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INTERIM REPORT:

CONSUMER INTEREST REPRESENTATION IN THE FEDERAL TELECOMMUNICATIONS REGULATORY PROCESS

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INTERIM REPORT: 2. Consumer Interest Representation in the Federal Telecommunications Regulatory Process

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A study of the issue of "Consumer Advocacy," prepared for the Regulatory Planning Unit, Socio-Economic Planning Branch, of the Department of Communications.

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§A / Introduction

The "consumer advocacy" study has proceeded in three major divisions: First, the environment of telecommunications in Canada has been surveyed, to determine the adequacy of both (a) consumer interest representation in the existing regulatory process, and (b) grievance amelioration procedures undertaken by the regulatory agency. Second, there has been an examination of the legitimacy of consumer advocacy, *per se*, by government officers before regulatory boards of government. Third, there is now in progress an examination of alternate models for effective consumer interest representation before government regulatory agencies, with appropriate emphasis upon the telecommunications field. This model building exercise includes both the consideration of modifying regulatory models used successfully in other fields and/or jurisdictions to the special requirements of telecommunica-

tion regulation at the federal level in Canada, and the construction of formats for consumer interest advocacy incorporating specific, preselected characteristics and devices. The various models of consumer interest advocacy and consumer complaint adjudication have been evaluated one against the other, and conclusions drawn as to the relative merits and deficiencies of each of the models.

§B / Overview of the Study

An essential first step in this study was the intensive examination of the procedures presently incorporated within the operations of the Canadian Transport Commission for the aggregation of consumer interests related to telecommunications, and the degree to which these interests are represented before the C.T.C. in the course of its telecommunications regulatory activities. This study included the in-depth examination of the significant recent reports of C.T.C. hearings involving Bell Canada, CN/CPT, and the British Columbia Telephone Company. The very minimal amount of published literature regarding the C.T.C. was examined, as well as materials prepared within the Department of Communications regarding C.T.C. procedures. Many hours were spent in discussions with persons interested in the Commission's operative methods. The over-all impression gained throughout this process was that, nearly without exception, telecommunications tariffs and carriers' permissible rates of return continue to be set without due consideration by the regulatory agency of the effect of its decisions upon either the individual users of the service in question, *qua* consumers, or the society at

large. *Consumer interest inputs are virtually non-existent presently in the telecommunications regulatory process.*

Studies to date further indicate that the consumer grievance amelioration and investigation procedures of the C.T.C. in its telecommunications role are equally inadequate. In all too many instances, the C.T.C. will merely forward telecommunications consumers' complaints to officials of the carrier complained about, there to die from inattention. The rules of procedure of the C.T.C., as well as other available information, suggest that the practices of the C.T.C. stand to deter it from serving in any was as an effective tool for the solution of consumers' problems regarding services provided by the regulated carriers. The formal C.T.C. rules of procedure also serve to explain why the Commission receives such a minimal amount of input from consumers in the course of its deliberations. The processes of the C.T.C. demand that all inputs, just to be heard--let alone to be at all effective--must be in a form which is totally alien and incomprehensible to the average consumer.

The consumer, unable to afford to hire professional counsel, is confronted by provisions in the C.T.C. procedural code demanding that written state-

ments of persons responding to carriers' applications must be in a highly formalized legal style, and submitted in a definite fashion within a rigid time span. The "respondent," as he is termed, may then still be required by the Commission to verify by affidavit "the whole or any part" of his submission. Failure to meet any of these conditions may lead to the entire reply, or any part of it, being "disposed of without further notice to him [the "respondent"]." Further analyses of the deficiencies noted in the *Rules of Practice* and actual operational methods of the Canadian Transport Commission are to be found in Divisions C and D of this Interim Report, respectively.

In the course of this study, the applicable definition of "consumer," in terms of consumer interests to be represented before a regulatory authority, has been dictated by the regulatory environment itself. While industrial and governmental users of telecommunications services may well have distinct, legitimate views on the subjects under consideration, views that may differ markedly from those of private persons who use the same carriers' services, it is apparent that the views of such institutional users are represented far more adequately than those of private persons before the C.T.C. While a major industry can well afford to

be properly represented by experienced counsel for its trade association, or even one moderate-size firm can afford to perpare a sophisticated legal, economic, and technical presentation on a given matter of interest to it, it is apparent that the equally legitimate interests of residential subscribers are never represented adequately before the Commissioners. There can, therefore, be little surprise that written orders of the C.T.C. reflect so little interest in, or awareness of, the private consumer. This functional definition of "consumer" also matches that used for the government's other "consumer" programmes.

It has been anticipated that any recommendation for increased government participation in aggregating and representing the interests relative to telecommunications of one specific group of the public, now conveniently labeled "the consumer," would have to be justified in terms of socio-political theory. In this regard, the legal history of government involvement in regulating the undertakings of businesses "affected with a public interest" has been examined, along with a sampling of relevant literature on regulatory philosophy. Division E of this Report presents a brief socio-legal justification of the measures outlined in this study. Furthermore, one

might well consider the proposed state expenditures for such programmes in the light of utilities' expenditures for representations before regulatory bodies--expenditures which, most often, can be passed on to the consuming public in the form of incrementally higher rates. Such activities are generally regarded by regulatory authorities as but another of the regulated firms' costs of doing business; as such, these expenditures are allowed to constitute a portion of the rate base.

The study seems to indicate that the Railway Transport Committee of the Canadian Transport Commission has failed to give as serious consideration to the interests of the consuming public in the course of its telecommunications-related deliberations as it has given to the interests so ably represented before it by counsel for the regulated carriers. It must be stated, though, that the entire study is predicated upon a presumption that the consumers, in aggregate, do have interests in matters such as these. While the reaction of this Consultant and of many others is to find it intuitively obvious that such is indeed the case, no empirical evidence can be adduced to support this conclusion. Random surveys of the public press do not seem to indicate that there is among the public

at large any deeply felt criticisms of the general national telecommunications policy or of the regulatory decisions of the Canadian Transport Commission.

