

CONSUMER REPRESENTATION: Recognition Criteria

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The masculine is used generically in this report.

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UNION DES CONSOMMATEURS, *Strength through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nationwide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Finally, regarding the issue of economic globalization, Union des consommateurs works in collaboration with several consumer groups in English Canada and abroad. It is a member of Consumers International (CI), a United Nations recognized organization.

INTRODUCTION

We find more and more decision-making bodies, nationally and internationally, where the participation of consumer representatives is solicited: issue tables, economic regulatory agencies, standards development organizations, self-regulating organizations, etc.

What are the criteria for choosing organizations or persons who will defend or express the concerns of consumers? How to ensure the competence and independence of those representatives? How to ensure their accountability? Do the organizations have standardized criteria for guaranteeing the representativeness of those who will defend consumers? Would consumers not be better served if such criteria were widely disseminated and applied? Would consumers' trust not be strengthened if those criteria were made known to them and the criteria's application were ensured?

The present study will attempt to answer those questions, with the goal of launching a debate on the importance of using objective criteria to ensure the representativeness, competence and legitimacy of those who play the essential role of promoting and defending consumer interests and reinforcing public trust in consultation and consensus-building proceedings.

CONSUMER REPRESENTATION: HISTORY AND CONTEXT

The right to representation refers to the right to be heard, to have one's point of view heard, to take part in a debate. More specifically, to defend consumers' right to representation is to insist on the recognition of their right to express and defend their interests during consultations and discussions.

The right to representation is well entrenched legally; this right has been recognized as one of the bases of natural or fundamental justice and transposed to the principles of procedural fairness. Those principles of fundamental justice, adopted from time immemorial by case law, recognize that certain rules of law are "natural", in that they are self-evident and must be applied spontaneously and at all times, whether or not they are codified. Those principles are recognized in Article 7 of the Canadian Charter of Rights and Freedoms: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Under principles of natural justice, as developed and entrenched by courts and case law, any person whose rights may be affected by a decision must have the opportunity to present his viewpoint ("audi alteram partem") and must be treated impartially and without prejudice ("Nemo iudex in sua causa").

This right to representation finds its counterpart in representative democracy, whereby interest groups must have the opportunity to be heard on issues that affect them or their interests, whether within government-established frameworks (parliamentary commissions, consultation groups...) or not (open letters in newspapers, petitions...). The CIVICUS¹ organization, which promotes the participation of civil society in government, considers citizen participation an essential component of governance and democracy.

The right of consumers to representation has in fact been recognized for several years: for example, in France, in a 1941 decree encouraging consumer participation in developing standards². In 1962, in the United States, John F. Kennedy gave a special address before Congress about government responsibility in protecting consumer rights and interests. Among basic consumer rights, he listed the right to representation ("the right to be heard"), described as the requirement to ensure that consumers are taken into consideration in the formulation of government policies³.

¹ CIVICUS. *What/Who is CIVICUS*, n.d. [Online] <http://www.civicus.org/who-we-are> (page consulted on May 7, 2009).

² *Décret n°41-1988 du 24 mai 1941 définissant le statut de la normalisation, article 5*, on the website LégiFrance.gouv.fr, France, n.d. [Online] http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=524C303C7879762520C4192D22506E14.tpdjo02v_1?idArticle=LEGIARTI000006629593&cidTexte=LEGITEXT000006071824&dateTexte=29990101 (page consulted on May 7, 2009).

³ "The right to be heard - to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals." John F. Kennedy, *Special Message to the Congress on Protecting the Consumer Interest*, March 15, 1962. [Online] http://www.jfklink.com/speeches/jfk/publicpapers/1962/jfk93_62.html (page consulted on May 7, 2009).

In 1975, the European Commission presented the *Preliminary Programme for a consumer protection and information policy*, which serves as a basis for the definition of five fundamental consumer rights, including the right to representation⁴.

In 1985, this consumer right of review was entrenched internationally in the *United Nations guidelines for consumer protection*, which recognize the “Access of consumers to adequate information to enable them to make informed choices” and their “Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them”⁵.

In 1997, the Treaty of Amsterdam, in increasing the powers of the European Parliament and insisting on integration rather than cooperation (among other things), also established a consumer protection policy by giving it an unprecedented legal basis. Article 153 states:

- In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests;
-
- Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities. (...).⁶

Article 38 of the Charter of Fundamental Rights of the European Union recognizes the importance of consumer protection by stipulating that “*Union policies shall ensure a high level of consumer protection*”⁷. This protection is evidently related to Articles 11 and 12 of the Charter, which promote freedom of expression and information (11) and freedom of assembly and association (12). The right of consumers to representation is entrenched in Paragraph 1 of Article 12:

“1. *Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*”

The consumer right to representation is also recognized among fundamental consumer rights as defined by the *Consumers International* organization, a worldwide consumer groups federation founded in 1960. This right is described as the right of consumers to have their interests represented in the development and implementation of government policies, and in the development of products and services⁸.

⁴ EU2009.CZ. *Consumer Protection*, n.d. [Online] <http://www.eu2009.cz/en/eu-policies/employment-social-policy-health-and-consumer-affairs-council/consumer-protection/consumer-protection-678/> (page consulted on May 7, 2009).

⁵ UNITED NATIONS. Department of Economic and Social Affairs. *United Nations Guidelines for Consumer Protection*, 1999. [Online] http://www.un.org/esa/sustdev/publications/consumption_en.pdf (page consulted on May 7, 2009).

⁶ EUROPEAN PARLIAMENT. *Charter of Fundamental Rights of the European Union*, n.d. [Online] http://www.europarl.europa.eu/compar/libe/elsj/charter/art38/default_en.htm (page consulted on May 4, 2009).

⁷ *Ibidem*.

⁸ CONSUMERS INTERNATIONAL. *How are consumer rights defined?*, n.d. [Online] <http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89647#rightsdefined> (page consulted on May 21, 2009).

The presence of consumer representatives is solicited essentially to ensure the legitimacy of a process (adopting a bill, developing a standard, etc.). Indeed, by giving the various stakeholders the right to speak, everyone's opinion is guaranteed to be taken into account, while the credibility of the organization or process is preserved, along with consumer trust. With regard to standardization, for example:

- To be credible, standards must have certain attributes:
- their development must be overseen by a recognized body;
- the development process must be open to input from all interested parties;
- the resulting standards must be documented and publicly available;
- there is usually a method for monitoring and verifying that organizations are complying with standards.⁹

Consumer representatives thus serve as guarantors by ensuring public trust in the products, programs or policies examined.

Greater importance in the last 20 years

Although the recognition of consumers' rights to be informed and heard is not new, the importance of these rights appears to have risen in the last 20 years, according to Mr. Bruce J. Farqhar, an expert in standardization issues¹⁰.

The International Association for Public Participation (IAP2) was founded in 1990 by public participation practitioners, precisely to respond to "*the rising global interest in public participation*"¹¹. The IAP2's mission is to promote public participation in government and industry decisions. With 1,000 members in 22 countries, the mission of the International Association for Public Participation (IAP2) is to support organizations and communities worldwide, with a view to continuously improving decision-making processes, by promoting the contribution of all stakeholders. IAP2 aims to give public participation a major role in the political, economic and cultural landscape of all nations.

The International Association for Public Participation (IAP2) describes public participation as the set of "any process that involves the public in problem solving or decision making". It developed "*Core Values for the Practice of Public Participation*", following a vast international collaboration aiming to identify aspects of public participation that go beyond national, cultural and religious differences. Those values are the following:

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process;
- Public participation includes the promise that the public's contribution will influence the decision;
- Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers;

⁹ CANADA'S OFFICE OF CONSUMER AFFAIRS. *Participating in the Standards System*, Canada, 2000. [Online] [http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/StandardsSystem.pdf/\\$FILE/StandardsSystem.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/StandardsSystem.pdf/$FILE/StandardsSystem.pdf) (page consulted on May 7, 2009).

¹⁰ UNION DES CONSOMMATEURS. *Les consommateurs et la normalisation: des intentions à l'action*, 2006, on page 52. [Online] <http://www.consommateur.qc.ca/union-des-consommateurs/docu/norm/05-normes-f.pdf>.

¹¹ INTERNATIONAL ASSOCIATION FOR PUBLIC PARTICIPATION. *About IAP2*, n.d. [Online] <http://www.iap2.org/displaycommon.cfm?an=3> (page consulted on May 25, 2009).

Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision;
 Public participation seeks input from participants in designing how they participate;
 Public participation provides participants with the information they need to participate in a meaningful way;
 Public participation communicates to participants how their input affected the decision.¹²

1993 also saw the creation of the organization *CIVICUS: World Alliance for Citizen Participation*, dedicated to reinforcing citizen action and civil society. Since 2006, a specific line of action has focused on participatory governance and has promoted the participation of civil society and its organizations within governments, notably by training government actors to show them the virtues of citizen participation¹³.

In 1999, the Standards Council of Canada (SCC) established Standard CAN-P-1D, *Accreditation of standards development organizations*, which provides principles for the consensus process that must be applied by such organizations in Canada (CAN-P-1D, paragraph 1.1). Those principles are taken up in Standard CAN-P-2F (*Requirements and Procedures for the Request for, Development, approval, Preparation, and Maintenance of National Standards of Canada*), in Article 7.6.1.1, regarding the principles of consensus:

Equal access and effective participation by concerned interests (this entails sufficient resources, equal access to information, and understanding of the process by all parties). In order to ensure effective participation, resources (money, training, staff expertise, etc.) shall be identified for member participation.

-
- Respect for diverse interests and identification of those who should be provided access (Guide 59 items 6.1, 6.5, and to some extent 6.3), to provide the needed balance of interests.
-
- Mechanism for dispute resolution (Guide 59 item 4.2).
-
- Note: Access by all parties poses particular challenges to finding the resources to permit participation by SMES, academics, and consumers.¹⁴

In 2002, the Australian government launched a vast consultation to develop principles for appointing consumer representatives on a more rational basis. The government's presentation stated that adequate consumer representation within government and industry bodies was important because:

- *it ensures that government and industry bodies have access to a wide range of views in their deliberations. Subsequent decisions or advice will therefore be more robust and/or more likely to be accepted by stakeholders; and*
- *Consumers should have input into decisions which impact on them.*¹⁵

¹² Ibidem.

¹³ CIVICUS. *Participatory governance*, n.d. [Online] <http://www.civicus.org/pg/6/46-pg-home> (page consulted on May 25, 2009).

¹⁴ STANDARDS COUNCIL OF CANADA. *Requirements and Procedures for the Request for, Development, Approval, Preparation, and Maintenance of National Standards of Canada* (CAN-P-2F), May 2006. [Online] http://www.scc.ca/Asset/iu_files/criteria/2f_e.pdf (page consulted on May 25, 2009).

