THE NEW CRTC TELECOMMUNICATIONS RULES OF PROCEDURE: A PRACTITIONERS' GUIDE

*T. Gregory Kane**

> By definition, procedure does not deal with the substance of controversial issues: and by nature, it is an arcane, bloodless, and thus unattractive subject of study. . . . For these reasons, as all wise lawyers know, a change in governing procedures is the simplest way to effect a basic change in the end product (that is, the substance) of governmental action.

I. INTRODUCTION

This quotation from an article by Antonin Scalia[1] is an excellent summary of a justification for embarking upon an exhaustive examination of practices and procedures. To fully appreciate the relevance of Scalia's observation, it is important, from a "process" point of view, to review the history of the proceedings before the Canadian Radio-television and Telecommunications Commission (the CRTC) which culminated in the making[2] of the CRTC Telecommunications Rules of Procedure[3] (the New Telecom Rules).

This is especially true for those who have not previously participated in CRTC proceedings. As Peter Grant has graphically characterized the situation,[4] there are "insiders and outsiders" in proceedings before regulatory tribunals. One of the duties incumbent upon a tribunal is to establish a framework for participation which will facilitate the entry of all interested persons. Thus for the "outsider", a convenient starting

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* Of the Ontario Bar. The author would like to record his appreciation to Greg Van Koughnett (CRTC Legal Branch), Phil Rogers and Malcom Andrew (CRTC Telecommunications Branch) each of whom read an early draft of this article and provided very helpful suggestions.

[1] Scalia, *Two Wrongs Make a Right. The Judicialization of Standardless Rulemaking*, REGULATION 38 (July/Aug., 1977).

[2] Pursuant to s. 65 of the National Transportation Act, R.S.C. 1970, c. N-17, the CRTC "may make general rules regulating its practice and procedure so far as not inconsistent with the express provisions of this Act".

[3] Rules of Procedure of the Canadian Radio-television and Telecommunications Commission in Regard to Telecommunications Proceedings, S.O.R./79-554 (113 Can. Gazette, Pt. II, 2766) [hereinafter cited as the New Telecom Rules].

[4] Grant, *Public Participation in the Administrative Process*, CONFERENCE ON ADMINISTRATIVE JUSTICE 229 (University of Ottawa, 1978).

point is a study of the established practices and procedures of the tribunal.

On the one hand, since the CRTC has recently established the New Telecom Rules, "outsiders" may feel that they are on an equal footing with "insiders" since everyone must adjust to the changes. The best way of demonstrating why that would be false security is to examine the process which led to the creation of the New Telecom Rules: the "insiders" were actively involved for three years and consequently could almost be described as surrogate parents! Let us look briefly at the process.

In one sense, it commenced on April 1, 1976, the day that the CRTC obtained jurisdiction over federally regulated telecommunications carriers in Canada, with the proclamation of the Canadian Radio-television and Telecommunications Commission Act.[5] The process officially commenced on July 20, 1976 when the Commission issued a statement entitled Telecommunications Regulation — Procedures and Practices[6] (the July statement). This was done in preparation for a public hearing scheduled to take place in September, 1976.

By coincidence, the process was formally completed exactly three years after the release of the first statement when, on July 20, 1979, the Commission, pursuant to section 14(2) of the Canadian Radio-television and Telecommunications Commission Act and section 65 of the National Transportation Act,[7] made rules of procedure in regard to telecommunications proceedings. At first blush, this three year period may appear to be a good example of regulatory lag. However, on further examination it will be shown to be just the opposite inasmuch as it is an excellent example of a comprehensive consultative process deliberately conducted over an extended period.

One clue with respect to the importance attached to "process" in proceedings before the CRTC can be obtained from comments delivered by the then Vice Chairman of the Commission, Charles Dalfen, in a panel discussion entitled *Telecommunications and Regulation*. Although the comments have been made in the context of the Commission arriving at a decision in an adversarial situation, they are nevertheless helpful in understanding the processs related to the practices and procedures proceeding:

> It seems to me that even though corporation executives, government officials or CRTC Commissioners or any group may come out with decisions that are in substance brilliant, considered at all angles of a situation, nevertheless, where there are divergent interests at stake, it's probably preferable to go through the process of a hearing, to go through the adversarial process, even at the risk of coming up with a decision that is much less perfect than any of

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[5] S.C. 1974-75-76, c. 49 (assented to June 19, 1975).

[6] Statement of the CRTC attached to Telecom. Public Notice CRTC 1976-2, 110 Canada Gazette, Part I, at 3804 (1976) [hereinafter cited as the July statement]. A copy of the statement may be obtained from the CRTC.

[7] R.S.C. 1970, C. N-17.

> us would have conceived of in the privacy of our own study or our own boardrooms. Because again, the process becomes almost more important in yielding the decision than the brilliance, the concisiveness or the perfection of the decision itself.[8]

Prior to April 1, 1976 the Canadian Transport Commission (the CTC) exercised jurisdiction over federally regulated telecommunications carriers in Canada.[9] Indeed the CTC and its predecessor agencies had carried out that regulatory responsibility since 1906 when the modern scheme of telecommunications regulation was established and placed under the jurisdiction of the Board of Railway Commissioners for Canada.[10] At that time there was a natural association between transportation and communications which had originally developed because telegraph lines were strung along railway rights of way. Subject to certain amendments to the governing legislation and the name of the regulatory tribunal,[11] this regulatory scheme remained intact until March 1973 when the Minister of Communications, Gérard Pelletier, issued a Green Paper,[12] followed in April 1975 by a Grey Paper,[13] which set out a two-stage process for revising federal communications legislation. The first stage in that process was to be the establishment of a single regulatory body to exercise jurisdiction over broadcasting as well as telecommunications matters.

