



**Residential Consumer  
Representation before the  
National Energy Board :  
Exploring the Possibilities**

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## Executive summary

The National Energy Board has great responsibility and power. The decisions they make pertaining to energy related matters have an important economic impact on Canadian consumers. Despite the importance of these decisions for the latter, they are practically never consulted during debates handled by the Board during its regular sittings. Created in 1959, The National Energy Board is an administrative and an almost judicial tribunal having the authority to authorize the building and exploitation of oil pipelines, gas pipelines and interprovincial and international production lines as well as international electrical transport lines. Furthermore the Board determines the rights and fees pertaining to pipeline companies that fall into their line of expertise and are responsible for the secure working order of these pipelines.

The energy sector progresses within a very dynamic economic context and has grown substantially in the last years. The regulatory process has also greatly developed in the last years. Transporters such as Trans-Canada Pipelines have always traditionally been homogeneous, and are generally natural gas distributors. Recently Quebec and Ontario provincial regulators made the decision to let consumers acquire their own transport capacity within the network and become clients of the transport industry. As provincial entities dismantle local gas distributors, the justification for them to represent clients before the National Energy Board is no longer as valid as it once was. On the contrary, the Board will now be the place where debates between different consumer categories will be held, similarly to the Ontario Energy Commission or the “Régie de l’énergie du Québec”, the only difference being that the number of people involved as well as their various interests will be far greater.

A regulated company holds a sort of natural monopoly and therefore, its clients are held captive. Since the information on company costs and revenue is released by the company, it is very tempting for the latter to take advantage of this obvious one-sided source of information. To counter balance this one-sided release of information, the regulated company’s staff participates in the process by making sure that all files are exhaustive enough to make the decision process more complete. As long as they have sufficient financial resources and information, the intervenors can participate in an effective way in the debate and finally, influence the regulator. However, when certain interested parties don’t have the financial resources to participate in these debates, it may be in the public’s interest to sufficiently support them if this enables the regulator to make the best decision possible, by reducing this one-sided flow of information and lessen its impacts on consumers.

By reading *The National Energy Board Act*, it is clear that no clause enables the Board to grant fees to public interest organizations in order to facilitate their participation in its regular sittings. According to the Act the Board may grant these participation fees for cases related to proposed detailed routes, changes to the proposed route of a pipeline or an international line, or an electrical transportation line. In other non-related cases, if an interested party intervenes, they have to assume the costs. It is clear to us that this seriously impedes the participation of organizations dedicated to protecting consumers and whose interest in participating in Board activities is self-evident.

Indeed, organizations that devote themselves to protecting residential consumers in Canada, such as Option Consommateurs, are community groups with limited financial resources who are unable to assume the expensive participation fees. The absence of residential consumers in fee

cases handled by the Board, including regulation negotiation sessions, are a reflection of insurmountable financial barriers.

The National Energy Board currently constitutes an exception to the rule in Canada, both at the federal and provincial levels. At the federal level, the Canadian Radio-television and Telecommunications Commission (CRTC), the only organization having mandates and responsibilities similar to National Energy Board, provides the reimbursement of participation fees for groups in the field of telecommunications. There is no such provision for radiobroadcasting, but the S-24 Bill project submitted in October 2000 aims at enabling such a reimbursement. The bill was not passed because of the start of the federal election campaign process in November 2000.

At the provincial level, all five registered economic regulation organizations with powers similar to those of the National Energy Board have the authority of granting fees to participants. Indeed *the Public Utilities Board of Alberta, the Manitoba Public Utilities Board, the Ontario Energy Commission, the British Columbia Utilities Commission and the Régie de l'énergie du Québec* provide for a representation and expertise fee reimbursement mechanism that facilitates the participation of groups who have less financial means.

The United States have a somewhat different approach when it comes to consumer advocacy. The general practice is for the State Legislative Assembly to create an independent organization, a Consumer Advocate, whose only purpose is to represent and defend the interests of consumers during sessions held by public service organizations. In the majority of cases the Consumer Advocate is a distinct division of the Office of the Attorney General and has a separate budget. The Consumer Advocate's mandate is to defend the interests of consumers in general whether they are residential, agricultural, commercial, institutional or industrial, and to represent them before economic regulation organizations as well as state and federal courts.

In light of the different practices recorded in North America, Option Consommateurs believes that the legislative aspect is a much more interesting and effective way to ensure that the interests of Canadian consumers are well represented before the National Energy Board. This solution implies that changes be made to the National Energy Board Act to enable them to authorize the payment of participation fees to individuals or legal entities whose interest in participating in Board debates is obvious. If the Consumer Advocate solution is indeed interesting, Option Consommateurs thinks however that it does not meet the needs of consumers.

First of all, this solution does not give a voice to consumers that is as direct as their representation through their independent protection organizations. If consumer groups can influence the content of Consumer Advocates' representation, the latter have the last word pertaining to recommendations, arguments, submission of proof, witnesses and cross-examination of witnesses testifying for other parties involved in the different cases.

Secondly, despite a certain independence from the regulating organization he answers to, the Consumer Advocate is nevertheless more or less tied to the organization's interests and cannot benefit from the same latitude as independent consumer protection organizations while defending the interests of the group he represents.

Thirdly, the Consumer Advocate can impede the efficiency of the Canadian consumer association movement in the area of energy transport, by reducing his own prospects of exercising and

developing expertise in this matter. This expertise can be developed only through direct intervention by consumer rights advocacy groups.

Option Consommateurs therefore recommends that the National Energy Board Act be modified so that the Board may have the authority to provide participation fees to public interest groups that are deemed useful and relevant to the debates.

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## **1. Introduction**

The objective of the present report is to portray Canadian consumer advocacy during the National Energy Board's regular sittings and to propose solutions in order to improve this advocacy. Since it first began its involvement in the Régie de l'énergie du Québec's regulating activities, Option Consommateurs has progressively realized the entire importance of the National Energy Board to Canadian consumers.

Indeed, the Board has very important duties and powers and its decisions have a direct economic impact on Canadian consumers of all regions because they influence a great number of sectors that are the basis for all Canadian economic activity : the transportation between provinces of hydrocarbons on pipelines, the international transportation of electricity, the export of electricity, of natural gas, the exploration and production of oil and natural gas in certain pioneer regions, etc. These decisions certainly affect Canadian consumers by ultimately being reflected in prices on the Canadian markets.

Nevertheless, despite the National Energy Board's importance to Canadian consumers, the latter remain mostly absent from the debates handled by the Board during its regular sittings. The main parties represented during pipeline transporter fee hearings are always gas and oil companies, such as local distributors and manufacturers of thermal electricity. None of these entities have interests that are compatible with those of the final Canadian consumers, i.e. the residential consumers.