¹⁵ COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL. *Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry*, June 2005, p.3. [Online] http://www.treasury.gov.au/documents/994/PDF/consumer_reps.pdf (page consulted on May 25, 2009).

We thus observe the ever-greater importance granted, in debates and speeches, to public participation in standardization and other organizations. But what about the implementation? Union des consommateurs has produced two important studies on consumer participation in the specific area of standardization¹⁶. Both studies concluded that the place given to or taken by consumers is insufficient or unsatisfactory, and they proposed solutions to improve the situation. The Union des consommateurs studies identified several obstacles to consumer participation; the literature consulted for the present study confirms their continued existence today, nationally and internationally (see for example the preamble to the CCAAC'S principles). The Union des consommateurs report presented the following findings:

In Canada, the United States, Europe and internationally, numerous barriers hinder greater consumer participation in standardization processes, specifically:

- insufficient financial resources;
- gaps in expertise and technical training;
- implementation of committees and working groups with little or poor balance;
- lack of credibility of some consumer representatives;
- overly complex procedures;
- limited dialogue between consumer representatives;
- deficiencies in distribution and content of information (...);
- etc.¹⁷

The present study, which focuses on representation criteria, directly examines the obstacle defined as: "The lack of credibility of some consumer representatives". The study titled *Towards Greater Consumer Participation in Standardization Processes* explained that by "analyzing the composition of several SDOs' committees, we are tempted to conclude that anyone can represent consumer interests because all of us are consumers in some spheres of our activities. Individuals who have no connection with consumer associations with designated officials and several people with no clear and uncontradictory mandate have in their possession a significant part of consumer representation due to the absence of a coherent, transparent and uniform selection process"¹⁸.

What is the situation, exactly? We will pursue the discussion by answering the following questions:

- How are consumer representatives currently selected in Canada and elsewhere?
- Do we observe shortcomings, in the definition and the application, regarding the selection criteria used in Canada?
- If so, what are those shortcomings, and what recommendations can we issue to fill those shortcomings?

To answer these questions, first we will define the essential qualities that a consumer representative should have, and then we will examine the recognition criteria used in Australia, Europe (European Consumers' Organisation, European Consumer Consultative Group, French

¹⁶ UNION DES CONSOMMATEURS, *Towards Greater Consumer Participation in Standardization Processes* (2005) [Online] http://www.consommateur.qc.ca/union-des-consommateurs/docu/UCnorm_E.pdf and *Les consommateurs et la normalisation: des intentions à l'action* (2006). [Online] <http://www.consommateur.qc.ca/union-des-consommateurs/docu/norm/05-normes-f.pdf>

¹⁷ UNION DES CONSOMMATEURS. *Towards Greater Consumer Participation in Standardization Processes*, 2006, on page 6. [Online] http://www.consommateur.qc.ca/union-des-consommateurs/docu/UCnorm_E.pdf (page consulted on May 25, 2009).

¹⁸ Ibidem, page 62.

accreditation system) and two Canadian organizations (Canadian Environmental Network and Office of Consumer Affairs).

The development of an analytical grid, using the recognition criteria identified, will then enable us to conduct a comparative study of the selection processes applied by the various Canadian decision-making bodies on which consumer representatives are called upon to sit. We will thus be able to evaluate the need to establish a policy for recognizing consumer representatives in Canada.

WHAT A CONSUMER REPRESENTATIVE IS

Consumer representation refers to the participation of consumers in standard-development organizations, issue tables, government advisory committees, government departments, industry working committees, etc.

Given that the purpose of such representation is to enable a true democratic exercise, it's important to observe certain rules to ensure that the voices of consumers are democratically carried as well as heard. It is of course through representatives that consumers can make their positions heard. For the purposes of this democratic exercise, it is therefore crucial that those representatives be chosen with care, since obviously they can't consult one at a time the citizens on whose behalf they will speak, nor can they obtain an explicit mandate from each citizen.

Thus, consumers will be validly represented only if the chosen representatives are able to reflect their viewpoints and concerns adequately. Such a representative must therefore have the ability, not only to be knowledgeable about the common interests of consumers (or of the consumer group he will represent), but also to adjust his positions to those common interests on an ongoing basis and to a certain extent.

Like any valid representative, the consumer representative must be transparent and accountable. This is why, for example, the Australian government, in its principles of recognition, estimates that a consumer representative must not only be able to reflect the viewpoint and concerns of consumers, but must also have the trust and support of consumers and consumer protection groups.¹⁹

¹⁹ Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry, Op. cit. note 15, page ix. We read that among the Principles developed by the *Commonwealth Consumer Affairs Advisory Council* is a requirement to ensure, to the extent possible, the participation of consumer protection groups in the process of selecting representatives (Principle 3).

ANALYSIS OF PRINCIPLES AND CRITERIA ALREADY DEVELOPED

In this part of our study, we have retained seven decision-making bodies that have developed recognition criteria or selection processes regarding consumer representatives:

- The Australian Commonwealth Consumer Affairs Advisory Council (CCAAC);
- The Canadian Environmental Network (RCEN);
- Canada's Office of Consumer Affairs (OCA);
- Consumers International (CI);
- The European Consumers Organisation (BEUC);
- The European Consumer Consultative Group (ECCG);
- The French consumer association accreditation system.

The first three bodies have developed consumer representative selection criteria or procedures, whether developed by consumer groups or not.

The four other decision-making bodies we have documented apply criteria for determining the eligibility of consumer representatives as members of consumer protection groups, or regarding the right of such groups to go to court in the common interest of consumers.

Several organizations, such as the *Commonwealth Consumer Affairs Advisory Council*, deem that a link between consumer representatives and consumer groups is essential in enabling access to a certain expertise and could serve to guarantee the transparency of representations and a certain accountability. Indeed, the mission of those organizations is by definition to promote and defend consumer interests, the same interests that the consumer representative will be called upon to defend. Accordingly, we will examine the criteria used by certain organizations, in order to identify the characteristics of a consumer rights group that ensures adequate representation or is likely to be consulted in the course of a selection process.

We will study all those selection criteria or processes, while dividing them into two distinctive categories: those for consumer representatives – whether belonging to groups or not – and those for consumer rights groups.

We will also distinguish between substantive and procedural criteria, whether of selection or determination.

Selection criteria and processes applied to consumer representatives

Principles of the Australian Commonwealth Consumer Affairs Advisory Council

Australia issued in 2005 its *Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry*: Six principles, voluntary in application, intended to guide government or industry authorities that want to appoint a consumer representative. The principles were developed, following vast consultations undertaken in 2002, by the *Commonwealth Consumer Affairs Advisory Council (CCAAC)*, an independent organization founded in 1999 to advise the Australian government about consumer issues.

In setting the background, the Australian document emphasizes that the appointment of a consumer representative is often a litigious process, and that in the last 20 years consumer rights groups have at times criticized the appointment process and the representative named to a given decision-making body. The choice of a representative has also often raised controversy between the various consumer protection associations²⁰.

Prior to the publication of the Principles, several appointment processes had been tested without success, involving appointment by a government department, a consumer protection organization or a combination of the two.

To develop principles that would apply to the choice of an adequate representative, the CCAAC first determined the bases of those principles:

Consumer representatives require specific skills, beyond an individual's own personal experiences as a consumer. The most useful definition of these skills is set out in the Benchmarks for Industry-based Dispute Resolution Schemes, and specifies that consumer representatives must be:

- (a) capable of reflecting the viewpoints and concerns of consumers; and*
- (b) persons in whom consumers and consumer organisations have confidence.*²¹

The consultations undertaken by the CCAAC led to the conclusion that there is no single way to manage the appointment of a consumer representative. The Principles thus aim to create a framework that guides sufficiently, while leaving a margin of manoeuvre for adapting to the specific circumstances of each appointment.²²

The six Principles developed by the CCAC are:

1. *Appointments must be made on merit;*
2. *Appointees must be independent of industry or government and free of conflicts of interest;*
3. *Consumer organisations should, where possible, be involved in appointments;*
4. *An appropriate range of candidates should be sought;*
5. *The appointment process must be consistent with good corporate governance and where relevant, good practice in self regulation;*
6. *The appointment process must be transparent, accountable and cost effective.*²³

The document specifies that all principles have equal weight and that none has precedence over the others.²⁴

²⁰ When the *Principles for the Appointment of Consumer Representatives* was published, the CCAAC was formed by 12 members: industry and business representatives (3), consumers (3), business consultants (2), the Ombudsman for Banking Services and Investments, a retiree, a lawyer, and a city councillor.

²¹ *Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry*, Op. cit. note 15, page ix.

²² *Ibidem*, page iii. "This document establishes a set of principles to guide parties looking to appoint appropriate consumer representatives. The principles are not mandatory, but when flexibly applied they should enable government and industry decision-making bodies to appoint appropriate consumer representative."

²³ *Ibid*, pages ix and x.

²⁴ *Ibid*, page 7.

We will summarize in the following pages the CCAAC document's explanations of each of the Principles. Other than those Principles, the CCAAC document expresses a few supplementary considerations, i.e., a few points that should be considered to ensure adequate representation; we will thus report the CCAAC's considerations on the subject.

The Principles refer on a few occasions to "consumer organisations", and indicate criteria for a group to be considered as such. A "consumer organisation" would be a group:

- 1- *whose main objective is to genuinely advance the interest of consumers; and,*
- 2- *that is independent of industry and government in its decision making; and,*
- 3- *due to its activities, membership or other relevant factor is publicly recognised as playing a legitimate role in advancing the interests of consumers.*²⁵

Principle 1: Appointments must be made on merit

This is necessary for selection criteria to be developed by the decision-making body concerned in order to choose a candidate who meets the particular requirements of the mandate. However, those criteria must correspond to the definition of a representative that is found in the *Benchmarks*, i.e., the ability to reflect consumers' viewpoints and concerns, and having the trust of consumers and consumer rights groups. The purpose of appointments on merit is thus to choose a candidate who is competent, credible and accountable.

For a candidate to be deemed adequate, minimum requirements must be met as to his qualities:

- *expertise in consumer affairs;*
- *links to relevant consumer organisations;*
- *capacity and willingness to consult with relevant consumer organisations;*
- *knowledge of, or the ability to acquire knowledge of, the industry/issues*
- *involved in the appointment.*

The document also mentions that it may be appropriate, depending on the files or the decision-making bodies, to appoint a representative who reflects the diversity of consumers, for example a representative from a remote region, whose language of origin is not that of the majority, etc.

Principle 2: Representatives independent of industry

Consumers will be represented adequately only if their representative is free of conflicts of interest. Public trust in the proceeding in which a consumer representative will participate also depends, in large part, on perception of the representative's independence. Perception is just as critical with regard to conflicts of interest.