The chosen regulatory vehicle for this fusion was what was then the Canadian Radio-Television Commission. Through the enactment of the Canadian Radio-television and Telecommunications Commission Act, Parliament removed regulatory responsibility for federal telecommunications carriers from the Canadian Transport Commission and added it to a restructured CRTC.[14]

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[8] Address by Charles Dalfen, in PROCEEDINGS OF THE SIXTH ANNUAL MEETING OF THE CANADIAN TELECOMMUNICATIONS CARRIERS ASSOCIATION 34 (June 19-21, 1977).

[9] The principal companies coming under federal jurisdiction are Bell Canada, British Columbia Telephone Company, CN-CP Telecommunications, the telephone operations of CN Telecommunications and Telesat Canada.

[10] This was achieved by An Act to Amend *The Railway Act, 1903*, S.C 1906, c. 42, ss. 29-35.

[11] The Board of Railway Commissioners for Canada was succeeded in 1938 by the Board of Transport Commissioners for Canada, which, in turn, was succeeded in 1967 by the Canadian Transport Commission, the Railway Transport Committee and finally in 1972 the Telecommunication Committee of the Canadian Transport Commission.

[12] DEPARTMENT OF COMMUNICATIONS, PROPOSALS FOR A COMMUNICATIONS POLICY FOR CANADA, A POSITION PAPER OF THE GOVERNMENT OF CANADA (1973).

[13] DEPARTMENT OF COMMUNICATIONS, COMMUNICATIONS: SOME FEDERAL PROPOSALS (1975).

[14] With commendable restraint, the Commission resisted the temptation to double the "T's"; consequently the acronym remained as "CRTC".

The second stage in the process is to be a complete revision of existing statutes with a view to clarifying their application to contemporary and future modes of telecommunications, to rationalizing the respective roles of the federal government and the regulatory body, to providing for more effective collaboration with the provinces, and generally, to establishing a coherent body of federal law on communications

The important point to remember is that on April 1, 1976, a regulatory tribunal with an established practice and procedure, the CRTC, had grafted onto it a new regulatory responsibility previously performed by another regulatory tribunal, the CTC, with its own entrenched practice and procedure, very different from that followed by the CRTC.

From a procedural point of view, CRTC hearings prior to April 1, 1976 were characterized in a legal sense by their informality: witnesses were not sworn except in revocation proceedings; there was no cross-examination; Commissioners and Commission counsel conducted the questioning of witnesses; and rarely was there an adversarial confrontation. In distinct contrast, the Telecommunication Committee of the CTC conducted its proceedings with the full panoply of legal trappings, including the key ingredients of sworn testimony and cross-examination. Possibly because cross-examination was available, parties were left to their own devices, with the result that Commissioners and Commission counsel seldom asked questions.

Yet what is particularly intriguing in comparing the two tribunals is that the written rules of procedure which governed the activities of the respective tribunals were essentially the same. If one was to have put the CRTC's Rules of Procedure[15] beside the CTC's General Rules,[16] very little difference would be observable in their structure and content. But rules of procedure are really only a skeleton to be fleshed out by the Commissioners of the respective regulatory tribunals in the exercise of their discretion. Fundamental legal matters such as cross-examination and swearing of witnesses were not specifically provided for but rather evolved from particular determinations in specific proceedings. Thus the CRTC, in its July statement, set out the aims of the procedural review as follows:

> Both sets of rules [for broadcasting and telecommunications] cover only the most essential elements of procedure, and do not deal with either the basic approach or with many of the practices of the Commission in its interaction with carriers, intervenors and the general public. For this reason, the Commission wishes to solicit comment not only on the specific rules of procedure that should govern telecommunications proceedings, but also on Commission practices under such rules. . . .
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> Both sets of procedures have been developed over a considerable period of time, and each has certain advantages. The Commission has no desire to apply its broadcasting procedures to the telecommunications side, or vice versa, simply in the interests of uniformity. The Commission wishes to approach the question of telecommunications procedures in a considered and

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Although the second stage process commenced in March, 1977 with the introduction in Parliament of Bill C-43, 30th Parl., 2d sess., 1976-77, entitled An Act Respecting Telecommunications in Canada, any number of events have conspired since that time, with the end result being that proposed legislation has yet to be considered by Parliament in any meaningful way.

[15] C.R.C., c. 375.

[16] C.R.C., c. 1142.

responsible manner, with a view to changing such procedures only to the extent that substantial advantages can be achieved.[17]

Following receipt of comments from interested parties,[18] the Commission convened a public hearing to allow parties to expand upon their written views and respond to questions from the Commission.[19] The Commission then announced that it would take some time before reacting to the submissions of interested parties and, for a period of almost two years, took advantage of specific proceedings related to each of the carriers under its jurisdiction to test certain of the procedures and practices which were set forth in the July statement. On May 23, 1978, the Commission issued a decision entitled *CRTC Procedures and Practices in Telecommunications Regulation*[20] which was based not only on the record of the September 1976 public hearing but also on the experience gathered in particular proceedings over the intervening two-year period.

This extensive decision was divided into two parts: the first part set out certain general conclusions relating to the telecommunications regulatory process and the second part set out the Commission's specific comments and conclusions in regard to each of the suggestions contained in the July statement. At the same time, the Commission published the Draft CRTC Telecommunications Rules of Procedure[21] and this separate document was an exact representation of the rules which the Commission intended to replace the Canadian Transport Commission General Rules under which it was operating during the transitional period.

However, the process was not yet completed. The Commission invited interested parties to make further written comments on the draft rules, to be submitted by September, 1978. Most of the thirty-two organizations and individuals who submitted written comments on the July statement availed themselves of the opportunity to submit written comments on the May, 1978 draft rules of procedure. After analyzing these comments and continuing to gain from the experience provided by on-going telecommunications proceedings, the Commission annnounced[22] the adoption of the New Telecom Rules on July 20, 1979. In addition, the Commission announced the adoption of the Regulations Respecting the Form and Publication of Tariffs[23] (the Tariff Regulations) which had originally been incorporated in the draft rules of procedure but

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[17] The July statement, *supra* note 6, at 5-6.