Quite recently, however, it has appeared that the C.T.C. has been extremely negligent in considering the interests of the consumer in the course of its deliberations. Great criticism has been levied against the C.T.C. for virtually rubber stamping tariff changes proposed by Bell Canada for certain classes of long distance telephone calls. Also, the C.B.C. radio show *Cross Country Check-Up* elicited a great deal of public interest on many telecommunications-related issues when it invited the President of Bell Canada to participate in a live phone-in show on the twenty-second of July 1971. In the absence of a detailed survey of public opinion in this area, such general indicators as do exist seem to show that consumers of telecommunications services do indeed have distinct interests. Furthermore, there is a real suggestion that these consumers perceive the present structure as totally overlooking their interests and favouring those of the regulated carriers. On this basis alone there seems to be a need to augment the procedures for representing before the regulatory authority the interests of the consumers of telecommuni-

cations services.

The study is now at the point of describing alternate models for the more effective representation of consumer interests before the federal telecommunications regulatory authority, and for the investigation and settlement of consumers' specific complaints regarding telecommunications services provided by the regulated carriers. The main methodology employed is, of necessity, the examination of structures in use by other regulatory bodies, in Canada and elsewhere, for these dual functions. The results obtained by these existing structures may then be evaluated as against the problems existing in the respective environments. Modifications are then considered, so as to make these procedures more likely to function effectively in a specifically telecommunications regulatory situation, and to make them consonant with the constitutional limitations upon federal regulatory authority in the milieu. These efforts are outlined in Division F of this Interim Report.

For administrative and policy reasons, it has been impossible to proceed with the present study in strict accordance with the predetermined time frame. Although originally designated as the Consultant's "principal" project over a span of three months, more

than two thirds of his time has been allocated by the Planning Branch to other activities. It is expected that consideration will be given to the advisability of producing a more detailed study of this issue on the basis of intradepartmental consideration of the empricial data and the recommendations offered herein.

Operating within the stated restrictions, the Consultant believes that he has explored the issue in sufficient depth to venture a recommendation as to a preferred structural model. Although, as shown in Division G, there are no constitutional limitations upon the selection of one model over any others, the economic and political dimensions of the problem definitely seem to favour one model in particular. The Consultant's tentative conclusions in this regard, based upon studies to this time, are expressed in Division H of this Interim Report.

§C / Procedural Requirements of the Canadian Transport Commission

A section-by-section review of the C.T.C.'s rules of procedure will not be undertaken to demonstrate how these rules serve to frustrate attempts to have represented before the Commission the interests of the consumers of the regulated carriers' services. Rather, note will be made of general deficiencies in the procedural format which has been institutionalized in these rules.

It is obvious that the rules of procedure are predicated on the presumption that all persons appearing before the C.T.C.--or all persons to whom the C.T.C. will wish to pay any attention--will be represented by legal counsel. Indeed, it would be absurd to presume that anyone not intimately acquainted with evidentiary procedures could meet the requirements relating to proper filing of briefs and other documents. Moreover, requirements as to the time schedule for filing of various papers are not at all suited to attracting inputs from consumers.

As nearly all major regulatory agencies have adopted similar complex procedural rules, it might be supposed that such are necessary for the efficient, just operation of these bodies. Perhaps the adoption

of less formalized procedures, which seem to work admirably in less hurried regulatory environments (see the analysis of the Prince Edward Island Public Utilities Commission in §F(3)(vi) of this Interim Report), is not a feasible alternative for a body with the case load of the C.T.C. Nonetheless, the very fact that such ritualistic rules of procedure are deemed essential to the smooth operation of the authority should seem to indicate the necessity of providing alternate channels into the Commission's deliberations for the interests of individual consumers. Although the intermediation of such points of view by one more bureaucrat, the Consumer Advocate's Office, may stand to blur somewhat the opinions and the wrath of each individual consumer, at least a consumer viewpoint would be injected into the deliberations of the Canadian Transport Commission, or its successor body in the telecommunications regulatory role.

§D / Level of Consumer Interaction by the Canadian Transport Commission

The present structure of telecommunications regulation in Canada, at the federal level, suffers several marked deficiencies in its ability merely to know of the needs felt by consumers of telecommunications services, let alone to perform its regulatory duties with full regard for these consumer demands.

There are currently two basic activities of the Canadian Transport Commission (formerly the Board of Transport Commissioners for Canada) in its telecommunications regulatory role. First, of its own initiative or in response to what it may perceive to be general societal demands, it periodically undertakes examinations of the over-all rate structure and range of services provided by the regulated communications carriers. Secondly, the Commission's staff handle administratively applications made to it regarding the various transportation and communication services which it regulates. Fewer than 2% of these consumer complaints give rise to formal hearings; the remainder are normally forwarded to the regulated utility for action, with a request that the Commission be kept informed. It is the exceptional user's complaint which will even

be thought by the Canadian Transport Commission to warrant an inspection by a staff member, and the forwarding of his report to one Commissioner for review.

Even in the exceptional instance where a user's complaint results in a staff investigation, there is at present no assurance that any legitimate grievances uncovered will be noticed by the Commission. One student of the C.T.C. has described the situation in these terms:

> However, in a number of cases, the complaint concerns an individual's interest as distinguished from what the Board has decided is in the interests of the general public and in such cases the policy of the Board is explained on the particular question and no further action is required. (1)

Thus, the definition of the common good preceeds the consideration of needs regarding services, as felt by the subscribers to the respective services. While there *may* be reasons for the C.T.C. to define in isolation from user demands the national interest requirements upon rail, air, barge, or pipe line companies, no rationale appears, *a fortiori*, to justify this

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[1]Arthur A. Wright, "An Examination of the Role of The Board of Transport Commissioners for Canada as a Regulatory Tribunal," 6 *Canadian Public Administration* (1963), 349.

isolation of the regulatory scheme in the telecommunications sector from consumers' needs.

