned above, the Act requires that a public hearing be held where the issue, suspension or revocation of a licence is involved and these applications are usually placed on the appearing side of the agenda. On the other hand, renewal of licence applications are routinely put on

the non-appearing side where the licensees have been performing satisfactorily and there are no serious complaints or interventions concerning their performance. Examples of other types of applications which may be placed on the non-appearing side include those for a change of a transmitter site, additions of channels to cable systems that do not raise policy issues, routine increases in rates charged by cable systems to their subscribers, the creation of limited networks, for example, for the broadcasting of football or hockey games throughout a given season and the addition of small territories to the authorized service areas of cable licensees. Other examples of "appearing" applications would be those involving a change of control of an undertaking, a significant change in programming format, a renewal application where there were serious programming complaints, applications for substantial increases or changes in the rate structure of a cable system or for the addition of distant television or radio channels to a cable system that might hurt the financial viability of local stations in the cable operator's territory.

4. Briefing the Commissioners

An important aspect of the preparatory work on applications is the compiling of the briefing or "factum book" for the assistance of the Commissioners who have been designated by the Chairman to sit on a given hearing. The book contains summaries of the applications, licensing histories, comments from the various branches that may raise issues, for example, of a financing, programming, or ownership nature, suggestions for questions the Commissioners may wish to ask applicants, and references to any regulations or policy statements that may be relevant to the particular applications being considered. The commissioners tend to rely primarily on the factum book in preparing for hearings. They also receive an oral briefing from the public hearing secretary on the day before the hearing at the location where it is to take place.

5. The Hearing

In broadcasting matters, the CRTC employs an informal hearing format similar to that of a debate. Applicants appear and speak to their applications and are questioned by the Commissioners and Commission Counsel on their written and oral presentations. Interveners then

appear to make their oral presentations and questions are similarly addressed to them. Applicants are permitted a reply. In all of this, the evidence given is not sworn and there is no cross-examination beyond the questioning of the Commission. Evidence is not "led" by counsel for applicants. Parties generally read their oral submissions from a prepared text.

A departure from this format is rare and has occurred only in the context of revocation of licence hearings, or hearings in which there is a real possibility that a licence may not be renewed. In such cases, the potential loss of licence makes it important that the facts presented to the Commission be as precise as possible and there be an opportunity given to test the facts by cross-examination.

While the *Broadcasting Act* provides that public hearings may be chaired by as little as two members, of whom one must be a full-time member,[59] the practice of the Commission has been until recently to sit in larger panels. If the application was a matter of some significance there could be as many as nine or ten members sitting. With the advent of more numerous hearings, the number of sitting members now rarely exceeds three or four unless applications involve major policy issues.

The Commission tries to organize its public hearings on a regional basis so that, for example, applications being heard in Nova Scotia will by and large concern only broadcasting undertakings in that province. One of the major advantages of the experiment with more numerous, small panels, was the refinement of this practice. The Commission was able to hear matters on a more local basis and to sit in smaller communities than previously.

The part-time member who represents the province in which the hearing is being held is, of course, an important participant on the hearing panel. Occasionally, part-time members have chaired panels notwithstanding their lack of power to vote on final licensing decisions.

Periodically, time must be set aside to enable the full Commission and Executive Committee to meet and consider applications that have been heard as well as other items of business. Formerly, when the Commission sat less frequently and in larger panels, an effort was made to co-ordinate the timing of Commission meetings and hearings. If a hearing lasted from Monday to Thursday, the sitting Commissioners would be joined by the other members on Friday at the location of the hearing, for a meeting. Time permitting, consultation on the applications could therefore take place immediately following the

hearing. Because of a greatly increased hearing load, this is no longer possible and consultation must await the intervals of free time.

6. The Post-Hearing Process

Under the current practice, the only staff who normally attend hearings taking place outside Ottawa are the hearing secretary, a legal counsel and perhaps one or two specialists in the issues raised by the applications. Other staff members audit the proceedings from Ottawa by means of a telephone hook-up and make notes for use at subsequent meetings with the hearing secretary. Immediately upon his or her return to Ottawa, the secretary consults with those individuals and prepares a memorandum of comments and recommendations on each of the applications. The memorandum is circulated to the members of the panel and is used in subsequent discussions by the panel members when they determine the recommendations they will make to the full Commission. These recommendations are then discussed at a Commission meeting in fulfilment of the statutory requirement of a "consultation" between the full and part-time members on the licensing decisions as set out in Section 17 of the Act. Eventually, the Executive Committee, at a separate meeting of its own, makes the final decisions. Normally, there is a period of roughly three months between the hearing of an application and the announcement of a decision.

C. Observations and Recommendations on the Application and Hearing Process

The following comments discuss certain procedural weaknesses of which CRTC officials are well aware. Over the past year or two, the Commission has been re-organizing itself in an attempt to overcome most of these problems. This process has been hampered by recent changes and vacancies in the ranks of Commissioners and senior staff. Since 1977, for example, there have been two new Chairmen appointed and for some time one of the two positions of Vice-Chairman remained unfilled. Once a full complement of Commissioners and senior staff is in place, the improvements already begun can be fully implemented and should considerably assist in resolving a number of the difficulties described below.

1. Delay

A common complaint of applicants before the CRTC is that the time required to process an application from the date of filing to the date of decision is too long. For matters requiring a public hearing, this period may, on the average, be anywhere from six to ten months. There are a number of reasons for this.

First, the application load is extremely heavy. In each of the fiscal years, 1977-78 and 1978-79, the CRTC received in excess of 2000 applications. This represented a dramatic increase over the 1976-77 year when some 1461 applications were received.[60] To this increasing load of broadcasting applications must be added those involving telecommunications matters which have put added strain on the Commission's public hearing and decision-making capabilities. Public hearings on telecommunications matters, though fewer, tend to be much longer.

Second, the public hearings held by the CRTC are frequent and increasing in number. In the year ending March 31, 1979, there were 44 hearings in all, 28 on broadcasting applications and 16 on telecommunications matters.[61] Bearing in mind that the Commission does not normally sit in July and August, this amounts to something more than four hearings per month on the average. The process of preparing for and sitting through public hearings deprives the Commissioners of time needed to deliberate on the applications already heard and arrive at decisions.

Third, the practice of assigning applications to regional hearings for administrative purposes and to enable members of the public living in those regions to more easily participate in public hearings which concern them may also considerably delay an application. Unless there are unusual circumstances, an applicant must wait until there is an appropriate regional hearing before his application will be considered. This problem was somewhat alleviated, however, when the new system of more numerous hearing panels was in full effect.

Fourth, because of the extremely heavy load of applications, the CRTC staff needs several months lead time to vet an application, go through the deficiency letter process and ensure that the application is complete before a notice of public hearing is published. As noted above, the date for publishing a notice in the *Canada Gazette* must be, at a minimum, 50 days prior to the commencement of the hearing. Taking this fact into account along with the lead time of two to four

months which the staff requires for its preparation, the normal interval between the filing of an application and the commencement of a public hearing is 4 to 6 months.

Fifth, while the new practice of multiple hearings within set blocks of time of one or two months allowed the hearing of a larger number of applications, it also increased the number of matters awaiting consultation and final decisions at subsequent Commission meetings. Consequently, while more matters were being heard, the time required to make and publish decisions did not seem to have been noticeably shortened.

There appear to be at least four areas where action is required to overcome the problem of delay. First, means should be found to eliminate the need for the large volume of applications for amendments of cable licences. Second, the number of applications assigned to public hearings should be reduced. Third, the lead time required before a hearing is held should be shortened. Finally, the time required to make decisions and prepare them for publication should be reduced. The first three matters are discussed more fully below and the third in Chapter Four on "decision-making".

(i) *Reducing the Volume of Applications for Amendments of Cable Licences*

The processing of cable applications occupies a disproportionate amount of the CRTC's time. In the fiscal year ending March 31, 1979, nearly half of the 2,122 broadcasting applications received related to cable. Applications for amendments to cable licences amounted to 801 or approximately 38% of this total.[62]

A large number of these licence amendment applications involved minor changes such as the addition of a television or radio signal, a variation in channel alignment and the addition of adjacent streets or communities to the licensed service area. Because cable licences contain details of these matters, applications to change them are, strictly speaking, applications for "amendments" of licences and are therefore subject to the procedural requirements of the *Broadcasting Act*. These include the publishing of notices in the *Canada Gazette* and in local newspapers of the areas served by licensees (s.20), a decision by the Executive Committee as to whether a public hearing is required (s.19(3)), a consultation in any event by the full Commission and a final decision by the Executive Committee (s.17(1)(*a*)). Besides these

statutory requirements, the applications must be processed by the staff in the manner previously described in this chapter. All of this is extremely time consuming and uses up valuable hours needed for work on major applications.

The Commission has tried to cope with this problem in part by deeming applications involving minor technical changes as "adjustments" to licences rather than "amendments". By this mechanism, the statutory requirements of notice and involvement of Commissioners is avoided. On a strict interpretation of the Act, there may be some question as to the legal validity of this practice. Apart from this, however, it still requires significant amounts of valuable staff time.

It would appear that a better solution than the "licence adjustment" procedure for the large number of applications for amendments to cable licences involving minor changes, would be to eliminate from the cable licence itself the detailed information that presently appears on it. The form of the cable licence was established before the Commission developed specific policies and regulations on the signals and local origination services that may be carried on cable systems. Accordingly, it should no longer be necessary to spell out these details on the licences. Such matters are or can be adequately covered in the cable regulations. The Commission may wish to keep a record of these details for each system for administrative purposes but this can be simply covered by a requirement to give the Commission notice of proposed changes and the effective date. The notice period should be sufficient to permit the Commission to respond if the changes appear to be contrary to the regulations. The Commission has recently begun to change its practices in this area by eliminating from cable television licences details of the specific channels on which signals are to be carried.[63]

(ii) *Reducing the Number of Public Hearing Items*

According to the CRTC's latest annual report, 1,356 applications were placed on public hearing agendas during the year ending March 31, 1979.[64] This represents an increase of roughly 13% over the previous year. Of these applications, 466 or approximately 34% involved the issue of new licences and therefore were required to be heard pursuant to paragraph 19(*a*) of the *Broadcasting Act*. As to the remaining 890 applications involving licence amendments and renewals as well as transfers of assets and shares in broadcasting undertakings, the Commission had a discretion as to whether or not a public hearing

was required. These then are the areas where the Commission can concentrate its efforts to reduce the size of its public hearing agendas.

In the fiscal year 1978-79, about 40% of the discretionary hearing items involved applications for amendments to licences. By far the largest part of this percentage (32%) related to cable. Thus, the amendment category of applications, especially those concerning cable, would seem to be an important area where the number of hearing items could be reduced. The Commission has been sensitive to this problem and has begun to implement mechanisms for dealing with such applications without a public hearing. In the area of cable rate applications, it has established a committee of three Commissioners to co-ordinate applications and expedite decisions where possible. The Commission has also proposed in its working paper on broadcasting procedures, a summary process respecting certain types of cable licence amendment applications. The process is designed to produce decisions within 60 days of filing applications based on written representations only where such applications are not seriously contested. The Commission has begun to extend such procedures to other types of licence amendment applications except those where the policy implications are significant enough to warrant a public hearing. These are important measures and should help to overcome the log-jam in this area.

However, if the Commission is to decide matters on the basis of written representations only, its procedures must ensure that applicants have knowledge of and an opportunity to address all of the CRTC's concerns arising out of any given application. It is important that the ground rules governing such "file" hearings, be clearly articulated. Mechanisms such as the vetting of applications with CRTC staff before they are filed to ensure that they are complete, and putting the applicant and any interveners on notice of the Commission's concerns which applicants could not reasonably have been expected to address, may also be important to ensure the efficiency and fairness of hearings based solely on written representations.

(iii) *Shortening the Lead Time Required to Vet Applications for Hearing*

As noted, the Rules of Procedure require that 50 days notice of the hearing of an application must be given to the public. The Rules also require that the application be complete before it is set down for hearing.[65] In practice, this means that the staff's requirements for further information through the deficiency letter process must have been

satisfied. This pre-hearing process can take from four to six months on average.

This period could be considerably shortened if the notice interval ran concurrently with the period during which the analysis and deficiency letter process is being completed. The two periods now run consecutively for several reasons. The application file is not made public until a notice of hearing is published. After that time, the Rules provide that no application may be amended or varied except with the permission of the Commission. Thus, interested members of the public are able to make a decision on whether or not to intervene on the basis of a complete file. Also, where there is competition for a new licence, this procedure prevents applicants from learning the details of their competitors' applications and adopting them in their own. Finally, the procedure gives the Commission a period to determine whether to call a public hearing on a given application.

Except for competitive applications where there appears to be a need for confidentiality, it is questionable whether the delay inherent in the consecutive periods of analysis and notice is really necessary. If notices of a tentative hearing date were published immediately after the filing of an application, the period between the filing and hearing dates could probably be cut in half. The public would be considerably helped by such a procedure by being given access to the file at an earlier date and, in most cases, by having a longer period in which to prepare interventions.

The Commission presently uses a mechanism it calls a "change notice" procedure to publicly advertise applications for relatively minor amendments to licences. The notice describes the application in question and stipulates a period during which written comments may be filed. It also indicates that after the expiry of the period, the Commission may make a decision on the basis of the written material filed or may call a public hearing. The *Broadcasting Act* requires the Commission to give notice in the *Canada Gazette* and local newspapers both of any application received by it for the issue amendment or renewal of a licence, and of any public hearing to be held in connection with such applications. The "change notice" fulfils the first of these requirements and, if the Commission decides to hold a public hearing, the second is met by a further notice setting out the details of the hearing and a period during which interventions may be filed. Although this procedure is a good means of expediting applications where no hearing is called, it becomes somewhat cumbersome and lengthy if the Commission decides to hold a hearing.

It is recommended that the Commission adopt a modified version of its change notice procedure for all but competitive applications. Immediately after receipt of an application, a notice of hearing would be published describing the application, the intervention process and the hearing details.[66] Except for the additional information concerning the proposed hearing, the wording of notices for applications involving the amendment or renewal of licences would be similar to that of a change notice with a clear indication of the Commission's discretion to decide the application on the basis of the written material filed or to proceed to hold a public hearing. In the case of applications for new licences where the Commission does not have this discretion, the notice would refer to the hearing in definite rather than tentative terms.

Upon publication of the notice, the public would be given access to the application as filed. If the hearing were set, as an example, for a date ten weeks after the publication of the notice, with the cut off date for submitting interventions being three weeks before the hearing as now required by the Rules,[67] interveners would have 49 days to prepare interventions as compared to the minimum of 30 now provided under the Rules. A period of six weeks should be sufficient to complete the analysis and deficiency letter process. This would leave interveners a week before the intervention date to amend their interventions on the basis of any new information added to the file as a result of this process. However, in the normal course there should not be extensive additions to the file since most of the information would be contained in the original application as filed.

This procedure would require the Commission to decide in a relatively short period of three weeks between the intervention date and that of the scheduled public hearing, whether a hearing was necessary. In many cases, however, the nature of the application itself rather than the interventions it attracted, would make this clear from the outset. In other cases, it would be possible for a committee of Commissioners and staff to decide relatively quickly whether a hearing was desirable as a result of the interventions received. Those applications not requiring a hearing could be allocated as non-appearing items or simply dropped from the hearing agendas.

The question may be raised as to what would happen if the applicant had not responded satisfactorily to the Commission's deficiency letter within the time stipulated above. Under the present system, the Commission will usually not set the application down for a hearing until all of its questions for clarification and further information have been answered. This acts as a spur to applicants to supply the

Commission with answers as quickly as possible. The same spur, however, would be present under the procedure recommended in that the Commission could simply withdraw the application from the hearing agenda if it were not deemed to be complete by the due date.

The best method of avoiding this problem, though, and at the same time of expediting the processing of applications, is to ensure that applications are as complete as possible at the time of filing. Dependency on the deficiency letter process to complete applications has resulted partly from application forms or requirements that are outdated, inappropriate for certain types of matters and non-existent for others. The Commission has recently revised its application forms for new AM and FM licences. The new forms require a great deal more programming information than the old. Some of this information would previously have been extracted from applicants through the deficiency letter process. On the other hand, the application forms for transfers of control in broadcasting undertakings are outdated and omit important information which is routinely supplied by applicants in their responses to deficiency letters. There are no prescribed application forms for amendments to licences even though there are common categories of requests for amendments for which standard forms could be prepared. For example, applications seeking increases in rates for cable television service are now made in letter form. In the past, cable licensees have had no precise idea of the information the Commission required to support such applications. As a result, a good deal of supplemental information has had to be obtained through deficiency letters and this has considerably delayed the Commission's decisions. The Commission has recently been evolving informal guidelines on its requirements for such applications. These have assisted licensees in supplying the Commission in the first instance with much more of the information it considers necessary in order to deal with the applications. If the Commission were to provide such guidelines or updated application forms for each of the standard types of applications it receives, the need for the deficiency letter process and, consequently, the lead time required to vet an application for hearing would be substantially reduced.

2. Mixing of Policy and Licensing Hearings

As mentioned previously, the CRTC has been very progressive in explaining to the public its concept of its mandate under the *Broadcasting Act* and the policies that flow from it. Over its history, the

Commission has issued numerous white papers on various policies and asked for response from broadcasters and the public. However, there have been occasional hearings on specific applications that raised significant issues upon which the CRTC had not yet developed a policy.[68] The major reason for this appears to have been the heavy workload of the Commission and the way it has conducted its hearings which, as noted, consumes a great deal of the Commissioners' time. It has not left the Commission sufficient time to reflect on and develop a policy in all the areas where it is required. On the other hand, the CRTC has been reluctant to allow a backlog of applications to build up by postponing their consideration notwithstanding the absence of policy frameworks within which the merits of the applications could be judged. The tendency, therefore, has been to use such applications as a means in themselves of developing general policies. While at times this may be the only feasible way of proceeding, it has sometimes produced unsatisfactory results both from the perspective of a proper exploration of the merits of a given application and the larger policy issues at stake. The merits have tended to become lost in the discussion of policy principles, yet such a discussion, in the absence of a carefully thought out Commission position, has sometimes been unstructured and unproductive. Applicants in such cases have faced considerable difficulty in attempting to fathom what the Commission's ultimate policy would be and consequently to shape their applications in an appropriate manner.

From the standpoints of fairness to applicants, efficient use of Commissioner's time and consistent development of policy, it would seem preferable, where possible, to postpone the hearing of applications which raise significant policy issues until there is a policy background against which they can be heard. If the Commission continues to take steps to reduce the size of public hearing agendas and to employ smaller panels, more time should become available for the development of policy. For example, under a system where small hearing panels are operating for an extended period, several full-time Commissioners not assigned to hearings could prepare policy positions in specific areas. A Commissioner, for instance, might be assigned a task to formulate new Canadian content requirements in radio or television programming. He would be given the staff members required for the task and an adequate period in which to develop a draft paper on the subject.

Formulation of policy in all required areas would reduce the time spent in hearings trying to develop it on an ad hoc basis. More and clearer policy guidelines would also make it easier for smaller panels

of Commissioners to deal with applications by giving them a firmer basis on which to hear matters and make recommendations for decisions. The industry and the public would benefit by being informed in advance of the policy principles that would guide the Commission in its decisions.

3. Delegation of Functions

The use of smaller hearing panels and of certain Commissioners to develop policy positions involves a greater degree of delegation of responsibility than has been the CRTC's custom. With a few exceptions, the Commissioners have tended to perform their functions as a group. The full Commission meets to consult on all licensing applications. Until recently, the full-time members tended to consider applications and take decisions as a whole. A great deal of time in Executive Committee meetings was taken up by staff briefings and the discussion of matters that were frequently not important enough to warrant the attention of all of the members. Not only did this waste time, but it also diminished the opportunities for individual Commissioners to develop expertise in, and have primary responsibility for, special functions of the CRTC.

Since acquiring regulatory authority over the telecommunications carriers, the Commission has established a Tariff Committee to reach decisions on the large volume of individual tariff applications from the carriers which flow into the CRTC on a continuous basis. As previously noted, a similar committee has also been formed to co-ordinate decisions on cable rate applications. The establishment of such committees with decision-making powers is provided for under Sections 11 and 13 of the *CRTC Act* which came into force in 1976. Before then, there was no statutory authority for delegation and indeed, the *Broadcasting Act* seems to require that the Executive Committee act only as a committee of the whole in its decision-making functions. This was a workable although cumbersome process in a less complex and onerous regulatory environment with an Executive Committee of only five members. With the Commission's acquisition in 1976 of more regulatory duties and four more full-time members, the drafters of the *CRTC Act* obviously foresaw the need for delegation of the Executive Committee's functions to smaller committees and a mechanism was provided for this. The Commission has taken advantage of it by setting up, in addition to the two bodies mentioned above, standing committees in the broadcasting area to perform such functions as reviewing

applications in order to determine the agenda and scheduling of hearings, determining which applications require oral hearings, deciding certain applications and overseeing research activities. This is a very positive development which should help the CRTC to function more efficiently.

However, for such a committee system to work effectively, Commissioners must be available for meetings. The inordinate demands on Commissioners' time made by the hearing schedule can make it difficult to convene meetings. Consideration should be given to delegating some hearing responsibilities to senior staff officers. This is currently done to some extent on the telecommunications side. Section 81 of the *National Transportation Act* allows the Executive Committee to appoint "any person to make an inquiry and report on any application, complaint or dispute pending before the Commission or on any other matter within the jurisdiction of the Commission". This section has been used to appoint a staff officer to conduct a pre-hearing conference in a general rate case, to sit on panels in regional hearings associated with such cases, to act as a taxing officer and to make an inquiry on a dispute involving an interconnection agreement.[69] A section similar to that contained in the *National Transportation Act* but extended to cover broadcasting matters was proposed in Bill C-16. Even without explicit statutory authority, some investigative and decision-making functions are carried on by broadcasting staff in the vetting and preclearance of food, drug, beer and wine advertisements.[70] This type of authority needs to be expanded into the hearing area in order to free Commissioners for their work on the committees and particularly for making decisions on broadcasting applications. Staff officers could, for example, hold inquiries and make reports to the Commissioners on programming complaints and other discretionary hearing items such as routine licence amendment applications which might warrant the appearance of applicants in certain instances to speak to particular aspects of their applications. The reports of such hearing officers would become part of the file material on which Commissioners would base their decisions.

4. Procedure at Public Hearings

(i) *Cross-Examination*

The informal debating format described earlier which the CRTC has adopted for its broadcasting hearings has in some respects served the Commission well. It has allowed the free interplay of ideas between

the Commissioners and parties appearing before them on the broad policy principles contained in Section 3 of the *Broadcasting Act* which govern the CRTC's activities. It has encouraged members of the public to come forward and speak their minds to the Commission without being intimidated by complex rules of procedure and the threat of rigorous cross-examination. It has allowed the Commission to hear a much larger number of applications than would have been the case had it followed more traditional, court-like procedures with full rights of cross-examination being given to the parties.

At the same time, this format has not lent itself to a searching examination of the evidence presented to the Commission. In most cases, parties adverse in interest have not been permitted to cross-examine each other. Lawyers representing such parties have tended to feel somewhat hand-cuffed, as a result. Questioning has been performed only by Commissioners or Commission Counsel and has been, for the most part, of a non-adversarial nature. Questions have generally been asked for the purpose of clarifying points rather than discrediting them. As a result, conflicting statements on the same point have sometimes been left unchallenged on the record or have not been sufficiently clarified. The questioning itself has been frequently of a general and random character and has lacked the specificity and follow-through required to hone the evidence and explore it in real depth.

This type of questioning has been adequate for some matters. Discussions of policy issues, applications where there are not serious interventions and general representations by members of the public on broadcasting concerns are examples. However, in applications where there is a real contest between parties and substantial interests are at stake, it would seem inappropriate for the Commission to carry the entire burden of questioning. In such cases, which are relatively few in relation to the total number of hearing matters, the Commission should adopt more strictly a role of pure adjudicator and allow the parties to thoroughly test each other's evidence and positions through cross-examination. If parties are not permitted this right in a serious contest, they are restrained from fully presenting their case and the Commission may be deprived of evidence that could be helpful or even of critical importance to it, in reaching its decision.

In its working paper published in July, 1978, entitled *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, the Commission reaffirmed its reluctance to routinely permit cross-examination in its proceedings. However, it indicated that it would permit cross-examination in a case where a party made a timely

request and could satisfy the Commission that it was warranted in the circumstances. This would appear to be a somewhat more limited approach to cross-examination than is desirable. The onus of satisfying the Commission that cross-examination is really required would seem to be fairly heavy and, indeed, in at least one major case since the paper was published, involving strong adversarial positions and conflicting interests, a request for this right was denied.[71]

The Commission's traditional concerns over cross-examination have been that it would be too time-consuming bearing in mind the CRTC's extremely heavy hearing load and that it would so change the character and atmosphere of broadcasting hearings that public participation would be discouraged. With respect to the first point, as noted above, there have not been many matters where the adversarial interests have been of a nature that would have made cross-examination appropriate. Moreover, if the Commission continues to adopt measures to streamline the hearing process and to reduce the number of matters on its hearing agendas, more time should be available for matters requiring cross-examination. As to the second point, a distinction needs to be drawn between public hearings involving matters that invite a general response from the public where an informal approach is accordingly both desirable and appropriate and those where more court-like procedures are required. It would be fairly easy for the Commission to determine which approach would be desirable well in advance of a hearing from the nature of the subject matter of the application and the interventions received.