[18] The CRTC received 32 written submissions from different companies, organizations and individuals.

[19] The public hearing took place in Oct., 1976, when 18 of the 32 parties appeared to present oral submissions.

[20] Telecom. Decision CRTC 78-4, 112 Canada Gazette, Part I, at 405. Published concurrently with Telecom. Decision CRTC 78-4, *id.* 4 C.R.T. 104 (May 23, 1978).

[21] A copy may be obtained from the CRTC.

[22] CRTC Public Announcement (July 20, 1979).

[23] S.O.R./79-555 (113 Can. Gazette, Pt. II, 2802).

which were published in a separate document on the advice of the Department of Justice.[24]

II. THE NEW CRTC TELECOMMUNICATIONS RULES OF PROCEDURE

For both "insiders" and "outsiders" the message has to be clear: there have been changes to the practices and procedures regarding telecommunications proceedings which will make them different from those of the previous Telecommunications Committee of the CTC or those of the CRTC in carrying out its regulatory responsibilities under the Broadcasting Act.[25] To paraphrase the Commission's stated aim in this process, the New Telecom Rules should be regarded as an attempt by the Commission to cover more comprehensively the elements of procedure as well as to provide a basic approach to practices of the Commission in its interaction with carriers, interveners and the general public. The presumption is that changes have been made in order to achieve substantial advantages.

Before examining the New Telecom Rules in greater detail, it is worth emphasizing the significance of five objectives which were set out in the July statement and which have appeared in each of the subsequent Commission documents on this matter. The objectives are as follows:

> 1. To ensure that Commission proceedings are of sufficient focus and depth to permit the highest possible quality of decision making;
> 2. To assist regulated carriers to deal effectively with Commission concerns in respect of specific proceedings and on an ongoing basis;
> 3. To facilitate the involvement of the public in the regulatory process through greater informality and public access;
> 4. To increase the capacity of intervenors to participate in public hearings in an informed way;
> 5. To eliminate unnecessary delay in the regulatory process.[26]

In fact, the objectives were actually contained in the May, 1978 draft rules as paragraphs to section 3(2). However, when the rules were formally enacted, the objectives had been removed as specific rules from the Rules of Procedure and were contained in the preamble to the Order[27] which formally made the Rules. As was stated in the Public Announcement released on the day that the new Rules came into effect, the objectives received widespread support at the public hearing and were

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[24] The advice was based on a difference in the language of the governing statutes. Ss. 270, 320(3), (6) of the Railway Act, R.S.C. 1970, c. R-2, authorize the Commission to prescribe the form and publication of tariffs, with both provisions including the phrase "by regulation". This is distinct from s. 65 of the National Transportation Act, R.S.C. 1970, c. N-17, which authorizes the Commission to make "general rules" regarding its practices and procedures.

[25] R.S.C. 1970, c. B-11.

[26] The July statement, *supra* note 6, at 6-7.

[27] S.O.R. 179-554 (113 Can. Gazette, Pt. II, 2766).

embodied in the Order adopting the new Rules; the Order, it was stated, "forms an integral part of the Rules".[28] In short, the objectives are still an important element in the enactment of the New Telecom Rules and should not be considered as having a diminished significance because they are contained in the preamble in the enacting Order rather than as a specific rule in the New Telecom Rules.[29]

"Outsiders" would be well advised to refer to the wealth of information (of which "insiders" will be well aware) contained in the May 23, 1978 decision[30] (*Decision 78-4*) which is, in effect, a fully annotated version of the draft rules of procedure which were published concurrently. The continuing value of *Decision 78-4* is apparent inasmuch as the rules which were eventually enacted did not differ significantly from the draft rules. As was stated in the Public Announcement accompanying the Rules, "The new Rules and Tariff Regulations contain a number of changes from the draft Rules in language and structure. However, with certain exceptions noted below, the essential provisions of the draft Rules remain unchanged."[31]

As a result of the extensive proceedings which preceded the enactment of the draft rules, parties are in the enviable position of having detailed commentary provided by the Commission in addition to the bald provisions of the Rules themselves. Another way of looking at the matter is that statements such as those found in *Decision 78-4* are of the type that would only be accumulated over the years in the context of rulings from the bench on procedural issues or contained in subsequent Commission decisions.[32]

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[28] *Supra* note 22, at 5.

[29] For an example of a case in which the Federal Court placed reliance upon a preamble and used it to ascertain the intention of the regulation-making authority, *see* the judgment of Marceau J. in the case of Association des Gens de l'Air du Quebec Inc v. Lang, [1977] 2 F.C. 22, 76 D.L.R. (3d) 455, *aff'd* [1978] 2 F.C. 371, 89 D.L.R. (3d) 495.

[30] *Supra* note 20.

[31] *Supra* note 22, at 2.

[32] It should be emphasized that there is a wealth of information and materials contained in all of the Commission releases, whether they be decisions, orders or public announcements. Interested parties must go beyond the traditional sources of information in order to be fully aware of events transpiring before the Commission.

To underscore the utility of Decision 78-4, it should be observed that there is no regular reporting system for the Commission's decisions in a form comparable to that which exists for decisions of the courts. The Commission is making an attempt to rectify the situation through the publication of an annual volume to be cited as "CRT", this is an unindexed collection of all the Commission decisions for its fiscal year Apr.-Mar. In addition, the Commission issues on a monthly basis a publication entitled TELECOMMUNICATIONS BULLETIN which is intended to provide an on-going record of the decisions and orders of the Commission affecting the telecommunications carriers under its jurisdiction.

One should also note that the Canadian Law Information Council is currently in the process of launching a publication that will cover the decisions of regulatory tribunals in the fields of transportation, communications and electricity.

