CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF a complaint filed by Cable Watch Citizens' Association ("Cable Watch") pursuant to section 12 of the *Broadcasting Act*, S.C. 1991, c. 11;

AND IN THE MATTER OF a complaint that the *Broadcasting Act* does not permit the CRTC to require cable television subscribers to pay a surcharge to maximize contributions towards a fund designed to encourage the production of Canadian programming;

AND IN THE MATTER OF a complaint that the CRTC failed to properly notify cable television subscribers that it intended to amend the Cable Television Regulations, 1986, so as to permit cable television companies to avoid reducing their fees as of January 1, 1995, and subsequently;

AND IN THE MATTER OF a complaint that the CRTC failed to properly notify cable television subscribers of the cost consequences that would occur as a result of the amendments that were made to section 18 of the Cable Television Regulations, 1986, which permitted cable television companies to avoid reducing their fees as of January 1, 1995, and subsequently;

AND IN THE MATTER OF a complaint that the cable television companies that contributed to the Cable Production Fund made these contributions without first providing their subscribers with proper advance notice of the impact of these contributions on the fees charged to their subscribers;

AND IN THE MATTER OF a complaint that the CRTC does not use the most effective methods for ensuring that cable television subscribers are fully informed of all decisions made by the CRTC and cable television companies that affect the rates charged to subscribers;

AND IN THE MATTER OF a complaint that the disputed funds should be paid into a trust fund so as to ensure that these funds will be available if it is determined that these funds should be refunded to subscribers.

SUBMISSIONS OF CABLE WATCH

CHRISTOPHER K. LEAFLOOR
Barrister & Solicitor
347 Bay Street, Suite 603
Toronto, Ontario, M5H 2R7

TEL: (416) 368-8970
FAX: (416) 368-8206

Counsel for the complainant Cable Watch

TO: CRTC
Les Terrasses de la Chaudiere
Central Building
1 Promenade du Portage
Hull, Quebec
K1A 0N2

PART I: THE NATURE OF THE PROCEEDINGS

1. The applicant Cable Watch Citizens' Association (hereinafter "Cable Watch") hereby requests the following relief from the Canadian Radio-television and Telecommunications Commission (hereinafter the "CRTC" or "Commission"):

(1) a ruling that the CRTC:

(a) did not have the authority to add subsection 18 (6.3) to the Cable Television Regulations, 1986, (hereinafter the "Regulations") so as to require subscribers to pay fees to maximize contributions to the Cable Production Fund;

(b) failed to properly notify cable television subscribers of its intention to add subsection 18 (6.3) to the Regulations so as to allow cable television companies to avoid reducing their fees as of January 1, 1995, and subsequently;

(c) failed to inform cable subscribers of the cost consequences that would occur as a result of the addition of subsection 18 (6.3) to the Regulations which permitted cable television companies to avoid reducing their fees as of January 1, 1995, and subsequently;

(2) a ruling that the cable television companies that contributed to the Cable Production Fund have significantly altered their fees charged to their subscribers, but these alterations were made without first providing cable television subscribers with proper advance notice of these alterations;

(3) orders requiring:

(a) cable television companies to refund to their subscribers all the funds collected without proper notice to subscribers of the companies' intentions to alter their fees as of January 1, 1995, and subsequently;

(b) cable television companies to reduce their rates to the levels that would have been in effect in the absence of

subsection 18 (6.3) of the Regulations;

(c) the CRTC to revise its rules and procedures so as to ensure that the CRTC is much more proficient at ensuring that cable television subscribers receive effective and clear advance notice of all decisions made by the CRTC and the cable television companies that will affect the cable fees charged to subscribers; and

(4) an interim order, pending the final resolution of the above issues, that requires cable television companies and the Cable Production Fund to pay into a trust fund all funds that have been and will be collected pursuant to subsection 18 (6.3) of the Regulations.

2. Cable Watch requests that a public hearing be held in regard to these matters. In order to maximize the participation of the public in this process Cable Watch requests that this hearing be held in Toronto, Ontario.

PART II: THE FACTS

The parties to the complaint

3. Cable Watch is a non-profit organization established in 1995 by founding directors L. Kee, B. Lowe, K. Mahar, J. Riggs and W. Whitehead. The mandate of Cable Watch is to protect the interests of consumers and to increase the public accountability of the CRTC. The objective of Cable Watch is to persuade Parliament to restructure the CRTC into a truly democratic and accountable public institution, to update and improve the *Broadcasting Act* and to introduce Citizen Utility Board legislation for regulated industries in Canada. At present, Cable Watch has members in both British Columbia and Ontario. Memberships are available to members of the

public with a minimum contribution of $15.

4. The CRTC is a quasi-judicial government body created by Parliament to regulate the Canadian broadcasting system and telecommunications industry. It is a quasi-judicial body which is at arms-length from Parliament. CRTC Commissioners are not elected by members of the public. Commissioners are appointed by federal cabinet to various terms.