It may be noted that no structure exists in the C.T.C., as regards either its telecommunications or transport regulatory functions, to translate whatever input it does receive at present, in the form of consumer complaints, into factors able to mold the policy decisions of the Commissioners. Also, there is no active solicitation of user reactions to carriers' services and tariffs.[2] Perhaps a valid reason can be found in the nature of the transportation industry in Canada to justify or excuse C.T.C. indifference to consumer demands--if so, it certainly does not appear at first glance. Nonetheless, in that area of the Canadian Transport Commission's authority of concern in the present study, telecommunications regulation, the government regulators could only be said to be remiss in their duties for the failure to aggregate adequately the needs felt in relation to telecommunications services by the purchasers--and by the would-be purchasers of these services.

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[2]See generally in this regard the excellent recent paper by Warren Black of the Department of Communications, Legal Services Branch, entitled, *Structure, Procedures and Powers of the Canadian Transport Commission* (1971).

§E / Socio-Legal Justification for State Involvement

It was at a very early stage in English legal history that there came to be firmly entrenched in the common law certain strong ideas about the special duties to society due of persons who own businesses "affected with a public interest." Those in what would later be termed a "natural monopoly" situation particularly were recognized as being obligated to conduct their affairs so as not to adversely affect the interests of those members of the public in need of their services. The classic statement of this principle, forming the basis for much of the later case law in the public utility field, is that of Lord Hale, in his *Treatise De Partibus Maris*:

> If the King or subject have a public warf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the warfs only licensed by the Queen according to the stat. 1 Eliz. c. 11, or because there is no other warf in that port, as it may fall where a port is newly erected,--in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pessage, &c. neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or Charter. For now the wharf and crane are affected with a public interest, and they cease to be just juris privati only .... (1)

This doctrine is further delimited in the case of *Allnutt et al. v. Inglis*,[2] which involved an importer's claim of the right to use a customs warehouse. Le Blanc, J., ruled,

> But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that where private property is affected with a public interest, it cases to be juris privati only; and in case of its dedication to such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable. (3)

Canadian courts, in the modern era, have not relied upon this principle of the common law either to justify extensions of governmental regulation of public utilities, or to legitimatize rulings limiting restrictive business practices. Rather, they have felt content to work within the more explicit guidelines of those specific acts of Parliament which have delimited the precise nature of the regulation to be imposed on businesses in Canada "affected with a public interest."[4] It should not be thought though

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[1]Par. sec., cap. 6(a). As quoted and followed in *Bolt v. Stennett* (1800); 8 T.R. 606, 608; 101 E.R. 1572, 1573. Note also the unnamed case cited in the footnote to *Bolt's* case (note (b), at p. 1573 in vol. 101 of the English Reports).

[2](1810), 12 East 527, 542; 104 E.R. 206.

[3]12 East 527, 542; 104 E.R. 206, 212.

[4]E.g., *Combines Investigations Act*, R.S.C. 1970,

that the common law doctrine is totally moribund today, for it is still capable of underpinning legal argument and, occasionally, even decisions of Canadian appellate judges.[5]

United States jurisprudence in the field of public utility regulation, which is followed most often in Canadian practice,[6] also has adopted this principle of the English common law as the basis for restricting the operations of privately owned businesses offering what is today termed a public service. The doctrine was first firmly incorporated into U.S. law by the decision of the federal Supreme Court in *Munn v. Illinois*[7]--a case resting soundly upon the foundation of earlier English cases.[8] Although U.S.

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c. C-23; *Bell Telephone Act*, S.C. 1880, c. 67, as amended; *Railway Act*, R.S.C. 1970, c. R-2.

[5]O'Halloran, J.A., dissenting in *Rogers v. Clarence Hotel* ([1940] 3 D.L.R. 583; 55 B.C.R. 214; [1940] 2 W.W.R. 545, 556-63), reviewed extensively the doctrine of the "Business affected with a public interest" and the applicable case law.

[6]See *Re Bell Telephone Company of Canada* (1966), 56 B.T.C. 535, 642-49.

[7](1876), 94 U.S. 113.

[8]94 U.S. 113, 127-29. Note also the concise statement in *Western Telephone Co. v. Northwestern Bell Telephone Co.* (1933); 188 Minn. 524; 248 N.W. 220, 229.

"A business is 'affected with a public interest' when by law or legal authority it is given a virtual

state courts are not above inventing new rules of "the common law," apparently to suit their whims of the moment in the course of utility regulation cases,[9] it must be said that the jurisdictions to the south are treating the doctrine of "businesses affected with a public interest" as a living principle of the common law; it remains a source of law capable of meeting changing social and commercial relationships through evolution, without losing that aspect of its legitimacy which is dependent upon it always being traceable back to its classical common law ancestry.[10]

The doctrine that the state has a right to regulate the operations of certain classes of businesses may well be said to be enshrined in the common

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monopoly in its field or when the public adapt their business or conduct to the methods used by it."

[9]For example, *Mountain State Telephone Company v. State Corporation Commission of New Mexico* (1959), 65 N.M. 365, 337 P. (2d) 943. The state's Supreme Court discussed the Commission's powers to regulate telephone carriers under an article of the New Mexico Constitution, and also offered the following exposition, which has no counterpart in Blackstone: "However, coincident with this power are the fundamentals of rate regulation that (1) the utility has a common-law [*sic*] right to fix its own rates and adopt such rate schedule as it believes just and reasonable and to place such rate schedule in effect;..." (65 N.M. 365, 372)

[10]E.g., *Hertz Drivurself Stations v. Siggins* (1948); 359 Pa. 25; 58 A. (2d) 464, 472.

law, as well as recognized by various acts of the Parliament of Canada. Moreover, though, it is generally accepted today that the overwhelming complexity of today's society requires that government take affirmative action to protect the individual subject from the disproportionately extreme economic and social powers of business enterprises. Few if any political theorists today would challenge as improper state regulation of businesses producing medicines, as the quality of such drugs is something beyond the means of the individual to assess for himself. Similarly, it is generally accepted that governmental involvement is desireable and/or necessary to curb those market forces which would otherwise mandate low payments to farmers for certain of their commodities. In general then, it can be said that, in our society, it has come to be generally accepted--and expected--that the society at large, through its government, will take appropriate measures to assist individuals or groups who would otherwise be detrimentally affected by the unchecked power of large, organized interest groups.