The wealth of material provided in the New Telecom Rules and associated Commission decisions militates against a section-by-section or even issue-by-issue review. A more helpful approach would be a summary of the key provisions which will apply to virtually all telecommunications proceedings, followed by a short commentary on highlights of the Rules themselves.

The focus for a summary of the New Telecom Rules and associated decisions is the five objectives of the new Rules. Reading all of those authorities together, parties preparing for a telecommunications proceeding before the Commission should plan on the basis of notice being provided to the interested public, realizing that the nature of the proceedings dictates the extent of the notice requirements. While every attempt will be made to eliminate unnecessary delay in the regulatory process, this will be balanced by the provision of adequate time in which to consider material and prepare for the public hearing or the written brief, as the case may be. To ensure sufficient focus and depth for Commission proceedings, ample opportunities are provided during the pre-hearing phase for the production of relevant information. The complexity of Commission proceedings necessarily means that the volume of information placed on the record will not decrease; however, the information will become more specific and relevant to the issues that will arise for determination. Consequently, during a public hearing, parties should be prepared for a considered examination of detailed, relevant information characterized by openness both in terms of provisions relating to confidentiality and cross-examination. Finally, the Commission will actively seek the views of a broad range of interests by encouraging participation ranging from less formal letters of comment to more formal interventions, supported if necessary and where appropriate by costs to certain interveners.

An excellent summary of the contents of the New Telecom Rules was provided in the July 20, 1979 Public Announcement as follows:

> The rules are divided into seven parts, the first part containing general rules applicable to all telecommunications applications and the latter parts containing rules applicable to specific types of applications. Within Part I, a rule is established whereby any person or association may request to be registered as an interested party in order to receive automatically copies of applications of particular interest as they are filed with the Commission. Part I also sets out a procedure for dealing with claims of confidentiality made by parties to a proceeding, whereby all documents filed are placed on the public record unless a claim for confidentiality is upheld by the Commission.
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> Parts II to V establish procedures to be followed with respect to applications by regulated companies for approval of new or amended tariff pages, general rate increases, agreements required to be filed under the *Railway Act* and capital stock issues respectively. Part VI deals with subscriber complaint applications and Part VII deals with all other applications. These parts typically contain rules specifying the type of documentation to be filed, the time periods permitted for such filings and the method of disposition to be employed by the Commission. In the case of Part III, provision is also made for the Commission to award costs to interveners.[33]

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[33] *Supra* note 22, at 3.

There are four procedural provisions which merit further discussion: conferences, confidentiality, tariffs and general rate increase applications.

A. *Conferences*

Once a proceeding has been initiated through the filing of an application, no party should feel constrained by an absence of adequate information since sections 13 and 15 through 18 provide a wide range of mechanisms for obtaining information and clarifying the issues which will have to be determined by the Commission. In particular, the provisions of section 15, concerning a conference to be convened by a member or officer of the Commission, could be of considerable assistance in situations where any one or all of the parties is dissatisfied with the pre-hearing record.

The flexibility of the conference provision can be illustrated by reference to the case of *Colins Inc. v. Bell Canada*.[34] Following a request from one of the parties, the Commission issued interrogatories to clarify certain aspects of the application and to ensure that an adequate file was available before continuing the proceeding. In order to assist an attempted settlement, the Commission convened two meetings between the parties; however, the negotiations broke down and the matter proceeded to a public hearing. In its decision regarding interim relief, the Commission stated as follows:

> In its Public Notice of 23 April 1979, the Commission stated that it "regrets very much that the parties were not able to achieve a satisfactory settlement of this matter in the course of their negotiations". The Commission remains of the view that it would be preferable if the parties could negotiate a suitable settlement of this matter. Although the Commission has scheduled a public hearing for the main application to commence on 26 June 1979, and this will be proceeded with if necessary, it requests the parties to communicate with each other with a view to resolving their differences and to report to it by 18 June 1979. If by that date, either party states to the Commission that negotiations have not been productive and that it sees no point in pursuing them further, the Commission will proceed with the hearing. However, the Commission hopes that the parties will proceed in good faith and will make its own good offices available in any way that may be helpful.[35]

In spite of the prodding, the matter did go to a public hearing which became one of the shortest in the Commission's history: a settlement was negotiated during the first break in proceedings on the first morning! Nevertheless, the important point is that a proper, established record at the time of commencing a public hearing is critical to the Commission's conduct of a proceeding. Furthermore, the *Colins* case illustrates the

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[34] Telecom. Decision CRTC 79-12, 113 Canada Gazette, Part I, at 3895 (June 7, 1979).

[35] *Id.* at 3905-06.

extent to which the Commission will make its own good offices available in attempting to resolve a dispute.[36]

B. *Confidentiality*

The issue of confidentiality is arguably the most difficult for a regulatory tribunal, and the detailed provisions found in section 19 are the result of a long and careful review of the issue by the Commission, reflecting trial and error as well as methods used elsewhere as in the Federal Court,[37] the Anti-dumping Tribunal[38] and the Canadian Transport Commission.[39] One very important element in section 19 is the presumption that material filed with the Commission will be placed on the public record unless the party filing the document makes a claim of confidentiality at the time of filing and in certain terms.[40] It should be remembered that section 19 is a procedural provision and not substantive; consequently, statutory provisions such as sections 331 and 335 of the Railway Act must be considered when relevant.[41] However, since both sections allow for the publication of confidential information when "necessary in the public interest" (section 331) or when there are "good and sufficient reasons for so doing" (section 335), the procedures for disclosure contained in section 19 of the Rules will be of assistance in carrying out such substantive provisions.

The key factor in the Commission's determination to place on the public record information that has been filed in confidence is the test of "specific direct harm" which would be likely to result from disclosure.

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[36] The logical extention of this rationale is that if the Commission can prevent a disputed matter from going to a public hearing, then that is the most efficient dispute resolution process available.