The Rules of Procedure (s.29) provide for pre-hearing conferences for a number of purposes such as the simplification of issues and settling of procedures in order to expedite hearings. The Commission has not used this mechanism very often in its broadcasting regulation. A more frequent use of informal pre-hearing conferences presided over by the Commissioner designated to chair the hearing or the counsel assigned to it, would assist in resolving questions of cross-examination and other procedural issues prior to the hearing.

In summary, therefore, it is recommended that in any application involving parties whose positions are clearly adversarial, the Commission should routinely permit, upon request by any such party, the right of cross-examination.

(ii) *The Role of the Commission's Counsel*

Unlike some tribunals in which the counsel acts solely as a legal advisor, the CRTC's counsel has traditionally taken an active role in the questioning of parties at public hearings. This role, however, has changed over the past several years. During the first years of the CRTC's existence, its counsel led off after the party's oral presentation and developed lines of questioning that could be pursued further by the Commissioners if they wished. He would tend to ask the majority of the questions and would pose the "tough" questions in circumstances where this was warranted. The advantage of this procedure was that it enabled a person trained for the purpose who had carefully studied the applications and had been well briefed by the staff, to ask questions in a planned and logical order designed to cover in sufficient depth the issues raised by the applications. This procedure was changed several years ago for the purpose of obtaining a greater involvement by the sitting Commissioners in the hearing process. Under the present practice, the Commissioners begin the questioning and counsel finishes, purportedly to cover any areas of concern omitted by the Commissioners or to pursue points which remain unclear.

While the present practice has achieved more active participation by Commissioners at public hearings, it has frequently resulted in a loose and disorganized question period which lacks focus and depth. There is a tendency to ask questions at random without a perceptible plan or adequate forethought and to slip back and forth among different subjects. Sometimes, the ground work is not sufficiently laid for critical questions, so that the responses evoked tend to be confused or insufficiently precise. When this happens, it is difficult for the Commission's counsel to go over the same subject matter without giving the appearance of asking repetitious and non-productive questions. As well, if the Commissioners have already spent a considerable time asking questions, they may tend to become impatient with and curtail a counsel who launches into a lengthy examination of his own, especially if there is a large number of items on the agenda yet to be heard.

It would appear that the role of the Commission's counsel at public hearings needs to be re-appraised and there are recent signs that this is happening. In many applications, the issues are limited and clear and there is no apparent need for participation by counsel. However, in matters involving particularly complex, procedural or legal questions, or where the Commission wishes to adopt a more adversarial stance or to obtain certain admissions or commitments from applicants, it would seem preferable to give counsel the primary responsi-

bility for questioning. Applications requiring active participation by the Commission's counsel can be identified by consultation between the counsel and the Chairman of the hearing panel well in advance of the hearing. In such applications, the counsel should be permitted to take the lead in the question period. In cases where it is deemed to be more appropriate for Commissioners to ask the questions, the Chairman should designate a Commissioner to be the lead questioner. This should also be done far enough ahead of the hearing to enable the designated Commissioners to thoroughly study the files for which they are responsible and to develop lines of questioning. Commission counsel and other appropriate staff members should be made available, as required, to the part-time as well as the full-time Commissioners for this purpose.

The quality of the questioning at CRTC broadcasting hearings is extremely important as a result of the hearing format employed. Because the parties are not usually permitted to question each other on the points of evidence at issue, an important burden falls on the Commission to ask all the questions that are relevant and necessary to fully expose and test the position of each party. If this is not done, the record is incomplete and the quality of decisions may suffer as a consequence. A further consequence of disorganized or incomplete questioning is the negative effect it can have on the credibility of the Commission as a regulator. Because the CRTC conducts so much of its business in public and uses a hearing format that requires its members to be active participants, its degree of competence is constantly on public display. The questions it asks of parties appearing before it are a major indicator of its competence and, as such, should be carefully thought through in advance of the hearing.

(iii) *Notice of the Issues*

The form of public notice used by the Commission for public hearings contains a brief description of the applications to be considered, the place of hearing and instructions on how interested persons may intervene. There is rarely any mention of the issues that have caused the Commission to consider that the matter should be the subject of a public hearing. In many instances, a spelling out of issues would not be appropriate. For example, in the case of competing applications for a new licence, the fact of the competition itself, rather than the issues which any single application may raise, is the basis of the hearing. Similarly, in renewal of licence applications which are automatically placed on public hearing agendas, the issues may not be

readily apparent until an intervener has responded to the public notice with his objections to the renewal of a given licence. However, there are many cases where an application is scheduled for a public hearing because the Commission has concerns which it believes are significant enough to warrant a public airing. Such issues are frequently not referred to in public hearing notices or, if mentioned, are insufficiently explained. As a result, the public and sometimes even applicants are not fully apprised of the reasons why the Commission has called a hearing on a particular application. In such cases, it is difficult for the parties to properly prepare themselves and the hearing process suffers to the extent that issues are raised of which the applicant or the intervener had no notice and must respond to without the opportunity of prior thought.

It would appear that the dialogue between Commissioners and parties at public hearings would be enhanced if the parties were made fully aware in advance of the hearing of the issues which the Commission wishes to discuss. Section 27 of the Commission's Rules of Procedure requires the Secretary to give at least ten days notice to an applicant stating whether he will be required to appear. This notice could contain a statement of the matters of particular concern to the Commission. A practical reason for this measure is to save the time parties frequently spend on matters which are of little relevance or concern to the Commission but which are covered because of an uncertainty about the real preoccupations that have led to the appearance. Adequate notice would allow parties to concentrate on the relevant points. It would also avoid the element of "surprise" in the raising of issues of which parties had no notice and thus would help to ensure a fairer hearing.

(iv) *Disclosure of Commission Briefing Material*

In its working paper on broadcasting procedures referred to above, the Commission drew a distinction between two categories of staff documents. The first category comprises documents which add evidence such as staff reports on physical inspections of undertakings and on the analysis of broadcast programs. The working paper suggests that such documents should be disclosed in order that parties will know and have the opportunity to reply to all relevant evidence in the CRTC's possession bearing on an application.

Examples of the second category of staff documents are those which summarize applications and discuss the relevance of Commis-

sion regulations and policies to particular applications. It was suggested that such documents do not add evidence and therefore should continue to be kept confidential in the Commission's discretion.

The briefing materials prepared by the staff for the assistance of Commissioners for each application may also contain comments from the various branches of the CRTC that raise issues and suggest questions the Commissioners may wish to explore with applicants. It would seem that the hearing process would be improved if this second category of documents were also disclosed. Frequently, the staff's briefing materials are relied upon by Commissioners as their primary source of information rather than the original applications. This is particularly true in the case of part-time members who do not usually have an opportunity to review the original files before a hearing. In such cases, it is of critical importance that the briefing materials be accurate and objective in tone. In this respect, summaries of the applications may be as important for what they omit as for what they include. Interpretations that staff members place on regulations and policies as they apply to a given application may also be of great importance to the positions of applicants and interveners. For the reasons noted already with respect to giving notice of issues, that is to focus discussion, eliminate surprises, allow parties to adequately prepare themselves and make the hearing itself more efficient, parties should be made aware of the staff's perceptions of the issues and questions concerning any application. With respect to the efficiency of the hearing process, the briefing material has occasionally contained facts that Commissioners relied upon to develop a line of questioning and which were later shown to be in error. The waste of time in this process could be easily eliminated if the briefing material were disclosed before the hearing. It is therefore recommended that all briefing materials prepared for Commissioners prior to the hearing be made available to the parties in sufficient time to enable them to comment on any errors or omissions.

CHAPTER THREE

Telecommunications Regulation

A. The Powers of the CRTC in Telecommunications Matters

As noted, the *CRTC Act* transferred to the Executive Committee of the CRTC all of the powers, duties and functions in relation to telecommunications that had formally been vested in the Canadian Transport Commission. The principal regulatory powers in this area are found in sections 320 and 321 of the *Railway Act* which provide that all tolls for telephone or telegraph services to be charged to the public by a federally regulated company must be approved by the CRTC, as must all agreements covering the connection of a federally regulated telephone system to any other system. Supplementary regulatory powers to inquire into and resolve complaints in the areas covered by the *Railway Act*,[72] to hold hearings,[73] and to issue orders and make regulations[74] are contained in the *National Transportation Act*.

The powers granted to the CRTC on this side of its jurisdiction are narrower in scope than on the broadcasting side. They are primarily rate centered, although there is some express authority over services and facilities in that the *Railway Act* requires that there be no unjust discrimination or undue preference or advantage shown in the manner in which they are offered to different persons or classes of customers. The current legislation does not provide policy principles to govern CRTC decisions in this area, nor are there general supervisory powers granted to ensure that policy principles are implemented. The statutory tests of justness, reasonableness and non-discrimination in relation to tolls and services place narrower limits on

the CRTC's regulatory scope than the provisions of the *Broadcasting Act*, which direct the CRTC to make the decisions it deems necessary to implement the broadcasting policy principles in that Act.

Nevertheless the CRTC has interpreted the statutory criteria in relation to rates in a broad fashion. For example, the justness and reasonableness of rates has been strongly linked by the CRTC to the quality of the services for which the rates are being charged.[75] The concept of non-discrimination has been extended to cover not only the relationship between the telephone company and its customers but also between the company and the suppliers competing with it in selling equipment that attaches to the telephone system.[76] The major difference between the CRTC's approach to telecommunications regulation and that of its predecessors has been this expansive interpretation and application of its jurisdiction.

The Commission's attitude respecting the statutory criteria is described in one of its earliest public statements issued soon after assuming jurisdiction over telecommunications, where it stated:

> The principle of "just and reasonable rates" is neither a narrow nor a static concept. As our society has evolved, the idea of what is just and reasonable has also changed, and now takes into account many considerations that would have been thought irrelevant 70 years ago, when regulatory review was first instituted. Indeed, the Commission views this principle in the widest possible terms, and considers itself obliged to continually review the level and structure of carrier rates to ensure that telecommunications services are fully responsive to the public interest.[77]

The CRTC confirmed this view in its subsequent decision of May 23, 1978, on telecommunications procedures and practices and all but rejected the boundary line which its predecessors had drawn around legitimate regulatory scrutiny in distinguishing between "regulation" and "management".

> In short, while the Commission has no desire to "manage" the companies subject to its regulatory jurisdiction, it does not consider itself restricted by any purely conceptional dividing line in investigating and determining matters properly coming before it.

In some instances, the legislation has provided no guidance to the Commission and it has had to define for itself the criteria it should apply to certain applications. In its decision concerning an agreement under which Telesat Canada was to become a member of the Trans Canada Telephone System, (TCTS) the Commission noted that section 320(11) of the *Railway Act*, which requires approval of interconnection agreements, contains no tests for the consideration of

such agreements.[78] The Commission accordingly applied the statutory criteria already described respecting rates but also took into account three public policy considerations namely, the effects of the agreement on the powers and autonomy of Telesat Canada, on the availability and expansion of satellite services in Canada and on competition in telecommunications services. Lacking statutory guidance, the Commission was required to spend considerable time before arriving at a decision in searching for the public interest tests which seemed to be most relevant to the application.

Two of the most important applications the Commission has dealt with have involved interconnection. The Telesat-TCTS case was one of these and the other was an application by Canadian Pacific to connect its system to the public telephone exchanges of Bell Canada for its private line, data communications service.[79] Both these cases contained enormously complex and far reaching issues, the determination of which could permanently change the structure of telecommunications in Canada. Whether or not the CRTC has correctly decided such matters as the proper degree of interconnection and joint association between national telecommunication systems is beyond the scope of this paper. However, it perhaps places too great a responsibility on the CRTC to decide these questions in the absence of any government policy. At the root of these issues is the degree of competition that should be permitted to exist in the services provided by regulated monopolies having regard to the economies of scale available to them in the services they provide. The government has not addressed the problem of competition in these circumstances and the CRTC has been forced to decide the issue in a number of its manifestations on an *ad hoc* basis.[80]

Although Bill C-16 and its predecessors established a broader regulatory framework for telecommunications, they provided no greater assistance to the CRTC in interconnection and competition questions than does the present legislation. The bills tended to simply extend the policy objectives in the *Broadcasting Act* to the field of telecommunications and did not deal specifically with matters peculiar to telecommunication regulation. In any event, such issues are probably too complex and variable to be dealt with adequately in statutory principles. The power to issue directions for the implementation of telecommunications policy that the bills granted to the Governor in Council is perhaps a better mechanism and will no doubt be used by the Cabinet to provide guidance in future when a new telecommunications act is finally passed.

B. The Processing of Applications

On May 23, 1978, the Commission published new draft telecommunications rules of procedure which codified the practices it had developed over the two years of its jurisdiction in this area and incorporated a number of the General Rules of the Canadian Transport Commission which had been carried over and continued as rules of the CRTC, after April 1, 1976.[81] The final rules were published on July 20, 1979.

The new rules introduce a number of innovations to the procedures inherited from the CTC. Whereas the *Canadian Transport Commission General Rules*[82] are broadly designed to apply to all of the proceedings before its various committees, the CRTC's Rules have been specifically tailored to the kinds of applications which may arise in telecommunications proceedings. For example, although the practice of submitting interrogatories had grown up in the Telecommunications Committee of the CTC, the General Rules made no reference to the practice. The CRTC's Rules spell out the right to submit interrogatories in various kinds of proceedings and the obligation of applicants to respond to them.[83] A rule of confidentiality is included which sets out a full procedure for claims of confidentiality and how they may be disposed of by the Commission.[84] A procedure by which interested parties may register with the Secretary of the Commission and therefore be served with copies of specific kinds of applications is introduced.[85] Rights of intervention are more fully spelled out and, in the case of general rate increase applications, are subdivided into three types according to the degree of participation which is desired by the intervener in the proceedings.[86] Details of the entitlement of interveners to costs in general rate increase proceedings together with a method of how they may be taxed is included.[87] Other innovations are introduced such as a complete set of procedures in relation to subscriber complaints,[88] a concept of central and regional hearings in general rate increase applications,[89] and a detailed description of the requirements of the different types of applications.

The Rules divide the various types of telecommunications proceedings into six categories namely, those relating to new or amended tariff pages, general rate increases, connecting agreements, capital issues, subscriber complaints and other applications.

1. Applications for Approval of New or Amended Tariff Pages

The tariffs of the telephone companies are very extensive and take the form of looseleaf volumes containing many hundreds of pages of separate rates charged for various services. Applications for changes to individual rates or for rates for new services flow in on a weekly basis to the CRTC. These applications are made in letter form and include a copy of the proposed new tariff page, the reasons for the changes requested and any supporting documentation that may be necessary.[90] These "filing letters" are passed directly to the Telecommunications Branch where members of the staff review them, obtain any further information they deem necessary for consideration by the Commission and prepare a recommendation for the Tariff Committee. This is a sub-committee of the Executive Committee and is composed of at least two commissioners and selected staff members. It tries to meet on the average of every two weeks and to review all of the filings up to the time of the meeting. The majority of these are approved and an order is issued shortly after. Those which the Committee judges should have public exposure are handled by way of a public notice calling for comments, usually within thirty days of the notice. After this time has expired and any representations received, the Commission may decide to hold a public hearing or it may simply make a decision based on all the written material in the file.

2. General Rate Increases

In contrast to routine tariff amendments for individual services, general rate increase applications affect all basic residential and business services. This type of application has the most direct impact on the general public and therefore is the type in which the public becomes most involved.

While there is no prescribed application form in this or any of the other kinds of applications, the Commission's practice is to require considerably more information at the initial filing stage than was the case with the CTC. The CTC required only a letter of application spelling out in general terms the reasons for the rate increases sought accompanied by the tariff pages affected by the proposed amendments. The CRTC's Rules provide that the application must now be in two parts, the first containing the material formerly filed under the CTC's

practice accompanied by a table showing the present and proposed rates, and the second part consisting of supporting memoranda containing all the evidence and exhibits intended to be introduced at the hearing. The Rules also require that the memoranda describe in detail the progress and current status of any outstanding matters raised in the most recent decision of the Commission respecting general rates and any other matters required by the practice of the Commission.[91] The attempt here is to permit interveners to know at the outset the entire case of the applicant, thus providing a better opportunity to assess whether they wish to intervene and, if so, the types of interrogatories they wish to submit. This is also a time saving device at the hearing since the evidence-in-chief need not be led through witnesses but can be merely tabled and updated as necessary by the witnesses who are then immediately ready for cross-examination.

Following the filing of the application, extensive public notice of it is required. The Rules provide for a simplified form of notice spelling out the changes applied for and the reasons for them to be published in all newspapers of general circulation specified by the Commission in the territory served by the applicant.[92] Applicants must also mail to each telephone subscriber a notice similar to that published in the newspapers. Copies of the application and the Commission's directions on procedure are required to be placed in each of the company's business offices for public inspection. In addition to notices to the general public, persons who have registered as "interested parties" with the Commission must be served with all the material filed by the applicant.

The notices set out three methods of intervention. Interveners may send a letter of comment to the Commission, make a submission at a regional hearing in addition to or in lieu of sending a letter of comment, and finally, fully participate in the central hearing by filing a "notice of intention to participate."[93] The intervention process therefore accommodates the various classes of interested persons according to the extent of their desired involvement in the process. In the 1978 rate application by Bell Canada for example, the Commission received some 3,600 written comments. Eight regional hearings were held in the areas served by Bell Canada, including northern communities, and approximately seventy individuals made personal representations at these hearings. Twenty-one individuals and groups participated in the central hearing.[94] As this example indicates, the extent of participation in the process varies inversely with the time and resources required by the three forms of intervention.

Following the submission of interventions, there is a period in which anyone who has filed a notice of intention to participate may address interrogatories to the applicant. While interrogatories are not defined in the Rules, they are simply questions which may be put in writing to the applicant on any aspect of the application. The questions are traditionally numerous and very wide ranging, asking for information on any matter concerning the operation of the applicant company that may be relevant to its application. In the Bell hearing referred to above, there were nearly one thousand interrogatories put to Bell Canada including those of the CRTC. Under the Rules, the applicant is required to respond to all interrogatories thus furnished to it. Where the applicant is unable or unwilling to furnish a full and adequate response because the information sought is considered to be not relevant, unavailable, or of a confidential nature, the Rules direct that full reasons supporting these grounds must be supplied.[95]

When responses have been made to all of the interrogatories, and the Commission is satisfied that it has received the information it requires, the matter is ready for hearing. Usually the date for hearing will have been established at the outset by the Commission's directions on procedure. A pre-hearing conference has been required in the major general rate applications heard by the CRTC so far in order to deal with interrogatories for which answers have not been supplied to the satisfaction of the interveners, and other preliminary points of procedure. The pre-hearing conference is usually chaired by a Commissioner who will sit at the central hearing. Interrogatories still in issue are normally disposed of by the Commission preparing a consolidated list of interrogatories which call for the information it considers the applicant should supply. Following the decision on the matters raised at the pre-hearing conference, the application is ready to be heard.

3. Connection Agreements

The *Railway Act* provides that federally regulated telephone companies wishing to connect their systems to another telephone system or vice versa must obtain the approval of the Commission. Such applications can be friendly or unfriendly. Subsection 320(7) of the *Railway Act* provides that where a telephone company wishes to connect its system to that of a federally regulated system and an agreement cannot be obtained, an application may be made to the Commission which may order connection upon such terms, including compensation, as it deems just and expedient. On the other hand, subsection

320(11) of the Act provides that where the operators of systems wishing to interconnect can reach agreement, it must be approved by the Commission before it has any force or effect.

Part IV of the Rules provide a procedure for the latter kind of connecting situation. Applications are made by filing a letter requesting approval of the agreement and explaining fully the circumstances leading up to its execution and the purpose and effect of its provisions. A copy of the agreement executed by the parties must be included as well as any further supporting documentation. The Rules provide a summary procedure where the agreement follows a standard form previously approved by the Commission, or there are special circumstances warranting a lesser period of notice than the required 60 days set out in the Rules.[96] Notices are provided to interested parties who have registered with the Secretary and the intervention process proceeds as in the case of a rate application. The Commission may then determine the application on the basis of the written documentation, require further information or issue directions on procedure if an oral hearing or other form of procedure is warranted.

4. Capital Issues

Under the special Acts of Bell Canada and the British Columbia Telephone Company, the Commission must approve the terms and conditions of all issues of capital stock of these companies. One of the difficulties in involving the public in this process is that the final price and terms of the stock offering are often not settled until the day it is put out for sale. To overcome this problem, the Commission has introduced a two stage application process.[97] The first stage consists of filing a detailed application setting out the capital amount sought and the type of equity issue involved. The actual price of the issue is not included but evidence concerning such matters as the need for capital, the choice of financing, and the current debt-equity ratio is included. Copies of the application are then forwarded to interveners who have expressed a continuing interest in such cases and written comments are requested within a specified time. In the absence of serious problems, the issue is then approved "in principle" without a public hearing.

In the second stage, on the day the company and its underwriters determine the actual price and final terms of the issue, this information is provided to the Commission and any interested interveners.

Provided the terms of the issue do not substantially depart from those already approved in principle, the Commission then gives its approval on the same day. By adopting this two step procedure, the Commission has attempted to achieve an equitable balance between the realities of the market place and its desire for public involvement in its proceedings.

5. Subscriber Complaints

Part VI of the Rules refers to procedures for complaints in connection with such matters as quality and accessibility of service, disconnection or reconnection of service or any other matter respecting the relations between the company and its subscribers. Complaints are made by delivering a letter to the Commission setting out the facts and requesting the specific relief desired. If the Commission believes the complaint is warranted and should be investigated, it forwards a copy of the letter or a summary thereof to the regulated company requesting comment, and the company must reply within twenty days or such other period as the Commission may determine.[98] Where neither the applicant nor the regulated company have requested an oral hearing, the Commission may deal with the matter on the basis of the written documentation before it, or may issue directions on procedure if an oral hearing or other form of proceeding is warranted.

Where an application or complaint seeks relief on an emergency basis, such applications may be made orally and the Commission may issue interim ex-parte orders in respect of the matter.

While in a sense, Part VI merely codifies a procedure which has been followed by the CTC and CRTC, the importance with which the Commission regards subscriber complaints can be seen in the detail with which the matter is treated in the Rules.

6. Other Applications

If an application does not fall under any of the above categories, there are general rules by which parties may bring matters before the Commission. These are set out in Part VII of the Rules. Where the application is directed against a party in adverse interest, that person is designated as "respondent" and the matter proceeds much in the

same way as a civil action in that the Rules provide for pleadings in the form of an "answer" by the respondent and a "reply" by the applicant. Provision is also made for the standard rights of intervention by other interested parties.

7. The Hearing Process

While the Commission's Rules and practices have attempted to introduce informality into telecommunication hearings, they are in fact of a much more formal nature than broadcasting hearings. Part of the reason for this is a long tradition of court-like procedures. Evidence given under oath, full rights of cross-examination and concluding arguments have given the proceedings the aspect of a civil trial. As well, the evidence is so voluminous and complex that it imposes its own formality and discipline. It relates more to technical than cultural matters and, generally speaking, more formal procedures are appropriate in the presenting and testing of such evidence.

The Commission, however, has tried to create an atmosphere of informality by introducing such measures as the use of meeting rooms instead of court rooms, allowing witnesses and counsel to remain seated and permitting witnesses to sit in panels while giving evidence. As well, in the general rate cases the Commission has held regional hearings in addition to the central hearing which are conducted along the lines of a public meeting. At these hearings any person or association affected by the application may read or expand upon his letter of comment, or make any other submission to the Commission. Representatives of the regulated company are entitled to ask questions of clarification but not to otherwise cross-examine. The notice requirements for regional hearings are less stringent in that a person wishing to appear must only notify the Commission orally or in writing at least twenty-four hours before the commencement of the hearing. The regional hearing is therefore a mechanism by which the vast body of telephone subscribers can appear before the Commission to air their views on a given application without the commitment of time or money required to participate in the central hearing.

At the central hearing, the witnesses for the applicant appear first and after stating their qualifications may be led through an up-dating of their memorandum of evidence previously filed. Cross-examination is then conducted by the various interveners in a pre-determined order, usually the order in which they were recognized at the outset of the

proceeding. Unlike the practice of the Canadian Transport Commission, the CRTC's own counsel takes an active role and also cross-examines after the interveners have concluded. The Commission's counsel takes the last spot so as not to pre-empt the cross-examination of witnesses by the other counsel. Unlike broadcasting hearings, most parties at a central hearing are represented by counsel.

Following the presentation of the applicant's evidence, the interveners call their witnesses. Memoranda of the evidence to be presented must be filed in writing with the Commission at least forty-eight hours in advance of the appearance of the witnesses and copies provided to all other parties.[99] The other parties, including interveners adverse in interest as well as applicants, then cross-examine the witnesses with the CRTC's counsel again in last position. The applicant is entitled to call rebuttal evidence and the same procedure applies as in the presentation of the evidence-in-chief.