Given the special nature of telecommunications carriers, virtually all of whom enjoy either a natural or a state-created monopoly, one can most readily justify the reasonable regulation of such businesses "affected with a public interest." Furthermore, the unfair advantage of such large corporations over individual subscribers

in the course of regulatory hearings would certainly seem to mandate state assistance to the consumer.

One other reason might well be cited by way of justifying state assistance in the process of representing consumer interests in the course of telecommunications regulatory hearings. It cannot be forgotten that such deliberations are quasi-judicial in character. As such, it is the task of the regulatory commissioners to adjudicate between two opposing sets of representations. It is respectfully submitted that one makes nothing less than a farce of the judicial process by perpetuating a system whereby it is assured that the interests of one concerned party, the consumers, are not represented before the tribunal in anything approaching an adequate manner. If the *Canadian Bill of Rights*[11] could recognize twelve years ago the necessity of assuring adequate legal representation to individual litigants in criminal causes, cannot we not today remedy the similar deficiency in this regulatory process, whereby the interests of large segments of the populace are continually allowed to go unrepresented by competent counsel?

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[11] S.C. 1960, c. 44, s. 2(c) (ii)

§F / Alternate Structures for the Augmentation of Consumer Interest Representation in the Telecommunications Regulatory Process

§F(1) / Goals Sought from the Proposed Restructuring of the Process

As discussed in Divisions B, C, and D of this Interim Report, the current procedures of the Canadian Transport Commission leave much to be desired as regards the effective aggregation and consideration of consumer interests in telecommunication services provided by the regulated carriers. The areas of specific concern can conveniently be ordered in a four-point schematization:

(i) There is a glaringly apparent need for the presentation to the Regulators of facts, issues, and interests from the point of view of the consumer. If the adversarial model of regulation is to work effectively, there must be as adequate a representation of these interests as there is of the interests of the regulated carriers.

(ii) The procedures employed to follow through on individual consumers' grievances regarding services provided by the carriers are in need of significant improvement. The customer's complaint against the regulated telecommunications utility should be followed through by an officer of government until a determination has honestly been made that (a) the complaint is unfounded or is beyond the scope of the Commission's authority, (b) the carrier remedies the

situation, or (c) the consumer's complaint has been pressed before the Commission itself and, if necessary, before the courts of competent appellate jurisdiction.

(iii) The federal telecommunications regulatory authority should receive periodically some accurate indications, based upon objective and properly verifiable data, as to consumers' needs for telecommunications services now and in the future, so as to further insure that all legitimate demands upon the regulated carriers will continue to be fulfilled. Sufficient attention must be given as well to the expected influences of technological developments in the telecommunications environment upon consumer demands and needs for telecommunication services. Towards this end, it might be expected that appropriate and sophisticated surveys of consumers' needs and demands would be conducted and/or commissioned by the office of the consumer advocate. Such surveys, combined with inputs received directly from the public, should allow the office to make properly authoritative representations before the Commission.

(iv) The traditional orientation of public utility regulation has resulted in scant attention being given to the social costs inherent in the decisions made as to services to be provided and tariffs to be levied. Such considerations have been rather alien to the hearings held by the C.T.C. Procedures should be institutionalized whereby submissions

to the Commission on such issues will be heard. As such interests cannot be expected to be championed by monied corporations, it is evident that an officer of the regulatory commission must undertake this task. As it is most frequently the consumers who are burdened with such expenses--expenses which may not all be expressable in simple monetary terms--it might properly be one function of the Office of the Consumer Advocate to make representations to the regulatory authority on such matters, as necessary from time to time.

§F(2) / Desired Characteristics of the Office

If an office of government is to be able to perform fully the tasks mandated by the above listing of first-priority goals, it is readily apparent that it should be structured in a manner which best meets the following criteria:

(i) The office must be able to gain a high level of public respect and confidence. As the consumer advocate must often play the role of the honest broker between the interests of the citizenry, the administrative board of government, and regulated businesses, the structure of the office must be such as will allow it to earn popular and general acceptance of its independence and integrity. As has often been said in relation to the various provincial Ombudsman schemes devised of late, the degree of public

trust to be gained by such offices is very largely dependent on the calibre of the personnel selected. Yet it is equally as true that no impediments in this regard should be placed in the structure of the office. One measure which might go far towards this end would be to allow the director of the Office an unfettered hand in selecting his staff and in overseeing the operations of the Office. In the creation of the Office, steps might well have to be taken to exclude the Office from certain of the traditional administrative niceties which pervade the public service.

(ii) One function of the amount of general acceptance and trust to adhere to the proposed office is the extent of its renounciation of partisan political motives. As the telecommunications regulators themselves--the members of the Commission--must be above doubt as to their impartiality, so too those persons appointed to represent the interests of the consumer in the operations of the Commission must be free from all appearances of factional entanglements.

(iii) A second function of the extent to which the telecommunications consumer advocate will gain general acceptance and respect will be the degree to which he is visible to the public. Clearly, the office of the consumer advocate cannot be hidden in the labyrinth of non-descript Ottawa

office blocks. Nor can the office be restricted from interacting freely and continually with all groups in society. This matter is considered further in Division F(4) of the present paper.

(iv) As the goals of the telecommunications consumer advocate's office are broad in scope and complex in their very nature, the office will have to develop a reasonably high level of expertise in numerous fields. The office will require to have on its permanent staff, or to have sufficiently free access to, persons with the broad range of professional and technical backgrounds related to its tasks. It could be anticipated that this range of essential skills would include law, economics, business administration, accountancy, engineering and the physical sciences, and the social sciences. As no one wishes to create unnecessarily a large addition to the federal bureaucracy, the office's nuclear staff could be supplemented from time to time, as the need arises. Such persons might be seconded to the Office from other branches of government, or hired on temporary contract from the commercial and academic sectors.