[37] Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10, s. 41. *See* the cases decided pursuant to that section: *e.g.*, Churchill Falls (Labrador) Corp. v. The Queen, 28 D.L.R. (3d) 493 (F.C. Trial D. 1972); Blais v. Andras, [1972] F.C. 958, 30 D.L.R. (3d) 287 (App. D.).

[38] Anti-dumping Act, R.S.C. 1970, c. A-15, *as amended by* S.C. 1970-71-72, c. 3. Of particular interest is s. 29 of the Act, *as amended by* S.C. 1970-71-72, c. 3, s. 7, and the cases decided pursuant to it: *e.g.*, Magnasonic Canada Ltd. v. Anti-dumping Tribunal, [1972] F.C. 1239, 30 D.L.R. (3d) 118 (App. D.); Sarco Canada Ltd. v. Anti-dumping Tribunal, [1979] 1 F.C. 247 (App. D. 1978); Brunswick Int'l (Can.) Ltd. v. Anti-dumping Tribunal (F.C. App. D. Dec. 18, 1979). *See* CANADIAN LAW INFORMATION COUNCIL, NOTES OF RECENT JUDGMENTS OF THE FEDERAL COURT OF APPEAL, 34.13, (Jan. 18, 1980).

[39] An examination of certain proceedings in the Canadian Transport Commission indicates the genesis of the CRTC's "specific direct harm" test with respect to confidentiality. In a decision of the Railway Transport Committee of the Canadian Transport Commission, Saskatchewan Wheat Pool v. C.N.R. (Rapeseed Case), [1972] C.T.C. 164, at 174-77, the Committee applied the test of "actual and substantial damage".

[40] It should be noted as well that the claim for confidentiality itself will be placed on the public record with a copy provided on request to any party.

[41] In other words, s. 19 of the New Telecom Rules, being subordinate legislation, should not be construed so as to abrogate a law of general application such as the Railway Act.

Following a consideration of submissions and relating them to the test of specific direct harm, the Commission will place a document on the public record where no specific direct harm is likely to result or where the specific direct harm is not sufficient to outweigh the public interest in disclosing the document. Those are the clear-cut cases; it becomes more difficult in situations where specific direct harm justifies a claim for confidentiality. In this situation the Commission may:

> (*a*) order that the document not be placed on the public record,
> (*b*) order disclosure of an abridged version or part of the document, or
> (*c*) order that the document be disclosed to parties at a hearing to be conducted *in camera*.[42]

Issues relating to confidentiality arise frequently in Commission proceedings and precedents for resolution according to paragraphs (*b*) and (*c*) have already been established. In a proceeding entitled *Bell Canada, Confidentiality And Other Preliminary Matters Concerning Support Structures Tariff*,[43] the Commission determined that an economic analysis prepared by Bell Canada was to be placed in an abridged version before the public hearing.

In the Bell Canada general rate increase hearing of 1978, the company filed a number of documents in confidence with the Commission. In ruling on the company's claim for confidentiality regarding a contract with the Kingdom of Saudi Arabia, the Commission determined that sufficient risk of harm was shown so as to outweigh the advantages of placing the information on the public record. At the same time, the Commission determined that the material was relevant and of importance to the issues which the Commission would ultimately have to determine in the rate case. Consequently, an *in camera* hearing was scheduled in the midst of the central hearing. One of the conditions of participation in the *in camera* hearing was that the participant make a declaration that he would keep confidential the information disclosed to him. The relevant documents were provided to participants during a lock-up the day prior to the *in camera* session. Indeed, all material such as notes and transcripts were maintained by the Commission, again on a confidential basis. It is of interest to note that out of some twenty registered individuals and associations at the central hearing, only two availed themselves of the opportunity to participate in the *in camera* session.[44]

The issue of the Saudi Arabia contract was reviewed once again in the 1980 Bell Canada general rate increase hearing and, as occurred in the 1978 hearing, the CRTC determined that certain evidence on this matter was confidential in nature and should be examined in an *in camera*

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[42] New Telecom Rules, s. 19(11).

[43] Telecom. Decision CRTC 76-2, III Canada Gazette, Part I, at 382 (1977), 2 C.R.T. 442 (Dec. 31, 1976).

[44] One possible explanation for the low level of attendance at the *in camera* session is that the declaration to keep confidential the information disclosed to the participants would have made for a very difficult relationship with the client following the *in camera* session.

hearing. As the Commission noted in its decision, "While all parties were eligible to participate in this proceeding, no intervener chose to participate, and cross-examination was carried out by counsel for the Commission."[45] Since the only two interveners who attended the 1978 *in camera* hearing were also interveners in the 1980 general rate increase hearing and obviously did not attend the hearing, it could be argued that participants find this manner of procedure to be unacceptable. It will be interesting to see whether the Commission will review the procedures related to confidentiality in light of the Saudi Arabia contract experience.

This procedural example becomes all the more fascinating when it is noted that the Saudi Arabia contract matter has developed into one of the most controversial within the Commission. For the first time since the Commission obtained jurisdiction over telecommunications matters on April 1, 1976, a Commissioner dissented and wrote a separate opinion on the treatment, for regulatory purposes, of the income from the Saudi Arabia telephone project. For lawyers who are familiar with judicial panels, a dissenting opinion is not an unusual matter. However, in regulatory matters a dissent is unusual and that is all the more so with respect to CRTC decisions.

C. *Applications for Approval of New or Amended Tariff Pages*

Any person interested in the Commission's telecommunications proceedings on a sustained basis must become thoroughly familiar with the various tariff provisions. A perusal of the relevant legislative provisions makes it clear that the federally regulated carriers are to be regulated mainly through tariffs approved by the Commission. With respect to any dealing with a customer, a carrier has to have a tariff which, to be effective, requires Commission approval.[46]

The principal source of the Commission's authority respecting the traffic, tolls and tariffs of the carriers is found in sections 320 to 322 of the Railway Act. A close examination and complete understanding of those sections is essential. However, because they are substantive rather than procedural, such an examination is beyond the scope of this paper.[47]

The important point to reiterate is that tariffs have a central importance with respect to the Commission's telecommunications regulatory responsibility, since they specify the terms and conditions for the provision of service by the carriers to subscribers. Interestingly enough, although the term "tariffs" is used frequently in the Railway Act, it is not defined in that Act. A definition has been provided in the

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[45] Bell Canada, General Increase in Rates, Telecom. Decision CRTC 80-14, at 7 (Aug. 12, 1980).