The Commission may then require that the concluding arguments of the parties be made orally, or in writing. The normal practice is to hear oral argument but in two of its most complex cases, the Commission has adjourned the proceedings after all the evidence was in and required written argument to be filed according to prescribed deadlines.[100] From the CRTC's viewpoint, this procedure has a number of advantages. It shortens the time of sitting and gives the parties an opportunity to provide more comprehensive and fully developed arguments than might otherwise be the case. This in turn assists the Commission in making and writing its decision.

C. Observations and Recommendations on the Application and Hearing Process

1. Access to the Central Hearing in General Rate Cases

As the foregoing description indicates, the CRTC has taken an innovative approach to telecommunications procedures in an effort to give greater access to a process which involves highly technical matters but whose results have a significant impact on members of the public both in terms of the rates they pay and the quality of the services they receive. Unfortunately, however, the Commission has not been

able to solve the problem of providing meaningful access to the central hearings in general rate cases to persons other than those who are prepared to spend the time and resources to become thoroughly acquainted with the extensive application material and participate throughout the hearing.

In the Commission's initial paper on proposed practices and procedures published in July 10, 1976, a proposal was put forward that general rate hearings be divided into three stages: the written or "application" stage, the hearing or "discovery" stage and the conclusion or "argument" stage. The concept advanced was that by means of staff digests that would summarize the lengthy technical and financial evidence presented during the discovery stage, persons could participate in the final argument without having attended the entire hearing or making themselves acquainted with the complete hearing record. The advantage in this procedure would be that parties who might not otherwise be able to participate in the central hearing could hire counsel for the limited time it would take to study the digest, prepare arguments and present them in the short concluding stage of the hearing.

In its decision of May 23, 1978, in relation to procedures and practices proposed in its 1976 document, the Commission indicated that it had found through experience that its resources did not permit it to produce such a digest in time to be of benefit to the final argument stage of a rate proceeding. It also noted that the time pressures on the Commission had required a speedy conclusion to its hearings and did not make it possible to have a delay between the evidence stage and final argument stage of a hearing of more than a week. Reference was also made to the distraction that such a digest might cause if the parties disagreed with its contents.

One can readily agree that the Commission's hearing load has been extremely heavy since acquiring telecommunications regulation. However, a number of the most time-consuming issues in past and current proceedings are of a non-repetitive nature. When these have been finally determined, it is to be hoped that more time will be available to the Commission in its telecommunications regulation. If this indeed happens and sufficient resources are provided to the Commission to have a person available at rate hearings whose sole function is to prepare a digest day by day, this idea should be looked at again. If the procedure were introduced, it would be preferable if persons who intended only to take part in the final argument were identified as interveners at the outset and required to file a statement of their position prior to the commencement of the discovery stage of the hearing,

notwithstanding that they would not be present for that part of the hearing. It is recommended that the Commission not abandon this idea but seek ways and means to implement it for future rate hearings. The digest of evidence would be helpful to all parties and the Commission at the argument stage. A short interval at the end of the evidence stage, sufficient to enable parties to prepare final arguments, including those who had not yet participated in the hearing, would not unduly delay the regulatory process.

2. Length of Hearings

A problem which seems endemic to telecommunications hearings is their length. Since the CRTC acquired regulatory authority in this area, there have been a greater number of hearings and on the average they have run for substantially longer periods than was the case with the CRTC's predecessors. This is partly because the Commission has had to deal with major new applications involving very significant and untried issues. A good deal of hearing time has been spent in orientation and in defining the issues. In cases like the Telesat Canada — TCTS and CNCP Telecommunications — Bell Canada applications[101] involving interconnection, a good deal of latitude has been demanded in the approach to the evidence and issues put before the CRTC in order to find and focus on the most relevant considerations.

The major cause of delay in telecommunications proceedings, however, is the length of time spent in cross-examination. One of the reasons for this is the large number of parties who become actively involved. In the 1978 Bell Canada rate case, for example, there were more than twenty persons and organizations represented at the central hearing. While only a fraction of these participated fully in the cross-examination, by far the largest portion of the 33 days of hearing time was taken up by this process.

In its July, 1976, statement, the Commission proposed means of avoiding duplication of cross-examination by requiring interested parties to work out an appropriate mode of proceeding with Commission counsel. Such arrangements would cover the order in which counsel questioned witnesses, the subject matter to be dealt with, the grouping of interveners where their interventions covered the same subject, and any other means of avoiding duplication. In its decision of May, 1978, however, the Commission acknowledged the desire of interveners to be given the freedom to cross-examine witnesses in their own way

even if the subject matter overlapped to some degree with the interests of other parties. The Commission felt it would be impractical and unwise to try to establish guidelines to avoid unnecessary duplication and called on parties to exercise their good judgment.

If the trend of lengthy and complex telecommunications proceedings continues, it would seem necessary to impose some limits on cross-examination. It is, of course, of major importance that the chairman of the hearing keep an eagle eye on the questions that are being asked in order to curtail questioning that simply goes over the same ground in the same manner as other counsel have done. There is however, another important aspect of this question. The parties frequently come into the hearing without a precise idea of the issues. It is through the process of examination and cross-examination that the issues have become more clearly defined. If part of this process of definition could be achieved at an earlier stage in a proceeding, it is likely that not so much time would be needed in cross-examination.

It is arguable that the Commission could and should take a more active role in refining the issues and indicating to the parties in advance of the hearing the matters which it considers relevant to its decision on the application. Unlike judges in a court of law, whose role is confined to adjudication of the points at issue which the parties themselves originate, the Commissioners of the CRTC are normally free to decide in each case the public interest principles involved and how they should be applied. Further, in nearly all cases there is no obligation to hold an oral hearing and the Commission could decide applications on the basis of the file material, provided that interveners were given an adequate opportunity to submit their written comments. Thus, in a rate case for example, the Commission has complete freedom as to the calling of a hearing and does so to assist itself in deciding whether the rates applied for are just, reasonable and not unduly discriminatory. As part of this discretionary process, the Commission should be at liberty, after all written material is filed, to articulate in detail for the parties the matters on which it wishes further information or argument.

Under the Commission's existing procedures for general rate cases, the entire case of the applicant is known before the hearing begins through the initial memoranda of evidence and the interrogatory process. In addition, through its lengthy and fully reasoned decisions on such cases, the Commission has established bench marks or criteria it considers important in applying the statutory tests. These have included a number of matters relating to quality of service which the Commission has said it will follow up and review at subsequent

hearings. The interconnection decisions have also enunciated a range of regulatory criteria for that type of application. It is probable that in further rate and interconnection cases, a number of the same or similar issues will arise again. On the basis of its experience to date, the Commission should be able to at least narrow these and eliminate those it does not deem to be directly relevant. It would not seem productive, for example, to explore again the relationship between Bell Canada and Northern Telecom in future rate cases when that ground has been covered so many times in the past. It is recommended, therefore, that at a reasonable time before the central hearing begins the Commission should settle the issues on which the hearing should proceed. This could be done after a pre-hearing conference at which all the parties, having been given a preliminary list of issues drawn up by the Commission, are provided an opportunity to comment on the list and suggest changes or additions. The existence of such a list would help to put a smaller framework around the hearing and to restrain random cross-examination.

3. The Position of Interveners

The Commission would be somewhat hampered, however, in defining the issues by not having at the time of preparing such a list, a statement of the interveners' positions and the evidence of the witnesses intended to be called by the interveners. In order to implement the above suggestion, therefore, it would be necessary following the interrogatory process for the interveners to file with the Commission a statement of their positions and memoranda of the evidence of their witnesses, the latter of which is now not required to be filed until 48 hours before the witnesses are called. If the positions and evidence were made known at an earlier time, this would also be fairer to applicants and allow them a more reasonable opportunity to prepare cross-examination than they have at present. Under the current practice, the interveners are made fully aware of the applicant's case many weeks ahead of the hearing through the application and interrogatory process. The applicants, on the other hand, do not know the interveners' cases until forty-eight hours before the witnesses are presented.

Some interveners have contended that they need to hear the cross-examination of the applicant's witnesses before they can prepare their witnesses' evidence. This appears to be somewhat questionable in the light of the almost unlimited opportunity to seek clarification of the applicant's evidence in the interrogatory process. In any event the

objection could easily be overcome by allowing such witnesses to supplement their evidence if required at the time they appear. In such cases, an outline of the supplementary evidence could be filed using the current forty-eight hour rule for notice to the other parties.

The Commission's decision of May, 1978, and its practice so far has permitted certain interveners such as the representatives of the provincial governments and the Director of Investigation and Research to take neutral positions throughout the hearing. Such interveners have argued that they are not able to determine what position they will take until they have heard the oral evidence. The result is that they tend to cross-examine the witnesses of all parties on a very broad basis, at considerable length and without the focus that comes from a position of support or opposition. Allowing interveners to maintain a neutral position raises a number of problems which contribute to delay of proceedings. For example, it is difficult for Commissioners or other counsel to know whether or not the questioning is relevant to a position as yet undisclosed. It is also difficult for applicants and other interveners to prepare their witnesses properly for cross-examination and to prepare rebuttal evidence to meet undisclosed positions.

It is possible that a procedure by which the Commission defined the issues in advance of the hearing would in itself curtail the questioning of neutral interveners. However, it does not seem reasonable that such interveners cannot determine their position on the basis of all of the information that is made available to them prior to the commencement of the hearing. The Director of Investigation and Research should be able to take a preliminary stance at that point on whether or not the application sought is anti-competitive. Similarly, the Ontario Ministry of Transportation and Communications should have a good idea whether or not the rate increases sought by Bell Canada are justified and in the interests of the telephone subscribers in Ontario. The taking of preliminary positions would not, of course, prevent any intervener from modifying his stance in his final argument as a result of what had transpired at the hearing.

It is therefore recommended that interveners be required to file a statement of position prior to the commencement of the hearing which sets out details of their support of, opposition to or modification requested of the application and the reasons for their position. This statement and memoranda of evidence of interveners' witnesses should be filed far enough in advance of the hearing to assist the Commission in preparing its list of issues in accordance with the previous recommendation.

4. The Interrogatory Process

The practice of submitting questions in writing to applicants grew up in telecommunications proceedings before the Canadian Transport Commission without any formal rules. The practice is similar to a written form of examination for discovery except that there appears to be few limits on the questions that can be addressed to the applicant. For the most part, applicants have attempted to answer interrogatories in a conscientious manner unless they are clearly irrelevant or the information sought is unavailable or confidential. In the 1978 Bell Canada rate hearing there were close to a thousand interrogatories submitted.[102] The time required both by the applicant and interveners in preparing these questions, responding to them, digesting the answers, and submitting and responding to supplementary questions is immense. There is considerable repetition in the questions that are asked and often the replies simply cross-reference the answers made to other interveners. This creates some confusion and difficulty in keeping these materials organized. The CRTC is in the process of attempting to standardize interrogatories for rate hearings and this will afford some help in preventing duplication.

Part of the problem of duplication and irrelevance is caused by the fact that the interrogatories are not channelled through the CRTC. There is, therefore, no winnowing process which sorts out inappropriate, irrelevant and repetitive questions. As a result, interrogatories flow from the various interveners in a random manner directly to the applicant, who must then devote substantial resources to finding the answers many of which are of doubtful value in the hearing context. It is obviously extremely difficult during a hearing to adequately keep track of a thousand interrogatories and their answers, and in fact only a small number of them are ever referred to.

A number of these problems could probably be avoided and a more orderly and meaningful process introduced if the Commission acted as a control centre for interrogatories. One practical benefit would be the use of a single consecutive numbering scheme to identify the interrogatories. The Commission would take the initiative at an early stage to gather in and vet all the questions desired to be asked by interveners. A procedure such as the following is recommended:

a. After the filing of the evidence, each intervener who has filed a notice to participate and wishes to submit interrogatories prepares a complete list of the questions desired to be asked.

b. The list of proposed interrogatories is served on all parties including the Commission.

c. A conference chaired by a senior official of the CRTC is then held in which representations can be made by all parties as to relevance, duplication, confidentiality and any other matters which are of concern.

d. The Commission then makes a decision as to the questions which must be answered, publishes a list and the responses are obtained.

e. The same procedure is adopted for supplementary interrogatories.

5. Applications for Revisions to Individual Tariffs

As described earlier in this chapter, there is a steady flow of applications for changes to individual tariffs or for approval of tariffs for new services in the form of "filing letters". The Commission receives approximately 500 of these per year. They range in importance from those involving small wording changes to those seeking approval of tariffs for major new business services. The majority, however, are of a routine nature.

The practice developed by the Telecommunications Committee of the CTC was to have these tariff matters dealt with primarily at the staff level. Upon arrival at the CTC, the filing letters would be analyzed by tariff specialists and, if found acceptable, would be sent immediately to two Commissioners for approval.

The CRTC has instituted a more elaborate and time-consuming procedure. A special standing committee has been struck which must approve all such tariff applications. A quorum of at least two Commissioners is required for meetings which are held approximately every two weeks, time permitting. Staff analysts now prepare formal agenda with recommendations for each application. The Committee has required substantially more supporting material from applicants, especially in the case of new or competitive services. For example, in most such cases an economic evaluation must accompany the filing to show that the service has been priced in such a manner so as not to be a burden on other services. The Commission has prepared new "Tariff Filing Guidelines" which spell out the kinds of supporting information required for various categories of tariff revisions.

As might be expected, when the new practices were first introduced, they caused considerable confusion and delay. However, it would appear that most of the wrinkles have been ironed out and for

the majority of applications, decisions are now being announced within 30 days of filing.

While there is little doubt that the new procedures have improved the quality of information available to the Commission for decision-making purposes, it would appear that except for a small percentage of applications, the machinery for processing them is too cumbersome. In addition to the preparation of written agendas and recommendations, a meeting of Commissioners and staff must be convened, and minutes taken, circulated and approved. Besides the Commissioners, of whom usually two or three attend the meetings, staff representatives from the Secretariat, Telecommunications and Legal Directorates of the CRTC are normally present. As a result, an average of six to eight senior staff members plus Commissioners are pulled away from their other duties to participate in decisions on mostly routine matters. The CRTC's busy hearing schedule often makes it difficult to convene such meetings.

When the Commission first assumed responsibility for telecommunications regulation, a certain educative purpose was served by having a number of Commissioners and staff review each tariff application. However, the Commission has now gained sufficient familiarity with and expertise in these matters that it is questionable whether the current procedure should continue. It would seem preferable at this stage to delegate to the staff specialists in this area more responsibility for processing the routine tariff applications or those for which there are established precedents. It should not be necessary to call a meeting of the Tariff Committee to deal with such matters. Similar to the CTC's practice, two Commissioners experienced in tariff matters could sign the necessary orders after consultation with the Director of Tariffs who would bring the applications to the Commissioners for their approval at any time they were available. This procedure would save the time required to convene a meeting of the Tariff Committee and would remove from its agendas all but the significant items. It would be understood, of course, that any Commissioner so dealing with a matter could refer it to the Tariff Committee if he considered it appropriate in the circumstances.

CHAPTER FOUR

Decision-Making

A. Collegial Decision-Making

To date, the CRTC has insisted upon a "collegial" approach to decision-making, which calls for Commissioners who have not sat at the hearing of a given matter to participate in the making of a final decision on it. In broadcasting applications, statutory provisions seem to explicitly require such an approach. It seems clear that the legislative intention in broadcast regulation was to provide for the contribution of regional part-time members to the deliberations of the full-time members in arriving at their decisions. Their participation in the Commission was presumably to keep the Executive Committee, based in Ottawa, in touch with local broadcasting concerns in the various regions of the country. In telecommunications matters, collegial decision-making on carrier applications has been justified on the grounds that issues of public interest or problems arising in individual hearings can transcend particular interests of the parties; therefore, the Commission has contended that decisions on such applications should generally be made at the Executive Committee level. The dubious merits of this type of collegial approach are treated later in this Chapter.

The notion of collegiality in another sense also has a close relationship to the marriage of broadcasting and telecommunications regulation. As was noted in the Green Paper on federal communications policies, there are important cross-over concerns affecting both cable operators and telephone companies. The Paper referred to the fact that the contractual arrangements between the telephone companies and cable operators for the use of telephone facilities and between broadcasters and telecommunications carriers for microwave facilities and land lines have a very direct economic effect on the broadcasting industry and its ability to carry out the policies set out in the

Broadcasting Act. The competition for services between telephone companies and cable operators is another reason for a collegial approach to regulation. This competition has become more focused recently in the context of applications by cable operators for non-programming services which in certain cases the telephone companies have opposed. The competition for services will no doubt become all the more acute with the advent of fibre optics technology which will permit a single wire to carry all forms of communications.

While recognizing that these cross-over concerns affect both branches of the CRTC's regulation, it would seem important to maintain a distinction between a collegial approach to decisions on policy and decisions on specific applications. It has been previously recommended that policy hearings should as much as possible be separated from hearings on specific applications. This principle applies equally to collegial decision-making. It is no doubt essential that Commissioners predominantly concerned with broadcasting matters discuss cross-over concerns with those primarily involved in telecommunications applications in order to arrive at suitable policies that will accommodate the needs of both broadcasters and telecommunications carriers. Similarly, it is desirable to maintain consistent policy positions from hearing to hearing in each of broadcasting and telecommunications matters and this requires involvement by all members of the Commission. However, these discussions should be conducted on a policy level in a special forum for that purpose notwithstanding that the separation of policy from the merits of applications may be extraordinarily difficult in some instances. Furthermore, with respect to hearings held on particular applications, it would seem to be much fairer to the appearing parties and more conducive to efficient, considered and comprehensive decision-making if the Commissioners who heard the applications were given authority to finally decide them as well.

B. Decision-Making in Broadcasting Matters

As previously indicated, the *Broadcasting Act* requires that most decisions be taken by the full-time members. The Commission as a whole makes decisions concerning regulations and the revocation of licences.

1. Matters Involving Executive Committee Decisions

For matters involving an Executive Committee decision that go to a public hearing, there is a three stage process. First, the hearing panel (usually a mixture of full-time and part-time members) meets immediately following the hearing and tries to arrive at a preliminary position on each application. Secondly, the Act requires that there be a consultation on the applications at a meeting of the full Commission. This enables members who were not present at the hearing to hear and comment upon the recommendations of the hearing panel. A consensus may or may not be arrived at in respect to these recommendations but no decision or vote is taken at this stage. The third step occurs at subsequent meetings of the Executive Committee where final decisions are made.

There are some serious problems in this process. First, Commissioners who have not participated in the hearing may take part in the decision either in a consulting or in a deciding role. At the consultation stage, such Commissioners will normally constitute a majority of those attending the meeting of the full Commission. It is possible that because the quorum requirements for hearing panels are two members, only one of which must be full-time,[103] a majority of the full-time members who make the final decision will not have participated in the hearing. While the recommendations of the hearing panel and the Executive Committee members who sat on the panel are persuasive, they are by no means final and the Executive Committee from time to time takes a different view.

Secondly, the recommendations may be arrived at without a careful review of the record by the sitting members and a thorough analysis of the issues that have arisen at the hearing. Aside from the time constraints imposed by the hearing schedule, which make a comprehensive review difficult particularly for part-time members, the role of the hearing panel as a recommending rather than a deciding body can have a psychological impact on the kind of preparation that is undertaken before a recommendation is made. There may on occasion be an understandable tendency for the hearing panel to rely on the Executive Committee to remedy any defects in the recommendations at the end of the process when it makes the final decisions. By that time the recommendations will have passed through the second and third stages of decision-making described above and the staff will have had a good opportunity to make their views known. If any key points have

been missed at the first stage, it is hoped that they will be picked up along the way.

Thirdly, the three steps take a number of weeks to complete and therefore not only cause delay in the making of decisions but also make it difficult for Commissioners to remember all the details of the applications they have heard.

Finally, it is too much to expect that with all of the other time pressures on the Executive Committee, the full-time members who have not sat on particular applications will read the transcripts and all the other file material before participating in decisions. Considerable reliance must be placed on the judgment of those members who prepared themselves for and were present at the hearing.

2. The Voting Status of Part-Time Members

The voting status of the part-time members was a matter of some consideration and debate at the time the 1968 *Broadcasting Act* was introduced. The following extract from *Hansard* at the time of the Act's third reading is instructive in this regard. In speaking to the Bill, the Honourable Judy LaMarsh stated:

> The government has been giving much consideration to the distribution of powers between the full time and the part-time members, ranging from having no part-time members to having part-time members with the same powers as full-time members. It will be recalled that the white paper proposed that the powers of the commission should be exercised by the full-time members alone but after consultation with the part-time members. The standing committee did not agree with this proposal and recommended that the part-time members should have the right to vote. It was never the intention of the government that the part-time members should be treated as no more than an advisory committee. After all, their purpose is to represent the public in various regions and walks of life. Having now had regard to the opinion of the standing committee, this bill provides a division of the powers between the full commission and the full-time members, and I believe that this will give a balance of authority which will best fulfil the public interest.
>
> Thus, Mr. Speaker, the right to make regulations lies with the whole commission. That should not be underestimated as to importance, for the part-time members will be sharing in the responsibility for establishing standards of programs, for regulating scheduling policy for classes or categories of programs, for controlling the nature and quantity of advertising, for prescribing the conditions for operating networks, and other important matters including the revocation of a broadcaster's licence. . .

So far as the power to issue licences is concerned the government is convinced that the public interest will best be served by reserving the power of decision to the full-time members. As permanent statutory officials with security of tenure they should be in a better position to make objective judgments than the part-time members who could be unduly influenced by local and sectional considerations. Nevertheless, 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 when licensing decisions are under consideration. It is equally essential, Mr. Speaker, that the full-time members should give full and careful attention to these representations before they arrive at licensing decisions. . .[104]

In responding to this compromise proposal, the Honourable Gordon Fairweather replied as follows:

There is a further serious departure from the recommendations of the parliamentary committee's report in clause 5 dealing with the setting up of the regulatory authority. The white paper, paragraph 4, said in dealing with this subject:

"The extended powers and responsibilities of the board will, in the opinion of the government, require the attention of more full-time members than at present, but there should continue to be a number of part-time members sufficient to provide a broad cross-section of Canadian opinion."

The parliamentary committee on page 8 of its report said that it approves of the licensing procedure, etc., but it believes that the authority of the board should not only reside in the full-time members but part-time members should have the right to vote. I believe that the full board should be part of the decision-making process.

I will be anxious to hear the minister's explanation for ignoring — I suppose she has some explanation — the recommendation of the parliamentary committee which made, I think, a pretty careful examination and study of what I believe to be the essentially undemocratic proposals in the white paper.

The insistence by the committee that the right to vote be given to all members of the regulatory authority was not lightly taken. . .[105]

There have been a number of developments since this debate took place more than a decade ago. Broadcasting licences for most of the major and medium sized markets have been granted. The CRTC has developed a number of policies and regulations which guide its licensing decisions. The tenure of the part-time members is as secure as the full-time members and many in the past have served a second term. The length of their tenure has permitted part-time members to become well versed in CRTC policies and regulations. Their familiarity with the local broadcasting scene in the geographic areas they represent

gives them valuable insights which, while presently contributing to the consulting process, should also be made available for final decisions on the applications they hear.

3. Proposals for Decision-Making in Broadcasting Matters

(i) *Changing the Status of Hearing Panels and their Members*

The following scheme is proposed as a means of improving the decision-making process in broadcasting matters.

1. Except for matters which the Commission deems to be of such significance that a larger panel is required, the standard panel should consist of not more than three members, two full-time and one part-time from the region affected by the applications on the agenda.
2. The part-time members should have the right to vote on the applications they hear.
3. The panel of three members should make, write and sign on behalf of the Commission final decisions on their hearing items, and this should be done as soon as possible after the hearing.

As will be noted, the key to the scheme lies in changing the voting status of part-time members to that of equality with full-time members for the applications they hear and in giving hearing panels final decision-making powers. This changed status would help to achieve greater compliance with principles of natural justice and would overcome the anomaly of having Commissioners fully participating in public hearings without the power to decide the matters they hear. As discussed later, although legislative changes would be required to fully implement these changes, the Commission could organize its consultative and decision processes in such a way as to give them practical effect.

The scheme outlined above contains two checks against a part-time member whose judgment may be overly swayed by local or regional concerns. First, the majority of the panel of three members would be comprised of full-time members. As well, if the role of the part-time member were changed to that of an "adjudicator" instead of "consultant", the role itself would in all likelihood help to promote an objective and "judicial" approach to decision-making.

With added decision-making responsibilities for hearing panels, it would seem wise to involve members in the hearing process at an earlier stage than at present. The use of more numerous and smaller panels would permit a consistent scheduling of public hearings in the various regions of the country. Part-time members could be advised well in advance of the dates on which they could be required for hearings. At the time of publishing the notices of public hearings in the *Canada Gazette* (50 days in advance of the hearing) copies of the original files could be sent to the appropriate members so that they would have ample time to become acquainted with them. An indication could be given to the panel members at this time of those applications likely to require appearances. If possible, an "issue sheet" prepared by the staff could be attached to each file highlighting in brief form the key issues in the application and any relevant policies or regulations applicable to these issues. Copies of any additional materials received after the publishing date and internal CRTC staff memoranda relating to any of the applications would be circulated as they became available. In this way, part-time as well as full-time members could become thoroughly familiar with the complete application file well ahead of the hearing. As the hearing date drew closer, the members of the panel might wish to meet with appropriate members of the CRTC staff to review the applications requiring appearances and to decide as between the panel members and the Commission's counsel who would be the lead questioner on each application.