This report attempts to explain the reasons behind the absence of residential consumers from the debates held before the National Energy Board and submits recommendations to make up for this absence. The report is divided into three main sections. After a general introduction of Option Consommateurs and the National Energy Board, section 4 discusses the economic and regulation aspects in the field of energy as well as current and future developments ; section 5 discusses the problem of lack of representation of residential consumers during the Board's regular sittings and compares the powers of the Board in comparison to similar organizations in Canada and in the United States. Finally, the sixth section proposes various solutions that promote an effective advocacy of residential consumers before the National Energy Board.

## **2. Introducing Option Consommateurs**

Option Consommateurs was founded in 1983. Its mission is to defend and promote the interests of low income consumers, inform consumers of their rights and the legal recourse they have, and represent their interests before decision making organizations, companies and various other entities.

The organization is active in many sectors, especially in the field of energy, financial services, the food industry, health, the protection of confidential information, insurance, international trade and more. The organization offers a variety of free services to the population, such as budget consulting, legal information and assistance to consumers who want to lodge complaints against companies and public services. Furthermore Option Consommateurs publishes a quarterly magazine called *Consommation*, which informs the public at large on various subjects related to consumers.

In the energy sector, Option Consommateurs has been an active intervenor before the Régie de l'énergie du Québec since the implementation of this economic regulation organization in 1997. It has participated in most of the fee hearings of gas distributors and all hearings pertaining to regulation principles in matters of electricity. It has also represented consumers in cases related to consumer complaints. Finally, it offers a free mediation service between energy distributors and consumers who are behind in their payments.

### **3. Introducing the Board: Mandates and responsibilities**

The National Energy Board was founded in 1959. It is an administrative and almost judiciary tribunal having all the powers normally given to a higher court pertaining to appearances at hearings, putting witnesses under oath and questioning them, producing and inspecting documents in reference to the application of their decisions.

The Board is the regulating authority having the competence, among others, to authorize the construction and the exploitation of oil pipelines, gas pipelines, and interprovincial and international production lines and international electricity transportation lines. Furthermore the Board determines the rights and fees of pipeline companies that fall under its jurisdiction and is responsible for ensuring the secure working order of these pipelines. The Board authorizes oil, natural gas and electricity exports. It also has other responsibilities related to the exploration and production of oil and natural gas. Finally, the Board is an adviser to the Canadian Minister of Natural Resources on subjects related to its expertise, meaning economic regulation.

## **4. Economic and regulated context in the field of energy**

### **4.1. The economic context : New sources of energy supply**

The energy sector is one of the sectors that has gone through important growth in the last years. The increase in global oil prices since 1999 has enabled many Canadian companies active in this sector to make record profits<sup>1</sup> and has encouraged them to increase their exploration and production activities, especially in Alberta but also in other areas of the country. The growth of the American economy has caused a considerably greater demand for electricity which, in the United States, is produced more and more with natural gas. Consequently electricity prices on the American markets have enabled Canadian electricity exporting companies, such as Hydro Quebec and BC Hydro, to make important profits. Moreover, the Canadian natural gas prices have considerably increased and reached record highs during the 2000-2001 winter season.

In this context it is not surprising to regularly hear about new pipeline projects aiming at putting together new sources with existing networks, especially to export them to the United States. These new projects are very ambitious : drilling on Nova Scotia's shores (Île-de-Sable and Panuke), the delta and the Mackenzie River valley, gas projects in northern Alaska making necessary a passage towards the south within Canadian borders (through Yukon or the Northwest Territories). In eastern Canada, the Cartier project (an Enbridge and Gaz Métropolitain consortium) aims at opening up the Île-de-Sable oil field to Quebec and Ontario consumers, who would then benefit from an increased rivalry on natural gas molecules.

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<sup>1</sup> National Energy Board 2000 annual report, page 3

#### **4.2. The context of regulation : Important developments**

Under the provisions of part IV of the *National Energy Board Act*, the Board regulates the rights and fees of transporters and makes sure that the rights and other conditions under which the merchandise is transported (natural gas among others) are fair and reasonable. Natural gas pipelines are generally monopolies and must therefore be regulated by strict rules if they are to be kept from taking advantage of their situation to unduly increase their profits at the prejudice of consumers.

In the gas industry recent and undergoing developments in certain provinces will bring about important changes to the sort of clients served by pipeline transporters, beginning with the nature of the relationship that transporters will have with their clients. We believe it is essential to take these profound changes into account in order to demonstrate the importance of increasing residential consumer advocacy.

A transporter's regular clients are relatively homogeneous with regard to one another. They are either natural gas manufacturing companies who have to send their merchandise from a point of entry, onto the transport network and up to a point of delivery (exports are an example), or local public utility companies (such as Gaz Métropolitain and Union Gas) who purchase natural gas at one location (the Alberta border for example) to have it shipped to their local distribution franchise. The shippers, as they are called, attempt to minimize their average transportation costs as much as possible while maximizing the use of their transportation capacity. Public utilities in particular use the diversity of their clientele (winter consumers, temporary or seasonal) to optimize costs. Despite the fact that the purchase of natural gas in Canada was deregulated in 1985 and although the final consumers are free to buy the amount of natural gas they need from the supplier of their choice, the transport of natural gas has essentially always been under the control of public utility companies.

Recently however, important debates in Ontario and Quebec have caused regulators from these provinces to enable end of the line consumers to acquire their own transport capacity on the TransCanada Pipelines network and other pipeline transporters in southern Ontario, by putting in place a fully unbundled market. These regulation developments have and will have a major impact on the energy market. It seems necessary to us to explain the terms.

In the case of Union Gas, the southern and western Ontario gas distributor and one of the largest in Canada, the Ontario Energy Board decided that beginning on November 1st 2001, each consumer who prefers direct purchase (as opposed to regulated services) would be given part of the transport capacity included in each contract currently underway between Union Gas and pipeline transporters, bringing natural gas to franchises through a vertical slice methodology.

In the case of Gaz Métropolitain, the Régie de l'énergie du Québec has also begun unbundling services by enabling important industrial natural gas consumers who wish to do so, to take control of the transport capacity reserved for them by Gaz Métropolitain, in accordance with the terms that are a bit different from those in Ontario, beginning on October 1<sup>st</sup> 2001. Furthermore, regulations negotiated between parties pertaining to the 2002 fees open the door to middle-ground consumers being able to do the same beginning on October 1<sup>st</sup> 2002.