[46] *See* Bell Canada v. Challenge Communications Ltd., [1979] F.C. 857, 86 D.L.R. (3d) 351 (App. D. 1978).

[47] *See* Kaiser, *Competition in Telecommunications: Refusal to Supply Facilities by Regulated Common Carriers*, OTTAWA L. REV. (forthcoming), for an excellent discussion of developments relating to s. 321 of the Railway Act.

New Telecom Rules as follows: " 'tariff' means any publication containing rates, charges, rules, regulations, conditions, specifications or requirements relating in any way to the furnishing by a regulated company of telecommunications services or facilities to any person."[48]

Given the wide range of services provided by the carriers under the Commission's jurisdiction and the variety of terms and conditions associated with those service offerings, it is not surprising that the tariffs are voluminous. In the case of Bell Canada, there are close to 1,000 tariffs presently in force, all of which have been filed and approved by the Commission or its predecessor agencies.

This in turn means that applications for approval of new or amended tariff pages are numerous. During 1979, the Commission made determinations on approximately 600 such applications. Since the majority of the applications relate to routine changes in the tariffs, the Commission has established a Tariff Committee in order to provide an expeditious handling of the filings. There is no public input for these routine determinations.[49]

The public has an obvious interest in being aware of proposed changes to existing tariff pages or of applications for approval of new tariff provisions. Since the majority of these applications involve routine matters, it is necessary to establish a mechanism whereby an interested party will not be overwhelmed by the material provided for such routine approvals. Conversely, the carriers will not be burdened with providing copies which, in all likelihood, would simply be discarded. Thus, pursuant to section 32 of the New Telecom Rules, the Commission has the discretion to issue a Public Notice regarding a tariff application; when this is done, any person or association registered as an interested party with respect to such an application will be given all relevant information. This necessarily puts a tremendous responsibility on the Commission to discern which of the approximately 600 applications received each year are of sufficient importance or interest to the public to warrant public notice. Although there are no clear guidelines, applications relating to competitive services and services in the monopoly sector in which the application relates to a significant change generally fall into this category.[50] To illustrate the difficulty in this process, one need only read the proceedings in the *Challenge* case[51] and the more recent

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[48] New Telecom Rules, s. 2.

[49] It was stated that copies of the by-law which established the Tariff Committee could be obtained from the Commission upon request: CRTC Public Announcement (July 20, 1979) at 8.

[50] For example, a more recent activity which will probably fall under this category is the matter of terminal attachment. *See* Bell Canada, Connection of customer-provided terminal devices, CRTC Telecom. Public Notice 1979-35, 113 Canada Gazette, Part I, at 7790 (Nov. 30, 1979).

[51] Challenge Communications Ltd. v. Bell Canada, Telecom. Decision CRTC 77-16, 112 Canada Gazette, Part I, at 61 (1978), 3 C.R.T. 489 (Dec. 23, 1977), *aff'd. supra* note 43.

radiotelephone service tariff changes by British Columbia Telephone Company.[52]

Part II of the New Telecom Rules must be read in conjunction with the Tariff Regulations which, as noted above, have now been enacted as a separate set of regulations. Sections 4 through 10 set out in some detail the information which must appear on the tariff pages and the form in which that information is to be set out. To the untrained eye, the tariff page can be a fairly mysterious document. However, a reading of these provisions should enable an individual to decipher all of the relevant information and understand the significance of certain notations on the page.

Since, in most cases, the need for individual contracts for service between a carrier and subscriber has been eliminated,[53] the subscriber is not provided with any documentation regarding the terms and conditions of service. Thus, at times of dispute, the carrier is fully aware of relevant terms and conditions and the subscriber is clearly handicapped. For these reasons, the Commission took steps to ensure the publication of tariffs on a wider basis than previously existed and to provide opportunities for the inspection of the tariffs by those who would not be interested in obtaining a complete set. Sections 11 and 12 of the Tariff Regulations set out the relevant provisions and section 13 carries it a step further by requiring the companies to provide certain information in the telephone directories which are provided to the subscribers. This information includes a statement of the rates, charges and conditions on which the services and facilities are offered and set out in tariffs approved by the Commission. In addition, there must be information relating to the availability of the tariffs, where they may be inspected and how they could be purchased if the subscriber so desired. The requirements are more onerous with respect to the General Regulations[54] which must be described including the actual text where appropriate. Finally, there must be a statement

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[52] British Columbia Telephone Company — Increase in Rates for Radiotelephone Service, Telecom. Decision CRTC 79-25, 113 Canada Gazette, Part I, at 7806 (Dec. 7, 1979).

[53] Prior to 1953 in the case of Bell Canada and 1956 in the case of the British Columbia Telephone Company, individual contracts for telephone service were entered into between the company and the subscriber. Since the contract was a standard form, it became an increasing burden on the companies from an administrative point of view. As a result, the companies applied under s. 348(3) of the Railway Act, R.S.C. 1927, c. 170 (now s. 322(3) of the Railway Act 1970, c. R-2) to have the Board of Transport Commissioners for Canada "prescribe" the terms and conditions which previously had been set out in the standard form contracts. The terms and conditions, entitled the "General Regulations", were then published three times in the Canada Gazette pursuant to s. 50 of the Railway Act, R.S.C. 1927, c. 170 (now s. 62 of the National Transportation Act, R.S.C. 1970, c. N-17). The result is that the terms and conditions now have statutory effect and render it unnecessary for the companies to rely on individual contracts for telephone service in order to effect notice of the terms and conditions under which service is provided. For the legal consequences of such procedure, *see* B.G. Linton Constr. Ltd. v. C.N.R., [1975] 2 S.C.R. 678, 49 D.L.R. (3d) 548 (1974).