The report mentions that certain groups consulted expressed disagreement with the imposition of the very strict criterion of independence that was considered (i.e., that would prohibit anyone associated with the relevant industry from being a candidate for representative), because they estimated that too strict a criterion would be unfair. Indeed, how to assess the candidacy of a person who has acquired industry experience and whose experience would constitute a definite advantage in his new duties? Based on the guidelines developed by the Investment and Financial Services Association, and also used by the Australian Stock Exchange, the CCAAC presents the following criteria, whose application would ensure the representative's independence, while not being too restrictive:

²⁵ Principles for the Appointment of Consumer Representatives: a Process for Governments and Industry, Op. cit. note 15, p. 6.

An appointee is independent if the person:

- *has not within the last three years been employed in an executive capacity by an organisation or as a director of an organisation about which the appointee will be expected to give advice or make decisions in their role as a consumer representative;*
- *has not within the last three years been a principal or a professional advisor to an organisation about which the appointee will be expected to give advice or make decisions in their role as a consumer representative;*
- *is not a significant supplier or customer of an organisation about which the appointee will be expected to give advice or make decisions in their role as a consumer representative;*
- *is free from any interest and any business or other relationship which could, or could reasonably be perceived to, materially interfere with their ability to act as a consumer representative.*²⁶

The candidate is of course responsible for confirming his independence and the absence of any conflict of interest.

Principle 3: Consumer organizations should where possible be involved in appointments

This may be done in several ways – by requesting that they provide a list of possible candidates, by including them in selection panels, or by letting them appoint representatives themselves.

The determination of the consumer rights organization relevant to the selection process will depend on the industry sector or the issue under consideration.

An appointment, without consultation, of a candidate by a government department would obviously contravene this principle. Such a representative would in fact represent the department and not consumers.

This principle complies with the very definition of a consumer representative, which requires public trust in consumer protection groups.

Principle 4: An appropriate range of candidates should be sought

To appoint the best possible representative, it is important to be able to choose from a range of several candidates. Taking practical aspects into account (costs, nature of the organization, specific abilities required), the process must ensure that as many people as possible are considered for the position. This may translate, for example, into media advertisements or into a call for candidates through appropriate channels.

The precise way to observe this principle may vary. For example, a consumer protection organization may provide a list of candidates, or the decision-making body where the consumer representative will participate may run a media recruitment campaign.

Principle 5: Good corporate governance

The decision-making bodies that will choose a consumer representative must apply to the representative selection process the same rules of good governance as those they must apply in their other areas of activity. Those rules of good governance require that decisions taken by those responsible aim to meet their company's objectives. Those rules will be observed if a

²⁶ *Ibid*, page 9.

company's choice of a consumer representative makes it possible, for example, to develop more-effective self-regulation.

Principle 6: A transparent, responsible and cost-effective selection process

The selection process should not impose an excessive burden on the organizations concerned. Common sense should apply regarding selection costs. For example, it would be excessive to publish an announcement in all the country's media if a consumer representative is sought for a decision-making body whose decisions will have little impact on the majority of consumers.

The selection process should be documented and decision-making archives should be kept, so that an outside look can, if applicable, verify the responsible nature and the transparency of the process.

ADDITIONAL CONSIDERATIONS

The consumer representative should have resources equal to those of the other representatives.

So that consumer representatives may fulfill their role effectively, the CCAAC insists that adequate resources must be made available to them. Accordingly, their remuneration should be equitable in comparison with that of other representatives, and reasonable expenses related to carrying out their duties should be reimbursed to them. In addition, access to training activities should be favoured, as well as the participation of representatives in industry or consumer movement events, such as seminars or conferences, in order to promote networking, information sharing and a comprehensive view of the issues.

The term of the appointment should be specified.

The initial agreement should provide for the term of the mandate. Given that the appointment of a consumer representative often depends on his relation, of employment or other, with a consumer association, the appointment review process should also apply in cases where that relation has changed.

The principles for appointing a consumer representative should also apply to reappointments. Thus, a representative who would want his mandate to be renewed should undergo the same selection process, so that the decision-making body may ensure that he is still an adequate candidate.

Canadian Environmental Network (RCEN)

"Progressive policy through public participation": that is the slogan of this independent organization created in 1977 to support and reinforce the participation of non-governmental environmental organizations in public consultations held by Environment Canada. The organization has since diversified its activities to include coordination, communication, research and networking actions in order to service more than 700 groups in Canada through one of its eleven regional networks.

To choose non-governmental delegates who will participate in public consultations, working groups or conferences, the RCEN developed in 1986, in concert with Environment Canada, a selection process that has been recognized by the environmental community, and that appears

to inspire various federal departments (Fisheries and Oceans Canada, Transport Canada, CIDA, Health Canada...²⁷).

This selection process is broken down into 20 points. On its website, the RCEN publishes a clear notice that this is only one example of steps and procedures related to the process of selecting representatives, and that it may happen that one or more steps are not necessary, depending on the requirements in specific circumstances.²⁸

On reading the various steps, we observe that, if the procedural aspects are carefully provided for, the process does not define what an adequate representative is or the criteria for determining at the outset the qualities sought. Under the process outlined, the criteria for selecting a representative are decided on a case-by-case basis, depending on the peculiarities of each request for delegates, by a selection committee formed by at least three members²⁹, with the purpose of selecting a candidate for whom a call for delegates has already been issued (step 2) and a contract written and distributed (step 4).

The preceding steps and the following ones serve to ensure that the process leading to the definition and application of those criteria are transparent, rigorous and conducted by qualified people. For instance: The call for delegates is issued as broadly as possible (step 2); the national caucus coordinator (NCC), who acts as secretary, verifies the selection criteria established by the selection group (step 7); all the candidates, as well as the RCEN, are informed of the decision taken regarding the choice of the appointed representative (steps 10 and 12); etc.

Accordingly, the RCEN's process leaves much room for adapting to the specific circumstances of each call for delegates, by choosing to develop a detailed selection process rather than recognition criteria for the representative to be appointed.

The RCEN's process also focuses on aspects that were the CCAAC's supplementary considerations: the process provides for sending the chosen representatives information on the planned consultation, and a sharing of expertise (steps 13 and 14), the drafting of reports by the representatives, as well as the RCEN's supervision and distribution of those reports (steps 16-18). In its last steps, the process provides for sending Environment Canada an invoice to cover the expenses of the representative and the organization (steps 19 and 20).

In short, the RCEN applies criteria that clarify and formalize a selection process, but that do not involve the criteria for selecting the representative.

²⁷ List provided by Robert Henri, responsible for RCEN communications, in an e-mail dated January 8, 2009.

²⁸ CANADIAN ENVIRONMENTAL NETWORK. *A Model Process for Delegate Selection*, n.d. "The information on this page is an example of the activities and procedures that are characteristic of the Delegate Selection Process. Please understand that, due to differing requirements, not all of these activities occur with every consultation." [Online] http://www.cen-rce.org/eng/consultations/delegate_selection.html (page consulted on May 25, 2009).

²⁹ *Ibidem*. Step 5: "RCEN forms a Delegate Selection Group, consisting of at least two members of a Caucus Steering Committee in addition to a National Caucus Coordinator who will act as secretary. **Selection criteria are established.**"

Canada's Office of Consumer Affairs (OCA)

The Canadian Office of Consumer Affairs (OCA) is an organization under the responsibility of the federal Industry Minister that has been created to fulfill Industry Canada's obligation, under the Department of Industry Act, to promote and protect the interests of Canadian consumers.

Although the OCA has not developed a specific selection process for consumer representatives, it has nevertheless produced a document titled *Participating in the Standards System, a Handbook for Consumer Representatives*, of which a section, *What Makes an Effective Consumer Representative?*, could be interpreted as a list of the qualities that, according to the OCA, a good consumer representative should have. Accordingly, an adequate consumer representative should have the following attributes:

- self-confidence and willingness to present a viewpoint even if it is a minority view
- good critical-thinking and verbal skills
- curiosity and willingness to learn new things
- time to devote to preparation, travel and participation
- self-motivation and discipline; in many cases, the consumer representative will
- have to do his or her own thinking and will often work to a self-imposed schedule
- an understanding of how committees and organizations work
- comfort with receiving and absorbing a lot of information
- comfort with asking questions
- willingness to travel
- willingness to follow through with a project that may last months or years.³⁰

As opposed to the RCEN's rules, the Office of Consumer Affairs provides for no framework for ensuring a transparent selection process or the representative's accountability. It lists criteria related to the personality profile and the abilities sought in a good representative.

Selection criteria applied to consumer rights groups

Consumers International (CI)

Created in 1960, the international federation of consumer rights groups, *Consumers International (CI)*, numbers 220 members in 115 countries sharing the same mission: to put consumer rights at the centre of decision-making processes. To do so, it is based on values reflecting the importance of: ethical conduct; independence from industry and governments; solidarity between federation members; integrity; transparency and accountability; and inclusiveness.³¹

CI campaigns and intervenes on international issues affecting consumers worldwide: corporate social responsibility, food safety, health and environment, sustainable consumption, for example. In all its projects, the organization takes care to develop the qualifications and influence of its member groups, to guarantee an effective counterweight to corporate lobbying.

³⁰ Op. cit. note 9, page 19.

³¹ CONSUMERS INTERNATIONAL. *How is CI governed?, n.d.* [Online] <http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89647> (page consulted on May 21, 2009).

So it develops projects focusing on consumer education and protection, intellectual property, drug advertising, etc.³²

To be admitted as a CI member, a consumer group must have the following three characteristics:

1. Independence from commercial and party political interests;
2. Have the status of a not-for-profit organization;
3. Act for the common good of consumers.³³

Acting in the common interest of consumers requires, in our view, that the consumer group recognize the interests and needs of the consumers it represents. In that sense, we consider this requirement as part of a representativeness criterion, which we will add to the independence criterion that is clearly related to the first point.

European Consumers' Organisation (BEUC)

Created in 1962 by consumer organizations from six European countries (France, Luxembourg, Belgium, Germany, Netherlands, Italy), the BEUC has its headquarters in Brussels. The association groups consumer organizations from European Union countries and other European countries, to promote, defend and represent consumer interests, through representation activities advocating what it considers "the fundamental rights of consumers" – the rights to "safety, information, choice, representation, redress, education, the satisfaction of basic needs, and a clean environment"³⁴.

In 2007, the BEUC numbered 41 members – independent national consumer organizations from 30 European countries. The BEUC mentions that it is recognized as a reliable representative by decision-makers and opponents alike, largely because of the combined abilities, knowledge and expertise of its members. Other than lobbying activities, the BEUC officially represents consumers within the decision-making process of the European Union, notably.