If such a system of pre-hearing preparation were adopted, the requirement for extensive staff briefing materials would be greatly reduced. All members of the panel would have read the original files, become acquainted with the issues at an early stage and at the time of meeting with the CRTC staff would be in a position to obtain staff advice as required. There would be a greater chance for the part-time members to take the initiative in exploring the issues and preparing productive lines of questioning.

(ii) *Elimination of the Consulting Process on Specific Licensing Applications*

Assuming that the panel that heard applications would also decide them, there would seem to be no purpose in having a further discussion on them with other Commissioners who were not present at the hearing. The part-time Commissioners who have not sat on a hearing do not normally examine with any thoroughness the application files or the briefing notes, nor do they take part in the staff briefings given to

the sitting Commissioners. At best, therefore, such Commissioners can contribute only minimally to the consultation and their opinions on issues may be expressed without any real knowledge of the circumstances of the applications giving rise to the issues. In any event, since the part-time members can only express opinions and not vote on applications, the process seems to provide them only a token opportunity to participate in decision-making. At the same time, the necessity of having a consultation considerably delays the decision process, since the full Commission meetings are held approximately only once in two months.

The procedure recommended here overcomes these deficiencies and eliminates the need for a consultation stage. Insofar as the consultation process serves as a means of informing other Commissioners of the matters coming before the Commission, such information is available in any event through the published notices of public hearings and decisions. These could be supplemented by information circulars sent periodically to the part-time members pointing out particularly significant applications and issues coming up on the various panels and by means of brief presentations at the regularly scheduled Commission meetings.

C. Decision-Making in Telecommunications Matters

In its announcement of May 1978, the Commission confirmed the approach to telecommunications proceedings enunciated in its statement of July 20, 1976 which read:

> The Commission intends to adopt an integrated approach to the telecommunications hearing and decision-making process. This means that decisions on carrier applications will as a general rule be made by the Executive Committee as a whole and that full-time Commissioners may participate in any particular hearing. . . .

As was noted by the Commission in its announcement of May 1978, a number of parties strongly objected to the approach and considered that only Commissioners who had actually presided at a hearing should be responsible for taking the decision that ensued. The Commission then set out two basic reasons why it had decided to adopt a collegial approach notwithstanding these objections. It was noted that virtually all of the cases which the CRTC had heard in telecommunications had

raised issues of a public interest nature that transcended the particular interest of the parties before it. It was felt that these broad policy matters should be discussed by the Executive Committee as a whole before a decision was taken. The second point was that problems encountered by one panel sitting on a telecommunications matter may be similar to that of another panel and a common discussion of these problems might assist both panels.

Neither of these reasons appeared sufficiently persuasive to overcome the fundamental injustice of allowing persons who had not sat through a hearing, observed the demeanour and credibility of witnesses and listened to all the evidence, to participate in making the decision. While consistency of policy positions from case to case is desirable, it is not essential and the facts of each particular case may call for a different application of policy principles. Further, while it is true that broad policy issues and the facts of particular telecommunications applications which the Commission has heard may be inextricably bound together, this should not prevent the Executive Committee, where it is deemed desirable, from discussing a policy issue in isolation from the facts. Such a discussion could take place at any time prior to, during or after a hearing, provided that the discussion was confined to a general consideration of the policy issue and the final determination of the issue as related to the facts of the specific case was left to the hearing panel.

On the second argument, it is again not necessary in order to develop common approaches to subjects of a similar nature that arise in separate hearings, to have the full Executive Committee make the decisions in each case. A hearing panel will be aware of an approach to a subject taken by another panel but should be free to follow or not follow that approach according to the circumstances of the case it is hearing.

In its most recent statement on the subject issued in July, 1979, the Commission stated that it had reconsidered its position in the light of further experience. Referring to its earlier public announcements on decision-making in telecommunication matters, the Commission stated:

> Further exposure to the range of telecommunication decisions required to be made by the Commission, however, including decisions based on extensive records of public hearings and review decisions, has persuaded the Commission to modify its approach somewhat. Accordingly, decisions following public hearings in which witnesses giving evidence are sworn and are subject to cross-examination, will, as a general rule, be taken by the panel of Commissioners assigned to deal with them. . . . In

regard to all other proceedings, decisions will, as a general rule, continue to be made on a collegial basis by the Executive Committee.[106]

Since all of the hearings arising out of the applications have involved sworn evidence and cross-examination, one can conclude from this statement that the Commission has virtually abandoned the concept of collegial decision-making in telecommunication matters. The concept would still apply, however, in policy hearings divorced from specific applications where less formal procedures were used to present and discuss the issues. It is to be hoped, though, that even in this latter case, the views of the hearing panel will be given decisive weight. Many of the telecommunication policy issues are of a technical and complicated nature. Their determination has and will directly affect the Commission's decisions on specific applications. Commissioners who have listened to the arguments on all sides of a given issue and participated in the questioning of witnesses will generally be in a better position to make an informed decision than members who have not sat at the hearing. The Commission has stated its intention to use a majority of the Executive Committee on policy hearings and this should help to ensure that the decisions of hearing panels are conclusive.

D. The Writing of Decisions

In both broadcasting and telecommunications matters, the writing of decisions falls primarily on staff members. In broadcasting applications, the Executive Committee arrives at a decision and stipulates certain conditions or points it may wish included in the written text. Except for occasional decisions which Commissioners prepare, the writing is then allocated by a co-ordinating branch of the Secretariat to various staff members. In telecommunications matters on which there has been a hearing, the primary responsibility for the first draft of the decision usually rests with a member either of the Legal Branch or of the Telecommunications Branch. Once the first draft is prepared, the Commissioners tend to become far more involved in the text of the decision and the drafting of subsequent versions than occurs on the broadcasting side.

For other than routine applications, drafts of broadcasting decisions prepared by staff members are circulated for comments to the Executive Committee and senior staff members whose work relates to the subject matter of the applications. This process can continue

through a number of drafts until one is arrived at which is satisfactory to all. The Chairman, as the chief executive officer, assumes the final authority for signing and releasing all decisions.

On the broadcasting side, for other than routine matters, this process is deficient in a number of aspects. While the three stages described in decision-making for broadcasting applications permits involvement by most of the Commissioners and wide ranging discussion of issues, decisions are usually taken without the reasons being fully spelled out by the Executive Committee. Some of the reasons for this have already been mentioned. There is usually a lengthy time interval between the hearing of an application and the final decision. It is difficult to recollect all of the details of applications and discussions which have taken place on them. Full-time Commissioners who have not sat on a particular application do not always read the entire record. They tend to rely for information on members of the Executive Committee who did sit and on the staff analyses prepared for their assistance which weigh the pros and cons of the applications and usually provide recommendations. These analyses, however, are generally of a summary nature. In other words, the nine Commissioners making the final decision on broadcasting matters do not all go through a rigorous and comprehensive briefing on each item following their own detailed examination of the entire hearing record. The primary reason for this is once again a lack of time. The demands of the Commission's hearings conducted under its present procedures, and of other business that must be conducted at Commission meetings simply does not permit the kind of thorough preparation before decisions are taken which is necessary for the highest level of decision-making.

The incompleteness of the process in broadcasting matters means that decisions are sometimes taken without carefully thought out reasons. As a result, staff members assigned to write the decisions have to flesh out the reasons provided. While all members of the Executive Committee have an opportunity to examine and request changes in decisions before they are released, and so can adopt or reject the reasons stated, it may be that placing the prime responsibility on staff members to write the decisions in this manner requires of them too much initiative in finding a supporting rationale. To the extent staff members do this, they become decision-makers, a function which should, of course, be exclusively that of the Commissioners.

Accordingly, it would seem highly desirable for the Commissioners hearing applications to not only decide them but, where possible, to write the decisions as well. If this were done routinely, the chances

would be greater that all relevant factors had been considered and weighed. The discipline of having to write decisions would of itself force Commissioners to consider very carefully all the facts and arguments presented to them on a given application and thus help to ensure a more searching approach to decision-making.

The following practice could be adopted. At the conclusion of the hearing, the panel would meet and review the applications they had heard. Sufficient time would be set aside for this purpose to permit the Commissioners to prepare rough outlines of decisions on each appearing item with reasons. Assistance of staff members to gather any necessary data and provide advice would be available. While final decisions in some applications might be postponed because further staff work was required, a strong effort would be made to decide applications at this time while all of the evidence was fresh in the minds of the Commissioners. This process might take one or two days immediately following the hearing. Having completed outlines of decisions, the panel members would then disperse. The full-time members would return to Ottawa and one of them would have the responsibility of preparing complete drafts of the decisions and circulating them to the other members. Consultations by telephone or if necessary at a meeting, would take place to settle the final revisions of the drafts. The decisions would then be released and the process would be completed within four to six weeks following the hearing. The full-time member charged with preparing the decisions would not be assigned a further hearing or other Commission duties until a sufficient period had elapsed for him to complete this work. The Secretariat would continue to prepare the decisions for routine or non-appearing items.

There might be concerns initially about achieving consistency of expression and policy positions where nine Commissioners theoretically would be writing decisions. Under the present system, the writing of decisions is co-ordinated by a branch of the Secretariat that either prepares or oversees the preparation of all decisions on the broadcasting side. This provides a check on consistency of style, terminology and arguments used to support various positions re-iterated from decision to decision. However, this concern could be largely met, if such a procedure were implemented, by assigning in the beginning period, members of the staff decision writing team and other knowledgeable senior staff members to full-time Commissioners as they prepared their final drafts. As Commissioners became accustomed to writing decisions, their need for staff assistance would probably diminish. As for consistency of style, while this may be a desirable attribute of decision writing, it is not essential provided that the meaning is clear

and that technical expressions or "terms of art" as used in different decisions are given a uniform meaning. Whatever difficulties of this sort that might be encountered in the first stages, they would be more than compensated for by the deeper involvement of Commissioners in developing the rationale underlying decisions and assuming a more personal responsibility for them.

E. Internal Review

If the recommendations concerning the delegation of decision-making and writing were to be adopted in broadcasting matters, a mechanism for review of decisions by the Executive Committee either on its own motion or that of a party to an application would permit decisions to be changed which the Executive Committee as a whole considered to have been wrongly taken. This could be, for example, because a decision was based on an error of fact or misinterpretation of policy. This mechanism is already provided on the telecommunications side by section 63 of the *National Transportation Act* which permits the Commission to "review, rescind, change, alter or vary" any order or decision made by it. The Commission was asked to act under this section for the first time by Bell Canada with respect to that part of the decision reached in the 1978 rate case which required that revenues earned by Bell in a contract with Saudi Arabia be treated as part of the Company's ordinary revenues for regulatory purposes. After calling for comments from interested parties as to the criteria it should apply in such cases the Commission announced that it would exercise its powers under section 63 where an applicant demonstrated on a prima facie basis one or more of the following: an error in law or fact, a fundamental change in circumstances or facts since the decision, a failure to consider a basic principle that had been raised in the original proceeding or that a new principle had arisen as a result of the decision. In addition, it was noted that section 63 would also permit the Commission to determine that there was substantial doubt as to the correctness of its original decision and that reappraisal was accordingly warranted.[107]

In broadcasting matters, there is at present no similar power to that contained in section 63 of the *National Transportation Act*. Except for clerical errors, the Commission has taken the position that once a decision has been rendered, it is powerless in law to change it.

This position has occasionally led to the necessity of the following cumbersome licence amendment procedures where the Commission has changed its mind on a policy principle after issuing a number of licences incorporating the principle. In such cases, the Commission has issued a public announcement notifying licensees of the change and inviting them to make applications for amendments of their licences. The procedures for such applications described in Chapter Two, including the publishing of notices, must be followed. This could be avoided if the Commission had the power to vary or rescind its decisions on broadcasting matters.

The last version of the new telecommunications legislation (Bill C-16) contained a provision similar to section 63 of the *National Transportation Act* but continued the existing situation by excluding from the power, decisions on broadcasting licensing matters. It would seem that a power to review and change its broadcasting decisions would be helpful to the Commission and those it regulates, so long as the power were used sparingly and according to the criteria the Commission has established for its telecommunications decisions. The criteria appear to be just as applicable to broadcasting as to telecommunications matters. As discussed, the power would also provide the Executive Committee with a check on the decisions of hearing panels if they were to be granted the automony in this area which is suggested.

It is therefore recommended that the *Broadcasting Act* be amended to include a power similar to that contained in section 63 of the *National Transportation Act*. However, a time limit, which is now absent in section 63, should be imposed on the exercise of this power in order to avoid the uncertainties that could forestall licensees from acting on a decision if the power were open-ended. A period of 60 days, for example, would coincide with the time now permitted to the Governor-in-Council under the *Broadcasting Act* to set aside or refer back to the Commission for re-consideration, the issue, amendment or renewal of licences.

F. The Scheme of Decision-Making Proposed and the Existing Law

It is apparent that a number of the foregoing recommendations are at variance with present legislation governing broadcasting matters. However, a few simple amendments to the *Broadcasting Act* or

telecommunications legislation previously proposed would provide statutory authority for these changes. Briefly, it would be necessary to amend section 19 of the *Broadcasting Act* to provide public hearing panels with the power to make decisions on behalf of the Commission, to remove from section 17 the need for a consultation with part-time members and to add a power to permit the Executive Committee to vary or rescind decisions as mentioned above.

Theoretically, section 13 of the *CRTC Act* now provides statutory authority for bestowing final decision-making authority on hearing panels. The section allows the Executive Committee to pass by-laws respecting the establishment of special committees to whom the powers, duties and functions of the Executive Committee may be delegated. Accordingly, the Executive Committee could in the case of each public hearing establish a special committee and delegate to it the power to make decisions respecting both broadcasting and telecommunications matters. However, such a process would be cumbersome and, in broadcasting matters, would not eliminate the present need for a consultation with the part-time members.

These changes could also be substantially implemented without statutory amendments by adopting administrative procedures that would accomplish the same ends. For example, the proposed panel could make and write the decisions as suggested. When completed, they could be tabled at meetings of the full Commission and briefly discussed to satisfy the consultation requirements with part-time members. The decisions would subsequently be tabled at the next meeting of the Executive Committee following the full Commission meeting where they would be subject to review by the Committee and, if found acceptable, adopted and immediately released. It would be understood that the decisions arrived at by the panel would have decisive weight and would only be varied or reversed under exceptional circumstances. Accordingly, in nearly all cases, decisions would be released immediately after the Executive Committee meeting, as written by the panel.

G. Dissenting Opinions

The CRTC has not had a tradition of issuing dissenting opinions and has done so only in recent years and in few instances. The first such occasion occurred in 1978 and involved an application by a

Toronto television company to acquire certain television and radio stations in Montreal.[108] In this case, there was a major split in the Commission on whether this merger would benefit the broadcasting system. The differing policy views were fully spelled out in the majority and dissenting opinions although the Commissioners subscribing to the two opinions were not identified.

There are several arguments against dissenting opinions with respect to regulatory tribunals such as the CRTC. Because the CRTC deals with many sensitive, public interest questions, it has considered it important to arrive at a Commission position following full internal discussion, which all Commissioners are then obliged to publicly support regardless of any personal misgivings they may have. There has been a belief that it would be difficult to regulate effectively in areas involving such questions if a split in the ranks were perceived by licensees and the general public. As well, the research and preparation of dissenting opinions require substantial staff resources which are not always readily available.

However, the experience of other tribunals in this area has been that the opportunity to dissent avoids protracted discussions to reach a compromise position. Where compromises are necessary, the reasons given for a decision may be watered down or incomplete. Moreover, as the CRTC's decision in the example cited above showed, the full exposition of different sides of a difficult policy question can serve to define the issues much more clearly. This, in turn, assists licensees and the public to better understand the Commission's policy thinking and to address the issues more intelligently in subsequent applications. It would seem desirable, therefore for the CRTC in appropriate cases to continue to publish the dissenting opinions of the Commissioners.

The scheme of decision-making proposed in this Chapter would facilitate the writing of dissenting opinions in that the Commissioners would themselves be assuming the burden of preparing the reasons for decisions and would be less dependent on staff for this function. The suggested number of three Commissioners for a hearing panel is to avoid the deadlock that could occur if the quorum of two permitted in the Broadcasting Act constituted the panel.

H. Oral Decisions

Because of the multi-stage decision-making process which has taken place in broadcasting, and to a much lesser extent in telecommunications matters, the Commission has been prevented from giving oral decisions at the time of the hearing. In broadcasting applications, there are many instances where the applications involve simple or uncontested issues and it would be entirely appropriate for the hearing panel to give a decision from the bench.[109] If necessary, a short recess could be called following each such hearing item in order to allow the panel to consult and agree on the reasons for its decision. Alternatively, a procedure could be developed where enough time was allocated at the end of each hearing day for the Commissioners to arrive at decisions on that day's items which could be announced the following morning.

In telecommunications applications, the matters which have gone to public hearings thus far have been so complex and lengthy that oral decisions would not have been possible or appropriate. However, should the Commission begin to hear more complaints or applications involving a simple tariff item where the issues are narrow and well defined, oral decisions might be possible in such cases.

The giving of oral decisions would expedite the decision-making process, be of great advantage to parties, who would know the decision immediately and could make their plans accordingly, and would allow Commissioners more time to spend on decisions where the complexity of the applications demanded lengthy deliberation and careful drafting of reasons. Here again, however, because of consultation requirements, statutory changes would be required to bestow on hearing panels the power to make final decisions.

CHAPTER FIVE

Political Controls on CRTC Decisions

As was noted in the Chapter One, the CRTC has evolved from a number of predecessor agencies with considerably less independence from political control. It took forty years to reach the level of independence of broadcasting regulation envisaged by the Honourable Mr. Cardin in 1928, when he said, "We should change the situation and take radio broadcasting away from the influences of all sorts which are brought to bear by all shades of political parties.". Telecommunications regulation, on the other hand, has been relatively free of political control since it came under the authority of the Board of Railway Commissioners in 1906. This is perhaps because of the more adjudicatory nature of rate regulation and the judicial character of the Board and its processes adopted from the beginning.

There have been a number of developments in the last few years which have called into question the CRTC's independent status. Claims by provincial governments for jurisdiction and an expressed willingness of the federal government to partially accommodate such claims, conflicts between the Manitoba and Saskatchewan Governments and the CRTC over cable ownership policies, and a desire on the part of the federal government to bring communications policy making back into its own hands have all contributed to an erosion of the CRTC's independence. With respect to the last point, Hudson Janisch, in an article published in the *Osgoode Hall Law Journal*, recites a number of instances of active intervention in CRTC processes by a former Minister of Communications and refers to the broad power granted to the Governor in Council in the proposed new telecommunications legislation to issue directions to the CRTC for the implementation of the policy objectives set out in the Act. Professor Janisch sees such actions as "part of a general trend towards the 'politicization' of regulation, in which it is envisaged that regulatory agencies will be held on much tighter political reins than they have in the

past.".[110] Whether or not this is so, there is little doubt that some of these actions, as described below, have had a detrimental impact on the integrity of the Commission's hearing and decision-making process.

A. Cabinet Review of CRTC Decisions

Both the *Broadcasting Act* and the *National Transportation Act* contain sections which permit the Governor in Council to set aside decisions of the Commission. There are important differences, however, in the powers provided in these Acts. Section 64 of the *National Transportation Act* permits the Governor in Council at any time, on his own motion or on the petition of an interested party, to vary or rescind any order, decision, rule or regulation of the Commission. The rights bestowed by section 23 of the *Broadcasting Act* are much narrower. First, the section refers only to the issue, amendment or renewal of broadcasting licences. Secondly, the Governor in Council cannot vary decisions in connection with these licensing actions but may only set them aside or refer them back to the CRTC for reconsideration. Thirdly, the section refers only to the Governor in Council and makes no provision for interested parties to petition the Governor in Council to act under this section. Finally, a time limit is imposed on the Governor in Council who must act within sixty days after the issue, amendment or renewal of a broadcasting licence.

One can only speculate on the reasons for these differences. As indicated, in creating the CRTC, Parliament thought it important to create an independent licensing body free from political interference because of the potential for misuse of the airways for partisan ends. At the same time, it is clear by the very existence of the section that the government of the day considered it wise to retain a power to overturn licensing decisions. The drafters of the Act apparently tried to strike a balance between independence and this right reserved to Cabinet by including the restrictions noted above.

Cabinet's power to set aside or vary decisions has been used sparingly, both with respect to telecommunications and broadcasting matters. In broadcasting, there have been numerous petitions presented to Cabinet and it has acted on only one of them, namely the setting aside of cable television licences issued for the certain communities in

Manitoba.[111] In telecommunications, the Cabinet has acted in two instances to interfere with the decisions of the responsible Commission. The first case occurred in 1973 when it varied the decision of the CTC on a Bell rate increase.[112] In the second instance, the Cabinet varied the CRTC's decision denying approval of the interconnection between Telesat Canada and the members of the Trans Canada Telephone System, by granting its approval of the agreement.[113]

Notwithstanding that section 23 of the *Broadcasting Act* provides only a unilateral right to Cabinet to set aside or refer back decisions of the CRTC, the Cabinet, by accepting petitions from interested parties and ruling on them, has incorporated into the section the same rights in this respect as exist in section 64 of the *National Transportation Act*. This practice was carried forward into the proposed new telecommunications legislation and so would have had the statutory basis which it now lacks.

There are no written procedures for presenting petitions to Cabinet but certain practices have been established. The petition may take the form of a letter or brief addressed to the Clerk of the Privy Council or the Minister of Communications. The petition is turned over to officials in the Department of Communications who prepare a memorandum for Cabinet with a recommendation. It has been the practice of the Department in nearly all cases to send a copy of the petition to the CRTC and ask for its comments. These comments are then incorporated into the memorandum or attached as an appendix. The procedures that have been established do not require that any of the parties to the proceeding from which the matter arises be given notice of the petition. Where parties discover by word of mouth that a petition has been presented, they may ask for a copy, but it is entirely in the discretion of the Department or the party presenting the petition whether a copy is furnished. If other interested parties are able to obtain a copy of the petition, they may file comments on it which the Department may or may not take into account in preparing its memorandum. Except for soliciting the CRTC's comments, the Department arrives at its recommendations independently and without consultation with the CRTC or any of the parties. The Minister then presents the final memorandum to a Cabinet committee at which none of the representatives of the Commission or other interested parties are in attendance.

A good deal of attention has recently been focused on the deficiencies of this procedure. This has been caused partly by the increasing number of petitions that have been presented over the last several

years as well as the fact that the Cabinet has acted recently to interfere with decisions in well publicized cases in communications and air transport. Critics of this process note the lack of notice to parties and of an opportunity to respond to the petition by other interested parties as well as to comment on the recommendations of the Department of Communications. The major criticism, however, relates to the independent decision-making capacity of the tribunals involved. The CRTC's decisions, for example, are made following a procedure which is designed to put all the relevant facts and arguments on the hearing record. The parties have a full opportunity to know and address the issues prior to the CRTC coming to a decision. This hearing process, which in telecommunications matters can be extremely lengthy and rigorous, appears to be a futile exercise if a body which has not participated in the process, and is therefore not fully informed, can vary or set aside the decision, perhaps on the basis of grounds that were not raised during the hearing and to which none of the parties were given an opportunity to speak.

Hudson Janisch expresses the views of most commentators on this subject when he writes:

> My opposition is based on four inter-related grounds:
>
> First, such appeals go far to undermine the whole rationale for hiving off adjudicative tasks to administrative tribunals as just discussed.
>
> Second, such appeals are inevitably very much hit and miss affairs and are subject to all the vagaries of the political process especially around election time and during periods of minority governments.
>
> Third, political second-guessing of the decisions of administrative tribunals will lead to a diminution in the quality of their decisions and in the quality of persons who will be prepared to serve on such tribunals. It is one thing to be reversed by a Court of Appeal; quite another to have a carefully thought decision swept aside in the vortex of partisan politics; . . .
>
> Fourth, to superimpose a political appeal on what is, in essence, a judicial process, is to seek to blend together two basically incompatible processes. Having given the parties their "day in court", it is the height of folly to turn around and peremptorily reverse that decision in a secret cabinet session. Once a decision has been made in an open manner, the only credible way in which it can be reversed is in a similarly open manner.[114]

From the point of view of the procedures which the CRTC employs in its hearings, this process can play havoc with principles of fairness. This is well illustrated by the events surrounding Cabinet

decisions to set aside two CRTC decisions involving the exercise of the latter's regulatory functions concerning broadcasting and telecommunications respectively — first, to grant cable television licences for Brandon, Selkirk and Portage la Prairie, Manitoba, and, second, to reject an application for approval of an agreement between Telesat Canada and the members of the Trans Canada Telephone System relating to the establishment of an integrated satellite/terrestrial communications network.