(v) To achieve any effective adversarial position, a telecommunications consumer advocate must be detached from the general organization of the regulatory authority. This requirement could be fulfilled alternatively (a) by placing

the function within another distinct federal department, such as Consumer and Corporate Affairs or Justice, (b) by making the office a highly distinct appendage upon the structure of the regulatory commission, under a director of high stature and accountable only to the Commissioners, or (c) by allowing the function to be performed by a structure entirely beyond the scope of normal governmental controls, such as a non-profit foundation or a private lawyer under contract to the state.

(vi) The consumer advocate office must be able to retain a high level of credibility in the eyes of the regulatory commissioners. A high level of respect in the professional competence and integrity of the office on the part of the Commissioners and the regulatory board's senior staff will make that much more efficient the investigative and information-gathering activities of the office. Any recommendations of the office regarding specific consumer complaints about the services of given regulated carriers will be all the more effective if it be accepted that the Commissioners and their senior staff have bestowed their confidence in the integrity and professionalism of the consumer advocate office. This factor is as important if the consumer advocacy function in telecommunications regulation is performed by an outside department of government as it is if the function is assigned to an office within the structure of the regulatory commission. It might be added in this regard that the

degree of trust in the office by the commission will be minimal if the Commissioners and senior staff are allowed to see the consumer advocate as someone assigned to spy on, or discredit them. Rather, the function must be effectively integrated into the total regulatory process of the telecommunications system.

(vii) The activity of investigating and, where possible, satisfying complaints regarding inadequacies in the services provided to customers by the various regulated carriers alone demands that the telecommunications consumer advocate office operate on a continuous basis; it cannot just spring to life immediately before each rate hearing of the regulatory commission. Equally as important though, the office must be in a position to garner the consumers' opinions regarding the general state of telecommunications services provided in the society, so as to be able to keep the Commissioners informed on this issue. The effective fulfillment of this task by the consumer advocate office will allow for formulation of telecommunications regulatory frameworks more consonant with the social needs of the times.

§F(3) / An Examination of Selected Significant Alternate Models

Within the severe time limitations imposed by admin-

istrative and procedural requirements, the basic outlines of specific models of consumer advocacy which are reasonably consonant with the needs in the telecommunications environment at the federal level in Canada have been examined, and are presented below. In the opinion of this Consultant, each of these models could be adapted to the requirements of the present environment.

§F(3)(i) / Staff Witness Model

This structure is presently in use by the Federal Communications Commission of the United States. Certain Commission employees, in addition to their general duties, are specifically assigned to offer evidence which they feel might be overlooked by the F.C.C.'s "Hearing Examiners". While the staff witnesses may often play an active adversarial role, they are also the same individuals charged with providing objective data for the Commission. The staff witnesses are not specifically consumer advocates; theirs is a more generalized devil's advocate function.

This scheme, as adopted by the F.C.C., seems to assure to the regulatory authority the greatest possible economy of manpower, as no special staff need be assigned to a distinct advocacy division within the Commission.

It might also be expected that such an approach, drawing on the full range of professional backgrounds in the F.C.C., assures that all needed skills might be devoted to the advocacy function. As the advocates are the same personnel who must supply the Commissioners with their objective data, the advocates might tend to have the ear of the Commissioners all the more readily. They would be unlikely to be seen as outsiders to the operations of the commission, and their activities thus resented.

This scheme has a negligent amount of role differentiation. For this reason, it might be expected that the personnel involved in the advocacy functions might tend to confuse more easily their functions and, perhaps, thus do a poorer or less credible job of advocating interests other than those of the regulated carriers. Above all, the staff witnesses of the F.C.C. are not expected to be consumer advocates, *per se*. Thus, they cannot be faulted for failing to undertake in-depth investigations of the needs of the non-institutional user of telecommunications services, both at present and in a dynamic context.

§F(3)(ii) / Office within the Regulatory Commission

A slight modification of the Federal Communication Commission's scheme would see the advocacy function assigned specifically and on a full-time basis to a given set of personnel, requiring that this office present the interests of the consuming public. Such a scheme has been tried by certain state public utility commissions in the United States; the Public Service Commission of the State of Maryland has had a "People's Counsel" for the past few years.

One possible deficiency of this structure is that the Consumer Advocate, being an appendage of the Commission and responsible to it, has a minimal level of independence from the points of view and regulatory philosophies of the Commissioners themselves. One might presume that, if the members of the regulatory commission are already attuned to the interests of the consumer, there would be little need to establish a Consumer Advocate Office. Conversely, if the purpose of establishing such a structure in the Canadian telecommunications regulatory sphere is to remedy a preceived error or void in the attitudes of the Commissioners of the C.T.C., it makes little sense to place the Consumer Advocate Office under the immediate control of

these very same Commissioners.

The Consultant wishes to note in this Interim Report that he has not been able to contact the various regulatory authorities in the United States and elsewhere so as to properly investigate the existing structures for consumer interest representation before such boards. This might well be one area warranting further investigation.

§F(3)(iii) / Office Elsewhere in Government

So as to overcome the deficiencies of Models (i) and (ii), the consumer advocacy function could be assigned to a division of government not under the control of the regulatory commission. One possibility might be the creation of an entirely independent entity, organizationally similar to the Office of the Auditor-General, which would be assigned the function and given standing before the regulatory authority by statute. While certain of the goals described in Division F(1) might thus be maximized, the costs would be greater than with the other schemes already considered. Also, there might be a great deal of Parliamentary reluctance to go so far beyond the normal organizational patterns in establishing an office of very limited size and function. Such an independent structure

might also experience difficulties in temporarily co-opting personnel with needed technical expertise from other departments.

It is suggested, though, that the best aspects of both schemes can be combined by placing the consumer advocacy function within the Department of Communications. This structure forms the basis for the recommendations made in Division H.