This transport capacity transfer necessarily means that an individual consumer, for example an industrial company that has many factories spread out among Union Gas franchises, will become

a client of TransCanada Pipelines. From that time onwards, clients of transporters will no longer be homogeneous but rather mixed, as long as each one has a separate consumer profile and very specific needs. More and more, it is expected that the interests of new pipeline transporter clients, those of important industrial consumers and of front line agents, will be represented before the National Energy Board. We have also noticed that the Industrial Gas Users Association (IGUA), as well as many important energy agents, has for a long time played an active role in the TransCanada Pipelines *Toll Task Force*.

As provincial entities unbundle local gas distributor services and as the latter become « wholesalers » of sorts for their franchise's natural gas agents and end of the line consumers, there will no longer be a valid reason why distributors should continue to represent clients before the National Energy Board, as they have done up until now. On the contrary the Board will now become the place where debates between different consumer categories are held, similarly to the Ontario Energy Commission and the Régie de l'énergie du Québec, with the difference that the number of intervenors and the diversity of interests will be far greater.

## **5. Representing residential consumers before the Board : Problems and comparisons**

### ***5.1. Conceptual justification of economic regulations and of the financing of participants***

At the onset, it seems proper to repeat the motives that are the basis for the existence of economic regulation organizations and the participation of intervenors with different interests. The regulated company is a natural monopoly whose clients, consequently, are captive: they have to go through that particular company to have their needs met pertaining to energy transport and distribution. Two sorts of behaviors can be a consequence of the implementation of regulation by an organization such as the National Energy Board. First of all, since the information on the company's costs and revenue is released by the company itself, the temptation is very strong to take advantage of the one-sided flow of information which is the logical consequence. The frequent repercussion is under estimated sales forecasts, which unnecessarily increases the cost of rights as well as end of the year surplus earnings that are distributed among shareholders.

In this connection, since the rate of return on the base rate is regulated, the company's objective will then be to increase the base rate by over-investing its capital (Averch-Johnson effect). Sales estimates originating from this information one-sidedness will justify additional investments<sup>2</sup>.

The difficulty with economic regulation organizations such as the National Energy Board is that administrative tribunals are submitted to the same burden of proof as civil courts. In particular, members of a panel, commission members or managers, whatever they are called, have to base their decisions on proof. To counterbalance this information one-sidedness, the regulator's staff contributes to the process by making sure that the files are sufficiently complete to enable decision makers to make the best decisions possible. However, this could also be achieved by

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<sup>2</sup> Please note that the behaviors presented here are without any nuance and that regulated companies are subtle when they go before economic regulation organizations. Nevertheless, these behaviors can be observed through the eyes of experts.

enabling the participation of intervenors in these hearings. These participants, whether they are residential, industrial or environmentalists, have interests that are in general far different from those of the regulated company (for example reducing operating costs) and want those interests to be known by the regulator. As long as they have enough informational and financial resources, these intervenors can be useful in these debates and influence the first instance regulator.

However when certain interested parties don't have the necessary financial resources to participate in these debates, it may then be in the public's interest to reasonably support them if this can enable the regulator to make the decisions that are in the best interest of the public. Financing the participation of certain intervenors, by reducing the discrepancy of financial means and by therefore improving the level playing field between the parties<sup>3</sup>, helps to eliminate the problems caused by information one-sidedness and lessens its impacts on consumers.

When reading the *National Energy Board Act*, we observe that no provision has been made to enable the Board to grant fees to public service organizations in order to facilitate their participation in their regular activities. The absence of power to our knowledge applies only to the *National Energy Board Act* in this instance when compared to the laws that govern most other economic regulation organizations in Canada and the United States.

In the following sub-sections, we will review the Board's legislation as well as other laws that constitute other similar organizations in Canada pertaining to supporting public participation in these organizations' regular activities. We will also take a look at the practice of Consumer Advocates, through which American states create an organization aiming at the defense and promotion of consumer interests before economic regulation organizations.

## **5.2. Powers of the Board relating to participation fees : Very limited**

According to the Act, the only cases where the Board can legally provide participation fees are those related to a pipeline's, or an international or interprovincial electricity transport line's proposed detailed route or modifications to that route. In these cases, admissible participation fees have to be related to the presentation of observations during a public hearing.

Observations can come from an owner opposed to the proposed detailed route or from another interested party, whether an individual or legal entity, also opposed to that proposed detailed route, without the latter being owners themselves of a land affected by this proposed detailed route, as stated in paragraphs (3) and (4) of Article 34 of the Act:

### **Written statement of interest and grounds for opposition**

34. (3) *Where an owner of lands who has been served with a notice pursuant to subsection (1) wishes to oppose the proposed detailed route of a pipeline, the owner may, within thirty days of being served, file with the Board a written statement setting out the nature of the owner's interest in the proposed detailed route and the grounds for his opposition to that route.*

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<sup>3</sup> Furthermore, please note that the concept of a *level playing field* has more scope than between the regulated company and the intervenors, since it also applies to between the intervenors, the latter having contradictory interests on various subjects.

**Opposition by persons adversely affected**

*(4) A person who anticipates that his lands may be adversely affected by the proposed detailed route of a pipeline, other than an owner of lands referred to in subsection (3), may oppose the proposed detailed route by filing with the Board within thirty days following the last publication of the notice referred to in subsection (1) a written statement setting out the nature of that person's interest in those lands and the grounds for the opposition to the proposed detailed route of the pipeline.*

After such opposition has been recorded, the Board has to hold hearings by virtue of Article 35 :

**Public hearing**

*35. (1) Where a written statement is filed with the Board pursuant to subsection 34(3) or (4) within the time limited for doing so under that subsection, the Board shall forthwith order that a public hearing be conducted within the area in which the lands to which the statement relates are situated with respect to any grounds of opposition set out in any such statement.*

*(...)*

**Opportunity to be heard**

*(3) At the time and place fixed for the public hearing pursuant to subsection (2), the Board shall hold a public hearing and shall permit each person who filed a written statement with the Board pursuant to subsection 34(3) or (4) to make representations and may allow any other interested person to make such representations before it as the Board deems proper.*

Therefore, by virtue of Article 35 (3), virtually any individual or legal entity, owner or non owner of a land affected by a proposed detailed route, as long as they show interest in this request, has the opportunity of going before the National Energy Board to present observations deemed acceptable.<sup>4,5</sup> Finally, the Board can order the reimbursement of fees brought about by the presentation of observations by an interested party during a public hearing, if they are judged acceptable, in accordance with Article 39:

**Costs of making representations**

*39. The Board may fix such amount as it deems reasonable in respect of the actual costs reasonably incurred by any person who made representations to the Board at a public hearing under subsection 35(3) and the amount so fixed shall be payable forthwith to that person by the company whose pipeline route is affected by the public hearing.*

In other cases not related to the proposed detailed route of a pipeline or an electrical transport line, a party wishing to intervene must assume the costs. It is clear to us that this seriously

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<sup>4</sup> Typically, this could be a case where an environmental organization gives observations on the direct impact of the proposed detailed route on the local environment, unless the *Canadian Environmental Assessment Act* applies .