1. The Manitoba Case

On August 1, 1975, the Commission announced that it was prepared to receive applications for cable licences serving communities in Manitoba. The notice made reference to the Commission's long standing policy that cable operators should own, at a minimum, the receiving antenna, the amplifiers in the cable distribution system and the drop lines linking the main distribution system to the homes of each subscriber. The policy allowed telephone companies to own the coaxial cable comprising the balance of the distribution system under a lease arrangement with the cable operators, known commonly as a partial lease agreement. At the public hearing, the Manitoba Telephone System intervened to argue that it should be permitted to own all of the distribution system.

In September, 1976, the Commission issued a decision granting licences to Winnipeg Videon Limited to serve Selkirk and denying the competing applications of two other contenders for the licence.[115] The licence for Brandon was granted to Grand Valley Cablevision Limited, and, again, two other contenders were denied.[116] The Government of Manitoba and the Manitoba Telephone System petitioned the Governor in Council and the decision was set aside on November 10, 1976,[117] the same date an agreement between the Government of Canada and Manitoba was concluded involving the allocation of jurisdiction over services that could be provided by means of cable television. The agreement appeared to trade off the CRTC's ownership policy in return for Manitoba's acknowledgement of exclusive federal jurisdiction over broadcast programming, community programming and pay television distributed on cable television systems.[118]

On December 30, 1976, the Commission issued a further announcement in which it indicated that it was again prepared to receive applications for the areas it had previously licensed. Reference was

made in the announcement to the agreement and the fact that it embodied an approach to the ownership of cable facilities which differed from Commission policy. The Commission noted that, while it was not a party to the agreement and therefore was not legally bound by it, it would be assisted in its deliberations on future applications to receive comments on the terms and scope of the agreement from applicants and other interested parties. The announcement then set out a list of concerns arising out of the ownership problem and stated that all proposals for cable television licences should deal with them.

Under these new terms of reference, applications were once again received for the communities, including applications from the previously successful contenders and some of the unsuccessful competitors. A public hearing was held in June of 1977 and in August, the Commission granted licences to different applicants than those who had previously been successful.[119]

The unfairness of this procedure for the applicants is apparent. After expending the considerable time and financial resources that are required to prepare and present applications to the CRTC, the two original, successful applicants had their licences set aside on the basis of an extraneous, political consideration that had nothing whatever to do with the merits of their applications. Because the Commission considered that the Manitoba Agreement introduced a fundamental change in the circumstances under which the original applications had been called, it decided it must start from scratch and issue a fresh call for applications rather than relicensing the same individuals on the basis of whatever ownership arrangements might subsequently be worked out in the light of the Agreement.

2. The Telesat/TCTS Case

On January 21, 1977, Telesat Canada (Telesat) filed with the CRTC an application for approval of an agreement between it and the members of the Trans Canada Telephone System (TCTS) pursuant to the requirements of section 320(11) of the *Railway Act*. The Agreement contained terms relating to the establishment of an integrated satellite/terrestrial communications network and financial arrangements to guarantee a certain rate of return to Telesat from the other members of TCTS. A lengthy hearing occupying several weeks took place. Thirty-four interventions were filed, and extremely detailed and lengthy written arguments were submitted by the major parties and

interveners. The Commission issued a complex and fully reasoned decision of 56 pages in which it reviewed and dealt with all the issues that arose at the hearing.[120] It decided not to approve the agreement on a number of grounds. It considered that the agreement would prejudice the process of effective rate regulation by the Commission and would raise a substantial likelihood of undue preference in favour of the member companies of TCTS with respect to the terms and price of satellite services. The Commission was also concerned about the effect of the agreement on the autonomy of Telesat and on competition as between members and non-members of TCTS.

On November 3, 1977, the Governor in Council varied the Commission's decision under section 64(1) of the *National Transportation Act* and approved the agreement.[121] In a news release accompanying the order-in-council, the Minister of Communications stated that the Governor in Council's action was, "dictated by broad issues of public policy, which lie beyond the reasonable purview of the CRTC.". The Minister stressed the particular and urgent concern of the Government with the future of Canada's domestic satellite services. The increased utilization of satellites envisioned under the proposed agreement, and the revenues arising therefrom, as well as the ability of satellites to provide communication services to the north and other isolated areas of Canada were stated to be important Government preoccupations. The news release went on to state that, to abandon the next series of satellites guaranteed by the agreement or to delay them, would mean the loss of contracts for Canada's space industries, with adverse effects in employment in this sector. As well, reference was made to the importance of Canada maintaining its preferred "orbital parking spaces for the ANIK-C series of satellites under international agreements.".

Regardless of the merits of the Cabinet's decision in both the Manitoba and Telesat-TCTS cases, the damage to the integrity of the CRTC's hearing procedures is evident. In the Telesat-TCTS application, the parties went through an extremely comprehensive hearing in which some seventeen witnesses on behalf of the applicant and interveners were called and cross-examined at length. Approximately 250 interrogatories were submitted and answered. The evidence in chief and cross-examination produced more than 3000 pages of hearing transcript. Detailed arguments by the various parties ran to hundreds of pages. And yet after all this time and effort expended by the parties and the CRTC, the decision was set aside for reasons which the Minister of Communications stated were beyond the purview of the Commission.

B. The Direction Power

In her news release accompanying the Telesat-TCTS order-in-council, the Minister of Communications stated that "because adequate statutory mechanisms through which the Government could have provided clear policy guidance to the CRTC are not yet available, the Commission was unable to accord these policy matters due consideration.". The Minister was no doubt referring here to the power in the proposed telecommunications legislation to give directions to the CRTC on all telecommunications matters except those subjects specified in the legislation. These exceptions were:

(1) the issue of a broadcasting licence to a particular applicant or the amendment or renewal of a particular broadcasting licence;

(2) the content of programming;

(3) the application of qualitative standards to programming;

(4) the restriction of freedom of expression; or

(5) the charges to be levied for particular telecommunications services or facilities or the revenue requirements of a particular telecommunications carrier.[122]

The *Broadcasting Act* presently contains a limited direction power which permits the Governor in Council to issue directions on the maximum number of channels or frequencies for the use of which broadcasting licences may be issued within any geographical area, the reservation of channels or frequencies for the use of the CBC and classes of applicants to whom broadcasting licences may not be issued.[123] Only three directions as subsequently amended have been issued to the CRTC since the coming into force of the *Broadcasting Act* in 1968. They relate to Canadian ownership of broadcasting undertakings,[124] the reservation of cable channels for educational broadcasting by provincial authorities[125] and the extent to which provincial governments may be involved in broadcasting.[126] There is no corresponding power to give directions respecting telecommunications matters under present legislation.

There was a good deal of concern expressed in various quarters about the breadth of the direction power which the new legislation gave to the Cabinet. The fear was expressed that Cabinet could misuse the power to interfere on a day to day basis with the regulatory activities of the CRTC, thus destroying altogether its independence. It would appear, however, that this fear was unfounded having regard to

the Cabinet's history of utilizing this power over the past decade in broadcasting matters. In the new legislation, it was obviously meant to be exercised with respect to broad policy matters and the stated exceptions would have prevented the Cabinet from interfering in specific licensing or rate decisions. In a practical sense, it is difficult to imagine that with all of its other business, the Cabinet could or would even wish to involve itself regularly in the business of the CRTC.

As well, there is a tendency to regard the Cabinet in this situation as a rather passive body ready to endorse automatically the recommendations of the Minister of Communications of the day. This of course is not so. The individuals that make up a Cabinet have a variety of different interests, political perspectives and ideas about how independent an agency like the CRTC ought to be, all of which could put a minister to a stern test when trying to convince his or her colleagues to accept a recommendation for a policy direction. The checks and balances provided within the political system itself is alluded to by Douglas Hartle when he states:

> In many respects, considering the independence-responsibility debate allows us to highlight one of the points in the earlier chapters. That point is neither more nor less than that the existing Canadian political system, in a multitude of ways, quietly serves many, often competing, special interests groups remarkably well without any one individual or group deliberately setting out to achieve that end, either now or in the past.[127]

There appears to be a consensus among those writing recently that responsibility for major policy development should reside primarily in the government. As these authors have noted, the concept of an independent regulatory agency is not necessarily at odds with the idea of political directives provided that the power to issue directives is exercised in a responsible fashion. In its final report issued in March, 1979, the Royal Commission on Financial Management and Accountability (Lambert Commission) stated in reference to the direction powers proposed by the former government in new transportation and telecommunications legislation:

> There are several safeguards necessary. We endorse the requirement in the Government's proposals that all directives be public, tabled in Parliament, published in the *Canada Gazette,* and that they not pertain to specific individual cases before deciding bodies but to broad policy matters. We believe that, in addition, there should be an opportunity for both the agency and the public to be consulted prior to the issuance of a directive.[128]

The Commission accordingly recommended a scheme[129] that, prior to the issuance of a policy directive, the Government should

"refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such further period as the Government may specify. . .".[130] In any such scheme, the Government would be free to accept or reject the position put forward on the proposed direction by the agency in its report. This is a worthwhile proposal and should be included in any future telecommunications bill which includes a direction power. Of considerable value to the credibility of the CRTC's regulatory process is the fact that the proposed procedure takes the exercise of the power out of the secret recesses of the Cabinet chamber and exposes it to the scrutiny of the Commission and the public before it becomes a *fait accompli*.

C. The Co-existence of Direction and Decision Review Powers

As previously discussed there is legitimate cause for concern in the Cabinet appeal process as exemplified in the Manitoba Cable and Telesat/TCTS cases. The co-existence of both a review and direction power seems unnecessary and, in a sense, a bit of overkill in so far as ensuring the adherence of regulatory decision-making to government policy. If the government can establish policy principles in advance to govern the decisions of a regulatory agency, there would seem to be no need for the additional power to interfere with such decisions after the fact, unless the agency has chosen to ignore a direction, or misapplies it. Assuming that this happened in the case of the CRTC, recourse could probably be had to the Federal Court of Appeal since the direction would have the force of law and decisions made in contravention of it would presumably be within the competence of the Federal Court to deal with. The difficulty with this legal recourse, however, is that decisions could be rendered by the CRTC which might be construed by the Court to fall within the strict wording of a direction but which applied the direction in a manner or with a result not intended by Cabinet. Accordingly, while this paper supports those who advocate the abolition of Cabinet appeals where a direction power exists, a limited right to set aside decisions should be retained where the agency has ignored or misapplied a direction. The power of the Cabinet to act on its own motion in such a situation, or on the petition of an interested party should also be retained but, in either case, notice of the Cabinet's intention to act, or of any petition received by it, should be given to all of the interested parties and the CRTC with a full

opportunity to all to respond in writing before the Cabinet makes a final decision.[131]

An objection that has been raised to the idea that the power to give a direction is an adequate alternative to the power to set aside or vary decisions, is that applications may come before the CRTC with major policy implications to which Cabinet has not had an opportunity to put its mind. This objection could be overcome however, by mechanisms such as a "stop order" which would halt the proceedings until the Cabinet had had an opportunity to reflect and decide whether a direction was necessary. Douglas Hartle has suggested that in some instances the Cabinet could issue an order converting an adjudicatory proceeding into an advisory or recommending proceeding on the policy the government should adopt. The government would then make the decision itself.[132] Such mechanisms would require the Cabinet to act at an early stage in the proceedings and in this regard, it would be important for the CRTC to keep the Minister informed of the applications it receives which could raise significant policy questions.

D. Ministerial Appeals

There is a limited right to appeal decisions relating to the CBC to the Minister of Communications contained in the *Broadcasting Act*. In recognition of the special status of the CBC as a crown corporation funded primarily by Parliament and responsible for providing a national broadcasting service, the Act sets out special procedures respecting conditions which the CRTC proposes to attach to CBC licences. The Corporation may request a consultation with the Executive Committee and if, notwithstanding the consultation the Commission attaches any condition to which the CBC objects, it may refer the matter to the Minister who can settle the issue with a written direction to the Executive Committee.[133]

This process contains a number of the objectionable elements already noted with respect to Cabinet appeals. Like other licensing matters, CBC applications proceed through a process of public notice and hearings at which any member of the public may intervene. The Commission makes its decision on the basis of the file and public hearing record thus developed. The process described above is conducted in private and may result in the Minister applying considerations that

were never previously mentioned. The negative effects on the credibility of the CRTC and its procedures of such a process are similar to those described previously. This was made evident in the decision renewing CBC network radio and television licences in 1974. After a lengthy hearing, at which a large number of interveners representing a wide spectrum of interests intervened, the Commission issued one of its longest and most comprehensive decisions to that date at which it proposed as a condition of the renewal of the CBC network television licence that commercials be phased out of its television programming over a period of years.[134] After a good deal of public and defiant comment from the CBC, the matter was discussed behind closed doors and a press release issued announcing that the condition would be further studied by the Cabinet.[135] In the end, the condition was dropped.

These events underline a paradoxical situation in which the CBC is specifically made subject to the CRTC's licensing and regulation making authority[136] and yet in certain critical respects is insulated from that authority. The special appeal mechanism is one example of this. As well, the Commission is prevented from suspending CBC licences for failure to comply with licence conditions.[137] Similarly, it cannot revoke CBC licences but can only report on breaches of conditions to the Minister.[138] This special treatment reflects the fact that the CBC is a Crown corporation whose funding is mostly provided by Parliament and that both it and the CRTC are accountable directly to Parliament.[139]

The political reality of the CBC's relationship with Parliament makes it unlikely that ministerial appeals will be abandoned despite their effect on the integrity of the CRTC's regulatory process. However, such appeals should be conducted in the open manner suggested above in connection with Cabinet reviews of CRTC decisions with notice of and an opportunity to comment on submissions made to the Minister provided to interveners who have participated in CBC licencing hearings.

CHAPTER SIX

Judicial Review

The Federal Court of Appeal exercises appellate jurisdiction over broadcasting and telecommunications decisions of the CRTC. In both cases, an appeal lies on a question of law or jurisdiction upon leave being obtained from that Court within one month of the date on which a decision is issued.[140] The powers granted to the CRTC are sufficiently broad and discretionary that this avenue of appeal does not offer much scope for attacking CRTC decisions. Nevertheless, there have been a number of appeals on both sides of the Commission's jurisdiction.

A. Broadcasting

The appeals in broadcasting matters have tended to focus mostly on procedural issues and questions of natural justice. The following are some of the issues which have been discussed in the cases.

1. Notice by the Commission of Its Concerns on Licence Renewal Applications

As referred to earlier in this study, the CRTC has not developed a general notice procedure that fully informs the parties to a hearing of the reasons they are being asked to appear. Such notice is particularly critical for licensees whose licences may be in jeopardy. Since the judgment in *Confederation Broadcasting (Ottawa) Limited and The Canadian Radio-television Commission*,[141] however, the Commission has taken some care to spell out in its notices any concerns that may lead it to fail to renew or revoke a licence. In the *Confederation* case,

the question of an unauthorized change in the management and control of a radio station which became the central issue at the station's licence renewal hearing, had not been mentioned in the notice of the hearing although there had been an exchange of correspondence between the CRTC and the station on the issue. The Commission granted a short term renewal and announced that at the expiry of the term the frequency would be re-assigned. Of the nine judges who heard the matter, four considered that the licensee had had adequate notice, especially in view of the Commission's complete discretion as to whether or not a licence should be renewed, and four held that the requirements of natural justice had not been met in that the licensee had not had full notice of the charges against it and an opportunity to reply to them. The ninth judge did not deal with the question of natural justice, finding instead that the Commission had acted beyond the licensing powers granted to it in the *Broadcasting Act* by coupling a renewal of licence with a denial to the licensee to apply for a further renewal of the licence.[142] Accordingly, the question of adequate notice in the circumstances of this case remained unresolved although the Commission, as mentioned, has made it a practice since this judgment to indicate any serious concerns it may have with a licensee's performance prior to the licensee being called to a hearing.

2. Public Disclosure of Application Material

Under Rule 20 of the Commission's Rules of Procedure, applicants may request confidentiality for certain kinds of information. In *Re Canadian Radio-Television Commission and London Cable TV Ltd.*,[143] London Cable submitted financial statements and projections in support of an application for a rate increase. The Company requested that this material be kept confidential and the Commission agreed. The Consumers Association of Canada, which had intervened in the hearing to oppose the application, appealed the subsequent decision of the Commission approving the rate increase. The Association alleged a denial of natural justice on the grounds that it had not been given access to the financial documents and therefore did not have an opportunity of fully knowing and answering the applicant's case. The Commission had also followed its usual practice in broadcasting hearings and refused to permit the Association to cross-examine the applicant's witnesses. While the Federal Court of Appeal found that the refusal to allow cross-examination had not prejudiced the Association's rights as an intervener, it concluded that the Commission had not conducted the kind of public hearing required under the

Broadcasting Act in denying the public access to the financial documents. Such a hearing, in the opinion of Chief Justice Jackett, should be one at which, subject to the procedural rules of the Commission and its inherent jurisdiction to control its own proceedings, "every member of the public would have a status 'to bring before' the Commission anything relevant to the subject matter of the hearing. . .". Consequently, the hearing would have 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. . . . in sufficient time to know whether or not to exercise their statutory right of presentation and to prepare themselves for the task of presentation. . .".

3. Discretion as to the Convening of a Public Hearing

Except for applications for new licences and those involving the possible suspension or revocation of licences, the CRTC has a discretion in all other cases under the *Broadcasting Act* to decide whether it would be in the public interest to hold a public hearing. The unrestricted nature of the discretion was discussed in *National Indian Brotherhood et al v. Juneau et al (No. 3)*.[144] The case involved a complaint by the Brotherhood and other groups representing Indian rights against the CTV network concerning the televising of a program which it was claimed was defamatory of Indians. The applicants before the Federal Court sought among other remedies a mandamus to compel the CRTC to hold a public hearing on the complaint. In dismissing the application, Mr. Justice Walsh held that the only question in this connection which a court could review was whether or not the CRTC had actually exercised the discretion given to it, that is, had put its mind to whether or not it would be in the public interest to hold a hearing and had made a decision on that matter. It was never intended under the Act, in the opinion of the Judge, that the court should substitute its discretion for that of the CRTC and in any way go into the merits of the complaint with a view to determining whether a public inquiry into it would be in the public interest.

4. Competing Applications for Licences at the Time of Their Renewal or Transfer

A number of public interest groups have raised the issue whether, at the time that a licence is about to expire or be transferred to a new licensee, there should be an open competition for it similar to that

which pertains at the time a broadcasting licence is first issued. The fact that CRTC procedures do not provide for competition in both these cases has been challenged in the courts. With respect to applications for renewal of licences, the Federal Court of Appeal has ruled that the CRTC is under no legal duty to hear applications in competition to that of the existing licensee. The practice with respect to transfers of ownership or control of licensed broadcasting undertakings is currently before the Federal Court as of the time of writing.

The issue with respect to renewal applications arose in the case, *In re the Broadcasting Act and in re Capital Cable Co-operative and the Canadian Radio-television Commission and Victoria Cablevision Limited.*[145] At the trial level, a mandamus application by Capital Cable to have its application for a cable television licence to serve the City of Victoria heard by the CRTC in competition with the renewal application of Victoria Cablevision was granted by Mr. Justice Dubé. In finding that the CRTC had a legal duty to hear the application of Capital Cable, the Judge found it would be contrary to natural justice to decide the renewal application without giving an opportunity to other applicants to offer alternatives. He suggested that more competition would greatly assist the CRTC in achieving its statutory public interest objectives and that should the Commission renew without hearing other applications, "it may discover too late that better and more acceptable alternatives have been passed by, perhaps to the detriment of the people in the area to be served.". The Court of Appeal, however, without comment on the principle of competition and in a very short judgment simply stated it could find no legal duty on the CRTC to hear the competing application.[146]

5. Meetings between Commissioners and Potential Applicants and the Rules of Natural Justice

The *Broadcasting Act* requires the CRTC not only to regulate but also to supervise all aspects of the Canadian Broadcasting system.[147] In carrying out these responsibilities, the Commission meets privately on a fairly continuous basis with licensees and other representatives of various interests in the broadcasting field. The Commission is thus kept apprised of recent developments, plans and concerns in the field which in turn assists it in regulating more effectively. This practice is not unique to the CRTC but is carried on by all regulatory agencies to a greater or lesser extent. The problem in terms of fair hearing procedures arises when topics which may become the subject of an

application are touched upon. If detailed minutes of any such discussions are not kept and made part of the public record of the subsequent application, then the agency becomes vulnerable to charges of potential bias, or a failure to disclose all relevant information to the prejudice of interveners.

Such charges arose in *The Canadian Broadcasting League and the Canadian Radio-television and Telecommunications Commission*.[148] The applicant sought a writ of prohibition to prevent certain Commissioners who had met on separate occasions with representatives of Canadian Cablesystems Limited and Rogers Telecommunications Limited from sitting at a hearing involving the transfer of control in Canadian Cablesystems to Rogers. Rogers had acquired shares and options to purchase shares in Canadian Cablesystems and the meetings were held to attempt to clarify whether these transactions had or would be likely to result in a change of control and to learn the intentions of Rogers Telecommunications in this regard. In discussing the application, Mr. Justice Cattanach held that the meetings were investigatory in nature in that the Commissioners were trying to ascertain whether the facts were such that a public hearing should be called to consider the effects of the share transactions. A distinction was drawn between an exploration of facts for the purpose of deciding whether to convene a hearing and a consideration of the issues to which the facts give rise. In the former case, the process is purely administrative, rather than judicial or quasi-judicial, and the rules of natural justice are not applicable.

B. Telecommunications

During the period from 1976, at which time the CRTC acquired telecommunications jurisdiction, to the end of 1979, there were only four legal appeals of its decisions and these have dealt with matters of substantive law rather than procedure. The lack of appeals on questions of natural justice is perhaps a reflection of the more formal procedures adopted by the CRTC in this area. Those wishing to challenge the CRTC's telecommunications decisions have tended to choose the avenue of a petition to the Cabinet rather than a legal appeal to the Federal Court of Appeal. There were petitions in connection with five of the CRTC's decisions as of 1979.[149]

Two of the legal appeals have been decided by the Court and two are yet to be heard.[150] Of the two decided cases, the first, *Bell Canada v. Challenge Communications Limited*,[151] involved a CRTC decision which disallowed certain provisions of a tariff of Bell Canada, concerning automatic mobile telephone service, as being unjustly discriminatory against Challenge Communications Limited, a supplier of mobile telephone equipment operating in competition with Bell. The tariff in question would have excluded Challenge and other suppliers from providing new mobile telephones with direct dialing access to Bell's telephone network. All such mobile units under the tariff in question were to be provided on a rental basis exclusively by Bell. Although Bell argued that the General Regulations governing the provision of its service prevented the connection of terminal devices to its telephone network without its approval, the Federal Court of Appeal held that the General Regulations were to read as subject to the provisions respecting tariffs in section 321 of the *Railway Act*. The major significance of the CRTC's decision and the Court's judgment was the extension in meaning given to the test of discrimination or undue preference in relation to tariffs as referred to in section 321. Until this case, the test had been applied only in relation to the customers of telephone companies. The Federal Court of Appeal, however, found that it applied to the telephone company as well as its customers, so that it could not give itself an undue preference or advantage in its tariffs vis-a-vis its competitors.

The other decided appeal[152] was brought by British Columbia Telephone Company against a CRTC order that required the Company to file for approval as a "telephone toll", a charge proposed to be levied against customers whose cheques in payment of their telephone bills were dishonoured. The charge was intended to recover part of the cost incurred by the Company in making good the N.S.F. cheques. The Federal Court of Appeal approached the question from the point of view of the contractual relationship that exists between a telephone company and its customer. It held that by proposing such a charge to its customers, the Company had introduced a condition into that relationship which required a promise from the customer to pay the charge in consideration for the continuation of telephone services. Viewed from that perspective, the Court held the charge to be part of the total charge for telephone service and therefore a "telephone toll" within the meaning of the *Railway Act*.

C. Standing of the CRTC before Appellate Courts

The proper role, if any, of an administrative tribunal before an appellate court where its decision is under attack has been recently reviewed by the Supreme Court of Canada. In two cases in which the subject was specifically addressed, the Court has stated that a board may appear as a party and make representations but only as to matters relating to its jurisdiction. Questions of jurisdiction in this context, however, have been held not to include the issue of whether or not the board has contravened the rules of natural justice. On this latter point, Mr. Justice Spence stated in *Re Canada Labour Relations Board and Transair Ltd. et al*:[153]

> It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of certiorari and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review.