§F(3) (iv) / Ombudsman Model

It is not suggested that a viable alternative is the establishment of a telecommunications Ombudsman. In those jurisdictions, such as New Zealand and the United Kingdom, where Ombudsmen serve to settle citizens' complaints regarding telecommunications services, these services are provided by the government itself, rather than by private companies or crown corporations. Also, the powers of Ombudsmen are generally quite circumscribed, as they can only issue recommendations, and often can only start investigations on matters forwarded to them by Members of Parliament.

With the foregoing in mind, though, there remain certain useful aspects of the Ombudsman scheme which might be appended to a telecommunications Consumer Advocate's Office. The experiences of the Canadian and Commonwealth

jurisdictions which have introduced Ombudsmen indicate that, given a high level of popular respect for both the office and its incumbent, the office may very often solve the complaints of the public merely by a process of mediation between the aggrieved party and the object of the complaint. One object of a telecommunications Consumer Advocate should certainly be to resolve difficulties between the public and the carriers through such informal channels, whenever possible.

A simple Ombudsman-like scheme, though, cannot solve the intricate problems related to the lack of consumer interest inputs in the telecommunications regulatory process. This scheme makes no allowances for the necessary ongoing representation before the regulatory authority of consumer interests, or for the filling of an active adversarial role in the course of the Commission's hearings. This structure is noted at this point specifically to indicate the need to combine with an adversarial Consumer Advocate some mechanism, similar to an Ombudsman, for the proper resolution of grievances held by individual consumers against the regulated carriers. Indeed, such an appendage to the Consumer Advocate's Office would leave him more free to pursue generally applicable consumer interests in the course of his formal representations before the regulatory Commission.

§F(3)(v) / Function Assigned to Someone Other Than a Public Servant

A fifth alternative is the funding by government of a private organization's consumer advocacy activities before the telecommunications regulatory authority. There would be two prime legislative tasks involved in such a scheme. First, it would probably be necessary for Parliament to insure in the statutory instrument creating the new Commission that the given organization always has *locus standi* before the authority. Second, each annual budget will have to include an appropriation to fund the consumer advocacy activities of the organization.

Normally, a right of appearance before judicial and quasi-judicial bodies only adheres to counsel for specific persons, natural or corporate, who are identifiable parties to the contentious proceedings. Persons appearing in any other capacity, as an *amicus curiae*, must specifically seek leave of the tribunal to interpose. In view of the nature of the function, it would be highly desireable for the consumer advocate to be assured by statute of the right of appearance on all issues. Moreover, consideration should be given to assuring him access by right to all documents of the regulated carriers which the regulatory authority is authorized to obtain. Such a right might well be justified by the very monopoly situation of the regulated carriers.

If it is to be expected that non-governmental consumer advocate will function effectively, it is apparent that the office must be properly funded. An annual appropriation will have to be appended to the budget of the regulatory authority or, perhaps, the Department of Communications. As a private organization will not have free access to technical expertise, as would a consumer advocate attached to either the Commission or to the Department of Communications, the need can be expected to arise more frequently to hire temporarilly the services of outside consultants. Thus, the budgetary requirements of a non-governmental advocate's office will be relatively greater.

No investigation has been made as to the willingness of any of the existing voluntary associations to assume the duties of consumer advocacy before a telecommunications regulatory commission; perhaps this might be considered at a later phase of the study. It would seem, though, that one likely candidate might be the Canadian Civil Liberties Association, headquartered in Toronto. A variation on this structural model would be to fund a single person, perhaps a member of the bar with extensive experience in administrative law, and allow him to function as a consumers' advocate.

Whether a grant is given to an organization or an individual, and this person or group is given statutory standing, it would seem that this model suffers one marked

deficiency: the structure presently hypothesized is likely to be politically unacceptable, as the advocate is not immediately responsible, through the usual channels of responsibility. No precedent comes to mind for such an office, quite limited in function, funded by Parliament, yet not subordinate to some larger commission or Crown ministry. While the level of political independence inherent in this model could be expected to be far greater that that of any of the other structures considered, its same independence from supervision may make it politically less acceptable. It is difficult to judge, though, whether the public will be more or less responsive to a "private", as contrasted with a public servant, consumer advocate.

§F(3)(vi) / Attitudinal Changes Within a Traditional Structure of Regulation

The Consultant undertook an in-depth analysis of the Prince Edward Island Public Utilities Commission. This study included an examination of the Commission's statutory mandates, the reading of local press reactions to the work of the Commission, and face-to-face interviews with the Commission's one full-time member and with an informed local observer of its operations.

The P.E.I. Commission is multi-functional; telecommunications regulation is but one phase of its activities. The provincial statutes do not require or specifically allow the Commission to undertake any unusual procedures designed to aggregate public or consumer interests and have them represented before the tribunal. The Consultant's investigations indicate, however, that this provincial regulatory authority has deliberately attuned itself to the interests of consumers of the regulated utilities' services, and that for this reason alone consumer interests appear to be far better represented before this Commission than they are before the present federal telecommunications regulatory authority.

The Secretary of the Prince Edward Island Public Utilities Commission, who has held that post for over twenty-five years, and is its sole member employed full-time in the work of the Commission, indicated that he makes a practice of seeking submissions in respect of carriers' rate applications from persons who have presented objections in the past. In addition to this personalized solicitation of views from the consuming public, the Commission will invite such respondents to make use of its library resources. Formal rules of procedure will be waived in instances where people make presentations to the Commission themselves, without being represented by counsel. It was indicated

to the Consultant by the Secretary of the Commission, W. R. Brennan, that such practices have often resulted in the Commission receiving "valuable" evidence; persons unrepresented by counsel have disclosed to the Commission facts highly germane to its proceedings which otherwise would have gone undisclosed. Moreover, this Commission will investigate every complaint, even if brought by a lone consumer--something it is not required to do by statute. This practice is followed even though the Commission has no permanent staff. The Consultant has concluded, on the basis of the investigations outlined above, that these practices of the Commission have resulted in both a greater degree of public confidence in the Prince Edward Island Public Utilities Commission than is placed in the Canadian Transport Commission, and a far greater representation of consumer interests before the former body than before the latter in its deliberations.