<sup>5</sup> Please note that in certain occasions, it is possible for an interested party to obtain financing from the *Canadian Environmental Assessment Agency*, if these occasions pertain to questions on the environmental impact of a project necessitating such an evaluation before its construction, in accordance with the *Canadian Environmental Assessment Act*. Financial aid, limited to \$ 30 000, promotes public participation in these preliminary and extensive evaluations , mediations and commissions.

impeded the participation of organizations devoted to the protection of consumers before the Board, their interest being self-evident.

Indeed, organizations that devote themselves to protecting residential consumers in Canada, such as Option Consommateurs, are community groups with limited financial resources who are unable to assume the expensive participation fees. These fees are varied: analysis, expertise, legal fees, travel (transport, accommodations, meals), translation, general fees, etc., and are very significant. The absence of residential consumers in fee cases handled by the Board, including regulation negotiation sessions, are a reflection of insurmountable financial barriers.

### **5.3. Comparisons**

In order to demonstrate that the National Energy Board, pertaining to providing participation fees, constitutes an exception to the rule in Canada, we will review the current federal and provincial legislation. This legislation review will enable us afterwards to make recommendations.

#### **5.3.1. At the Canadian federal level**

At the federal level the only other organization with mandates and responsibilities similar to those of the National Energy Board is the Canadian Radio-television and Telecommunications Commission (CRTC). The CRTC obtains its authority from many laws on different subjects. As its name indicates, the CRTC is active in two important sectors: radio-television and telecommunications. The legislative context, in relation to participation fees pertaining to the CRTC, is not the same in these two sectors.

#### The case of the CRTC – telecommunications sector

For cases touching on telecommunications, such as local and inter-city telephone communications, the CRTC has all powers necessary to promote the public's participation at hearings. The CRTC has the authority under Article 56 of the *Telecommunications Act* of 1993:

*[Award of costs]*

56. (1) *The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.*

*[Payment of costs]*

(2) *The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs*

For example, here is an excerpt from the 2001-10 CRTC Costs Order published on July 17<sup>th</sup> 2001:

*Direction as to costs*

9. *The application for an award of costs in respect of the above-mentioned*

*proceeding is approved. Pursuant to subsection 56(1) of the Telecommunications Act, the Commission fixes the costs to be paid to ARC at \$2,015.65*

*10. Costs awarded herein shall be paid by TELUS Québec forthwith<sup>6</sup>*

### The case of the CRTC – radio-television sector (Bill S-24 project)

The *Broadcasting Act* does not provide for participation fees for the public. However, the radio-television sector is currently going through major upheavals because among others of the convergence of media and public service companies (Québecor Medias purchased Vidéotron and TVA, Bell Globemedia purchased the CTV and TQS networks). Although the CRTC invites the population to participate in these hearings, it is very difficult for a community group to comprehend all the implications related to this convergence, for example, without using external consultants.

To make up for this gap, Manitoba Senator Sharon Carstairs submitted to the Senate in 2000, a short Bill project aiming at giving the CRTC the authority to provide public participation fees. Here is the S-24 Bill project:

*1. The Broadcasting Act is amended by adding the following after section 9:*

*“Award of costs*

*9.1 (1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.*

*Payment of costs*

*(2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.”*

*2. Subsection 10(1) of the Act is amended by deleting the word "and" at the end of paragraph (j) and by adding the following paragraph:*

*(j.1) establishing the criteria for the awarding of costs; and”*

It is interesting to note that following a question by Senator Hays to Senator Kinsella, Senator Gauthier had research done to find out whether administrative tribunals other than the CRTC have the same authority to provide fees to participants. On October 17th 2000, the Senator briefed the Canadian Senate on the findings. According to him, many similar tribunals have this authority under their respective charters. Beginning by noting that the CRTC already has this authority by virtue of Article 56 of the *Telecommunications Act* for the sector of Canadian telecommunications, he indicated that the Canadian Transportation Agency, the Canadian Cultural Property Export Review Board, the Employment Equity Review Tribunals and the

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<sup>6</sup> Source: <http://www.crtc.gc.ca/archive/FRN/Costorders/2001/Co2001-10.htm>.

National Energy Board, as well as many other provincial public service regulation organizations also have this authority<sup>7</sup>.

Unfortunately, the beginning of the federal general election campaign process in November 2000 meant that the Bill was not passed. When the campaign began, the Bill had passed its second reading<sup>8</sup>.

### **5.3.2. At the Canadian provincial level**

The provincial public services regulation organizations have the responsibility of making sure that public service fees and supply conditions are fair and reasonable for consumers and for the company's shareholders, by approving among others their investments and the expenses necessary for the proper running of operations, by checking on their activities and by determining a reasonable rate of return on shareholder assets.

Each of the five registered provincial economic regulation organizations with powers similar to those of the National Energy Board have the authority to provide participation fees to intervenors. Here are the Articles pertaining to financing for each of these five organizations:

#### The case of Alberta

Until 1995, regulation for public service organizations was ensured by the *Alberta Public Utilities Board*. This organization, by virtue of its Article 60, had the authority of providing participation fees to intervenors in accordance with their conditions:

##### *Costs of proceedings*

**60(1)** *The costs of and incidental to any proceeding before the Board, except as otherwise provided in this Act, are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.*

**(1.1)** *The Board may order that its costs of or incidental to any proceeding before the Board are to be paid and by whom they are to be paid.*

**(2)** *The Board may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.*

**(3)** *The Board may prescribe a scale under which costs are to be taxed.*

**(4)** *The Board may, with the approval of the Lieutenant Governor in Council, prescribe the fees to be paid by local authorities or persons interested in the matters that come before the Board.*

In 1995, the *Public Utilities Board* was replaced by the *Alberta Energy and Utilities Board* which, by virtue of Article 10(1) of its charter, has the same powers and duties as the *Public Utilities Board*:

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<sup>7</sup> Please see Senator Jean-Paul Gauthier's speech before the Senate on October 17<sup>th</sup> 2000. Source: [http://www.parl.gc.ca/36/2/parlbus/chambus/senate/deb-f/81db\\_2000-10-17-F.asp?Language=F&Parl=36&Ses=2](http://www.parl.gc.ca/36/2/parlbus/chambus/senate/deb-f/81db_2000-10-17-F.asp?Language=F&Parl=36&Ses=2).

<sup>8</sup> The second reading took place on October 17th 2000.