To qualify as a consumer organization and thus become a BEUC member, the following criteria must be met:

- have a national base;
- exist as a legal entity in their own right;
- have as main purpose the promotion and defence of the general interests of consumers;
- be able to demonstrate competence in promoting and defending consumers' interest in all areas concerning the latter;

³² CONSUMERS INTERNATIONAL. *Key issues*, n.d. [Online] <http://www.consumersinternational.org/Templates/Internal.asp?NodeID=89651> (page consulted on May 21, 2009).

³³ CONSUMERS INTERNATIONAL. *What criteria does an organisation need to meet in order to be eligible for full and affiliate membership of CI?*, n.d. [Online] <http://www.consumersinternational.org/Templates/Internal.asp?NodeID=96872&int1stParentNodeID=89655&int2ndParentNodeID=96868> (page consulted on May 20, 2009).

³⁴ EUROPEAN CONSUMERS' ORGANISATION. *Consumers on the European stage*, n.d. [Online] <http://www.beuc.eu/Content/Default.asp?PageID=855&LanguageCode=en> (page consulted on May 25, 2009).

- be independent of government, whether national, regional or local, and of other non-consumer interests.³⁵

The BEUC conducts its representations itself, so it has not developed criteria for the necessary qualifications of an adequate representative, since its credibility and representativeness are based on the expertise of its member associations. Nor has it developed a selection process regarding representation. However, its members' selection criteria clearly indicate some of the criteria the BEUC deems essential to adequate consumer representation: competence, representativeness and independence.

European Consumer Consultative Group

Since 1973, the European Union has benefited from the assistance of consumer committees, which have been renamed several times: the latest name is the *European Consumer Consultative Group*, created by the European Commission (hereinafter the Commission) on October 9, 2003³⁶.

The European Consumer Consultative Group can be consulted by the Commission regarding all consumer protection issues in the European Union (EU). It is formed by one member representative of each national consumer organization and by one member of each European consumer organization. Those members are named to a 3-year mandate by the Commission after being suggested by the consumer organizations.

In 2003, this newly created Group replaced the former Consumer Committee “to increase the transparency and the efficiency of the operation of the Group, in particular by amending the procedure for the nomination of the candidates, making the term of office of members representing national consumer organisations renewable only once, putting in place effective reporting mechanisms and providing for the adoption of the rules of procedure of the Group”³⁷. *(Emphasis added)*

The intention was thus to tighten the criteria for selecting consumer representatives, particularly by clarifying what is meant by a “European consumer organization”. The current candidate nomination procedure is based on a new definition of consumer rights organizations that puts the accent on the independence of those organizations, which must be independent of any “*industry, commercial and business or other conflicting interests*”.

The definition used since the adoption of Decision 2003/709/CE is as follows (article 2, paragraph 3):

For the purposes of this Decision ‘European consumer organisations’ means consumer organisations fulfilling one of the two following sets of criteria: they must:

³⁵ EUROPEAN CONSUMERS’ ORGANISATION. *How to apply for BEUC membership*, n.d. [Online] <http://www.beuc.eu/Content/Default.asp?PageID=840&LanguageCode=en> (page consulted on May 25, 2009).

³⁶ *Commission Decision of 9 October 2003 setting up a European Consumer Consultative Group (2003/709/CE Decision)*, Official Journal of the European Union, October 10, 2003, available online. [Online] http://eur-lex.europa.eu/pri/en/oj/dat/2003/l_258/l_25820031010en00350036.pdf (page consulted on August 25, 2009).

³⁷ *Ibidem*, paragraph 4.

(a) 1. *be non-governmental, non-profit-making, independent of industry, commercial and business or other conflicting interests and have as their primary objectives and activities the promotion and protection of the health, safety and economic interests of consumers in the Community, and*

2. *have been mandated to represent the interests of consumers at Community level by national consumer organisations in at least half of the Member States that are representative, in accordance with national rules or practice, of consumers and are active at regional or national level, and*

3. *have provided to the Commission satisfactory accounts of their membership, internal rules and sources of funding,*

or

b) 1. *be non-governmental, non-profit-making, independent of industry, commercial and business or other conflicting interests, and have as their primary objectives and activities to represent consumer interests in the standardisation process at Community level, and*

2. *have been mandated in at least two-thirds of the Member States to represent the interests of consumers at Community level by*

- bodies representative, in accordance with national rules or practice, of national consumer organisations in the Member States, or

- in the absence of such bodies, by national consumer organisations in the Member States that are representative, in accordance with national rules and practice, of consumers and are active at national level.³⁸

Representation is made only by consumer rights organizations, so competence criteria are omitted since the associations are, apparently, assumed to have the required qualifications for ensuring adequate representation as long as they meet the other criteria. The criteria that will be applied for the eligibility of a consumer group are thus: independence and representativeness.

³⁸ *Ibidem.*

For the purposes of a more exhaustive comparison, we reproduce the 2000 definition here: The 2000/323 Decision refers to Section 5 of the 283/1999/CE Decision, which defined a European consumer organization:

“The financial support referred to in Article 2(b) may be granted to European consumer organisations which:

- are non-governmental, non-profit-making organisations whose main objectives are to promote and protect the interests and health of consumers, and

- have been mandated to represent the interests of consumers at European level by national organisations of at least half the Member States of the Community that are representative, in accordance with national rules or practice, of consumers and are active at national or regional level.”

Decision No 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers, Official Journal of the European Union No. L 034 of 09/02/1999, January 25, 1999, available online. [Online]

http://ec.europa.eu/dgs/health_consumer/general_info/legal_base/base01_en.html (page consulted on May 25, 2009).

The French consumer association accreditation system

In France, consumer associations have their own “right to act” (*droit d’agir*), written in the consumer code. This right to act consists of the capability to seek civil (not penal) redress for direct or indirect prejudice to the collective interest of consumers. To avoid the “too-great risk of associations arising for which the interest of consumers would serve as a front for other interests”, however, this right is only granted to “accredited” consumer associations³⁹. [Our translation]

The authors Calais-Auloy and Steinmetz present as follows the conditions for a consumer association to be accredited:

- To be accredited, the association must be declared regularly. Its explicit statutory object must be the defence of consumers. It must exercise no professional activity. Finally, it must be representative. This last condition is the most difficult to appreciate. A decree of May 6, 1988 states the three criteria for determining representativeness (art. R.411-1 c.consom.):
- lifetime (at least one year);
- practical and public activity in defence of consumer interests; this criterion is appreciated particularly through publications and permanent staff;
- size, appreciated through the number of contributing members (at least 10,000 for national associations). [Our translation]

Accreditation is granted for five years and is renewable.

Public interest representation is granted only to consumer rights organizations, so standards of competence are omitted here also, since the associations are, apparently, assumed to have the necessary qualifications for ensuring adequate representation, if they meet the other standards. The useful criterion applied for determining the eligibility of a consumer group only involves representativeness (defence of consumer interests and number of members).

³⁹ J. CALAIS-AULOY and F. STEINMETZ. *Droit de la consommation*, Paris, Dalloz ed., 2003, note 4, p.596.

ANALYTICAL GRID

A comparison and an attentive analysis of the standards (criteria) used by the decision-making bodies studied reveal several common points. From our study of the seven decision-making bodies selected, we draw the following recognition criteria and important considerations:

Recognition criteria:

- 1) independence from government and industry;
- 2) competence;
- 3) representativeness;
- 4) accountability – notably: link with consumer rights groups;
- 5) transparent criteria;
- 6) transparency of the selection process;

Important considerations:

- 7) granting financial resources to the representative;
- 8) training provided to the representative.

Six of the seven decision-making bodies have transparent criteria. However, this does not imply that the criteria are *sufficient*, but rather that they have been stated clearly or not. In this regard, only the RCEN does not explicitly detail its criteria for selecting representatives.

It appears that representativeness is particularly important in selecting a representative, given that this criterion is mentioned by five of the seven decision-making bodies. This criterion includes all the requirements for ensuring that the consumer representative or group reflect the concerns and viewpoints of the consumers represented, and thus that consumer interests are at the heart of the mandate.

The importance of independence from government and industry is common to four of the decision-making bodies.

The criteria of competence and accountability are mentioned by three of the decision-making bodies.

More marginal are the considerations for granting financial resources and the availability of representatives' training, as well as the transparency of the selection process, i.e., the existence of a formal selection process (two mentions).

Using the analytical grid below, we can view the situation at a glance:

Criteria Used	Australia	Canadian Environmental Network	Consumers International	Canadian Office of Consumer Affairs	European Consumers Organisation	European Consumer Consultative Group	French consumer association accreditation system
Independence from government and industry	✓		✓		✓	✓	
Competence	✓			✓	✓		
Representativeness	✓		✓		✓	✓	✓
Accountability – link with consumer groups	✓	✓	✓				
Selection transparency	✓ (process must be documented and archives kept)	✓ (formalized process, creation of a selection committee and disclosure of results)					
Criteria transparency	✓		✓	✓	✓	✓	✓
Important Considerations							
Granting financial resources	✓	✓					
Training offered	✓	✓					

LIST OF DECISION-MAKING BODIES ON WHICH CONSUMER REPRESENTATIVES CURRENTLY SIT IN CANADA

There are in Canada many decision-making bodies that solicit the presence of consumer representatives (or before which representations are made by those who claim to represent consumer interests). For example, the following is a list of decision-making bodies that have, in recent years, solicited the participation of Union des consommateurs or recognized its status as a consumer protection organization:

- Régie de l'énergie du Québec;
- Advisory Committee on the Financial Accessibility of Education;
- Desjardins Financial Security;
- Fédération des caisses Desjardins (Table des Associations de consommateurs);
- Commissioner for Complaints for Telecommunications Services;
- Office de la protection du consommateur (Comité consultatif sur les agents de voyage, Table de concertation sur la vente d'automobiles d'occasion, Table de concertation sur la vente d'automobiles neuves, Table de concertation sur la téléphonie cellulaire, consultation on amendments to the Consumer Protection Act);
- National Energy Board;
- Canadian Radio-Television and Telecommunications Commission (CRTC);
- Bureau de normalisation du Québec (Comité consultatif québécois pour les consommateurs);
- Hydro-Québec (Table de recouvrement, Groupe de travail Faibles revenus);
- Standards council of Canada (Canadian Advisory Committee on COPOLCO – ISO, Consumer Participation Task Group of the Consumer and Public Interest Committee);
- Health Canada and Canadian Food Inspection Agency (Working Group on Schedule A to the Food and Drugs Act, legislative renewal for a Canadian Health Protection Act, Canada's Food Guide, Consumer Product Safety, Food Labelling, Office of Consumer and Public Involvement, drug consultation...);
- Various standing committees of the House of Commons;
- Committee on Institutions, Quebec National Assembly;
- Office of the Privacy Commissioner of Canada (voluntary code for notification of breaches in the protection of personal information);
- Canadian Department of Finance (prebudget consultations, consultation on a framework for electronic payments);
- Agence de l'efficacité énergétique (Plan d'ensemble en efficacité énergétique);
- External Advisory Committee on Smart Regulations.