5. In contrast to the labour relations board model, where labour and management have equal representation on the decision-making body, the composition of the CRTC does not equally represent the parties affected by its rulings. In fact, there is not one Commissioner who has devoted a career to public interest advocacy or consumer rights. Instead, Commissioners are largely drawn from the industries regulated by the CRTC, the media or government.

CRTC Fact Sheet, "So, Who's Who at the CRTC?", December 1995

6. Furthermore, some of the CRTC Commissioners and staff who leave the CRTC are subsequently employed by companies in the broadcasting and telecommunications industries, or become consultants for companies in the same industries. For example, Andre Bureau, Louis R. Sherman, Beverley Oda and Lisa de Wilde have shifted roles in this fashion.

7. Cable television companies are monopolies licensed by the CRTC to provide cable television service to Canadian consumers. As a result of the substantial benefits and protections these statutory monopolies receive, each cable company has certain legal obligations to its subscribers.

The Cable Television Regulations and notices to subscribers

8. Prior to the introduction of the Regulations in 1986, the cable industry lobbied the CRTC for a "lighter regulatory hand" in regard to subscriber rate regulation.

9. The CRTC accommodated the cable industry in this matter and on February 13, 1986, the CRTC issued its proposed regulations as an appendix to Public Notice CRTC 1986-27 and called for public comment.

10. Among the many changes, the CRTC proposed to introduce a regulation, subsection 18 (6), to allow for capital expenditure rate increases to basic cable subscribers, with the stated objective of encouraging cable companies,

> "...to rebuild and improve old plant and equipment, to increase channel capacity and to improve the technical capabilities of their systems in order that the delivery of Canadian services will be facilitated and the quality of service improved."
>
> Public Notice CRTC 1986-27, dated February 13, 1996, p.19

11. At that time, the CRTC held out to the public that,

> "The capital investment credit would permit licensees who make eligible capital expenditures **to recover 50 per cent of the capital expenditure amortized over 60 months** on a pro rata per subscriber basis.
>
> ...
>
> "Eligible capital investment projects, either purchase or lease, are defined as capital expenditures for new construction and replacement or improvement of existing physical plant which will enhance basic service including head-ends, amplifiers and distribution plant. Capitalized leases are eligible under this option; interest allocations however are not

included.” [emphasis added]

Public Notice CRTC 1986-27, dated February 13, 1996, p.19-20

12. At the same time, the CRTC made a commitment to keep subscribers fully informed about their fees through direct notification by the cable companies.

> “Mindful of the impact this more streamlined process might have, the Commission will require that each subscriber is provided with a notice of increase with details which explain the increase. **The new notification requirement** (which improves the present public announcement formula) **will enable subscribers to be fully informed** so as to react to any increases put forward by the licensee serving them.” [emphasis added]
>
> Public Notice CRTC 1986-27, dated February 13, 1986, p.5

13. When the Regulations were announced by the CRTC on August 1, 1986, the CRTC stated that these regulations would ensure that cable subscribers would be notified of any pending or proposed changes in their monthly fees for basic service.

> “Concerning monthly fees, subscribers will be better informed than in the past by the inclusion of a new requirement that licensees notify all subscribers **of any pending or proposed change in fee**.” [emphasis added]
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.4

14. Furthermore, the Regulations required that the advance notification given to subscribers by the cable companies,

> “... be made in accordance with the simplified form, set out in the schedule to the regulations. An outline of the changes in rate structure will be provided in the schedule. In the case of increases related to capital investment, this requirement will provide subscribers with immediate and pertinent information about improvements and additions to the service they may expect in the next year.”

> Public Notice CRTC 1986-182 p. 23-24

15. The schedule contained in the Regulations requires that the advance notification given to subscribers by the cable companies include the proposed amount of increase per subscriber per month, the effective date of the proposed increase, and the reason for the proposed increase.

> (Provide brief statement outlining purpose of capital expenditure (e.g., upgrade of quality, increase channel capacity or addition of new facilities), expected time of completion of capital improvements, purpose of other increase, and other relevant information.).
>
> The Cable Television Regulations, 1986, dated August 1, 1986, Notice to Subscribers Schedule

16. According to Public Notice CRTC 1986-182, the reason why the Regulations require cable companies to include the CRTC's address in all notifications to subscribers respecting proposed rate changes is,

> "... for the convenience of any subscriber wishing to intervene and all interventions will be assessed by the Commission in determining whether or not to suspend or disallow the proposed increase.
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.24

17. Furthermore, the CRTC made the commitment to the public that it would consider interventions from subscribers in determining whether or not to suspend certain rate changes, and that,

> "... suspensions would be invoked in cases where the Commission believes it desirable to have access to additional information, further public process, or both."
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.21

18. The CRTC noted that it had "received some 4,500 submissions commenting on the proposed changes to the regulations" in response to Public Notice CRTC 1986-27 and that members of the Consumers' Association of Canada (hereinafter the "CAC") had sent the majority of the letters filed in opposition to the proposals by the CRTC. The Regulations, however, were introduced against the wishes of the CAC.