*Powers of the Board*

*10(1) For the purposes of carrying out its functions, the Board has all the powers, rights and privileges of the ERCB and the PUB that are granted or provided for by any enactment or by law.*

Therefore, the *Alberta Energy and Utilities Board* maintained the authority to provide fees, just as its predecessor, i.e. the *Public Utilities Board*.

The case of Manitoba

The *Manitoba Public Utilities Board* also has the authority to provide participation fees to intervenors at hearings, by virtue of Article 56 of its charter :

*COSTS*

*Costs in discretion of Board*

*56(1) The costs of, and incidental to, any proceeding before the Board are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed..*

*Order for payment of costs*

*56(2) The Board may order by whom, and to whom, any costs are to be paid, and by whom the costs are to be taxed and allowed..*

*Scale of costs*

*56(3) The Board may prescribe a scale under which the costs shall be taxed.*

The case of Ontario

The *Ontario Energy Board* gets its authority from Article 30 of its charter, which went through profound changes in 1998 in order to include the implementation and the supervision of a deregulated natural gas and electricity market on Ontario territory.

*Costs*

*30. (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be assessed. 1998, c. 15, Sched. B, s. 30 (1).*

*Same*

*(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be assessed and allowed. 1998, c. 15, Sched. B, s. 30 (2).*

*Scale*

*(3) The Board may prescribe a scale under which such costs shall be assessed. 1998, c. 15, Sched. B, s. 30 (3).*

*Inclusion of Board costs*

*(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board. 1998, c. 15, Sched. B, s. 30 (4).*

*Considerations not limited*

*(5) In awarding costs, the Board is not limited to the considerations that*

*govern awards of costs in any court. 1998, c. 15, Sched. B, s. 30 (5).*

The Ontario case is particularly interesting. Up until a few years ago, the Ontario Energy Board, in addition to permitting the public's participation through financing provided for by its charter, had also implemented a staff organizing model which improved consumer representation even more. Indeed, the Ontario Energy Board's personnel played a dual role : on one hand it assumed the traditional role of supporting representatives, by making sure that all procedures were adequately followed, and that all items were covered, and that the information contained in files was complete enough to enable proper decision making ; on the other hand the personnel also acted as an advocate of public interest at hearings, having the authority to submit proof, cross-examine witnesses and present arguments at the closing of a hearing.

The Board has since then abandoned this dual role, thinking that many groups financed by virtue of its laws, already defended the interests of consumers and of the environment. However, it did not completely abandon the concept either : when there a few or no intervenors in a particular file and therefore no opposition to the request, file representatives may ask personnel to play the role of concerned party at the hearing, by submitting written requests for information, by negotiating the settlement of disputes, by submitting proof and by arguing at the closing of a hearing. This alternative is used mostly in files from small regulated companies and also in files related to company assets (for example, extensions and network reinforcements).

### The case of British-Columbia

The *British Columbia Utilities Commission* also has the authority to provide fees by virtue of Article 118 of the 1996 Act :

#### *Participant costs*

*118 (1) The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.*

*(2) If the commission considers it to be in the public interest, the commission may pay all or part of the costs of participants in proceedings before the commission that were commenced on or after April 1, 1993 or that are commenced after June 18, 1993.*

*(3) Amounts paid for costs under subsection (2) must not exceed the limits prescribed for the purposes of this section.*

### The case of Quebec

The Régie de l'énergie du Québec has the authority of providing fees to people whose participation is deemed useful, in accordance with Article 36 of its charter :

*36. La Régie peut ordonner au transporteur d'électricité ou à tout distributeur d'électricité ou de gaz naturel de payer tout ou partie des dépenses relatives aux questions qui lui sont soumises et à l'exécution de ses décisions ou ordonnances.*

*Elle peut ordonner au transporteur d'électricité ou à tout distributeur d'électricité ou de gaz naturel de verser, tout ou partie des frais, y compris des frais d'experts, aux personnes dont elle juge la participation utile à ses délibérations.*

*Lorsque l'intérêt public le justifie, la Régie peut payer de tels frais à des groupes de personnes réunis pour participer aux audiences publiques.*

Before its creation in 1997, its predecessor the Régie du gaz naturel du Québec, had similar powers by virtue of Article 30 of its charter :

*Dépenses*

*30. La Régie adjuge à sa discrétion sur les dépenses relatives aux affaires de son ressort et à l'exécution de ses décisions.*

*Frais*

*La Régie peut ordonner à un distributeur de payer, en totalité ou en partie, des frais, y compris des frais d'experts, aux personnes dont elle juge la participation utile à ses délibérations.*

### **5.3.3. American comparisons: "Consumer Advocates"**

American jurisdictions have a somewhat different approach when it comes to consumer representation. We consulted the websites of many American states and their respective economic regulation organizations and reviewed a certain number of decisions pertaining to fee hearings. Among these jurisdictions, we selected five in different regions of the United States in order to analyze their methods in relation to the financing of public participation and the advocacy of consumers during economic regulation organization debates.

The general practice in the United States is that State legislatures create independent organizations, called Consumer Advocates, whose only function is to advocate and defend consumer interests during public utilities hearings. In most cases, Consumer Advocates are a distinct section within the State Attorney General's Office and have a separate budget as well.

The Consumer Advocate's mandate is to defend and advocate the interests of consumers in general, whether residential, agricultural, commercial, institutional or industrial, before economic regulation organizations and federal and state courts. Here are five examples whereby a Consumer Advocate was created and represents local consumers:

#### Ohio

*The Ohio Consumers' Counsel* represents residential consumers :

*§ 4911.02 Powers and duties.*

*(...)*

*(2) Without limitation because of enumeration, the counsel:*

*(a) Shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters;*

*(b) May take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission;*

(c) *May institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission;*

(d) *May conduct long range studies concerning various topics relevant to the rates charged to residential consumers*<sup>9</sup>.

He can also represent municipal corporations. The OCC answers to the Ohio Attorney General.

In 1999, the OCC employed 74 people and had a 6,7 million dollar (U.S.)<sup>10</sup> budget. Its financing is provided with fees from regulated companies, by virtue of article 4911.18 of the *Ohio Revised Code*.

## Missouri

The *Missouri Office of the Public Counsel* is a distinct division of the Economic Development Department. The *Public Counsel* is named by the director of this department and represents the interests of public utility consumers. He derives his powers and duties from Article 386.710 of chapter 386 of the *Missouri Revised Statutes*:

386.710. 1. *The public counsel shall have the following powers and duties:*

(1) *He shall employ a staff or hire on a contract basis such employees and experts as are necessary to carry out the purposes and responsibilities of his office, and shall set their compensation within the appropriation made for that purpose;*

(2) *He may represent and protect the interests of the public in any proceeding before or appeal from the public service commission;*

(3) *He shall have discretion to represent or refrain from representing the public in any proceeding. He shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. (...)*

2. *The public counsel shall be served with all proposed tariffs, initial pleadings, and applications, in all proceedings before the public service commission, and shall be served with a copy of all orders of the commission.*

(...)