ASSESSMENT OF THE USE OF RECOGNITION CRITERIA IN CANADA

Do the decision-making bodies we have just listed use criteria for recognizing consumer representatives in their working groups or committees, or for determining the representativeness (etc.) of those who come before them as such? If so, do those criteria correspond to those we have identified in our analysis? Do the selection processes all contain the desirable guarantees?

This is what we will examine now, through an in-depth study of the selection methods used by five of those decision-making bodies, which cover a representative range (regulatory organizations, standards organization and government organizations):

- Régie de l'énergie;
- Canadian Radio-Television and Telecommunications Commission;
- Bureau de normalisation du Québec;
- Office de la protection du consommateur;
- Health Canada.

We will also verify whether those organizations have rules for ensuring the remuneration of representatives and access to adequate training resources (as suggested by the CCAAC-Australia in the considerations it adds to the representation criteria themselves, and by the Standards Council of Canada with standard CAN-P-2F requiring the granting of sufficient resources and equal access to information).

To proceed with our examination, we explored the websites of those various organizations, to determine whether the sites contain calls for public participation and instructions for being admitted in working committees or groups. In the absence of such information, we contacted those organizations to ask whether they had selection criteria or processes for choosing representatives of the consumers solicited and, if so, how those criteria or processes were applied and how potential representatives and the public could know about them.

To examine the information obtained, we will use the analytical grid presented in the preceding part of this report, in order to determine whether the five selected organizations apply the selection criteria we have identified and transparent rules for the selection process.

But first, we will give a few additional details regarding the criteria applied by the five decision-making bodies selected.

Criteria applied in the five decision-making bodies selected

RÉGIE DE L'ÉNERGIE DU QUÉBEC

The Régie de l'énergie is an economic regulatory organization with the mission of conciliating the public interest, consumer protection and a fair treatment of the electricity carrier and the power distributors.

The Régie de l'énergie encourages the intervention of consumer representatives in the cases it hears. In fact, the Régie *“needs the perspective provided by active, focused, structured participation by consumers and interest groups in the regulatory process to help it make appropriate and timely decisions”*.⁴⁰

The Régie de l'énergie du Québec defines an intervenor as *“any interested person authorized by the Régie to participate in a hearing with a view to making representations”* (article 1 of the *Regulation respecting the procedure of the Régie de l'énergie*⁴¹). To authorize an interested party to participate in a hearing, the Régie requests that the following information be provided (articles 5 to 8 of the Regulation):

- 5. In the course of the examination of an application, an interested person may apply to the Régie for status to intervene before it.
- 6. An application for intervention must be made in writing, signed by the interested person or the person's representative and sent to the Régie and the applicant within the time fixed by the Régie.
- The application must state:
 - (1) *the name, address, telephone number and any other telecommunications numbers of the interested person;*
 - (2) *the nature of the interested person's interest and, where applicable, representativeness;*
 - (3) *the reasons in support of the intervention;*
 - (4) *a concise statement of the conclusions sought or recommendations proposed;*
 - (5) *the manner in which the interested person's position is to be presented, including whether witnesses are to be heard or expert evidence presented, and the estimated hearing time; and*
 - (6) *the interested person's suggestions to facilitate examination of the application.*
- 7. The Attorney General and the Minister responsible for the administration of the Act respecting the Régie de l'énergie (R.S.Q., c. R-6.01) may at all times intervene on their own motion before the Régie.
- 8. The Régie may disallow or accept the application for intervention. If the application is accepted, the Régie determines, if it considers it necessary, the scope of the participation having regard to the intervenor's interest and the nature, importance and breadth of the issues addressed by the intervenor.

⁴⁰ RÉGIE DE L'ÉNERGIE. *2007-2008 Annual Report*, June 2008, page 3. [Online] http://www.regie-energie.qc.ca/documents/rapports_annuels/rapp_ann_2008_ang.pdf (page consulted on May 25, 2009).

⁴¹ GOVERNMENT OF QUEBEC. *Regulation respecting the procedure of the Régie de l'énergie*, c. R-6.01, r.4., n.d. [Online] <http://www.canlii.org/en/qc/laws/regu/oc-437-2006-2006-go-2-1651/latest/oc-437-2006-2006-go-2-1651.html>. (page consulted on May 25, 2009).

- 9. The intervenor is to receive all documents filed in the record and must send all documents it files to the participants and to the Régie in the required number of copies.⁴² (Emphasis added)

The commissioners assigned to the file study all the applications for intervention and grant (or refuse) the status of intervenor, for each record, in a *Décision sur la reconnaissance des intervenants* (decision regarding the recognition of intervenors) that, like all Régie records, is public. For example, in Decision D-2008-110, the commissioners specify: “*In its estimation, the Régie takes into account the link between the conclusions sought by the applicant and his interest. The application for intervention must therefore demonstrate the relevance of the applicant’s contribution to the study of the file, in consideration of his field of expertise. The Régie examines applications for intervention in the light of its empowering legislation, Regulation and relevant decisions.*”⁴³. [Our translation]

It should be noted that, although any person or organization can submit written observations about an issue debated before the Régie, by explaining the nature of their interest, expenses may be reimbursed only to persons or organizations to which it has recognized the status of intervenor⁴⁴.

In short, the Régie has certain recognition criteria, summarized in articles 6 to 8 of its Regulation respecting the procedure, and established by precedent provided by decisions regarding the recognition of intervenors, which decisions are taken at the beginning of any case it hears. Accordingly, certain criteria of competence and representativeness must be examined by the commissioners. However, no objective source specifies criteria for the Régie to assess representativeness, except perhaps what is found in the requirements regarding the content of the annual declaration in the Intervenor Costs Payment Guide⁴⁵. Nowhere is there mention of any imperative of independence from government or industry.

Although the transparency criterion is not applied to the recognition of competence and representativeness, it is applied to the process, since the commissioners must always justify, in writing, their decision to recognize an intervenor or not.

As for training, it is not formally offered within the framework of the proceedings presided by the Régie, except for the requirement sometimes imposed on distributors and carriers to organize working groups with recognized intervenors in order to inform the latter about the details of the distributors’ and carriers’ case being heard by the Régie de l’énergie.

⁴² *Ibidem*.

⁴³ RÉGIE DE L’ÉNERGIE. *Décision sur la reconnaissance des intervenants: Demande relative à l’établissement des tarifs d’électricité pour l’année tarifaire 2009-2010*, September 4, 2008. [Online] <http://www.regie-energie.qc.ca/audiences/decisions/D-2008-110.pdf> (page consulted on May 25, 2009).

⁴⁴ RÉGIE DE L’ÉNERGIE. *Principes élémentaires de fonctionnement*, April 2002, page 8. [Online] <http://www.regie-energie.qc.ca/documents/autres/Regie101.pdf> (page consulted on May 25, 2009).

⁴⁵ RÉGIE DE L’ÉNERGIE. *Intervenor Costs Payment Guide*, October 2, 2003. [Online] <http://www.regie-energie.qc.ca/audiences/3412-98/3412guide-anglais.pdf> (page consulted on May 25, 2009).

BUREAU DE NORMALISATION DU QUÉBEC (BNQ)

The BNQ, founded in 1961, is a member organization of Canada's National Standards System. It exercises its standardization activities – standards development, certification of products, processes, services and persons, certification of quality and environmental management systems. The BNQ is also responsible for evaluating Quebec laboratories that seek accreditation and for food safety certification.

The BNQ develops various types of normative documents: standards, estimates or codes, as well as specifications. The first are established by consensus, as opposed to specifications. This means that interest groups are consulted for developing standards, through working committees or public consultations. An information document titled *Consensual Standardization – Policy and Rules of Procedure* (BNQ 9950-099/2004⁴⁶), published in 2004, details the process enabling the BNQ to reach a consensus.

The cornerstone of the process is the creation of standardization committees, with the standards developer (the BNQ) being empowered to “*balance the representation of the three interest groups on the standards development committee concerned with the subject of standardization*” (article 4.3.2.1). To do so, it sends written invitations to experts or organizations chosen among those he considers to be the three major interest groups concerned with standardization, i.e., suppliers, users and general interest representatives (article 4.3.2.2). Then the solicited organization chooses its delegate, who must defend his organization's positions and not his own (articles 4.3.4.2 and 4.3.4.3).

Article 4.3.3.2 specifies: “When forming the standards development committee, the standards developer will consider the fact that experts or bodies not approached to sit on the committee as members will be given the opportunity to argue their case during the public enquiry.”

The public enquiry, which follows the standards committee study and the internal review of the adopted consensual document, invites the comments of persons or organizations who are interested in being heard but have not been invited to sit on the standards committee (article 4.5.3.1). They then have 60 days to send their comments, which will be taken into account and eventually submitted to the standards committee (articles 4.5.3.8 to 4.5.3.11).

Although the BNQ ensures that consumer groups participate in representations, nothing indicates that it applies any rule for verifying the competence or representativeness of the groups it calls upon. A solicited organization vouches for the competence of the representative, who will of course be accountable to his organization. Nor does anything indicate that the criterion of independence (from government and industry) is applied in selecting the groups that may be solicited.

Moreover, the selection's transparency is not optimal, although it is clearly prescribed in the information document we have just summarized. Indeed, the discretion left to the standards developer is total: it decides which organizations or experts to solicit for the standards committee, and it has total leeway regarding the committee's size and the option of a committee without a representative from one of the three categories. Note 2 of article 4.3.2.2 even states

⁴⁶ BUREAU DE NORMALISATION DU QUÉBEC. *Consensual Standardization – Policy and Rules of Procedure*, February 5, 2009. [Online] http://www-es.criq.qc.ca/bnq/documents/enquetes_publicques/9950-099_dpen.pdf (page consulted on May 25, 2009).

that “*other models of committees are possible*”. It is true that interested persons and organizations have the opportunity to be heard during the public investigation, but their arguments and comments will certainly not have the same weight as if they had expressed as part of the standards committee’s meetings. They may not even be submitted to the standards committee, as this is left to the standards developer’s discretion.

The information document 9950-099/2004 also specifies that participation in standards committees is on a “volunteer basis and without remuneration” (article 4.3.4.6) and that the BNQ “may, if necessary, target sources of financing” (article 4.3.4.7). It seems taken for granted that the training and remuneration of committee members are paid for by the organizations delegating the latter.

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC)

The Canadian Radio-Television and Telecommunications Commission (CRTC) is an independent public organization that regulates and supervises broadcasting and telecommunications in Canada. Its mandate consists of ensuring that broadcasting and telecommunications systems meet the needs of the Canadian public and the objectives set in the *Broadcasting Act* and the *Telecommunications Act*.