[54] *Id.*

setting out procedures for resolving complaints and settling disputes between subscribers and the company. This would refer to the initial recourse that a subscriber may adopt, the appeal procedure within the company and the final resort which may be had to the Commission for a review of the matter.

A practitioner, advising a client interested in the tariff changes of a company regulated by the Commission, must be aware that there are simply no shortcuts. One would be advised to take advantage of all the opportunities now provided by the New Telecom Rules and the Tariff Regulations by registering as an interested party for specific areas of interest. If tariff changes are of sufficient significance to one's interests, then subscribing to a company's tariff service is also important and provides the convenience of having a complete set of tariffs on hand.

D. *Applications for General Rate Increases*

Applications for general rate increases are probably the most visible aspect of the Commission's regulatory responsibilities, in that these activities receive the greatest amount of media attention and the highest level of participation by interested parties in the Commission's proceedings.[55]

In initiating an application for a general rate increase, a combination of section 37 and Forms 5 and 6 establishes a procedure whereby the Commission and the applicant agree upon the material which will be filed to constitute the application, as well as the relevant dates and the manner in which the subscribers will be made aware that an application has been filed.

The end result of the provisions in the New Telecom Rules is that a company will be filing a detailed application; notice of this application will be given widespread publication including specific billing inserts in each subscriber's bill during the period commencing with the date of filing; and the application will be explained in layman's terms with some emphasis on how it will affect a particular subscriber.

It should be noted that the Rules now set out specific, minimum periods for the consideration of a general rate increase application and these time periods apply in all but exceptional circumstances.[56] Thus,

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[55] For example, in the Bell Canada general rate increase hearing before the CRTC which took place in Mar., 1978, 28 interveners indicated their intention to participate at the central hearing and the Commission received some 3,600 interventions, 30 of which were in the form of petitions containing numerous signatures. *See* Bell Canada, Increase in Rates (Introduction), Telecom. Decision CRTC 78-7, 112 Canada Gazette, Part I, at 5002, 4 C.R.T. 313 (Aug. 10, 1978). Almost three years later, in the Bell Canada general rate increase hearing which took place in May and June, 1980, some 25 interveners indicated their intention to participate at the central hearing and the Commission received 1,242 interventions, including several which were in the form of petitions containing numerous signatures (one with over 10,000 signatures). Bell Canada, General Increase in Rates (Introduction), Telecom. Decision CRTC 80-14 (Aug. 12, 1980).

[56] New Telecom Rules, s. 37.

from the date of the filing of the application at least forty-five days must be provided for the filing of letters of intervention, notices of intention to participate and interrogatories. At least seventy-five days must be provided for the filing of responses to interrogatories and at least 180 days must be provided for the proposed effective date of the rate changes.

The provisions relating to the directions on procedure and the form of the appplication contained in sections 37 and 38 will ensure that a great deal of detailed information will be filed by the applicant and thus be available to potential interveners from the date of the filing of the application. In addition, section 41 permits an intervener to address interrogatories to the applicant in order to obtain further information or clarification of information already provided.

The information-gathering process has not been a satisfactory one in the Commission's view, and it has decided that considerable information could be provided in the form of responses to an initial, comprehensive set of interrogatories covering the topics and questions that arise in virtually all rate cases. In the 1978 Bell Canada general rate increase decision, the Commission stated its intention as follows:

> The Commission accordingly proposes to develop, on the basis of the record of the rate cases it has now heard, such a comprehensive set of interrogatories, which it would intend to issue with its directions on procedure in rate cases. While interveners would remain free, subject to the rules of relevance, to address further interrogatories to the applicant and to seek further information from its witnesses, their task should be facilitated by the above measures.[57]

The first opportunity the Commission had to explore this procedure occurred during the 1980 Bell Canada general rate increase proceeding. The Commission interrogatories were provided to Bell Canada prior to the time it actually filed its application, so that on the date that the filing took place the responses to the initial set of interrogatories prepared by the Commission were provided as part of the Bell application. The goal of the exercise was to reduce the duplication of interrogatories from interveners, to enhance the clarity and effectiveness of the process, and to provide savings in time, energy and money to all parties. The experiment appears to have been a success following its first test. In the 1980 Bell Canada general rate increase decision, it was stated, "The Commission has concluded that the initial set of interrogatories has achieved these goals, and intends to continue this practice."[58]

The Commission has recognized the benefits which flow from greater public participation in the consideration of general rate increase applications and, through the enactment of the New Telecom Rules, has confirmed certain innovations which had been introduced incrementally in previous proceedings. One of the innovations is a division in the public hearing between a "central hearing" and "regional hearings". The key

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[57] *Supra* note 55, at 104, 4 C.R.T. 3, at 357-58.

[58] *Supra* note 45, at 3.

difference is that at the central hearing witnesses will generally be required to prepare written testimony before their appearance, to present sworn testimony and to be available for cross-examination. However, the regional hearings are designed to be much more informal so as to encourage the involvement of members of the public who otherwise would not be able or inclined to participate at the central hearing. Thus the requirements for participation at the regional hearings are much less rigid and the more formal trappings such as advance written testimony, sworn testimony and cross-examination are not present at all. It must be emphasized that regional hearings are not simply a forum for individual subscribers to come forward and "blow off steam".[59] Instead they are an excellent opportunity for an intervener to present a view or explore an issue with the Commission at a fraction of the cost which would be incurred by participating at the central hearing. The fact that an intervener at a regional hearing cannot be cross-examined may be attractive, but the other side of the coin is that the intervener in turn will not be able to cross-examine witnesses for the company.