4. *He shall have all powers necessary or proper to carry out the duties specified in this section*<sup>11</sup>.

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<sup>9</sup> Sources: Ohio Revised Code, Chapter 4911: Consumers' Counsel and the OCC website: <http://www.state.oh.us/cons/>.

<sup>10</sup> For the source of Consumer Advocate budgets, please see *infra*, note 17.

<sup>11</sup> Source: <http://www.moga.state.mo.us/statutes/C300-399/3860710.HTM>.

The OPC's budget for 1999 was close to one million dollars U.S. The Office employed 16 people. It wasn't possible for us to determine how they obtain their financing. The Office supposedly receives its money directly from the State.

## Florida

The *Public Counsel* of Florida is named by a bi-partisan committee of the Florida Legislative Assembly. He represents the people of the State during public hearings of the *Public Service Commission* of Florida and other federal organizations. He derives his powers and duties from Article 350.0611 of the Florida Statutes :

**350.0611 Public Counsel; duties and powers.**—*It shall be the duty of the Public Counsel to provide legal representation for the people of the state in proceedings before the commission and in proceedings before counties pursuant to s. 367.171(8). The Public Counsel shall have such powers as are necessary to carry out the duties of his or her office, including, but not limited to, the following specific powers:*

*(1) To recommend to the commission or the counties, by petition, the commencement of any proceeding or action or to appear, in the name of the state or its citizens, in any proceeding or action before the commission or the counties and urge therein any position which he or she deems to be in the public interest, whether consistent or inconsistent with positions previously adopted by the commission or the counties, and utilize therein all forms of discovery available to attorneys in civil actions generally, subject to protective orders of the commission or the counties which shall be reviewable by summary procedure in the circuit courts of this state;*

*(2) To have access to and use of all files, records, and data of the commission or the counties available to any other attorney representing parties in a proceeding before the commission or the counties;*

*(3) In any proceeding in which he or she has participated as a party, to seek review of any determination, finding, or order of the commission or the counties, or of any hearing examiner designated by the commission or the counties, in the name of the state or its citizens;*

*(4) To prepare and issue reports, recommendations, and proposed orders to the commission, the Governor, and the Legislature on any matter or subject within the jurisdiction of the commission, and to make such recommendations as he or she deems appropriate for legislation relative to commission procedures, rules, jurisdiction, personnel, and functions; and*

*(5) To appear before other state agencies, federal agencies, and state and federal courts in connection with matters under the jurisdiction of the commission, in the name of the state or its citizens<sup>12</sup>.*

The Office had a 1999 budget of 2,7 million dollars U.S. and employed 28 people. The Office is an organization that answers to the Florida Legislature and its financing is funded by the latter's State budget.

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<sup>12</sup> Source: [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&URL=Ch0350/ch0350.htm](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0350/ch0350.htm).

California

The *Office of Ratepayers Advocates* is a division of the *California Public Utilities Commission* in accordance with Article 309.5 of the 1996 *Public Utilities Code*. By virtue of this Article, the ORA represents consumer and public utility customer interests before the CPUC. The Commission provides a separate budget and determines the number of employees that the ORA may hire. The wording of Article 309.5, prior to January 1st 2002, gave the ORA powers that are similar to those of Consumer Advocates mentioned above; Here are both versions:

*309.5. (a) There is within the commission a division to represent the interests of public utility customers and subscribers in commission proceedings. The goal of the division shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels.*

*(b) The director of the division shall be appointed by and serve at the pleasure of the Governor, subject to confirmation by the Senate. The director shall annually appear before the appropriate policy committees of the Assembly and the Senate to report on the activities of the division.*

*(c) The commission shall, by rule or order, provide for the assignment of personnel to, and the functioning of, the division. The division may employ experts necessary to carry out its functions. Personnel and resources shall be provided to the division at a level sufficient to ensure that customer and subscriber interests are fairly represented in all significant proceedings.*

*(d) The commission shall develop appropriate procedures to ensure that the existence of the division does not create a conflict of roles for any employee or his or her representative. The procedures shall include, but shall not be limited to, the development of a code of conduct and procedures for ensuring that advocates and their representatives on a particular case or proceeding are not advising decisionmakers on the same case or proceeding.*

*(e) The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission provided that any objections to any request for information shall be decided by the assigned commissioner or by the president of the commission if there is no assigned commissioner.*

*(f) There is hereby created the Public Utilities Commission Ratepayer Advocate Account in the General Fund. Moneys from the Public Utilities Commission Utilities Reimbursement Account in the General Fund shall be transferred in the annual Budget Act to the Public Utilities Commission Ratepayer Advocate Account. The funds in the Public Utilities Commission Ratepayer Advocate Account shall be utilized exclusively by the division in the performance of its duties. The annual budget for the division shall be separately identified in the commission's annual budget request. The commission shall annually submit a staffing report containing a comparison of the staffing levels for each five-year period.*

*(g) This section shall remain in effect only until January 1, 2002, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2002, deletes or extends that date.*

*309.5. The commission shall create an organization or division within the commission to represent the interests of public utility customers and subscribers in commission proceedings. The commission shall, by rule or order, provide for the assignment of personnel to and the functioning of*

*the organization or division. This section shall become operative on January 1, 2002<sup>13</sup>.*

The ORA's 1999 budget was 12 million dollars U.S. and they employed 126 people.

Please note that the *Public Utilities Code*<sup>14</sup>, by virtue of Articles 1801 to 1812, enables the CPUC to finance consumer group participation in their activities, including expert and legal fees. This way, consumers can be doubly represented.