The process of recognizing the parties interested in participating in a CRTC proceeding (public notice, application...) is both simple and obscure. Simple in that any person or organization may submit observations concerning CRTC public proceedings or register as a stakeholder in telecommunications applications. No criterion restricts the possibility of participating, if only as a representative, and no procedure provides a framework for such participation. Simple also because anything can be done on the Internet by filling out online forms.

The process is also complex, because the procedure applicable to broadcasting or telecommunications is not clear. And in the absence of clear guidelines, it is difficult to evaluate the impact of one’s intervention.

Broadcasting

The fact sheet titled *How to Participate in a CRTC Public Process*⁴⁷ states, under the heading “Your opinion counts!”, that everyone is invited to submit observations, which must clearly declare agreement or disagreement with the application and be supported by facts and arguments.

⁴⁷ CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION. *How to Participate in a CRTC Public Process*, n.d. [Online] http://www.crtc.gc.ca/eng/info_sht/g4.htm (page consulted on May 25, 2009).

Telecommunications

Article 7 of the CRTC Telecommunications Rules of Procedure⁴⁸ only mentions that a “Any person or association may be registered as an interested party in respect of an application (...) after filing a notice in Form 1 of the schedule with the Secretary containing the information required by that Form” without providing further details on the nature of the expected intervention or the qualities necessary for intervening as a representative (representativeness, competence, accountability...).

Only when persons or organizations request a reimbursement of expenses (which is possible only in the field of telecommunications) can one vaguely perceive the CRTC’s assessment of an intervenor’s competence. Accordingly, article 11 of the Guidelines for the Taxation of costs stipulates the following:

11. *In judging whether or not the time expended by a claimant is excessive under the circumstances, the considerations which may be taken into account by the taxation officer include:*

(a) the extent of the applicant’s participation and the degree of complexity of the issues to which that participation related;

(b) the degree of responsibility assumed by the claimant;

(c) the duplication of tasks among claimants;

(d) experience of the claimant; and

(e) time claimed and awarded, globally, by specific service or both, in the proceeding or in other proceedings. [Mod. May 1998]⁴⁹

With regard to the complexity of issues discussed during the claimant’s participation (a), and to the assessment of his experience (d), we may suspect the existence of a competence criterion. But since it applies only to an intervenor who requests an order respecting costs and is thus examined only after the fact, we note that no competence criterion is applied in choosing an interested party who will intervene as a representative.

We therefore conclude that the CRTC does not use selection criteria to recognize a party interested in commenting on a procedure as a representative: as we have seen, anyone who wants may submit his observation as a representative, in the areas of broadcasting and telecommunications alike. This gives participation a certain transparency, since the CRTC documents, including those regarding the appointment of representatives, are public.

⁴⁸ CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION. *CRTC Telecommunications Rules of Procedure*, n.d. [Online] <http://laws.justice.gc.ca/en/ShowFullDoc/cr/SOR-79-554//20091007/en> (page consulted on May 25, 2009).

⁴⁹ CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION. *Guidelines for the Taxation of Costs*, n.d. [Online] <http://www.crtc.gc.ca/eng/legal/forms/guide.htm>

As for the reimbursement of expenses, it certainly is curious that, depending on the issue addressed, the same organization will consent to cover the expenses of representatives or not. With regard to training, the CRTC's rules do not provide for anything.

OFFICE DE LA PROTECTION DU CONSOMMATEUR (OPC)

The Office de la protection du consommateur (OPC) is a government organization that reports to the ministre de la Justice du Québec and whose mission is to protect Quebec consumers and defend their interests. The OPC is thus responsible for informing and educating consumers, applying the laws under its purview, and favouring concertation between socio-economic agents⁵⁰.

Concertation is described by the OPC as *“Cooperation with consumer associations, merchant groups, Québec government departments and agencies and other partners from all sectors: voluntary undertakings; cooperation agreements; information-sharing; consultation”*.

Under the heading *Legislative Consultation*, we observe, for example, that the OPC pursued, in January 2009, a consultation on proposals to amend consumer protection legislation. However, nothing indicates before whom or how this consultation is conducted. No information is provided on the type of notice desired and from whom (general public, associations...). Nor is there any mention of other participations that the OPC might seek.

As a consumer rights organization, Union des consommateurs is one of the OPC's preferred interlocutors and has often been invited to sit on working committees debating various issues: automobiles (new and used), travel agents, cell phones, amendments to the Consumer Protection Act... The same is true of several consumer groups in Quebec, which are the first to be called upon when the OPC seeks an informed opinion on a consumer issue.

The OPC's invitations are personalized and no formal process is associated with recognition of the status of invited representatives. The OPC itself thus decides whom to solicit for its consultations. The selection's transparency is therefore nonexistent. Nor does the OPC's selection method enable us to determine whether or not specific recognition criteria are used, even if we may assume so (representativeness, for example, being ensured by the invitation to organizations rather than to individuals who would act as representatives).

Finally, the OPC does not have rules for reimbursing expenses during the consultations it undertakes with the solicited organizations, and has no program for training intervenors.

⁵⁰ OFFICE DE LA PROTECTION DU CONSOMMATEUR. *About the Office, Mission and mandate*, n.d. [Online] http://www.opc.gouv.qc.ca/WebForms/APropos/Mission_en.aspx (page consulted on May 25, 2009).

HEALTH CANADA

Health Canada has made public involvement a priority, and has even integrated it with its 2007-2012 Strategic Plan. In 2000, the Department published a document titled *The Health Canada Policy Toolkit for Public Involvement in Decision Making*, in which we find “public involvement principles”:

- * Health Canada is committed to public involvement which is integral to decision making and providing quality service.
- * Health Canada's public involvement activities improve knowledge and understanding of health issues through dialogue.
- * Health Canada is open to hearing the views of Canadians and providing timely feedback on the outcomes of dialogue.
- * Health Canada's public involvement activities reflect the diversity of Canadians' values and needs and are transparent, accessible and coordinated.
- * Health Canada provides guidance and ensures access to learning opportunities in support of employees' responsibility and accountability for planning, designing, implementing and evaluating public involvement initiatives.⁵¹

Moreover, the document specifies guidelines for helping Health Canada employees choose adequate public involvement techniques likely to enable them to meet their objectives⁵². In addition, five public participation levels have been defined, to determine whether public involvement will involve: information or education (level 1); gathering information or views (level 2); discussion (level 3); the involvement of citizens (level 4); and creating partnerships with groups or citizens (level 5)⁵³. It is also mentioned that criteria – which are not named – for selecting participants accompany each of those levels, and “are intended to guide the planning process by highlighting the main objectives of the public involvement”.

Health Canada thus invites its employees to refer to this document as soon as a need for public involvement is felt. But the *Toolbox* is far from being the only document in circulation at the Department with regard to public involvement. Indeed, the Health Products and Food Branch (HPFB) also promotes public participation in its decision-making processes, and has published many documents stating the means to that end: *Health Products and Food Branch Public Involvement Framework* (DGPSA, 2005), *HBFB Policy on Voluntary Statement of Information for Public Involvement* (2005), *Guidance on Advisory Bodies* (2007), *Review of Regulated Products – Policy on Public Input* (2007), *2005-2007 Public Involvement Performance Report*, etc.

The document *Guidance on Advisory Bodies* serves as a benchmark for applying certain principles, such as transparency, which must surround the creation, composition and work of an advisory committee, the importance that the committee's composition reflect a range of

⁵¹ HEALTH CANADA. *The Health Canada Policy Toolkit for Public Involvement in Decision Making*, 2000. [Online] http://www.hc-sc.gc.ca/ahc-asc/pubs/_public_consult/2000decision/pol-eng.php (page consulted on May 25, 2009).

⁵² Ibidem, page 9.

⁵³ Ibidem, page 8.

viewpoints, that each opportunity to take public opinion into account be fully used, and finally, that each member make a compulsory declaration of affiliations and interests. More specifically, the guide states certain criteria for selecting the members of an advisory committee, such as: professional credibility, affiliations and interests, the ability to work within a committee, an open mind and judgement⁵⁴. It also provides benchmarks for ensuring a diversity of opinions in a committee's composition (articles 2.6 to 2.8). Finally, the exclusion of participation or limited participation may be decided by HPFB if a person has direct financial interests⁵⁵.

HPFB has also created the Office of Consumer and Public Involvement (OCBI), which acts as a "centre of expertise on reaching out to and involving the public"⁵⁶ to develop outreach initiatives for informing the public and promoting its participation. Each year, the OCBI supports about a hundred public involvement activities.

"HPFB's Public Involvement Framework's Transparency and Openness Principles" guide this public participation: Under the transparency heading, we find the principles of equal access to information, relevance, clarity, accountability and timeliness. Under the openness heading are listed the following principles: equality of opportunity for participation, relationship building, timeliness, planning, support and capacity, clarity, shared responsibility, accountability and innovation⁵⁷. Regarding the principle of "support and capacity", we read: "Recognizing that stakeholders have differing capacities to participate in public involvement processes, measures are in place to ensure effective participation", but without specifying what type of measures, financial or other, have been taken. In the document *Guidance on Advisory Bodies* (2007), however, we learn that the travel and accommodation expenses of committee participants may be reimbursed⁵⁸.

HPFB's methods for activities requiring public involvement are varied: consensus conference, public forum, working group, technical consultation, discussion group, bilateral meeting, electronic workbook, Internet posting, survey, advisory body, etc.⁵⁹

The abundance of information on the subject sends a very clear message: Canadians are strongly encouraged to participate in the decision-making process of Health Canada and its HPFB. The introduction to the 2005-07 Public Involvement Performance Report states: "Becoming a world-class regulator means promoting a more open and transparent system, where the involvement of the public and stakeholders contributes to better overall quality of decision making and effective regulation in the public interest."

This Department's priority clearly appears on its website: A banner titled "Get involved! Public participation" is prominently displayed on the home page and gives access to all the information

⁵⁴ HEALTH PRODUCTS AND FOOD BRANCH. *Guidance on Advisory Bodies*, 2007, articles 2.4 and 2.5. [Online] http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/hpfb-dgpsa/public-rev-exam/advisory-consultatif_5-eng.php (page consulted on May 25, 2009).

⁵⁵ *Ibidem*, section 4

⁵⁶ HEALTH PRODUCTS AND FOOD BRANCH. *Office of Consumer and Public Involvement*, March 2005. [Online] http://www.hc-sc.gc.ca/ahc-asc/alt_formats/hpfb-dgpsa/pdf/ocpi-bpcp/factsheet-feuillelet_info-03-05-eng.pdf (page consulted on May 25, 2009).

⁵⁷ HEALTH CANADA. *Health Products and Food Branch, 2005-2007 Public Involvement Annual Performance Report*, 2007, page 9. [Online] http://www.hc-sc.gc.ca/ahc-asc/pubs/cons-pub/pub-invol-perf-rap_rap-rend-part-pub-01-eng.php (page consulted on May 25, 2009).