This view was confirmed by the Court in *Northwestern Utilities Limited et al v. The City of Edmonton*.[154] Mr. Justice Estey, in a judgment unanimously concurred in by the other judges sitting on the appeal, stated that the policy of the Court has been "to limit the role of an administrative tribunal whose decision is at issue before the Court, even when the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction". With reference to the question of whether a tribunal has failed to observe the rules of natural justice, Mr. Justice Estey stated:

> "In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions."[155]

While one can readily appreciate that a board should not speak to the merits of a decision it has made, it is not entirely clear why it

should not be able to explain to a court the reasons why it adopted the procedure it did in a given case and to attempt to justify it. One of the chief characteristics of a board, which distinguishes it from a court, is the flexibility it has to adopt procedures best suited to achieve the specialized functions for which it was created. These procedures differ considerably from board to board and the degree to which they must adhere to the rules of natural justice depends on a variety of factors such as, the necessity to hold hearings, the extent of discretion they have to take into account in their decisions matters not on the record, and the scheme of decision making established in their statutes. The parties to a proceeding before a board may not be in the best position or have the necessary knowledge to explain properly the rationale underlying the board's procedures. Further, there is no guarantee that any of the parties which appeared before a lower appellate court will take the matter on to a higher court. Consequently, a board may be saddled with a decision that makes it extremely difficult to perform its statutory responsibilities with no recourse to a higher court.

In actual fact, the CRTC has been represented by its own counsel and has taken an active role in all of the appeals concerning its decisions including the Confederation Broadcasting Case referred to previously which was heard by the Supreme Court of Canada and involved a question of natural justice. The courts thus far have not objected to this involvement. In nearly all these appeals, however, the Commission has been cast in the role of respondent rather than appellant and this perhaps has made a difference to the way in which the courts have perceived the propriety of its participation. Also, the Federal Court of Appeal, before whom most of the appeals involving CRTC decisions have been decided, has taken a more flexible approach than the Supreme Court to the active participation of tribunals whose decisions are under appeal or review, and the issue has not yet arisen in that court.

With respect to telecommunications decisions, the *National Transportation Act* grants a specific right to the CRTC to be heard on appeals to the *Federal Court of Appeal*. There is no similar right granted in the *Broadcasting Act*. It would seem important for the reasons already referred to, that the CRTC continue to be heard on challenges to its jurisdiction including allegations that it has exceeded its jurisdiction by breaching the rules of natural justice. It is accordingly recommended that a specific provision granting this right should be provided by legislation.

CHAPTER SEVEN

Public Access

Much has been written about the CRTC's involvement of the public in its regulatory activities. Since the Commission was established in 1968, it has adopted a high profile and actively sought out means by which interested persons could more easily participate in its processes. In broadcasting, such measures as holding public hearings throughout the country, advertising them widely, using informal procedures that permit virtually any member of the public to come forward and speak his mind, inviting public comment on policies before they are implemented and, in general, creating an atmosphere of openness and accessibility, have been successful in achieving a great deal of public response. It has been easier for the CRTC than other agencies to achieve such response because of the character of the industry it regulates. Broadcasting by its nature is a very public activity on which most Canadians have a viewpoint. Ask any man on the street, for example, to express an opinion on CBC programming and he is bound to have a comment. Also, as Hudson Janisch notes in his study on the Canadian Transport Commission, the personal style of the Chairmen of the CRTC has had something to do with the public visibility of the Commission. As he puts it:

> Its first chairman participated in numerous media encounters where he has often been sharply criticized. He constantly sought to explain CRTC policies to industry and the general public as well as to encourage greater public understanding of the problems facing Canadian broadcasting. CRTC commissioners and the agency's senior staff regularly attend the annual conventions of broadcasters and cable operators where they patiently seek to explain the policies to their critics. At these sessions, they have naturally had to fend off what could become embarrassing questions about particular policies and even particular applications. The impressive element here is that they have not used the potential difficulty of having to refuse to discuss a pending matter as an excuse to avoid public scrutiny.[156]

It must be recognized, as well, that the regulatory activities of the Commission are of widespread interest to Canadians because they affect the programming fare available to them. The CRTC's decisions and policies are news which is constantly reported not only by the electronic but also the printed media. It is common practice for the CBC and CTV networks, as well as individual broadcasters and cable companies, to report on and even carry live coverage of their own licence renewal proceedings. Through the broadcasting system, therefore, many Canadians have been able to view CRTC proceedings and become acquainted with the issues without ever attending a hearing.

On the telecommunications side of its jurisdiction, these built-in aids for public involvement do not exist. The issues in this area, being oriented more towards hardware facilities than program content, are much more difficult to understand. They involve technical and economic considerations which require a specialized knowledge to adequately comment upon. Nevertheless, since assuming responsibility for telecommunications regulation in 1976, the CRTC has met the challenge of greater public involvement in this area with imagination and innovative techniques, a number of which are referred to below. As an example, in the CRTC's first three major telephone rate applications, approximately 4,500 Canadians expressed their views either by way of a written comment, attendance at regional public hearings or full participation in the central hearing at which these applications were considered.

A. Public Notice

There are extensive requirements for notifying the public of pending applications and hearings in the rules governing both broadcasting and telecommunications procedures. In broadcasting, these include publishing announcements in the *Canada Gazette* and local newspapers and broadcasting them over any radio or television station to which the application relates. In the latter case the rules require four announcements informing the public of the date fixed for the hearing, the nature of the matter to be heard and the rights of interventions open to the members of the public. The Commission's working paper on broadcasting procedures suggests increasing the number of broadcast notices for applications to renew radio and television licences to as many as 20 and for other types of applications to as many as 16.

Such announcements would give notice not only of pending applications but also of any decisions following the hearing of the applications that amended the licences of the stations in question.[157]

In addition to pending applications, the Commission's proposals would require licensees to broadcast notices during the currency of their licence terms at least twice a month to the effect that they make use of radio frequencies which are public property, that their undertakings must therefore be operated in the public interest, that the licensee welcomes comment and criticism and that its public file containing its licence, promise of performance and a record of all dealings with the CRTC is available during business hours for public viewing at the station's offices.

On the telecommunications side, there are of course no licences involved or use of public frequencies. The notices therefore relate only to the details of applications and pending hearings and do not have the added element of public accountability for the manner in which the undertaking is being operated. Nevertheless, the notice requirements are very extensive, particularly in relation to general rate increases. The Commission has followed a practice in matters requiring a public hearing of issuing directions on procedure on a case by case basis which sets out the parties which must be notified. With respect to general rate increases, notices are published in the *Canada Gazette*, in at least one of the newspapers serving each of the communities within the service area of the applicant and are mailed to each telephone subscriber as part of his monthly billing. This last form of notification is an innovation by the CRTC and includes a brief description of what the application is about, how the subscriber's telephone rates would be affected, a detailed schedule of the proposed changes and the reasons why the company is asking for a rate increase. The notice also contains explicit instructions on how subscribers can view a copy of the application and how they can comment or intervene. The three methods of intervention set out in Chapter Three are extensively described. It is primarily because of this notice by way of a billing insert that the Commission has been able to obtain such a large public response to the general rate applications. The idea has been so successful that the Commission has proposed that the same procedure be followed by cable operators in relation to all applications for amendments to their licences, which would include those for rate increases.[158]

In cases where the nature of an application makes it unclear as to whether or not a hearing should be called, the Commission has used a method both in broadcasting and telecommunications matters

of testing public reaction. Notice of the application is published and public comment invited. The Commission then decides on the basis of the comments received whether a hearing should be held or whether the matter can be decided on the basis of the written documentation. Wide-spread circulation of these notices was until recently obtained through the Commission's mailing list of some 2500 regulated companies and other interested parties who received copies of the public announcements and decisions of the Commission free of charge. In order to reduce expenditures, this service was terminated at the end of 1979. It is now necessary to pay an annual fee to the Government's Publishing Centre in order to receive copies of the CRTC's notices and decisions. This is regrettable as the charge will no doubt deter many members of the public from subscribing to the service and thus reduce the effectiveness of this form of public notice. It is to be hoped that means can be found to re-institute the former service.

A further innovative notice procedure in the Commission's new Telecommunications Rules, mentioned in Chapter Three, is the register of "interested parties". This allows any person to register with the Secretary of the Commission as an "interested party" in respect of any or all of the categories of applications involving new or amended tariffs, general rate increases, interconnection agreements or capital issues. The Rules provide that, after registration, such persons must be served with all application material at the time it is filed with the CRTC. A covering letter set out in the forms attached to the Rules must also be included which describes the application and contains the details required for filing an intervention.

B. Hearings

As discussed in previous chapters, the Commission has attempted to create a hearing environment that encourages as much public participation as possible. For both broadcasting and telecommunications matters, it has devised two types of public hearing formats. The first applies to the main hearing where the procedures are structured for the presentation of applications and interventions. The other is a town hall meeting format which has permitted members of the public to come on short notice and "sound off" on any matter in relation to broadcasting or telecommunications rate matters. The regional hearings on applications for general increases in telephone rates are held

in communities selected mainly on the basis of the areas from which the largest quantity of written representations are received. They are usually held in the evening so that interested persons are not required to take time off work. Besides allowing members of the public to voice their views on the applications, they often achieve immediate solutions to subscribers' problems. The meetings are well attended by executives of the telephone companies who take the opportunity to talk to those appearing to try to resolve their problems expeditiously.

On the broadcasting side, the Commission had instituted a practice of holding public meetings of a similar nature on the evening prior to the commencement of a public hearing. As these hearings took place in communities across the country, they provided an opportunity for citizens in all parts of Canada to speak directly to the Commission on their concerns about the broadcasting services that were being provided to them. The Commission's Broadcasting Rules also permit representations by community groups to be made at the main hearing upon 48 hours notice being given prior to the hearing. As in the case of the CRTC's free mailing service, budgetary considerations have also forced the cancellation of the public meetings. Again, it is to be hoped that this is only a temporary measure and that the practice will be reinstated. It is a valuable mechanism for direct access by the public to the Commission.

C. Policy Development

Perhaps more than any other federal or provincial agency, the CRTC has involved those it regulates and the public in the formulation of its policies and regulations. In broadcasting, the evolution of major policies in cable television, Canadian content requirements and FM broadcasting have been accomplished through a system of releasing white papers, calling for written briefs on their proposals and holding public hearings at which the authors of the briefs appear and expound on them. In some cases the evolutionary process in a given area has required a series of such papers and hearings before a final policy emerges. In the case of FM broadcasting, for example, it took two major documents, three public hearings and a period of seven years to arrive at new policies. Although the *Broadcasting Act* does not require this process, the Commission has found it an indispensable means of shaping policies, especially those which have sought to break

new ground. On the other hand, the Act does require such a procedure for the enactment of regulations. Copies of proposed regulations must be published in the *Canada Gazette* and a reasonable opportunity afforded to licensees and other interested persons to make representations on them.[159]

The Commission has announced its intention to follow a similar practice in telecommunications regulation in what it has referred to as "issue hearings". These would involve extracting topics that re-occur in rate hearings from the context of particular applications and treating them as general policy questions. In its decision of May 23, 1978, such matters as non-urban telephone service, billing and collection practices and customer-owned attachments to carrier systems were mentioned as examples. As the basis for issue hearings, the Commission would prepare documents on these matters, raising questions which should be addressed and soliciting comments from carriers, habitual interveners and the public. The proposals for new procedures and practices and for uniform methods in the manner in which carriers account for their costs have already been dealt with in this fashion.

D. Interveners' Costs

As a number of interveners have pointed out to the CRTC, the best notice and hearing techniques for involving the public are futile endeavours if the public cannot afford to participate. The Commission's field of regulation has grown steadily more complex over the past few years and this in turn has increased the degree of expertise and resources required by interveners to make a meaningful contribution to the process. It has not been the practice of the CRTC or other federal administrative tribunals to provide financial support to those appearing before it. The tribunals are not provided with funds for this purpose and in any event such a practice could raise questions about the impartiality of the tribunal.

One of the means by which support may be provided to worthy and needy interveners, however, is through an award of costs against the regulated companies in their applications for increased benefits. Again, the tradition in the federal regulatory tribunals has been not to award costs. The CRTC, however, has departed from this tradition and has opened the door to such awards in carefully defined circumstances.

The *Broadcasting Act* makes no provision for the payment of costs of the parties to proceedings. Section 73 of the *National Transportation Act*, however, provides the Commission with power in telecommunications matters to award costs. In seeking means of funding interventions in lengthy rate hearings, interveners have periodically sought payment of costs under this provision. The matter was thoroughly aired before the Canadian Transport Commission on the application of the Consumer's Association of Canada.[160] In its decision, the CTC contended that the costs referred to in Section 73 were not intended to be applied to the type of regulatory proceeding involved in a rate case. Such a proceeding is not of an adversarial nature in the ordinary sense with a winner and loser. Also, with a number of interveners involved, the CTC wondered how one would choose who should be awarded costs and on what basis.

The CRTC first tackled this question in its decision of December 23rd, 1977 in *Challenge Communications Limited vs. Bell Canada*. As previously noted, in this case Challenge alleged that a certain portion of Bell's tariff relating to mobile telephone service was unjustly discriminatory. The Commission found in favour of Challenge and in dealing with its claim for costs, made reference to the fact that none of the predecessor agencies of the CRTC had ever awarded costs and no scale of costs had therefore ever been adopted. Notwithstanding this, the Commission found a number of factors which supported the applicant's claim for costs:

> First, this case was in the nature of an adversary proceeding, in which the applicant achieved its principal goal. Secondly, in the prosecution of its case, the applicant in effect, represented the entire COAM suppliers' section of the MTS industry. Thirdly, in bringing to the attention of the Commission a tariff which was contrary to Section 321 of the *Railway Act* and in making its case, Challenge made a substantial contribution to the effective discharge of the statutory responsibilities of the Commission in respect to the matters at issue in this case. And fourthly, the amount of costs incurred by the applicant represented a strain on its financial resources.[161]

The Commission stated that none of the above factors standing alone would have been compelling but that the combined effect was sufficient to convince the Commission that the applicant was deserving of the awarding of costs in this case. It consequently ordered that the costs of Challenge be paid by Bell Canada on a solicitor and client basis according to the tariff of costs in the Supreme Court of Ontario. The bill was subsequently taxed by the General Counsel of the CRTC.[162]

Having broken new ground on the question of costs, the Commission then considered whether costs should be awarded in the context of general rate applications which, as noted above, are of different character than the adversarial proceedings in the Challenge case. The question was first dealt with in a decision on CN Telecommunications' application for increase in telephone rates in Newfoundland. Costs were awarded to counsel representing the Newfoundland and Labrador Federation of Municipalities which appeared as an intervener in the proceeding.[163] The principles for awarding costs had been previously suggested by the Commission in its draft Rules published in May, 1978. These proposed that the Commission might award costs against the applicant to any intervener who:

(a) has a substantial interest in the outcome of the proceeding, or represents the interests of a substantial number or class of subscribers,

(b) has participated in a responsible way,

(c) has contributed to a better understanding of the issues by the Commission, and

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

Using the same criteria, the Commission awarded costs to the counsel representing the National Anti-Poverty Organization, Inuit Tapirisat of Canada, and other interveners at the Bell general rate increase application heard during the months of April through June of 1978.[164]

It will be seen by the above that the CRTC has tried to confine the awarding of costs to specialized situations where, in the Commission's opinion, the matter was one deserving of costs. The Commission, however, has recently broadened its approach still more by requiring Bell Canada and British Columbia Telephone Company, in their applications for increases to their long distance or TCTS rates to pay the costs of consultants hired by the CRTC to organize, analyse and report on evidence in that hearing. The matter is currently under appeal but is an indication of the scope of the interpretation which the Commission places on its powers to award costs under section 73 of the *National Transportation Act*.[165]

E. The Disclosure of Information

The CRTC has been an active proponent in recent years of disclosure of information filed by applicants in support of their applications in both broadcasting and telecommunications matters. On the broadcasting side, the disclosure of financial information has long been a subject of controversy. The existing rules of procedure in broadcasting provide that the Commission may at the request of the applicant, *if in the opinion of the Commission the public interest will best be served by so doing*, treat as confidential certain information including the financial statements of licensees (emphasis added).[166] In its early years, the CRTC used to routinely permit the filing of financial information under this rule on a confidential basis. This practice was challenged by several public interest interveners and the policy, insofar as it applied to financial information filed to support a cable rate application, was changed to require that such information would routinely be made public, unless the public interest dictated otherwise.

The Commission's proposals for changes to its broadcasting procedures considerably extend disclosure requirements. Licensees must maintain a public file at their main offices containing a variety of material relating to the operation of the undertakings, including all correspondence between the licensee and the CRTC, as well as the audited financial statements for the particular undertaking and, where applicable, any holding company of the licensee company.[167] In addition, the Commission proposes to apply the test evolved in its telecommunications proceedings to broadcasting applications and require that before information will be treated as confidential, the applicant must establish to the satisfaction of the Commission, that disclosure will cause specific direct harm that outweighs the benefit to be derived from public disclosure.[168]

On the telecommunications side, there is a statutory basis for confidentiality that is lacking in the *Broadcasting Act*. Section 331 of the *Railway Act* states that, where information concerning the costs of a railway company, or other information that is by its nature confidential is obtained from the company by the Commission, it shall not be published or revealed in such a manner as to be available for the use of any other person, unless in the opinion of the Commission such publication is necessary in the public interest. Similarly section 334, relating to information returns supplied by regulated companies to the Commission, explicitly states that such information shall not be open

to the public unless there appears to the Commission "to be good and sufficient reasons" for releasing any part of it.

The obvious intent of the sections is to provide confidentiality for information relating to carrier costs. Disclosure would be the exception rather than the rule. The Commission was forced to come to grips with these sections early in its regulation of the telephone companies. In a decision dealing with a claim by Bell Canada for confidentiality of an economic study in an application concerning a tariff for the lease by cable operators of space on Bell's poles, the Commission dealt with the intent of the sections. With specific reference to section 331 it stated:

> The Commission has thus obtained confidential information that has been ruled relevant to the determination of matters before it, and has received specific requests by interested parties intervening at the public hearing to make that information available to them.
>
> In such circumstances the Commission believes that there is a balance that must be struck in the public interest between the advantages of maintaining confidentiality and the requirements of a proper determination of the matters under Sections 320 and 321 of the *Railway Act*.
>
> The Commission notes that the specific issue of confidentiality arises in the broader context of the necessity for the effective regulation in the public interest of telephone and telegraph companies, many of whose activities are performed on a monopoly basis.
>
> 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 upon the quality of the participation of interveners. It follows that interveners must, in principle, have as much relevant information as possible in order properly to discharge their role. A limitation to this principle would arise, however, when the disclosure of certain information would be likely to cause specific direct harm to the Company.[169]

By this reasoning, the Commission effectively reversed the onus in section 331. While the section would seem to require confidentiality in all but exceptional cases, the Commission, in requiring the disclosure of most of the study in question, appeared to rule that in all cases where interveners needed relevant information to assist them, it would be in the public interest to release it to them unless specific direct harm were proven. Therefore, interveners need only state their need of information sought to be kept confidential and the onus would then shift to the carriers to prove the harm.

The test laid down by the Commission has not been easy for the carriers to meet since it is difficult to predict with any certainty the

competitive harm which may occur from the release of financial information. As the Commission itself noted in one of its decisions, there are no facts in the future.[170] Consequently, a great deal more information is now available in telecommunications proceedings than has been the case previously.

An element of disclosure of information covered in the broadcasting proposals is that by the Commission of its own briefing notes prepared by the staff. As noted in Chapter Two, it is recommended that all such material prepared prior to the hearing for the assistance of the sitting Commissioners, should be made public for the reasons stated. The same fundamental principle of enhancing the quality of participation in the regulatory process that the Commission has stated as a basis for disclosing information provided by applicants, is equally applicable to the information it generates itself for its hearings. For the same reason, it is recommended that staff documents relating to telecommunications applications be made available as well. Summaries of application material and background studies are useful and necessary for Commissioners but the information in them may be mis-stated or the emphasis made in a way that is prejudicial to the case of the applicants. Applicants and also interveners would benefit from knowing the contents of such material in advance of the hearing and having an opportunity to comment on it in their oral presentations.

F. Complaints

A substantial number of complaints on both broadcasting and telecommunications matters are received on a continuous basis by the CRTC. On the broadcasting side, the processing of such complaints is dispersed throughout the various branches depending on whether they relate to a programming, licensing, legal or other type of matter. Many of the letters are addressed to the Chairman of the CRTC. These are normally distributed to the appropriate branches which prepare responses for his signature. Recently, complaints that raise significant issues have been considered by a standing committee of Commissioners. Generally speaking, however, there has been a lack of co-ordination and follow-up in the procedures for handling complaints. A standard practice is to refer them to the licensees in question, directing them to correspond directly with the complainants and to keep the Commission informed. The CRTC does not actively intervene in most

instances to attempt to bring about a solution. As noted earlier, there have been very few public hearings on complaints.

On the telecommunications side, the procedure is more structured, and effective. Part of the reason for the effectiveness is that the complaints generally are in regard to a service or technical matter which can be identified quickly and dealt with. Broadcasting complaints, on the other hand, frequently deal with issues of a non-recurring nature, such as an alleged misrepresentation of facts or viewpoints attributed to persons referred to in a program, or the tastefulness of a certain program. These are much more difficult to deal with because they involve questions of individual standards and judgments of programming content which the CRTC has usually considered lie outside its regulatory purview. The Commission correctly takes the view that its function is not to act as a censor of programs.[171] Also certain complaints involve matters for which there is recourse to the courts, for example, the broadcasting of libellous or obscene matter, and the Commission considers that the courts are the appropriate forum for resolving disputes in such cases.

Nevertheless, the procedures established on the telecommunications side seem worthy of emulation for broadcasting complaints. Two full-time staff members deal with all telecommunications complaints. Rather than writing the company and requiring it to straighten the matter out with the subscriber, these complaint officers require the companies to respond directly to them. The officers then assess whether the complaint is justified and whether further action is required. Where action is required, it is initiated by the officers and followed up until the matter is resolved. Where necessary, a visit to the telephone undertaking or a meeting with the parties may be held.

It is recommended that the Commission should appoint on the broadcasting side similar officers whose sole responsibility is to deal with all complaints that flow into the Commission. Whether the letter is addressed to the Chairman or any other individual, it should be referred to these officers and they should have the responsibility for finding the answer and replying. The work demands on the senior officers in the Commission are such that letters of complaint have a low priority and are often neglected in favour of more urgent tasks. Officers dedicated exclusively to complaints would ensure that they were handled promptly and, equally important, in a consistent manner. They would have the authority to visit licensees, where necessary, interview complainants, gather the facts and generally stay on top of

the situation. They would take a much more activist role in resolving complaints than the Commission presently does.

G. Other Means of Keeping the Public Informed

As the Commission has stated in its proposals for new procedures and practices, effective intervention and participation by the public in the hearing process requires that information about licensees and the telecommunication carriers be available on a continuous basis. In the broadcasting procedures, as noted, it is contemplated that a public file kept up to date will be maintained at the offices of all licensees. In its proposals of July 1976, in regard to telecommunications matters, the Commission suggested that the public should have access to the monthly or quarterly reports now filed by carriers on a confidential basis. In its decision of May 1978, the Commission confirmed its opinion that significant benefits could be derived from the publication of reports on a regular basis setting out statistical information regarding carrier activities. The decision stated that the Commission would within the context of its Cost Inquiry[172] consider the nature and form of such a reporting process. As well, the Commission noted that it had been investigating the feasibility of a practical system for making the record of previous proceedings available to interested parties. This, of course, would be extremely useful to the general public and all persons working directly in the field to assist in the research and referencing of past materials.

The Commission has also instituted a regular monthly reporting system of all its telecommunications proceedings. It is called the *Telecommunications Bulletin* and is divided into three parts. The first part contains a status report on active proceedings and is kept continually updated; the second summarizes recent telecommunications decisions and orders of general interest, and the third contains a chronological table of CRTC telecommunications orders made during the period, most of which deal with routine tariff applications. The *Bulletin* is sent free of charge to all who request it and serves a useful purpose in keeping interested members of the public abreast of the Commission's activities in this area.

It is recommended that a similar bulletin be prepared for broadcasting matters. The broadcasting announcements are voluminous and

difficult to keep track of. A monthly bulletin summarizing important developments would be a very useful reference tool, particularly as the CRTC has discontinued circulating its decisions and announcements.

On its broadcasting side, the Commission has utilized a number of means outside the application and hearing process to keep the public informed of its activities. Commissioners and senior staff members frequently are interviewed by the press and appear at public gatherings to give speeches on various aspects of CRTC policy. Specific decisions, regulations, policy statements and other public announcements are available upon request from the CRTC's information office. The Commission is helped in disseminating information about its broadcasting activities by newspaper columnists who specialize in broadcasting matters and report regularly on CRTC proceedings and policy proposals. As well, the Commission issues frequent press releases and other forms of explanatory documents in relation to its current activities. From time to time it sponsors seminars on current broadcasting issues of public concern.

One means of assisting the public which is badly needed is an index to the subject matter of broadcasting decisions and announcements which is kept current. The monthly bulletin suggested before could contain such an index. At the present time, the only index available is that contained in a bound volume of decisions which is released annually.[173] However, it is organized according to the locality which the licensee serves rather than the subject matter of the decision. Therefore, unless one knows the details of a particular application there is no means of researching decisions in a given area. There has been some assistance in this regard provided by the Commission's annual reports where, under various subject headings, major decisions were referred to and summarized. However, the Commission's past two annual reports have failed to do this. This was a helpful format and should be re-instituted.