### Texas

By virtue of paragraph 13 of the *Texas Utilities Code*<sup>15</sup>, the *Office of Public Utility Counsel* represents residential and small business consumers. The *Counsellor* is named by the Governor of Texas for a two-year mandate and with the approval of State Senate. He holds his powers in accordance with paragraph 13.003 of the *Code*:

*§ 13.003. Office Powers and Duties*

*(a) The office:*

- (1) shall assess the effect of utility rate changes and other regulatory actions on residential consumers in this state;*
- (2) shall advocate in the office's own name a position determined by the counsellor to be most advantageous to a substantial number of residential consumers;*
- (3) may appear or intervene, as a party or otherwise, as a matter of right on behalf of:*
  - (A) residential consumers, as a class, in any proceeding before the commission, including an alternative dispute resolution proceeding; and*
  - (B) small commercial consumers, as a class, in any proceeding in which the counsellor determines that small commercial consumers are in need of representation, including an alternative dispute resolution proceeding;*
- (4) may initiate or intervene as a matter of right or otherwise appear in a judicial proceeding:*
  - (A) that involves an action taken by an administrative agency in a proceeding, including an alternative dispute resolution proceeding, in which the counsellor is authorized to appear; or*
  - (B) in which the counsellor determines that residential electricity consumers or small commercial electricity consumers are in need of representation;*
- (5) is entitled to the same access as a party, other than commission staff, to records gathered by the commission under Section 14.204;*

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<sup>13</sup> Source: <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=00001-01000&file=301-327>.

<sup>14</sup> To take a complete look at the *Public Utilities Code*, go to the following website : <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=puc&codebody=&hits=20>.

<sup>15</sup> To take a complete look at the *Public Utilities Code*, go to the following website: <http://www.capitol.state.tx.us/statutes/uttoc.html>.

- (6) is entitled to discovery of any nonprivileged matter that is relevant to the subject matter of a proceeding or petition before the commission;
  - (7) may represent an individual residential or small commercial consumer with respect to the consumer's disputed complaint concerning utility services that is unresolved before the commission; and
  - (8) may recommend legislation to the legislature that the office determines would positively affect the interests of residential and small commercial consumers.
- (b) This section does not limit the authority of the commission to represent residential or small commercial consumers.
- (c) The appearance of the counsellor in a proceeding does not preclude the appearance of other parties on behalf of residential or small commercial consumers. The counsellor may not be grouped with any other party<sup>16</sup>.

In 1999, the Office had a budget of 1,7 million dollars U.S. and employed 22 people. Most of the financing originates from taxes on public service revenue, in accordance with the 1975 Texas *Public Utilities Regulatory Act*.

#### **5.3.4. Comparing consumer advocacy budgets**

The *Texas Office of Public Utility Counsel* made public, on June 1st 2000, its five-year strategic plan for 2001-2005, aiming at improving the services they offer to the Texas population. In order to justify their additional needs in terms of financial and human resources for their regular activities, the Office made a comparative study of Consumer Advocate resources throughout the United States.

Here is a part of the data presented in the study, which compared around fifty registered organizations.

**Comparing consumer advocacy budgets, 1999<sup>17</sup>**

<b>Advocate</b>	<b>1999 budget (\$ US)</b>	<b>Number of employees</b>	<b>Regulated companies</b>
California	12 000 000\$	126	1446
Florida	2 700 000\$	28	27
Missouri	973 643\$	16	72
New Jersey	4 000 000\$	39	26

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<sup>16</sup> Source: <http://www.capitol.state.tx.us/statutes/ut/ut001300.html#ut003.13.003>.

<sup>17</sup> For a complete comparative chart, please refer to the following website : <http://www.opc.state.tx.us/Opc99.htm>.

New York	2 813 100\$	32	63
Ohio	6 694 112\$	74	320
Pennsylvania	4 115 000\$	30	474
Texas	1 685 734\$	22	79

On reading this information, it is quickly evident that Consumer Advocate resources vary considerably from one state to another and that there is no direct causal link between a state's population or the number of regulated businesses and Consumer Advocate budgets.

For purposes of comparison, the Texas study indicates also that the 1999 *Public Interest Advocacy Centre* budget was a little over half a million dollars U.S. and employed 7 people. Option Consommateurs received around \$450 000 in 1999 in Energy Commission hearing participation fees. Furthermore, 85% of these fees were paid out to external professionals (lawyers, experts and analysts). Option Consommateurs only employs one person pertaining to the Energy Commission's activities, who divides his time between the three Quebec regulated agencies.

#### **5.4. Conclusion**

The practices we have observed pertaining to consumer advocacy before economic regulation organizations in North America lead us to believe that the absence of representation of residential consumers before the National Energy Board is a real problem. However, as we mentioned in section 4, there are many motives to justify the proper representation of Canadian consumers.

It is our opinion that there are two solutions that are worth exploring in order to make the representation before the all so important Canadian organization, i.e. the National Energy Board, possible. These two solutions are presented below in section 6.

### **6. Possible solutions**

The two possible solutions bring us back to the two representation models introduced in section 5. Please note that Option Consommateurs believes that the legislative approach is far more interesting to ensure proper representation of Canadian consumers before the National Energy Board.

#### **6.1. Legislation**

The most obvious solution, by reading the information above, is the one whereby the *National Energy Board Act* would be amended in order to explicitly provide the Board with the necessary powers to authorize participation fees to individuals or legal entities, whose relevance is self-evident. Changes to the Act would enable the Board to enlarge the scope of its power when it comes to questions pertaining to the proposed pipeline detailed routes.

Modifications to the Act could be the ones proposed by Senator Carstairs in her S-24 Bill project. Such changes would enable the elimination of articles in the Act that invoke the notion of fees to be paid to owners of interested parties pertaining to a proposed pipeline detailed route by a pipeline transporter. Eventual changes could also model themselves on legislation in Canada and the United States pertaining to the participation of organizations that represent consumers.

## **6.2. Regulations and politics**

### **6.2.1. Analyzing the Act**

Despite the lack of Board jurisdiction pertaining to participation fees, another solution is possible. The National Energy Board already has, in accordance with Article 8 of its charter, almost all of the latitude necessary to put the Consumer Advocate model in place.

*8. The Board may make rules respecting*

*(a) the sittings of the Board;*

*(b) the procedure for making applications, representations and complaints to the Board and the conduct of hearings before the Board, and generally the manner of conducting any business before the Board;*

*(c) the apportionment of the work of the Board among its members, and the assignment of members to sit at hearings and to preside thereat; and*

*(d) generally, the carrying on of the work of the Board, the management of its internal affairs and the duties of its officers and employees.*

According to article 8.d), it is at the Board's discretion to establish the rules pertaining to internal operations and the different roles that the staff can play. Reading this article leads us to believe that the Board could divide their staff into two groups : one would support the membership of the Board, the other would staff the Consumer Advocate Office, in a similar way to Ontario for certain cases. Furthermore, Article 24.1 (1) indicates that the Board recovers its expenses from companies operating a pipeline or an international or interprovincial electricity line, in accordance with a calculation method determined by a regulation.