⁵⁸ *Op. cit.* note 54, article 7.4.

⁵⁹ *Op. cit.* note 57, page 14.

on consultations in progress and reports presented during recent consultations⁶⁰. The audiences targeted and the coordinates of the location for sending comments are clearly mentioned. Usually, consultations appear to take place online or in writing.

The Frequently Asked Questions section also informs us that “*A public consultation provides the government with an opportunity to hear what Canadians are thinking on a particular issue. Responses to consultations help form policies and legislation that reflect the concerns of Canadians*”. And: “*There a variety of ways to provide your feedback. This can include e-mail and online forms and surveys, 1-800 numbers, attending town hall meetings or workshops.*”

However, there is no indication as to how or by whom the comments will be viewed. In addition, the specific objectives of the consultation are not spelled out. What is simply mentioned, for example, is: “*Proposed addition of eight medicinal ingredients to Part I of Schedule F to the Food and Drug Regulations*”⁶¹, without further detail. Selection transparency is thus lacking, since the intervenors cannot know whether their comments are received, by whom or for what purpose. So no distinction is drawn, on the website, between personal interventions and those made by an interest group representative.

But as we have seen, public participation not only takes place on the Internet. For its technical consultations, working groups or other bilateral meetings, the selection criteria guiding the choice of representatives of the solicited consumers are those that appear in HPFB’S document *Guidance on Advisory Bodies*. However, we note that HPFB’s principles of openness and transparency are neither criteria for selecting the best possible representative, nor a selection process. The selection criteria of the *Guidance* document mainly emphasize the necessity that the representative be competent and transparent in the declaration of his interests; it is important not to confuse the necessity of declaring potential conflicts of interest with the requirement of independence from government and industry. As mentioned above, HPFB does not exclude from any consultation a participant whose financial interests might be litigious.

The case of Health Canada is thus very interesting. A major effort, expressed in several hundred pages, has been expended to document the transparency of the decision-making process desired by the Department, and to ensure the broadest and most varied possible public participation. But although it has defined certain criteria, HPFB has not pursued the exercise to the point of defining selection criteria for each of the various methods used for public involvement activities (activities that have been, for their part, defined in a glossary⁶²). That would certainly contribute to completing an undertaking that was well begun, and to strengthening the trust of Canadians in that Department’s decision-making process.

⁶⁰ HEALTH CANADA. *About Health Canada, Public Involvement*, n.d. [Online] <http://www.hc-sc.gc.ca/ahc-asc/public-consult/index-eng.php> (page consulted on May 25, 2009).

⁶¹ HEALTH CANADA. *Food and Drug Regulations, Project #1591*, n.d. [Online] http://www.consultations.hc-sc.gc.ca/public-consult/consultations/current-encours/consultation_e.php?id=245 (page consulted on May 25, 2009).

⁶² *Ibid.*, pages 44-46.

EXAMINATION USING THE ANALYTICAL GRID

In short, by transposing the results of this sample of five organizations into the grid developed above, we arrive at the following result:

Criteria Used	Régie de l'énergie du Québec	BNQ	CRTC	OPC	Health Canada
Independence from government and industry					
Competence	✓				✓
Representativeness	✓				
Accountability – link with consumer groups	✓				
Selection transparency	✓				✓
Transparency of criteria	✓				
Granting of financial resources	✓ (only for intervenors)		✓ (for the telecommunications sector)		✓ (travel and accommodation expenses)
Training offered	✓ (sometimes)				

This examination using our analytical grid clearly demonstrates that, apart from the Régie de l'énergie and, to a lesser extent, Health Canada, the decision-making bodies that solicit the participation of consumer rights organizations in Canada don't appear to have, for the choice of representatives who will participate in their proceedings or consultations, a formal recognition process using clearly established criteria. At most, they provide a small amount of information on their websites.

In our view, applying criteria that are not explicitly disclosed cannot be considered equivalent to applying a formal policy for recognizing representatives. This is why, although the OPC, the CRTC or Health Canada appear, to a certain extent, to evaluate competence and representativeness, their failure to clearly mention their criteria for doing so amounts in our view to not applying such criteria. Indeed, we cannot assume the application of formal criteria if the process is left to the entire discretion of those who decide to use it: How to know whether, for those organizations, a representative's link to a consumer association, for example, is primordial in determining representativeness? Or, to qualify as a representative and be authorized to intervene on behalf of consumers, is it sufficient to have consumed the product that is the object of the consultation?

Finally, it should be noted that the Régie de l'énergie, Health Canada and the CRTC allow anyone to participate in a consultation and intervene on his own behalf or as a group's representative; only the Régie de l'énergie treats the two differently, since the first is present as an observer and the intervenors have to establish that they are representative. The CRTC and Health Canada impose no distinct regulations or requirements for persons who intervene on their own behalf and those who intervene as representatives. And yet, it would seem logical that

participation applications from individuals and representatives be treated differently and have to meet distinct requirements.

POSITION OF THE CANADIAN CONSUMER INITIATIVE (CCI) MEMBERS

The Canadian Consumer Initiative (CCI) is a coalition grouping six of the largest consumer groups in Canada: the Alberta Council on Aging Services, the Automobile Protection Association, the Consumer Council of Canada, Option consommateurs, the Public Interest Advocacy Centre and Union des consommateurs. The ICC's mission is to represent consumers' interest before federal authorities, by presenting guidelines and advice on various subjects.

In the course of our research, we solicited the opinion of CCI members regarding the criteria we were studying and were preparing to retain in our recommendations. Our requests remained unanswered. To compensate for that failing, we focused on a process in which most CCI members have participated and that has enabled discussions on representation criteria and selection processes as part of a particular proceeding. The process developed by the participants gives us a concrete illustration of the recognition criteria that were considered among the most important for Canadian consumer groups.

On December 20, 2007, the CRTC rendered a decision (CRTC 2007-130) ordering the main Canadian providers of fixed, mobile and Internet telephony services to create an independent telecommunications consumer protection agency with the mandate of settling complaints from individuals and small retail businesses. Two of the administrators of this Commissioner for Complaints for Telecommunications Services (CCTS) must be selected among candidates nominated by Canadian consumer protection groups, as the CRTC stated in its decision:

- The Commission notes, however, that there is currently no process in place for the nomination and appointment of the two consumer-group-appointed directors. The Commission considers that the Consumer Groups active in this proceeding should establish a transparent process for the nomination and appointment of the consumer-group-appointed directors⁶³.

For the purposes of the present study, we are interested in the processes and criteria chosen by consumer groups called upon to define a transparent process for selecting consumer representatives who would be appointed members of the CCTS. To establish those criteria and processes, the groups were inspired by the CCAAC's principles, which had also been adopted by consumer group members of the Australian *Telecommunication Industry Ombudsman*. On that basis, the Canadian consumer groups developed a *Process for the Nomination and Selection of Consumer Group Directors of the Commissioner for Complaints for Telecommunications Services (CCTS)*⁶⁴.

⁶³ CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION. *Telecom Decision CRTC 2007-130, Establishment of an independent telecommunications consumer agency, Ottawa, December 20, 2007*. [Online] <http://www.crtc.gc.ca/eng/archive/2007/dt2007-130.htm> (page consulted on May 25, 2009). Those groups are: ARCH Disability Law Centre, British Columbia. Public Interest. Advocacy Centre, Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre and Union des consommateurs.

⁶⁴ *Process for the Nomination and Selection of Consumer Group Directors of the Commissioner for Complaints for Telecommunications Services (CCTS)*, March 10, 2008.

The Consumer protection groups having planned to invite other groups to participate in nominating and selecting candidates, a definition of *consumer group* was adopted, modelled after that of *Consumers International*.

The Nomination and Selection Process provides for the following:

“Consumer group” for the purpose of the CCTS consumer-group-appointed director nomination and selection process is a group (not an individual):

- whose mission includes advancing the interests of consumers (or of a particular class of consumers);
- that, due to its activities, membership or other relevant factors is publicly recognized as playing a legitimate role in advancing the interests of consumers; and
- that is not-for-profit, non-partisan, independent of government and industry, and that receives no sponsorship or financial support from any commercial interest that is directed to a telecommunications objective of the donor or recipient, and that does not receive significant general or charitable support from any corporation.⁶⁵

It should be noted that the Process clarifies the notion of representativeness by linking it not only to membership or to activities conducted, but also to “other relevant factors”. The protection of consumer interests is also specified, in that it can be done on behalf of a “particular” class of consumers.

The qualifications of candidates must include the following:

- expertise in consumer affairs;
- links to relevant consumer organizations;
- capacity and willingness to consult with relevant consumer organizations;
- knowledge of, or the ability to acquire knowledge of, telecom related consumer issues.

These criteria are manifestly inspired by the CCAAC’s principle of “Appointments on Merit”.

As for the nomination process, it contains measures for selecting voting consumer groups (which must correspond to the above definition), the submission of candidacies by voting members (who will have to observe the abovementioned criteria), and voting by e-mail and, if necessary, by ballot.

⁶⁵ *Ibid.*

In short, when using our own criteria to examine the recognition criteria adopted for the appointment of CCST directors by consumer protection groups, we obtain the following result:

Criteria Used	CCST Candidates
Independence from government and industry	
Competence	√
Representativeness	√
Link with consumer groups	√
Selection transparency	√
Transparency of criteria	√
Granting of financial resources	
Training offered	

We hesitated in checking the independence criterion. We concluded that it was not met, since nowhere is it mentioned in discussing candidate selection criteria; the fact that such independence is required of voting consumer groups does not guarantee that the candidates on which those groups will vote must meet the same criterion of independence from government and industry.

CONCLUSION: THE BASES OF A CONSUMER REPRESENTATIVE RECOGNITION POLICY

The purpose of this study is to discuss the relevance of adopting in Canada a consumer representative recognition policy. For an informed discussion, we have examined the best existing practices, developed analytical tools and drawn a portrait of the current situation in Canada.

As we have seen, it appears that few Canadian decision-making bodies use a formal and clearly established procedure for selecting the consumer representatives they want to consult. This leads to consequences we find important, particularly (in relation to the present study) regarding the difficulty of guaranteeing that qualified representatives are identified. In the term “qualified”, we include the criteria of competence and accountability as well as representativeness.

Indeed, the purpose of this study involves this idea: How to ensure that representations made on behalf of consumers are made by authentic and adequate consumer representatives? It appears to us that the development of a formal policy for recognizing consumer representatives, modelled on the one adopted by Australia, is a realistic way to ensure that this consumer right to representation is actually respected.

As for the approach adopted by the RCEN, to develop a selection process rather than selection criteria, not only does it appear incomplete to us, but it would not be practical in representing consumer rights. Indeed, consumer protection organizations don't benefit, as do environmental groups, from a network dedicated to reinforcing their participation in public hearings. Our proposals will therefore not go in that direction.