For obvious reasons, the personalized attention afforded consumer complaints and representations by members of the smallest province's regulatory authority may not be possible on the part of a regulatory authority the size of the C.T.C. Nonetheless, it is suggested that the same attention to the interests of consumers could--and indeed should--be shown by a federal regulatory authority if these functions are institutionalized in a special permanent office. Indeed, it is suggested that the *raison d'etre* of

the Consumer Advocate's Office is to provide just this sort of attention to the interests of consumers of the services regulated. The present federal experience seems to indicate very strongly that these legitimate interests cannot be properly safeguarded without the creation of a separate office. It cannot be expected that a new federal telecommunications regulatory authority, however constituted, will show the same level of attention to consumer interests afforded by the far smaller Prince Edward Island Commission.

§F(3)(vii) / Centralization of the Consumer Advocacy Activity

A Consumer Advocate's Office devoted merely to problems of telecommunications regulation will, most certainly, have to be severely limited in size. Moreover, it may be economically impossible to for such a uni-functional Office to make the fullest possible contacts with members of the public across Canada. Media coverage afforded to a telecommunications Consumer Advocate cannot be expected to be very great, and the cost of creating branch offices across the country may well be prohibitive.

An alternative idea, which might not suffer these deficiencies, would be to create a single office in government which would be empowered to perform functions of

of consumer advocacy, as outlined herein, before many or all of the federal regulatory boards. Such a centralized Consumer Advocate's Office could either be established as an independent structure, similar to the Office of the Auditor-General and reporting directly to Parliament, or the Office could be attached to an existing department, such as Consumer and Corporate Affairs or Justice, and responsible through the respective Minister.

It might be expected that this structure would allow the Consumer Advocate's Office to gain sooner a greater degree of experience in consumer interest representation before regulatory commissions. Also, the necessarily greater size of the Office would allow it to hire permanently personnel with a greater range of academic backgrounds and practical experience. With more opportunity for advancement within the Office, due to its greater size, there is a greater possibility of reducing personnel turn-over; the Office might thus operate more efficiently, as less time would have to be spent orienting "green" employees.

Members of the public are more likely to know of the existence of one large Consumer Advocate's Office, and to make use of its services. Given the low level of knowledge about the operations and structure of government by the bulk of the citizenry, as indicated by research surveys, it is hard to assume that very many people will know of the

existence of a small, obscure telecommunications Consumer Advocate's Office. Conversely, a larger, centralized Office should receive far more media coverage and become more well known to the public. It also seems valid to presume that a larger Office, with a higher level of popular support, might be somewhat more credible in the eyes of the regulatory Commissioners than a small, single-purpose telecommunications Consumer Advocate's Office.

§F(4) / Personnel Requirements of the Office

The number and type of personnel should not vary, to any great extent, between any of the models sketched herein of single-function telecommunication Consumer Advocate's Offices. In addition to needed clerical and secretarial assistance, it should be possible for any of these models to operate initially with perhaps three professional employees. The director of the Office might be a senior lawyer, preferably someone with extensive experience in administrative law. Ideally, this person should be a Q.C., known to and respected by the members of the regulatory authority, and with appropriate credentials to attract public confidence in the Office. In

addition to this senior Advocate, the Office might begin operations with another lawyer and, perhaps, an economist. The Director of the Office might well be given full authority to select his subordinates.

It is apparent that these three persons cannot be expected to bring to the Office all the needed expertise. The various branches of the Department of Communications, and other ministries, might be asked to loan temporarily personnel whose fields of special knowledge are required at any given time by the Office. In the alternative, or when a major project is contemplated by the Consumer Advocate's Office, necessary personnel or services could be contracted for, over a definite period of time, with private individuals, companies, and institutions.

As regards the Office's permanent staff, it would appear to this Consultant that there would be little difficulty in attracting high calibre personnel. The law faculties are increasingly graduating persons with keen interests in the field of consumer law. Similarly, in the graduate faculties of economics and commerce are to be found increasing numbers of students who would prefer a position with an office of this nature to the traditional posts in business and government. It would be hoped that the small number of posts with the Office could be

allocated appropriate public service job classifications to insure an appropriately high salary level to the incumbents.

§F(5) / Cost of Establishing the Office

The Consultant has not undertaken detailed analyses of the probable per annum costs of creating an Office of the Consumer Advocate. In informal discussions with others in the Department of Communications, the figure of $125,000 per year has been accepted as a reasonable cost approximation. This figure is based on the assumption that the Office will be able to share the physical plant and support services of an existing government department or agency, and includes the estimated costs of those services which might have to be obtained under special contract with outside persons. It must be noted, though, that the expenses of such an Office as this should be expected to vary significantly from year to year, with fluctuations in the case load of the regulatory agency. Therefore, provisions should be made so that the Office is not unnecessarily restricted by any given pre-estimation of its annual budgetary requirements.

§G / Constitutional Consideration of Crown Indivisibility

It has been suggested to this Consultant that the establishment within government of a consumer advocate's office might raise a major problem in the realm of constitutional law,[1] as the possibility would arise of the Crown in right of Canada speaking with two voices on a given issue. The English constitutional writers have pointed out the irreconcilability of such a situation, should it arise, with the very basic premise underlying the constitutional system that each official expression of a Minister of the Crown is a statement of "the Royal will."[2]

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[1]Constitutional law, in the Canadian context, relates not only to the explicit provisions of the *British North America Acts, 1867-1949*, but also to the more implicit basic governmental conventions of the state. The *B.N.A. Acts*, it must be remembered, are not a comprehensive codification of constitutional law, as in the American document of 1789. See MacGregor Dawson, *The Government of Canada*, Fifth Edition (Ward), 1970, chap. 4. Note as well the first paragraph of the Preamble to the *British North America Act, 1867:*

"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of Great Britain and Ireland, *with a Constitution similar in Principle to that of the United Kingdom*:" (Emphasis added).