While such methods of facilitating research may not seem of critical importance, they have a strong effect on the quality of the regulatory process. In order to address the Commission intelligently, licensees and interveners need to know its current thinking on particular issues and to be able to trace the development of that thinking through the Commission's published documents. It is in the CRTC's best interests to ensure that those who make submissions to it have the means of informing themselves as fully as possible. Notwithstanding present financial restraints, the Commission should be increasing its efforts to

achieve this objective rather than curtailing them and it is to be hoped that budgetary considerations have caused only a temporary setback in this respect.

CHAPTER EIGHT

Conclusions and Suggestions Respecting the Structure of the CRTC

At the outset of this paper, reference was made to the question of whether the marriage of telecommunications and broadcasting regulation has been a happy one. Perhaps the best answer is that it has survived for more than four years and nobody is yet talking of divorce.

It would appear that the rationale for joining the two areas of regulation stated in the Green and Grey Policy Papers has been borne out. Indeed, the need for a co-ordinated approach becomes stronger every day as technology brings broadcasting licensees and telecommunications carriers into ever closer contact. The Commission has already had a number of hearings where opposing interests of the two sectors have required adjudication. The tariffs proposed by Bell Canada and British Columbia Telephone Company for the use of their telephone poles and conduits by cable operators were strongly contested by cable licensees in the territories served by the two carriers.[174] The two national associations representing cable television operators and radio and television broadcasters have intervened in the Telesat-TCTS and CNCP-Bell Canada interconnection hearings. Bell Canada has opposed applications by Ontario cable licensees to introduce non-programming services such as burglar protection, medical alerts and information retrieval.[175]

The issues in these contests involve more than questions of reasonable rates and the appropriateness of certain services for distribution over cable as opposed to telephone systems. They raise other complex problems such as how far a natural monopoly should extend, the degree of competition that is desirable between regulated companies and the extent to which it should be regulated, whether or not there should be a separation of control over the content of what is

carried from control over the carrier system itself, the extent to which the costs of providing new services by telephone and cable companies, especially competitive services, should be separated from those of other services for the purpose of setting equitable rates and so on. All of these matters require the CRTC to balance competing interests as between the sectors it regulates and between each sector and the public it serves. The range and complexity of these interests demands the unified perspective of a single regulatory authority.

A. The CRTC's Record since April 1, 1976

In spite of predictions that the CRTC would grind to a halt under the weight of its new responsibilities with very little in the way of additional resources to cope with them, the Commission's productivity does not seem to have suffered noticeably.

On the broadcasting side, in the year ending March 31, 1976, the Commission received 1,579 applications, announced decisions on 1,336, and had on hand at the end of the year 1,346.[176] In its fiscal year ending March 31, 1979, it received 2,122 applications, announced decisions on 1,733 and had on hand at the end of the year 1,456.[177] While these figures show a slight decline in the percentage of decisions announced in relation to applications received (85% to 82%) it is apparent that the Commission's productivity has kept pace with the large increase in the number of applications, (+ 74%). Moreover, there has been a substantial improvement in the percentage of applications on hand at the end of the year in relation to those received. (67% in 1979 vs. 85% in 1976).

All of this has been accomplished notwithstanding the demands made on the time of Commissioners and staff by lengthy telecommunications hearings and decisions. In its 1978-79 fiscal year, the Commission held 15 telecommunications hearings including the regional hearings associated with Bell Canada's general rate increase application. In two of those proceedings, the central hearing in the Bell Canada case and the CNCP-Bell interconnection application, the hearing of evidence occupied 58 days. The decisions in these two cases taken together were more than 400 pages in length.

In its approach to telecommunications regulation, the CRTC has shown the same verve and initiative in tackling major issues that it did

in the first years of its broadcasting regulation. It has designed and implemented new procedures that have opened up telecommunications proceedings to much more public participation. As a result, the issue of the quality of service provided by telephone companies to their subscribers has taken on major importance in applications for general rate increases. The Commission has required the companies to establish new standards for measuring service in areas which are of most importance to subscribers and to report the results of these measurements on a regular basis. In the two major interconnection cases, the Commission decided a range of extraordinarily difficult issues that had never been considered by its predecessor agencies and for which there were therefore no precedents. In its approach to complaints, the question of awarding costs to interveners, to liaison with provincial regulatory agencies in the conduct of several of its proceedings, to issues of competition and many other matters, the CRTC has shown a considerable degree of innovation and willingness to depart from traditional regulatory positions.

If the Commission has paid a price for all of this activity, it has been on the broadcasting side. Although it has managed to keep abreast of the increasing volume of applications since 1976, it has not appeared to have matched in its broadcasting regulation the energetic and progressive tackling of critical issues that has been the hallmark of its telecommunications regulation. Many of the major problems that have been outstanding since 1976 and before are unresolved. New criteria that measure Canadian content in television programming in terms of quality rather than quantity, the introduction of pay television, finding the means of stimulating the production of Canadian television programs that will successfully compete with U.S. programming, and revision of the radio and television broadcasting regulations, many of which have remained unchanged since the 1930's, are some of the matters needing fresh and imaginative approaches. However, the Commission has simply not been able to commit the time and resources necessary to tackle these problems adequately and cope as well with the burdens of its new field of responsibility. To accomplish what it has in telecommunications has required a tremendous effort and many late nights and weekends of work by the Commissioners and staff working primarily in this area. It is to be hoped, however, that means such as those suggested in this paper and others that the Commission is experimenting with will be found to delegate more responsibility and allow Commissioners and staff to function more efficiently. Substantial commitments of time and talent are needed to meet the challenges on the broadcasting side.

B. The Two Kinds of Procedures

When the transfer of telecommunications regulation to the CRTC was first proposed, there was a good deal of speculation about the impact of the two types of procedures on each other. Would telecommunications procedures become less court-like as a result of the influence of the broadcasting tradition or would broadcasting hearings begin to look more like telecommunications proceedings? As it has turned out, each proceeding has retained its original character by and large. The Commission has taken the steps noted previously to introduce a note of informality into telecommunications hearings, but they are still a forum in which lawyers feel more comfortable than laymen. In broadcasting, there has been even less impact felt. This is partly because the part-time members, who do not experience the formalities of telecommunications hearings, sit on the broadcasting hearings, usually in numbers roughly equal to the full-time members. More important, however, to the retention of informality is the absence of cross-examination by lawyers for the parties and evidence given under oath led by means of lawyer's questioning.

One of the subtle effects stemming from the full-time Commissioners' experience with the more formal procedures is a somewhat more vigorous and crisp form of questioning employed by such members on occasion in broadcasting hearings than has often been the case. There is less of a tendency to let general or superficial answers slip by and more pursuit of precise responses. Also, the expertise gained in dealing with numerous objections of a legal or procedural nature in telecommunications hearings has stood the Commission in good stead when it encounters the odd such objection in broadcasting proceedings.

The CRTC is probably unique in having two such different sets of hearing procedures co-existing within the same agency. There has been from time to time discussion within the Commission as to whether it should try to combine the best elements of each and produce one set of procedures for use in both areas of its regulation. However, it would seem desirable that the Commission continue to use both. Each set of procedures suits the character of the proceeding it governs and that character is important to the regulatory objectives on each side of the Commission's jurisdiction. The dialogue with broadcasters and public involvement which characterizes a broadcasting hearing provides continuous exposure of the Commission to broadcasting

concerns across Canada which, in turn, is of invaluable assistance to it in shaping its policies. On the other hand, the determination of issues in broadcasting applications do not normally involve the kind of rigorous testing of large quantities of technical and economic evidence that make more formal procedures suitable in a telecommunications hearing.

While it is therefore deemed important to maintain the distinct character of the two types of procedures, that is not to say that elements of each should not be used on appropriate occasions in the other type of proceeding. For example, the broadcasting hearing format might better suit an "issue" or policy hearing in telecommunications than the more formal procedures. The Commission has already adopted a modified form of its broadcasting procedures for its Inquiry Into Telecommunications Carriers' Costing and Accounting Procedures. (Cost Inquiry)[178] In certain broadcasting matters where there are strong adversarial positions at stake, it has been suggested in Chapter Two that cross-examination should be routinely permitted. The Commission's extensive experience with cross-examination gained in its telecommunications hearings should assist it in putting appropriate limitations on parties seeking this privilege in broadcasting applications. The CRTC in many ways is fortunate to have experience in and the flexibility to draw on elements of either type of procedure according to the dictates of the particular kind of matter that is before it.

C. The Need for Specialization

As previously mentioned, in its proposals of July 20, 1976, on procedures and practices in telecommunications proceedings the Commission noted the cross-over concerns between the two areas of its jurisdiction and said it intended to adopt an integrated approach to the telecommunications hearing and decision-making process. This collegial approach to decision-making has already been discussed in Chapter Four where it was recommended that the panel which hears a matter should decide it. Besides the procedural injustices inherent in collegial decision-making, there is the practical difficulty in complex and highly technical proceedings of members who have not participated in them not having a sufficient level of knowledge to make an informed decision. There is also the matter of the background, skills and interests of Commissioners which make some better equipped and

suited to telecommunications proceedings and others to a broadcasting hearing. A knowledge of economics, accounting and the technology used in telecommunications undertakings is essential for effective regulation in this area. While these skills also have a place in broadcasting regulation, the emphasis is more on cultural or software considerations so that Commissioners operating in this area should have interests attuned primarily to such matters.

As the Commissioners presently operate, there is a fair degree of specialization at the member level. The Act which expanded the CRTC from five to nine members in 1976 also added another vice-chairman. Although it was not specified that each vice-chairman would have primary responsibility for one of the areas of regulation, this was the obvious intent of the legislation and in fact is the way matters have worked out. As well, certain of the other Commissioners tend to sit on most telecommunications hearings while others confine themselves to the broadcasting side. However, there is no hard and fast rule and all of the Commissioners who sit regularly on telecommunications matters also participate in broadcasting hearings.

It is submitted that the issues encountered by the CRTC on both sides of its jurisdiction have grown too complicated for this generalist approach. It would seem desirable for a complete understanding of these issues and finding the best regulatory solutions, that most Commissioners be allocated to one area or the other and spend their full time in the designated area. This kind of specialization and commitment is necessary to keep fully abreast of developments in each of the areas of regulation, both in Canada and other countries, and to acquire the level of expertise needed to find creative answers to the increasing complex problems in these areas. The identification of Commissioners as specialists and decision-makers in one field or the other would also serve to strengthen the confidence of regulated companies and the public in the regulatory system since it would be known that decisions were being made by the persons most knowledgeable and experienced in a given field.

It is acknowledged, of course, that because of the cross-over concerns discussed previously that the decisions made by the telecommunications group of Commissioners could have a direct impact on matters coming before the broadcasting group and vice-versa. The recommendation for specialization is not intended to mean that each group would work in isolation from the other. Where matters of joint concern arose, it would be necessary for the two groups to act in concert, for example, by composing hearing panels with

Commissioners drawn from each side. Executive Committee meetings would provide a forum in which policies affecting both areas of regulation would be hammered out. These discussions would doubtless take on a good deal more focus and depth if the Commissioners were speaking from positions based on a higher level of knowledge and expertise gained through specialization. In all of this, the Chairman of the Commission, whom it is assumed would not be aligned with either group, would play an important role in providing a policy over-view and acting as a liaison between the groups to co-ordinate the sharing of views and discussion of problems which had a mutual impact.

D. The Role of the Part-Time Commissioners

Over the years, the part-time members of the Commission have served the Commission diligently and well. When hearings have been called, they have been required to leave other occupations for periods of one or two weeks at a time, brief themselves fully on the applications to be heard, sit for long hours at public hearings and participate in lengthy business and consultation meetings. The time requirements in all of this have excluded from the ranks of potential part-time members, persons whose occupation will not allow them to be away frequently.

In the early years of the CRTC, when the Executive Committee numbered only five members, a good deal of reliance was placed on the part-time Commissioners to keep the Executive Committee apprised of regional broadcasting concerns and to take an active role in the formulation of policy. Public hearings were not held as frequently and the panels were much larger. Because business meetings of the Commission were held in tandem with hearings, it was not unusual for five or more of the ten part-time members to be present at a hearing and, in any event, sufficient numbers of full-time and part-time members would arrive at the conclusion of the hearing to form the majority needed to make a quorum for the consultation and business meeting. This system tended to keep part-time members fully involved in Commission activities. Those who had not sat at a hearing would be brought up to date in the subsequent meeting while the issues and arguments were still fresh in the sitting members' minds. More of them sat as a group on a larger percentage of the total applications in hearings across Canada with the result that they were kept better informed about the

national broadcasting scene and the totality of the Commission's regulatory activities.

Since the Commission acquired jurisdiction over telecommunications, the role of the part-time member has become less significant. There are a number of reasons for this. Their exclusion from telecommunications regulation has meant that they have no participation in an area which has largely pre-occupied the full-time members and in which extremely significant decisions are being taken. The expansion of the Executive Committee has diffused decision-making and made it more difficult for the full-time members to arrive at a consensus on broadcasting policies. Involvement of the part-time members in the policy-making process to too great an extent makes the task of reaching a concensus that much more difficult. In general, the regulatory load which the Commission now carries is so time-consuming for the full-time members that there is not the same opportunity to keep the part-time members as involved as they once were.

More fundamentally, one must also question whether the role originally envisaged for part-time Commissioners is still relevant. According to the extract from *Hansard*, quoted in Chapter Four, their purpose was to represent the public in various walks of life. They were to act in a purely advisory capacity with respect to specific applications, but were to have full opportunity to express their views and to make representations on behalf of local and sectional interests when licensing decisions were under consideration. As mentioned in Chapter Four, most of the major broadcasting licences have now been granted. Public interest groups regularly appear at CRTC hearings across the country to voice local broadcasting concerns. Regional CRTC offices have been opened in order to keep the Commission in daily touch with broadcasters in these regions. It is arguable therefore, that there are now sufficient mechanisms available to keep the CRTC informed of "local and sectional interests" and part-time members are no longer needed for this purpose.

There is a more serious problem, however, and it stems from the same arguments presented earlier to support the need for specialization. The basic question that must be answered is whether the major issues in broadcasting have grown so complex that they demand a depth of knowledge and expertise that can only be gained by full-time involvement. It is submitted that this is now largely the case and that in any future broadcasting or telecommunications Act, the position of part-time Commissioners should be phased out as terms expire. This recommendation is not meant to denigrate in any way the contribution

which the part-time members have made to the CRTC in the past and continue to make. It simply reflects the view that regulation is an evolutionary process which in this case has now gone beyond the stage where an agency composed of full-time and part-time members is the best vehicle for the regulation of broadcasting. This recommendation is also not intended to be at odds with that contained in Chapter Four, respecting the granting of part-time members a voting status on the applications they hear. The scheme of decision-making proposed in that Chapter attempts to satisfy principles of fair procedure or natural justice given the existing situation where part-time Commissioners do sit on public hearings and participate in the decision-making process.

E. A New Structure for the CRTC

Despite the fact that the three telecommunications bills introduced by the last Government did not go past first reading, there is little doubt that new legislation will eventually come into force. There is general agreement that the *Broadcasting Act* needs revision to take account of a radically changed broadcasting environment from that which existed in 1968. The legislation governing telecommunications has remained relatively unchanged for more than 70 years. The claims of some provinces for a greater role in telecommunications regulation, concerns such as those expressed in the Clyne Committee Report respecting Canadian sovereignty, and technological advances making possible new telecommunications services and methods of distributing them to the public, are major influences that should stimulate the introduction of new legislation.

The bills previously introduced maintained the existing structure of the CRTC. Thought should be given in any new legislation to whether that structure is still adequate. For example, an argument could be made for increasing the number of full-time Commissioners. The current hearing schedule in both sectors of its jurisdiction leaves Commissioners little time to work on the larger policy issues. While suggestions have been made in this paper to permit the freeing of some members for matters other than the hearing of applications, this may not be enough in view of the increasing volume of applications. As noted at the beginning of this Chapter, broadcasting applications alone rose 74% in a three year period after the CRTC assumed telecommunications regulation. Also if the position of part-time Commissioner

were phased out, as recommended, more full-time members would be required to assist in the hearings.

A further change that should be considered is the decentralization of the Executive Committee. A common complaint voiced about the CRTC relates to the fact that a group of Commissioners, all based in Ottawa, make decisions affecting what the rest of the country sees on their television screens and hears on their radios. There is a resentment in certain parts of the country that such decisions are not made by persons more locally situated, who are in daily touch with the broadcasting needs of the residents of their area. Interested members of the public in Vancouver, for example, are not apt to travel to Ottawa to gain access to the Commissioners in the normal course. On the other hand, public hearings held in Vancouver at which such access can be had are not that numerous and the hearing schedule does not leave time for many meetings with individuals or groups on a face to face basis. The opening of regional offices has alleviated this problem somewhat, but they are manned by staff members who, of course, are not the decision-makers.

Consideration could therefore be given to increasing the number of full-time Commissioners sufficiently so that one or more members could be assigned permanently to each of the Atlantic Provinces, Quebec, the Prairie Provinces and British Columbia. These regional members would be granted decision-making authority and would consequently be responsible for hearing and deciding the broadcasting applications arising in their respective areas. Telecommunications applications would continue to be dealt with primarily by Ottawa Commissioners except that one of the members in British Columbia would be a specialist in this area to handle complaints, make inquiries and generally act as a liaison between the CRTC and the federally regulated telephone company in that province.

The Ottawa Commissioners would also hear and decide broadcasting applications from Ontario. As well, the Chairman and two Vice-Chairmen, situated in Ottawa, could act as a review committee with the power either on its own motion, or of a party to an application, to refer back for re-consideration, to vary or set aside decisions on both telecommunications and broadcasting matters made in any of the regions, including Ontario. If one of the review committee had sat on a hearing from which the decision under review arose, his place would be taken by the most senior Ottawa member.

Each of the regional offices would operate under a regional chairman who would supervise and be responsible for the work of the staff

and any other Commissioners assigned to his region. In order to maintain uniform policies and approaches to broadcasting regulation and decision-making, it would be necessary for the regional chairmen to meet regularly in Ottawa with the Vice-Chairman in charge of broadcasting. As well, Ottawa Commissioners could be assigned to sit with regional chairmen on applications raising issues of national significance.

In keeping with the recommendation respecting specialization, each of the two Vice-Chairmen in a new Act would be given operational responsibility for either broadcasting or telecommunications regulation. The Chairman would have responsibility for and over-all supervision of the development of policy on both sides and of the operations of the CRTC as a whole. He would also act as a liaison between the Commission and other government departments, in particular, the Departments of Communications and Secretary of State.

Hearings involving the development of major policies in broadcasting and licence renewals of the national networks would be conducted by a panel composed of the Chairman, the Vice-Chairman in charge of broadcasting, and all of the regional chairmen.

A new decentralized structure such as that outlined would accomplish a number of positive purposes. It would put Commissioners in touch on a day to day basis with licensees and the public they serve. It would meet one of the major arguments of provincial governments for jurisdiction by providing a locally based regulator. It would ease the hearing load by providing more Commissioners situated locally who would not have to travel as much. They would have delegated decision-making authority and more flexibility to plan regional hearings as required. There would be far more time and opportunity available to local Commissioners to investigate and take action on broadcasting complaints. The Commission's "supervisory" responsibilities mentioned in the existing *Broadcasting Act* could be carried out more fully and effectively since Commissioners would have first hand knowledge of the performance of licensees in their region. Licence renewal hearings could, as a consequence, become much more effective vehicles of accountability than they have been up to now.

It would be possible under the existing legislation to partially implement de-centralization. The Commission could assign one of its full-time members to each of its present four regional offices on a permanent basis. That member together with the part-time member from the region could be appointed under section 11 of the *CRTC Act* as a

standing committee to hear all broadcasting applications from that region. A consultation would still be required under section 17 of the *Broadcasting Act* at a meeting of the full Commission but this could easily be done on a regular basis. Subject to this requirement, the final decision of the regional panel would be given conclusive weight by the Executive Committee. The full-time Commissioners assigned to the regions would continue to meet frequently with the Executive Committee to co-ordinate broadcasting policies and guidelines for the handling of particular kinds of applications. The regional offices would require sufficient staff and other resources to organize and conduct hearings.

The Commission might consider initiating on an experimental basis a form of decentralized regulation such as that described. If four Commissioners were assigned to the regional offices, the Commission would still have five full-time members in Ottawa. Depending on the extent of the geographic jurisdiction delegated to the regional standing committees, the five Ottawa based members would in all probability be able to cope adequately with the broadcasting applications not covered by the regional offices as well as telecommunications matters. However, this would need a period of assessment as would the effectiveness of the regional Commissioners in processing and deciding applications. Even a partial implementation of regional regulation, however, should achieve some of the benefits referred to above.

An important factor affecting the feasibility of locating Commissioners in the regions is the possibility of a transfer of cable television regulation to provincial authorities. This will likely occur in some provinces if new telecommunications legislation is finally enacted. Such regulation constitutes a substantial part of the CRTC's workload. If it were removed from the Commission, it would be necessary to determine whether the radio and television applications originating in a given region would justify having a full-time Commissioner resident there.

F. The Immediate Future

The CRTC has been under considerable pressure from a number of quarters for several years. Complex regulatory issues, added burdens of telecommunications regulation, a nearly complete turnover of

Commissioners and senior staff, a more activist role played by Ministers of Communications in the decisions and policies of the CRTC and demands by provincial governments for regulatory authority over communications have all contributed to these pressures. It is apparent that times are changing for the CRTC and within the Commission there is a degree of uncertainty as to what the future may hold.

There is little question that the CRTC faces difficult times ahead. Factors such as those mentioned above will continue to put strains on the Commission and create an atmosphere of doubt about its future responsibilities. The CRTC has now existed for more than a decade. After such a period, it is to be expected that the structure and primary purposes of a regulatory body such as the CRTC will be re-examined. However, if the process of re-examination is too prolonged and the problems leading to re-appraisal remain unresolved, the impact on the body's morale and effectiveness is bound to be damaging. It is therefore to be hoped that the present uncertainties regarding the CRTC and the scope of its regulatory powers will be settled in relatively short order.

Over the period of its existence, the CRTC has compiled a substantial record of accomplishments. Starting with the repatriation of broadcasting undertakings from U.S. interests, it has tackled major, difficult issues in both broadcasting and telecommunications with energy and dedication. While there have been many disagreements between the CRTC and those it regulates as well as the general public as to where the public interest lies in specific instances, the Commission has conscientiously sought to find solutions to regulatory problems that best fulfil the statutory objectives which govern its activities. As this study indicates, the Commission's procedures have been designed to involve the public as much as possible in this quest.

However, procedural innovations that give the public greater access to the CRTC, are often costly. Under current government policies of budgetary cutbacks and personnel freezes, the Commission is finding it extremely difficult to maintain its customary practices for keeping the public informed and involved in its activities. In such a climate, it is even more difficult to introduce changes in this respect that require additional money or personnel. Nevertheless, it is self evident that the ability of the Commission to adequately respond to the concerns of the public served by broadcasters and telecommunications carriers depends in large part on the degree of access that the public has to the CRTC. A substantial reduction in this access as a result of fiscal restraint would seriously impede the Commission's ability to carry out

its functions in the public interest. It is therefore to be hoped that adequate financial and personnel resources will be made available to the CRTC so that its present mechanisms for public involvement may continue and others, such as those suggested in this study, may be pursued.

Endnotes

1. *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 2.
2. *Radio Act*, R.S.C. 1970, c. R-1, ss. 3 and 4.
3. *Broadcasting Act*, s. 22(1)(*b*).
4. Peers, Frank W. *The Politics of Canadian Broadcasting 1920-1951*, Toronto, 1969, pp. 3-4.
5. Commons Debates, June 1, 1928, p. 3662.
6. *Report of the Royal Commission on Radio Broadcasting*, Ottawa, 1929, p. 5.
7. The Committee's terms of reference are set out in the Preface and Annex A of its report, *Telecommunications and Canada*, Ottawa, March, 1979.
8. *Supra* note 6, p. 6.
9. *In re Regulation, and Control of Radio Communications In Canada* [1931] SCR 541, [1932] A.C. 304.
10. S.C. 1932, c. 51.
11. *Ibid.* ss. 8 and 9.
12. S.C. 1936, c. 24.
13. S.C. 1958, c. 22.
14. S.C. 1974-75-76, c. 49.
15. *Broadcasting Act*, s. 15.
16. *The Railway Act*, 1903, 3 Edw. VII, c. 58.
17. *An Act to Amend the Railway Act*, 1903, 6 Edw. VII, c. 42.
18. "Regulation of Bell's rates first occurred in 1892, when Bell's Charter was amended to prohibit Bell from increasing its then existing rates without the consent of the Governor-in-Council. Then in 1902, Bell's Charter was further amended to permit the Governor-in-Council to increase or decrease company rates upon the application of the company or of any interested municipality. The Governor-in-Council, in turn, had the power to commission any Supreme Court, Exchequer Court or Superior Court Judge to inquire in a summary way into the application and to make appropriate recommendations to the Governor-in-Council for an order changing the rates." *Telecommission Study 1(b), "History of Regulation and Current Regulatory Setting"* — Department of Communications, March 1970, p. 37.
19. *The Transport Act*, S.C., 1938, c. 53.
20. *The National Transportation Act*, S.C., 1966-67, c. 69.