In addition, we think it hazardous to entrust a small selection committee, case-by-case, with the definition of selection criteria to be used for choosing the desired representative. Time constraints, a lack of resources and so many other factors can make such a selection committee hurry its work. Moreover, the transparency we advocate for selection criteria appears imperilled by a case-by-case determination.

As for the principles of the Australian CCAAC, three years after their implementation, is their expected usefulness confirmed? It seems so: Discussions with Mr. Colin Neave, CCAAC chairman (and their architect), confirm that the principles have been very well received and that they benefited from great support after their publication⁶⁶. Moreover, although the CCAAC has not established an official follow-up process, the organization is informed that the principles are now used by several decision-making bodies, government and other⁶⁷. Accordingly, the

⁶⁶ Excerpt from an e-mail message by Mr. Neave (November 25, 2008): “The Guide was warmly welcomed and there was strong interest in the development of a framework for the appointment of consumer representatives and broad support for the Guide, once it was published”.

⁶⁷ Excerpt from an e-mail message by Mr. Neave (November 25, 2008): “CCAAC has not formally engaged in monitoring the usage of the Guide since releasing it. However, there are examples of organisations referencing the Guide, which suggests that it has been used in developing policies in those bodies. For example, Cancer Voices NSW acknowledges that it uses best practice principles developed by CCAAC, the Consumers Health Forum and the National Breast Cancer Centre. The Australian Institute of Health Policy Studies also examined the Guide, as part of the research project Conceptualising consumer engagement: A review of the literature, in its investigation into current

confirmation of their usefulness leads us to consider the adoption in Canada of explicit principles that would be strongly inspired by the framework adopted by the Australians.

However, the following questions, which arose in the course of our analysis, lead us to favour the adoption of a few additions to the Australian recognition policy:

- Can a consumer representative be considered independent from government and/or industry if the consumer protection group to which he belongs or is related receives part of its funding from one or the other?
- To ensure the credibility of a consumer representative, the link with consumer protection groups appears crucial. Only one such link makes it possible to ensure, on one hand, that the positions taken are not those of a single person, and on the other hand, that the accountability is to an authentic consumer group, which may, or must, support his positions. In that sense must a recognition policy include a definition of a consumer protection group?
- For the criterion of representativeness, should we include, as with the French “right to act”, the necessity for a group to have a certain membership, or should we consider membership as one way among others to measure representativeness?
- For the criterion of competence, is it indispensable to draw a list of the qualities necessary for a good consumer representative, or at least a list of essential qualities, whatever the context or mandate?
- Are some criteria missing? For example, no decision-making body we studied has established a compliance verification process, i.e., to ensure, after the fact, that the criteria have been duly applied. Would that be important?
- Should recognition criteria be accompanied by regulations for the selection process? If so, what would be the basic requirements of such a process?
- Should the necessary funding of consumer representatives be an integral part of a representation process?

With its experience, the CCAAC also raises some of these questions. In fact, Mr. Neave tells us that some aspects could be explored, in the event that the principles are reviewed. For example, the representatives’ role in decision-making; their remuneration; their rights and obligations; the way to find and recruit representatives or the question of whether they should be representative of certain groups or sectors⁶⁸.

approaches and the development of new models for effective consumer engagement and representation in health policy and services. The former Minister of Financial Services and Regulation agreed with the Chairmen of the Telecommunications Industry Ombudsman (TIO) Board and Council that the Minister would no longer be consulted and that appointments to each of those bodies would be in line with the guidelines developed by CCAAC. Those guidelines were adopted as part of the TIO Council’s election policy. The Guide was also promoted on the LAWLEX Corporate Bulletin². LAWLEX publishes on behalf of the Centre for Corporate Law and Securities Regulation, the Faculty of Law of Melbourne University with the support of the Australian Securities and Investment Commission, the Australian Stock Exchange and several leading law firms.”

⁶⁸ Excerpt from an e-mail message by Mr. Neave (November 25, 2008): “There are some further issues about the resourcing of roles and responsibilities of consumer representatives that might be explored but CCAAC has not yet reviewed the Guide. The consultative process raised issues about:

In short, according to Union des consommateurs, to establish in Canada the bases of a policy for recognizing consumer representatives is to answer some of these questions and discuss their inclusion among the principles developed in Australia, which otherwise appear to us very appropriate for their objectives.

Our analysis of the situation therefore leads us to suggest the addition of a few criteria to the selection process itself, to make the process transparent. We therefore add, to the recognition criteria and those related to the process, the obligation to ensure necessary funding so that the representative may have optimum working conditions for carrying out his mandate adequately.

As for the question of independence related to government funding, we choose the CCAAC's solution, which specifies that appointees must be independent of industry and government, and – this is where the distinction is important – must be free from any conflict of interest, i.e., free from any interest, business link or other relation that might hinder his capacity to act as a consumer representative. As we have seen, the European Consumer Consultative Group takes the same path in admitting in its ranks only consumer organizations free from “industry, commercial and business or other conflicting interests”.

These distinctions added to the criterion of independence make it possible to associate it not with the funding source but to free decision-making. Thus, a government-funded consumer group will be considered independent if it does not lose its margin of manoeuvre in taking decisions, nor its freedom to choose cases of interest and positions to adopt. Maintaining this independence from government beyond funding enables the organizations to keep all their credibility. The same approach could also apply to industry-funded consumer groups; however, the question of credibility would be altogether more important here. Indeed, as opposed to government, whose mandate in a democratic society is to solicit and take into account varied and often opposed interests, companies by their very nature generally seek to promote only their only interests. A financial association with companies naturally risks raising fears more spontaneously regarding possible conflicts of interest.

Accordingly, we formulate the following recommendations (modelled on the best practices observed in Australia and Canada), to lay the foundations of an adequate consumer representative recognition policy. We thus hope to launch the discussion in view of adopting, in Canada, a formal policy for recognizing consumer representatives.

-
- the role of consumer representatives in decision making;
 - the resources and remuneration of consumer representatives;
 - the legal obligations and rights of consumer representatives;
 - the applicability of general principles to diverse bodies, including government and nongovernment organisations and companies;
 - the way in which consumer representatives are found and recruited; and
 - whether consumer representatives need to be representative of particular groups or sectors.”

RECOMMENDATIONS

Whereas, in a participatory democracy, all interests must have the opportunity to have their point of view heard, and the right of all concerned parties to be heard is fundamental;

Whereas consumers therefore have the right to be represented in all proceedings where issues of interest to them are debated;

Whereas consumers will be validly heard only if their representatives have the capacity, intention and means to have their interests heard;

Whereas the appointment of adequate representatives in proceedings and consultations has the effect of ensuring their credibility and earning greater trust from the public;

Whereas the adoption of explicit and transparent rules would ensure the credibility of those appointments and representatives;

Whereas said rules should ensure that those called upon to act as consumer representatives are truly representative and represent consumers adequately;

Union des consommateurs recommends the adoption of a framework for recognizing consumer representatives;

Union des consommateurs recommends that this framework reflect the principles essential to adequate representation, to wit:

1. Competence;
2. Independence;
3. Representativeness;
4. Accountability;

Union des consommateurs also recommends that this framework reflect the principles essential to the credibility of the processes:

1. The transparency of appointment criteria and processes;
2. Responsible appointment processes at reasonable cost;
3. Recognition of the application of good governance rules;
4. The involvement of consumer rights organizations.

Union des consommateurs recommends in addition that recognition be given in this framework to the necessity of providing sufficient resources to ensure adequate representation.

Whereas a simple declaration of principles risks entailing difficulties of interpretation and application and leading to the adoption of unforeseeable criteria by various decision-making bodies;

Whereas it is important that the framework adopted remain flexible so that it may be used and adapted by the largest possible number of decision-making bodies;

Union des consommateurs recommends that criteria for ensuring the observance of established principles be detailed in the recognition framework;

REPRESENTATION CRITERIA

1. Competence:

- expertise in consumer affairs and ability to acquire knowledge (if it has not already been acquired) related to the theme of the mandate;
- a range of several candidates should be considered, to maximize the chances of finding the best possible representative;

2. Independence:

Consumer representatives with no relation of dependence on industry or government.

A consumer representative will be considered independent if:

- he has not been employed in the last three years in an executive position within an organization, or has not been a director of an organization regarding which he will have to express a view or take decisions;
- he has not in the last three years advised an organization regarding which he will have to express a view or take decisions;
- he is not a major supplier or customer of the organization regarding which he will have to express a view or take decisions;
- he is free of any interest, business relation or other relation that might hinder, or be perceived as capable of hindering, his capacity to act as a consumer representative;

3. Representativeness:

- For groups: mission, public activities, number of members, the organization's number of years in existence, etc.
- For individuals: link with consumer rights organizations, in particular;

4. Accountability:

- The link with relevant consumer rights organizations constitutes a guarantee of accountability.

CRITERIA RELATED TO THE APPOINTMENT PROCESS

1. Transparent selection criteria and appointment process:

- Clearly defined selection criteria;
- Explicit appointment process, including a clear mandate, the duration of the mandate, and a timely review process;
- Accessible and available selection criteria and appointment process.

2. A serious and transparent appointment process at reasonable cost

- The selection process should be documented, and archives on the decisions taken should be kept;
- In addition, selection costs should be guided by common sense.

3. Recognizing the application of good governance rules

Decision-making bodies that seek a consumer representative should apply to the process of selecting that representative the same rules of good governance they apply to their other spheres of activity.

4. The involvement of consumer rights organizations:

Involve consumer rights organizations in the appointment, whether by asking them to provide a list of possible candidates, including them in selection panels or letting them choose the representatives.

ELIGIBILITY REQUIREMENT: OBLIGATION TO ENSURE NECESSARY RESOURCES

Whereas the role of consumer representatives within the various organizations that solicit their participation is important;

Whereas consumer representatives generally do not have the same resources as other intervenors in the various proceedings;

Whereas it is important to guarantee the full participation of consumer representatives:

Union des consommateurs recommends:

- The granting of necessary financial resources for consumer representatives to work effectively;
 - a. Remuneration reflecting the time spent by the representative to perform the requested tasks;
 - b. Reimbursement of expenses incurred.
- The provision of continuous training activities and the participation of representatives in relevant activities (seminars, conferences...).

PARTICIPATION OF CONSUMER ASSOCIATIONS

Whereas consumer associations can have an important role to play, whether as representatives or as participants in the processes of selecting or appointing representatives;

Whereas consumer associations do not generally have the same resources as other intervenors to the various proceedings;

Whereas it is important to guarantee the full participation of consumer associations:

Union des consommateurs recommends that the proposed framework for recognizing consumer representatives be developed in collaboration with consumer rights groups;

Union des consommateurs recommends that sufficient resources be allocated to consumer associations to enable their adequate participation in those proceedings.

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