[2]Dicey, *Introduction to the Study of the Law of the Constitution*, Tenth Edition (Wade), 1964, pp. 325-27.

In both Britain and Canada, statutory authority now permits independent regulatory commissions to exercise powers on behalf of the Crown which were not known to exist in the common law.[3]

Although certain of the schemes discussed in this Report will see one servant of the Crown arguing publicly a position which may be at variance with that ultimately adopted by the competent regulatory commission or Minister of the Crown, it is submitted that this will in no way controvert the provisions of the constitution. It should be recalled, first, that the consumer advocate, even if a Crown employee, is not a Minister of the Crown; it is only the statement of a Minister which is taken to be a commitment on behalf of the Crown. Also, the consumer advocate would not purport to expound government policy; rather, he and his subordinates will only be in the role of servants of Her Majesty in right of Canada offering advice to one of Her Majesty's Ministers.[4]

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[3]Dicey, p. 325n.

[4]Or advising a regulatory Commissioner, whose legal role is constitutionally similar to that of a Minister of the Crown.

Dealing with this first point, it seems clear that the consumer advocate's office is not greatly different, in its constitutional role, from the function performed by a public servant asked to produce a departmental working paper to illuminate a previously unconsidered ramification of the department's tasks. Similarly, all that a consumer advocate's office would be doing is bringing before the regulatory authority certain considerations which, though highly germane to the duties of the commission, have heretofore been stifled through certain procedural devices of the C.T.C.

Secondly, and without prejudice to the foregoing, it is submitted that even if the adversarial duties of a consumer advocate/Crown servant are to be seen as constituting a distinct pronouncement of Government policy, no aspersions are thereby cast upon the indivisibility of the Crown in right of Canada. As discussed above, only the statements of a Minister, or someone placed by statute in a quasi-ministerial role, are taken as commitments of the Crown.[5]

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[5]"Of magistrates also some are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere". Blackstone, *Commentaries on the Laws of England*, Book First, Chapter Second (italics from the original text).

Even then, it is an accepted constitutional practice in Canada that such persons may speak outside of their legal role, as when espousing particular interests before investigatory committees of Parliament, royal commissions of inquiry, and regulatory tribunals.

If it is desired to have this consumer advocacy function exercised through a public servant, the doctrine of Crown indivisibility does not stand to be imperilled in any way. In view of the clear constitutional provisions in this regard, it would seem quite superfluous to append to the statutory instrument creating such an office any disclaimer of Crown responsibility for its acts. The Crown requires no special protections in this context to safeguard its indivisibility.

§H / Conclusions

Having given due consideration to each of the schemes outlined in this Interim Report, and to possible variations of these structures, it is the recommendation of this Consultant that prime consideration be given to the establishment of a consumer advocate's office within the Department of Communications. It is felt that such a structure is the most feasible politically, can be established at the least expense, and stands to enjoy a probability of success in consumer interest representation at least as high as that of the other schemes considered.

In the course of conversations with senior members of the Department, the Consultant has been persuaded that, however attractive might appear the establishment of an office of the telecommunications consumer advocate beyond the control of the Minister of Communications, such a structure would be unacceptable to the Department of Communications. Such a model would be perceived as creating a real likelihood of conflict between the Office and the Department. The relative merits of such an independent office are considered elsewhere in this Interim Report; however, the Consultant respectfully suggests that whatever advantages might adhere to such a model are not sufficient to justify further jeopardizing the implementation of the general scheme.

As has been noted already, it is felt that the creation of an extra-Departmental consumer advocate's office would not give rise to any constitutional law problems relating to the indivisibility of the Crown in right of Canada. Nevertheless, this Consultant anticipates that the Government of the day might find it politically untenable to have the telecommunications consumer advocate - ostensibly representing the views of the people of Canada - advancing proposals which might oppose diametrically the policies of the Government. It is understood that a telecommunications consumer advocate responsible to the Minister of Communications will be relatively less free to pursue policies viewed as eccentric by Government. This problem would be especially accute in the event that the Office is given a responsibility to represent the consumer interest as regards quasi-judicial decisions relating to the granting of technical licenses pursuant to the *Radio Act*; such might be an additional function assigned to a C.T.C./C.R.T.C. successor body. Be that as it may, it is respectfully suggested that the political system requires, and experience justifies, placing full powers in a Minister to regulate the totality of federal activities in the sphere of communications. It might well be expected, though, that the creation of a properly constituted consumer advocate's office, as a functionally and organizationally distinct unit within the

Department, might lead to a shift in emphasis - throughout the Department of Communications - such that greater attention would be afforded to "consumer interests" in the daily workings of the Department's various division.

At this time, the implementation of a consumer advocacy programme for telecommunications regulation must be seen as an experimental undertaking. As such, it might be difficult to justify placing the function beyond the normal administrative controls of government. Also, it might be hard to justify involving another department of government, which is not presently involved in telecommunications regulation at all, in the process. This is not to suggest that the centralization of consumer advocacy functions before several regulatory tribunals might not warrant serious consideration at some future date. Rather, what is suggested is that the consumer advocacy system, which is as yet untried in Canadian regulatory practice, be developed on an "in house" basis, so to speak.

Should the concept, in some form or another, be adopted eventually by other federal regulatory authorities, serious consideration then might properly be given to the amalgamation of the separate offices, possibly as a division of the Department of Consumer and Corporate Affairs or the Department of Justice. At that stage, it might even be deemed advisable to create an independent

structure, similar in organizational concept to the office of the Auditor-General and, like the Auditor-General, responsible directly to Parliament.

In brief, it is the considered opinion of this Consultant that the general concept of consumer advocacy should be adopted at this time with respect to those telecommunications regulatory activities presently undertaken by the Canadian Transport Commission. For reasons relating to the basically experimental nature of the concept, political considerations, and economy of operation, it appears to this Consultant that the function should initially be undertaken within the Department of Communications, and under the supervisory control of the Minister of Communications.