21. The CTC united under one authority the regulatory responsibilities not only of the Board of Transport Commissions but also of the Air Transport Board and the Canadian Maritime Commission. The *National Transportation Act* provided that the CTC should establish separate committees to regulate the various modes of transport falling under its authority.

22. R.S.C. 1970, 1st Supp., c. 35.

23. *CRTC Act*, s. 3(1).

24. *Ibid.*, s. 14.

25. In a news release dated February 13, 1979, to which draft proposals for constitutional amendment were attached, the Minister of Communications stated that "it is envisaged that it would be provincial responsibility to license cable systems within a province and to license them or other entities to provide programming services, including those of a community or instructional nature. Also, the province would be able to regulate intra-provincial telecommunications services provided on the cable system such as meter reading, fire alarm surveillance systems etc.

    For its part the federal government would make general regulations to be observed in the introduction and provision of programming services. . ."

26. [1932] A.C. 304.

27. 51 D.L.R. (2d) 716; 52 W.W.R. 286.

28. *Supra* note 26, p. 315.

29. *Capital Cities Communications Inc. v. CRTC* [1978] 2 SCR 141; *La Régie des Services Publics v. Dionne* [1978] 2 SCR 191.

30. CRTC Decisions 76-432,433, 434 and 435, 2 C.R.T. 153-161.

31. Known as the Co-operative Programming Network (C.P.N.), the system went into receivership in January, 1979. C.P.N. provided first run and older movies, variety shows, documentaries, children's programs and sports specials, over four channels leased from Sask-Tel on the same co-axial cable used by the CRTC licensees. The programs were delivered to subscribers' homes by means of a separate drop wire in order to maintain a physical distinction between C.P.N's undertaking and that of the CRTC thus avoid jurisdictional claims by the CRTC. In June, 1979, a new consortium was formed consisting of Credit Union Central, three cable television companies and the Saskatchewan Government to continue the service. Under the new arrangement the Government assumed all of C.P.N.'s existing debt.

32. The compromise required licensees to retain ownership of the receiving antenna and wiring inside buildings. The telephone companies could own the remainder of the system including the amplifiers and drop wires.

33. Order-in-Council P.C. 1970-496, March 19, 1970: SOR/70-113.

34. Order-in-Council P.C. 1972-1569, July 13, 1972: SOR/72-261.

35. *The Alberta Educational Communications Corporation Act*, Stat. Alta. 1973, c. 3, s. 6(1)(b).

36. *E.g.* Decision CRTC 74-67, March 29, 1974; and 76-715, September 30, 1976, 2 C.R.T. 349.

37. *Supra* note 7, p. 33.

38. *Bell Canada Special Act*, S.C. 1880, as amended, s. 4 *British Columbia Telephone Company Special Act*, S.C. 1916, as amended, s. 2.

39. For a recent analysis in this area, see *Canadian Television Broadcasting Structure, Performance and Regulation* by Robert E. Babe, a study published by the Economic Council of Canada in 1979.

40. *Telecommunications Regulation — Procedures and Practices*, July 20, 1976. *CRTC Procedures and Practices in Telecommunications Regulation*, May 23, 1978. *Draft CRTC Telecommunications Rules of Procedure*, May 23, 1978. *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, July 25, 1978.

41. *CRTC Act*, s. 3(2).

42. *E.g.*, ". . . the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (s. 3(*b*)); also ". . . the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources." (s. 3(*d*)).

43. See, for example, *In re Capital Cities Communications Inc*, [1975] F.C. 18, in which Mr. Justice Ryan, of the Federal Court of Appeal, in holding that a decision to approve an amendment of a cable licence to permit the operator to delete commercials from the signals of U.S. television stations before distributing them was within the powers of the CRTC, stated at p. 28 in reference to a CRTC policy on this subject:

    The policy statement itself indicates that it was drafted and promulgated for the purpose of "the implementation of the broadcasting policy enunciated in section 3". The conditions imposed by amendment of the Rogers licence are designed to further this policy. It is for the Commission, not for us, to decide whether the policy and the particular decisions are well calculated to achieve the end sought.

    See also *CKOY Limited v. Her Majesty the Queen* [1971] 1 SCR 2, in which Mr. Justice Spence, writing for the majority of the Supreme Court of Canada, held that a regulation would be considered valid under the concluding words of Section 16, "respecting such other matters as it deems necessary for the furtherance of its objects" provided a connection could be found between the regulation in question and the policy objectives in Section 3. Whether or not the Court considered that the regulation actually would implement the objectives would be irrelevant provided the connection was present.

44. *Broadcasting Act*, ss. 17(1)(*d*) and 24(1).

45. *Ibid.* s. 17(1)(*a*).

46. The Commission has revoked for cause only one licence (Wawa Cablevision Ltd. Decision 73-71) and has failed to renew a licence in only three instances (CHIN, Toronto, Ont., Decision 70-72; CJLX, Thunder Bay, Ont., Decision 73-19 and CHER, Sydney, N.S., Decision 71-120). There have been other instances in which the CRTC declared an intention not to renew licences but the undertakings were sold to new owners approved by the CRTC prior to the expiry of the licences.

47. In a Public Announcement of June 2, 1972, the CRTC explained that where licensees are public companies "it is not practical for the Commission to intervene in normal day-to-day trading of shares on the open market." Nevertheless, this practical consideration has to be reconciled with the need "to maintain supervision of the ownership and control of licensees and of broadcasting undertakings". Thus, the Commission insisted that direct or indirect share transfers that would change effective control must receive the prior approval of the Commission, failing which it would consider revocation proceedings.

    The question of what is "effective control" in public companies or a change in control significant enough to require prior CRTC approval varies greatly from case to case and has been the subject of several important public hearings. See for example, the hearing which reviewed Western Broadcasting Limited's purchase of shares in Bushnell Communications Limited, April 17, 1972, in Ottawa and more recently, Rogers Telecommunications Limited's purchase of shares in Canadian Cablesystems Limited, February, 1978, in Toronto. In its working paper entitled *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters* issued on July 25, 1978, the Commission proposed that all transactions which "materially affect" control (defined to mean transactions involving 10% or more of the voting securities) should also require prior approval. In an announcement dated January 7, 1980, the Commission confirmed that it would attach a condition requiring such approval to all new licences and existing licences as they are renewed.

48. *Broadcasting Act* s. 3(*c*).

49. The CRTC's extremely heavy hearing schedules and its reluctance to interfere in the content of programming are perhaps the major reasons for its lack of activity in this area. There have been only three occasions on which the Commission has called licensees to a public hearing to examine programming complaints: March 18-20, 1969, (CBC — re "Air of Death"); March 30-31, 1976; (CFCF-AM Montreal — re the station's campaign against Quebec's Bill 22), Nov. 21, 1978; (Foster Hewitt Broadcasting Ltd. re CKO-FM's play by play sports broadcasting).

50. *CRTC Annual Report 1978-79*, p. 2 and 3.

51. *Supra* note 3.

52. Administrative responsibility for applications is allocated according to the region to which an application pertains. The five regions established

by the CRTC for this purpose are British Columbia, the Prairie Provinces, Quebec, Ontario and the Atlantic Provinces.

53. *Broadcasting Act* s. 19(1).

54. *CRTC Rules of Procedure* SOR/71-330, *Canada Gazette Part II* July 28, 1971, p.1154, as amended by SOR/77-533, *Canada Gazette Part II*, July 13, 1977, p. 2932, s. 4(2)(*b*).

55. *Ibid.* s. 5. The rule requires at least four announcements during a ten day period ending 40 days before the date set for the commencement of the hearing. In the case of AM and FM stations the announcements must be broadcast between 7:00 and 9:00 a.m. or 4:00 and 6:00 p.m. For television stations, the hours are 6:00 p.m. to 11:00 p.m.

56. *Ibid.* ss. 5, 14 and 15.

57. *Ibid.* s. 16.

58. The Commission's working paper of July 25, 1978, entitled *Proposed Procedures and Practices Regulating to Broadcasting Matters* recommends a change in this rule that would require a written reply to interventions before an oral reply would be permitted. Other proposals would substantially increase the number of notices of applications required to be broadcast by licensees.

59. *Broadcasting Act* s. 19(4).

60. *CRTC Annual Report '76-'77*, p. 28.

61. *CRTC Annual Report 1978-79*, pp. 3 and 4. This figure includes eight regional hearings held in connection with a Bell Canada rate application but does not include nine instances where more than one panel sat simultaneously at the same location.

62. *Ibid.*, p. 2.

63. CRTC Public Announcement, December 4, 1979.

64. Approximately 55% of these, however, were placed on the non-appearing side of the agenda. While this device saves hearing time, staff preparation is the same whether an application is ultimately designated as an appearing or non-appearing item.

65. *CRTC Rules of Procedure*, ss. 4(2) and 8.

66. The flexibility inherent in the CRTC's new method of scheduling hearings and the use of its computer make it possible to assign a tentative hearing date as soon as an application is received.

67. *CRTC Rules of Procedure*, s. 15.

68. Examples include applications heard for non-programming services on cable; for multicultural television; for the carriage of U.S. F.M. stations on cable; for pay television services and applications involving concentration of ownership of broadcasting undertakings.

69. See *City of Prince Rupert Connecting Agreement with B.C. Telephone Company*, Telecom. Decision CRTC 77-9, 3 C.R.T. 262, where the

Commission considered that the matter called for a coordinated approach between federal and provincial agencies and so appointed a committee of inquiry under section 81(1) of the *National Transportation Act* consisting of staff members of the CRTC, the B.C. Motor Carrier Commission and the Ontario Telephone Service Commission. The committee submitted a lengthy report to the CRTC dated December 27, 1978. After calling for comments from interested parties (Telecom. Public Notice 1979-11) on March 7, 1979, the CRTC issued its decision taking into account the recommendations of the committee and the responses received to the committee's report. (Telecom. Decision CRTC 79-21, November 9, 1979.)

70. Sections 10 and 11 of the *Radio (A.M.) Broadcasting Regulations, Radio (F.M.) Broadcasting Regulations* and *Television Broadcasting Regulations*; see also *Procedure for Clearance of Food and Drug Commercials*, CRTC Circular 176, May 24, 1972 and *Beer, Wine and Cider Advertising* CRTC Announcement, July 19, 1971.

71. Application for the transfer of effective control of Canadian Cablesystems to Rogers Telecommunications Limited. Decision CRTC 78-611, September 7, 1978, 4 C.R.T. 400, which dealt with a number of preliminary issues raised at a pre-hearing conference, denied a motion by the Canadian Broadcasting League, an intervener, to cross-examine the parties in five specific areas.

72. *National Transportation Act*, S.C. 1966-67, c. 69, s. 45.

73. *Ibid.* ss. 17-19.

74. *Ibid.* s. 46.

75. See, for example, the following decisions on rate increase applications: *Canadian National Telecommunications, Increase in Telephone Rates in Northwest Canada*, Telecom. Decision 77-33, April 7, 1977, 3 CRT 16; *British Columbia Telephone Company Increase in Rates*, Telecom. Decision 77-5, May 17, 1977, 3 CRT 46; *Bell Canada, Increase in Rates*, Telecom. Decision 77-7, June 1, 1977, 3 CRT 87; *CN Telecommunications Increase in Telephone Rates in Newfoundland*, Telecom. Decision, CRTC, 78-5, July 5, 1978, 4 CRT 258 *Bell Canada, Increase in Rates*, Telecom. Decision CRTC 78-7, August 10, 1978, 4 CRT 313.

76. *Challenge Communications v. Bell Canada*, Telecom. Decision CRTC 77-16, December 23, 1977, 3 C.R.T. 489.

77. *Telecommunications Regulation — Procedures and Practices*, July 20, 1976.

78. Telecom. Decision CRTC 77-10, August 24, 1977, 3 C.R.T. 265.

79. Telecom. Decision CRTC 79-11, May 17, 1979.

80. In the absence of any clear government policy on competition as it relates to regulated industries, paradoxical situations such as that which occurred in the Telesat — TCTS case are likely to arise. There, the Director of Research and Investigation, Combines Branch, took a strong stance against the agreement on the basis of anti-competitive arguments set forth in a lengthy and fully argued brief, only to find the CRTC's

decision overturned by Cabinet and the agreement approved on the basis of other principles. See: Order-in-Council P.C. 1977-3155, November 3, 1977. See also accompanying news release of the Minister of Communications of the same date.

81. Under s. 17 of the *CRTC Act.* all orders, rules, regulations and directions, relating to telecommunications made by the Canadian Transport Commission continue in force until repealed or replaced by the CRTC.

82. CTC General Order 1967-1, September 20, 1967 as amended.

83. *CRTC Telecommunications Rules of Procedure*, Telecom. Order CRTC 79-297, July 20, 1979, ss. 17-18.

84. *Ibid.* s. 19.

85. *Ibid.* s. 7.

86. *Ibid.* s. 40.

87. *Ibid.* s. 44.

88. *Ibid.* s. 55.

89. *Ibid.* ss. 36 and 43.

90. A document entitled *Regulations Respecting The Form And Publication of Tariffs* was issued by the CRTC on July 20, 1979, concurrently with its new Rules of Procedure, under Telecom. Order CRTC 79-298. These regulations replace the CTC's *Tariff Circular 3* and contain details concerning the form, content, style and publication of tariffs.

91. Rules, s. 38.

92. *Ibid.* s. 39.

93. *Ibid.* s. 40.

94. Telecom. Decision CRTC 78-7, August 10, 1978, 4 C.R.T. 313 at 315-316.

95. Rules, s. 18.

96. *Ibid.* s. 47(2) and (3).

97. *Ibid.* ss. 51-55.

98. *Ibid.* s. 56(3).

99. *Ibid.* s. 43(6).

100. *Telesat Canada, Proposed Agreement with Trans-Canada Telephone System* Telecom. Decision CRTC 77-10, August 24, 1977 3 C.R.T. 265; *CNCP Telecommunications Interconnection with Bell Canada*, Telecom. Decision CRTC 79-11, May 17, 1979.

101. *Ibid.*

102. *Supra* note 94, p. 314.

103. *Broadcasting Act*, s. 19(4).

104. Commons Debates, November 1, 1967, pp. 3752-3.

105. *Ibid*. p. 3760.

106. Public Announcement, *CRTC Telecommunications Rules of Procedure and Tariff Regulations*, July 20, 1979, pp. 7-8.

107. Telecom. Decision CRTC 79-1, February 2, 1979, 4 C.R.T. 619.

108. Multiple Access Limited — Baton Broadcasting Ltd., Decision CRTC 78-669, October 12, 1978, 4 C.R.T. 456; see also Multiple Access Limited — Jean A. Pouliot, Decision CRTC 79-442; July 6, 1979; CHIC Radio Limited Decision CRTC 79-658, November 5, 1979.

109. The non-appearing items on an agenda could also be quickly disposed of in this matter assuming the hearing panel had thoroughly examined them prior to the hearing and had found no impediments standing in the way of approval.

110. *Policy-Making in Regulation: Towards A New Definition of the Status of Independent Agencies in Canada*, Osgoode Hall Law Journal, April 17, 1979, Vol. 17, No. 1, p. 89.

111. P.C. 1976-2761, November 10, 1976.

112. P.C. 1973-1765, June 21, 1973.

113. *Supra* note 80.

114. *Political Accountability For Administrative Tribunals*, H. N. Janisch, paper presented at the Conference on Administrative Justice, University of Ottawa, January 27, 1978, reproduced in a collection of unedited Conference papers and comments by the Canadian Institute for the Administration of Justice.

115. Decision CRTC 76-650, September 16, 1976, 2 C.R.T. 311.

116. Decision CRTC 76-651, September 16, 1976, 2 C.R.T. 312.

117. *Supra* note 111.

118. The agreement was made before the judgments of the Supreme Court of Canada (*supra* note 29) which settled the jurisdictional question in relation to cable systems which receive and distribute broadcast signals.

119. Decisions CRTC 77-468 and 77-469, August 8, 1977, 3 C.R.T. 198 and 200.

120. *Supra*, note 100.

121. *Supra* note 80. The Consumers Association of Canada, an intervener at the CRTC hearing, challenged the Cabinet's decision on the basis that the power to "vary" under s. 64(1) did not permit the Cabinet to, in effect, reverse the CRTC's decision and substitute the Cabinet's own findings with an entirely different result. However, the Federal Court of Appeal held that the word "vary" has a very wide connotation and encompasses the reversal of decisions resulting in a finding that is opposite to that in the original decision. See *Consumers Associate of Canada v. Attorney-General of Canada* [1971] 1 F.C. 433.

122. Bill C-16, s. 9(2).

123. *Broadcasting Act*, s. 22(1)(*b*).

124. Order-in-Council P.C. 1969-2229, November 20, 1969, as amended by P.C. 1971-37, January 12, 1971 and P.C. 1975-342, February 20, 1975.

125. *Supra* note 33.

126. *Supra* note 34.

127. Douglas G. Hartle, *Public Policy Decision Making and Regulation*, a study prepared for the Institute for Research on Public Policy, March, 1979, p. 124.

128. Final Report, p. 317.

129. Previously proposed by H. N. Janisch, *Supra* note 114.

130. Final Report, p. 318.

131. A recent judgment of the Federal Court of Appeal, *Inuit Tapirisat v. The Right Honourable Jules Léger* [1979] 1 FC 213, lends some support to this view. The Court held that within limits, there is a duty of fairness owed to an interested party in a proceeding who exercises the right of petition or appeal to the Governor in Council. An appeal of this judgment to the Supreme Court of Canada has been heard and a decision is pending.

132. *Supra* note 127, pp. 131-133.

133. *Broadcasting Act*, ss. 17(2) and 17(3).

134. Decision CRTC 74-70, March 31, 1974.

135. Press Release, March 4, 1975, by the Minister of Communications, Gérard Pelletier, and the Secretary of State, Hugh Faulkner.

136. *Broadcasting Act*, ss. 3 and 39.

137. *Broadcasting Act*, s. 17(1)(*d*).

138. *Ibid.*, s. 24(3).

139. The CRTC reports through the Minister of Communications and the CBC through the Secretary of State.

140. *Broadcasting Act*, s. 26; *National Transportation Act*, s. 64(2).

141. [1971] S.C.R. 906.

142. Martland, Hall, Spence and Pigeon JJ. found a denial of natural justice. Fauteux C.J., Abbott, Judson and Ritchie JJ, come to the opposite conclusion. The ninth and deciding judgment, stating that the Commission had acted outside its statutory authority, was given by Mr. Justice Laskin, as he was then.

143. [1976] 2 F.C. 621.

144. [1971] F.C. 498.

145. [1976] 2 F.C. 627.

146. [1976] 2 F.C. 633.

147. *Broadcasting Act*, s. 15.

148. January 13, 1978, Unreported, Federal Court file T-74-78.

149. Telecom Decision 77-3 — C.N.T. increase in rates, petition by C.N.T., denied; Telecom. Decision 77-7 — Bell Canada rate increase, petition by Inuit Tapirisat and National Anti-Poverty Organization, denied; Telecom. Decision 77-10, Telesat — TCTS agreement, petition by Bell Canada, Telesat and B.C. Tel, granted; Telecom Decision 78-7, Bell Canada rate increase, petitions by Inuit Tapirisat, denied, and Bell Canada, pending; Telecom. Decision 79-11, CNCP-Bell Canada Interconnection, petition by TCTS members, denied.

150. One of the pending appeals (Federal Court File A-441-79) is by Bell Canada of that part of Telecom. Decision CRTC 79-5 directing that Bell Canada and B.C. Tel. pay the cost of consultants retained by the CRTC in connection with the two companies' applications for changes in their long distance rates. The consultants performed a study of the method by which the member companies of the Trans Canada Telephone System divide the expenses and revenues attributable to long distance telecommunications services.

    The other pending appeal (Federal Court Files A37-80 and A-567-79) is by Consumers Association of Canada of Telecom Decision CRTC 79-13 approving the acquisition by B.C. Tel of G.T.E. Automatic Electric (Canada) Ltd. and of Microtel Pacific Research Limited. The appeal raises the question, *inter alia*, as to whether the CRTC erred in law by approving the application when it found as a fact that the weight of the case respecting the public interest was equally divided for and against the acquisition.

151. [1979] 1 F.C. 857.

152. *British Columbia Telephone Company and the Canadian Radio-Television and Telecommunications Commission*, May 30, 1979, unreported, Federal Court File A-216-79.

153. [1977] 1 S.C.R. 722 at 764-47.

154. [1979] 1 S.C.R. 684.

155. *Ibid.* p.710.

156. H. Janisch, *The Regulatory Process of the Canadian Transport Commission*, a study prepared for the Law Reform Commission of Canada, p.83.

157. *Proposed CRTC Procedures and Practices Relating to Broadcasting Matters*, July 25, 1978, pp.8-12.

158. *Ibid.* p. 9.

159. *Broadcasting Act*, s. 16(2).

160. CTC Decision, March 15, 1976: *In the Matter of Whether the Canadian Transport Commission should Award Costs to Parties Appearing Before*

It and More Particularly to Some Intervenors Under Certain Circumstances.

161. Telecom. Decision CRTC 77-16, December 23, 1977, 3 C.R.T. 489 at 506.

162. Taxation Order 1978-1, October 23, 1978.

163. Telecom. Decision CRTC 78-5, July 5, 1978, 4 C.R.T. 194.

164. Telecom. Decision CRTC 78-7, August 10, 1978, 4 C.R.T. 313.

165. A further example of the CRTC's expansive approach to this issue is its recent decision to award interim costs. Provision for this is made in section 45 of the Telecommunications Rules announced in July, 1979. In an accompanying Public Announcement of July 20, 1979, the Commission stated that it had concluded that the awarding of interim costs might in certain cases mean the difference between participation by an intervener in an informed way and no participation at all. Accordingly s. 45 of the Rules states an intervener may be awarded such costs if he is representative of a group or class of subscribers that will receive a benefit or suffer a detriment as a result of the decision, if he can demonstrate that he can contribute to a better understanding of the issues by the Commission, if he undertakes to participate in the hearing in a responsible way and if he can demonstrate financial need.

166. Broadcasting Rules, s. 20.

167. *Supra* note 157, pp. 14-15.

168. *Supra* pp. 16-18.

169. *Bell Canada, Confidentiality and other Preliminary Matters Concerning Support Structures Tariff Proceeding*, Telecom. Decision CRTC 76-2, December 31, 1976, 2 C.R.T. 442 at 444-5.

170. Telesat — TCTS, Telecom. Decision CRTC 77-10, 3 C.R.T. 265 at 277.

171. The broadcasting policy set out in section 3 of the *Broadcasting Act* supports this position. Section 3(*c*) states that "all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned." There is, however, a potential conflict between the freedoms expressed in this section and the obligation on broadcasters contained in section 3(*d*) to provide a "balanced opportunity for the expression of differing views on matters of public concern." See the CRTC's announcement of January 12, 1976, *CFCF and Bill 22* and of February 24, 1977, *Controversial Programming in the Canadian Broadcasting System – Report on Issues raised by CFCF's anti-Bill 22 Campaign*, 2 C.R.T. 662.

172. *Inquiry into Telecommunications Carriers, Costing and Accounting Procedures*. Begun by the CTC in 1972, this Inquiry is being continued by the CRTC in six phases. Phase one dealt with telecommunications carriers' costing and accounting procedures and was the subject of a hearing held November 22-25, 1977. (See Telecom. Decision 78-1,

January 13, 1978, 3 C.R.T. 524 and Telecom Decision 79-9, May 8, 1979). Phase two was concerned with establishing the information that the CRTC would require to be filed in support of new tariffs. A hearing on this phase was held December 11-14, 1978. (see Telecom Decision 79-16, August 28, 1979). There are four more phases yet to be considered: information to be filed in support of competitive services rates in rate hearings; information required for rate structure changes and general rate increases; miscellaneous issues such as rate of return and capital structure; and the establishing of an on-going reporting system for carriers which would include information relating to such areas as quality of service and construction programs.

173. The CRTC began publishing its decisions in a separate volume from its annual report for the year 1975-76. Before that time the decisions were appended to the annual reports. The recent volumes of CRTC announcements have been designed in two parts with Part I containing the CRTC's decisions and Part II its policy statements.

174. *Bell Canada, Tariff for the Use of Support Structures by Cable Television Licensees*; hearing commenced in Ottawa on January 10, 1977; see Telecom. Decision 77-6, May 27, 1977, 3 C.R.T. 68; *B.C. Telephone Co., Tariff for the Use of Support Structures by Cable Television Licensees*; hearing commenced on May 16, 1978 in Vancouver; see Telecom. Decision 78-6, July 28, 1978, 4 C.R.T. 258.

175. Applications by Ottawa Cablevision Limited, Grand River Cable TC and London Cable TV heard in Ottawa commencing November 21, 1978.

176. *CRTC Annual Report '75-76*, pp. 25-26.

177. *CRTC Annual Report 1978-79*, pp. 1-2.

178. *Supra*, note 172; the Commission also used this approach in its hearing on its proposals for new procedures and practices in telecomunications matters held in Ottawa, October 25-29, 1976.