*Regulations imposing fees, etc.*

*24.1 (1) Subject to the approval of the Treasury Board, the National Energy Board may, for the purposes of recovering all or a portion of such costs as the National Energy Board determines to be attributable to its responsibilities under this or any other Act of Parliament, make regulations*

*(a) imposing fees, levies or charges on any person or company authorized under this Act to*

*(i) construct or operate a pipeline or an international or interprovincial power line,*

*(ii) charge tolls,*

*(iii) export or import oil or gas, or*

*(iv) export electricity; and*

*(b) providing for the manner of calculating the fees, levies and charges in respect of the person or company and their payment to the National Energy Board.*

Reading those two articles, combined with the Board making organizational choices pertaining to staff responsibilities, enables us to believe that it is among its attributes to establish and financially support duties that are distinct from its operations aiming specifically at protecting Canadian consumers. However, there is one important condition related to exercising this option: the Board must receive the approval of the Treasury Board to impose rights, royalties or fees falling under its jurisdiction (article 21.1 (1), sub-paragraph a)). This therefore implies that the Board make a request to the Treasury Board.

### **6.2.2. Mandates and responsibilities of Consumer Advocates**

Consumer Advocates would have the mandate of advocating and defending the interests of Canadian consumers before the National Energy Board, meaning at public hearings, settlement negotiations and all other hearings where the interest of Canadian consumers would be affected. More specifically, the Advocate's mandate would be to obtain the most advantageous fee conditions and the most reliable and secure service from regulated organizations. In relation to the scope of his mandate, it is our opinion that the Consumer Advocate's mandate should be limited to defending the consumer categories that are not already represented before the Board. Indeed, if certain fee conditions are currently in the position of being represented before the Board at their expense, they should be able to do so in the future as well.

As far as internal policies go, the Advocate should be separate from the rest of the Board and consequently, mechanisms should be put in place to tighten the access of confidential information for each staff branch, in order to ensure confidentiality to other parties (among others a code of ethics and the prohibition of the exchange of information between the staff of the Consumer Advocate's Office and the rest of the staff employed by the Board). The budget of the Consumer Advocate would also be separate from the remainder of the Board's budget, but gained back by the latter through the fees, levies and charges payable by regulated companies, by virtue of Article 24.1 (1). The budget would total a reasonable amount in order to enable effective implication in cases, in view of the number of regulated companies and the number of files. This could imply in certain occasions, the hiring of outside specialists or consultants, for the purpose of submitting testimony or only to aid and assist the staff of the Consumer Advocate's Office.

The Advocate would benefit from the same procedural rights as the other parties during Board hearings, that is to say would have access to public information and in the case of settlement negotiations, to confidential information shared with other parties, and would also have the right to submit proof, to hear witnesses and cross-examine witnesses of other parties and finally, to argue a case at the closing of the hearing.

Finally, the Advocate should make sure that his own position is in accordance with the position of groups devoted to the protection of energy consumers, by organizing among others, national consulting meetings with these groups and also, on certain occasions, by giving them precise mandates helping the Advocate to fulfill his duties.

### **6.2.3- The limits of the protection provided by Consumer Advocates**

If the Consumer Advocate solution is an interesting one, it also has limits that are susceptible of offering less protection to consumers. On one hand, this solution does not give consumers a voice as direct as the representation they have through their independent protection agencies. If consumer groups can influence the content of the actions taken by the Consumer Advocate, the latter has the last word as to content of recommendations, arguments, proof submission, witness testimonies or cross-examinations of witnesses from other parties who interfere in different cases. Direct representation through their associations is the only way that can ensure them the determining of their own recommendations as well as their own intervention strategies. This direct advocacy can be ensured only if representation fees are implemented.

Secondly, despite a certain independence from a regulatory organization, the Consumer Advocate is nevertheless more or less tied to the organization's interests and cannot benefit from the same latitude as independent consumer protection agencies, pertaining to the defense of interests of the group he is supposed to represent. Even if the Consumer Advocate is separated from the rest of the Board and that certain provisions aiming at preserving this independence are put in place, the Consumer Advocate is nevertheless a member of the Energy Board. In this case we believe that the Consumer Advocate could oppose with more difficulty certain positions of the regulatory organization if the latter made a decision that is potentially disadvantageous to consumers. The question we submit here is: If the Board votes in favour of the industry as opposed to consumers, would the Advocate have the absolute right to oppose himself to this decision? We are not convinced that the Consumer Advocate would be able to act as independently as a consumer group pertaining to strategic orientations.

Thirdly, the Consumer Advocate could lessen the efficiency of the Canadian consumer movement in the field of energy transportation by reducing their opportunity of developing their own expertise in the field. This expertise can only be developed through direct intervention by consumer interest defense groups. If the latter cannot directly intervene in debates surrounding the transportation of energy and cannot therefore develop an expertise, they cannot adequately give constructive and useful advice to the Consumer Advocate, since the latter would benefit from an informational one-sidedness which would be in his favour. It is our opinion that such a situation would lessen the chances that the decisions made by the organization are to the consumers' advantage.

## **7. Conclusion**

Option Consommateurs believes that it is in the public's best interest that groups representing consumers are able to be heard before the National Energy Board, because the latter's decisions have an important impact on Canadian consumers. It is therefore important for the Board to hear various points of view enabling it to make more educated decisions that are in the best interest of the public.

Moreover, new information from the energy sector leads us to believe that the Board will soon be called upon to play a more important role in a not so distant future. Indeed, from the perspective that the Canadian and American Governments are thinking of increasing their mutual energy market relationship, more specifically pertaining to the transportation of electricity through among others a North-American energy policy, it is of the utmost importance that Canadian consumers, especially residential consumers, be heard by this major public decision maker.

Option Consommateurs firmly believes that the best way to increase representation of residential consumers before the National Energy Board is to ensure the direct participation in Board activities of groups dedicated to defending and promoting consumers' interests. Because of the high cost of such a participation and the limited financial means of consumer advocacy groups, the most appropriate way to ensure this representation is adequate provision for fees pertaining to this participation.

**Option Consommateurs therefore recommends that the *National Energy Board Act* be modified so that the Board may have the authority to provide participation fees to public interest groups that are deemed useful and relevant to the debates.**

### **Drafting the report**

This report was written by Yannick Vennes who up until August 31st 2001, worked at Option Consommateurs. Since September 1<sup>st</sup> 2001, he has worked for *Econalysis Consulting Services Inc.*, a consulting firm specializing in the regulation of public utilities in Canada (energy and telecommunications). Jacques Saint-Amant, consultant for Option consommateurs, also contributed to the writing of the judicial aspects of this report.

The report was reviewed by Mrs Louise Rozon, Director of "Option Consommateurs", and by Mr Patrick Vanasse, head of research and representation. The author gives his warm thanks to both for their precious assistance during the writing of this report.

The report and the proposals it contains are the official opinion of Option Consommateurs on the subject of residential consumer representation before The National Energy Board.