The most innovative element in this part of the Rules is that relating to costs. The substantive, statutory provision is section 73 of the National Transportation Act[60] which states, *inter alia*, that the "costs of and incidental to any proceeding before the Commission . . . are in the discretion of the Commission [which] may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed". Through the enactment of sections 44 and 45 of the New Telecom Rules, the CRTC has become the first federal regulatory tribunal to establish a procedure whereby costs will be awarded in certain circumstances.

One provision which is entirely new in the cost award area is that which provides for an interim award of costs. Within thirty days of the making of an application to the Commission for a general rate increase, an intervener may apply for an interim award of costs if he

> (*a*) has, or is representative of a group or class of subscribers that has, an interest in the outcome of the proceeding of such a nature that the intervener or other party will receive a benefit or suffer a detriment as a result of the order or decision made following the proceeding;
> (*b*) can demonstrate to the satisfaction of the Commission that he can contribute to a better understanding of the issues by the Commission,
> (*c*) undertakes to participate in the proceeding in a responsible way, and
> (*d*) can satisfy the Commission that he does not have sufficient financial resources available to participate effectively in the proceeding in the absence of an award of costs under this section.[61]

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[59] *See In re* C.R.T.C., [1976] 2 F.C. 621, at 625, 67 D.L.R. (3d) 267, at 270 (App. D.) where Jackett C.J. stated that a meaningful public hearing held pursuant to the Broadcasting Act was not one "at which members of the public are merely given an opportunity to 'blow off steam'".

[60] R.S.C. 1970, c. N-17.

[61] New Telecom Rules, s. 45(1).

This provision for interim costs was not contained in the May, 1978 draft rules. In its Public Announcement of July 20, 1979, the Commission explained the insertion by relating it to one of the five objectives:

> Having evaluated the comments received, and with a view to furthering the objective of increasing the capacity of interveners to participate at public hearings in an informed way, the Commission has concluded that the awarding of interim costs may in certain cases mean the difference between participation by an intervener in an informed way and no participation at all, and has accordingly made appropriate provisions for interim costs in section 45 of the new rules. It is to be noted that any party receiving such interim costs will be fully accountable for their proper disbursement.[62]

An outstanding issue is the matter of which proceedings qualify for an award of costs. Although section 73 of the National Transportation Act gives the Commission complete discretion in the awarding of costs, the New Telecom Rules relate a cost award to general rate increase proceedings. Nevertheless, the Commission has awarded costs in proceedings other than general rate applications,[63] and *Decision 78-4* leaves open the possibility of the Commission exercising its discretion regarding costs in proceedings other than for general rate increases. Even within the context of a general rate increase, it is also yet to be determined whether an intervener who appears at a regional hearing and not the central hearing is eligible for an award of costs.

One matter of considerable importance which was not addressed in the New Telecom Rules is that of decision-making. This was a topic of considerable interest in the public hearing which the Commission convened in September, 1976 to consider the new practices and procedures; it was triggered by a paragraph in the original July statement which reads: "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. . . ."[64]

A number of parties urged the Commission to reconsider this proposition, arguing that it is fundamental that "he who hears must decide" and that to establish a contrary practice would be potentially a reviewable error. However, the Commission maintained its position and, in the May 23, 1978 decision, reaffirmed the above position.[65]

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[62] *Supra* note 22, at 6.

[63] *See, e.g.*, Challenge Communications Ltd. v. Bell Canada, *supra* note 51; Taxation Order 1978-1 (an "adversarial" proceeding); British Columbia Tel. Co. — Proposed Acquisition of GTE Automatic Elec. (Can.) Ltd. and of Microtel Pac. Research Ltd., Telecom. Decision CRTC 79-17 (Sept. 18, 1979) (an acquisition requiring approval pursuant to An Act to Incorporate the Western Canada Telephone Company, S.C. 1916, c. 66).

[64] The July statement, *supra* note 6, at 2.

[65] *Supra* note 20, at 6-10, 4 C.R.T. 104, at 107-9.

Since that time there has been some change. In the July 20, 1979 Public Announcement, released in conjunction with the New Telecom Rules, the Commission stated:

> Further exposure to the range of telecommunications 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. The Commission will continue its practice of assigning a majority of its full-time Commissioners to such proceedings where significant industry-wide policy issues are raised. In regard to all other proceedings, decisions will, as a general rule, continue to be made on a collegial basis by the Executive Committee [66]

III. CONCLUSION

To reiterate one last time, the "process" whereby the Commission has brought about changes to its telecommunications practices and procedures in order to achieve substantial advantages must not be underestimated. In so doing, it transformed what Scalia described as an "unattractive subject of study"[67] into one of the most interesting and invigorating regulatory activities, certainly at the federal level.

The Commission's accomplishment stands in marked contrast to the situation which exists with the Federal Communications Commission (FCC) in the United States. There, one commentator has noted, the intention to clarify agency procedures and establish clear and definite standards "has become something of a tradition for new FCC Chairmen".[68]

Yet the process does not end with the formal enactment of New Telecom Rules and Tariff Regulations. Elements of discretion[69] which ensure flexibility in the application of rules of practice and procedure will require constant vigilance on the part of the Commission, the carriers and the interested public alike, so that the new practices and procedures will truly achieve the substantial advantages that everyone seeks in the field of telecommunications regulation.

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[66] *Supra* note 22, at 7-8.

[67] *Supra* note 1.

[68] B. COLE & M. OETTINGER, RELUCTANT REGULATORS 31 (1978). The book is a highly engaging account of the "inside" story of the Federal Communications Commission (the United States counterpart to the CRTC). There is no comparable description of the CRTC and for those with no experience regarding the inside activities of the CRTC, this work is highly recommended.

[69] Although there are discretionary powers interspersed throughout the New Telecom Rules, the most general provision is found in s. 28 which states, "In respect of any proceeding, the Commission may, where appropriate, dispense with, vary or supplement any of the provisions of these Rules."