19. According to the CRTC, the Regulations would adequately protect the interests of consumers.

> "Much of the opposition appeared to reflect incomplete information as to exactly what was being proposed and how the rate-setting process would operate. ...."
>
> "While the CAC remains opposed to any reduction in the Commission's scrutiny of rate change applications, the Commission considers that the built-in limitation on indexing and pass-through increases, and the passive disallowance control and the direct subscriber notification process will achieve the desired objectives for both the industry and the public. It is the Commission's opinion that these features will provide the adequate protection expected by subscribers ..."
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.17

20. A majority of the Commissioners approved subsection 18 (6) of the Regulations, which was designed to allow cable companies to increase their basic cable rates in order to partially recover eligible capital expenditures from their subscribers.

21. Furthermore, the CRTC said that rates for basic cable subscribers should not subsidize the provision of other services and that capital expenditure increases must relate to the basic service.

> "The Commission confirms its position on the need for cost separation, so that basic service subscribers neither directly nor indirectly subsidize the provision of discretionary programming services or non-programming services. ... It should be noted that the provisions for rate changes based on capital expenditure expressly state that the expenditure must relate to the basic service (subsection 18 (5))."
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.29

22. At the same time, the CRTC promised the public a review of the Regulations in two years.

> "By way of ensuring that the Commission's obligations, particularly as it concerns cable subscribers, are being met, the impact of the new rate setting provisions for Class 1 and Class 2 systems will be reviewed in two years.
>
> "The Commission hopes that the cable industry which has argued for a lighter regulatory hand will now demonstrate that a flexible, supervisory approach to regulation will benefit the broadcasting system as a whole, the subscriber, as well as the cable industry itself."
>
> Public Notice CRTC 1986-182, dated August 1, 1986, p.30

23. Since 1986, pursuant to the Regulations, hundreds of cable companies have provided thousands of different notices to subscribers across Canada. These notices have provided subscribers with information about changes to their cable television subscription rates. The notices given by Rogers Cable TV Limited (hereinafter "Rogers Cable TV") to its subscribers in Toronto are typical of these notices. Rogers Cable TV Limited is the largest cable operators in Canada and Toronto is its largest system. For the sake of simplicity, these submissions will regard these notices given by Rogers in Toronto as representative of the sort of information that all cable television companies have provided to their subscribers about changes to their rates for cable television service.

24. On or about December 1, 1986, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective January 15, 1987, increasing their monthly charge from $9.60 to $10.10, pursuant to subsections 18(2), 18(4), 18(6) and 18(7) of the Regulations. Subscribers were notified that $0.20 of this proposed change was pursuant to subsection 18 (6) of the Regulations "to partially offset capital expenditures of $8,283,000" that were to be made in the system in that operating year by the company..

> "Pursuant to subsections 18.2, 18.4, 18.6 and 18.7 of the Cable Television Regulations, 1986, this is notification that the Rogers Cable TV - Toronto monthly subscription rate is changing effective January 15, 1987. The amount of this change, if fully approved, is $.50 per subscriber per month which will increase the present monthly rate from $9.60 to $10.10.
>
> ...
>
> "The balance of the change, **$.20 is to partially offset capital expenditures of $8,283,000 that will be made in the cable system in the current operating year to maintain and improve the quality and reliability of services, increase channel capacity and extend cable service to new areas**.
>
> "Rogers Cable TV - Toronto has filed documentation supporting the rate change with respect to capital expenditures with the Canadian Radio-television and Telecommunications Commission. You can view this documentation at our offices at 855 York Mills Road, Don Mills, Ontario, M3B 1Z1, during normal business hours. Comments can be sent to our offices at the same address. The documentation may also be seen at the CRTC offices at 1 Promenade du Portage, Hull, Quebec during normal business hours. The CRTC has the ability to intervene to disallow all or part of the capital expenditure portion of this increase. Written comments must be submitted to the CRTC prior to December 25, 1986. Their mailing address is: Secretary General, CRTC, Ottawa, Ontario, K1A 0N2. A copy of comments made to the CRTC must also be sent to our office at the above noted address." [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about December 1, 1986

25. The CRTC subsequently allowed only $0.09 of the proposed $0.20 increase pursuant to subsection 18(6) of the Regulations.

26. On or about July 15, 1987, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective, September 1, 1987, increasing their monthly charge from $9.99 to $10.88, pursuant to subsections 18(2), 18(4), 18(6) and 18(7) of the Regulations. Subscribers were notified that $0.53 of this proposed change was pursuant to subsection 18(6) of the Regulations to "partially offset capital expenditures of $22.8 million" which were to be made in the cable system in the 1987/1988 operating year by the company.

> "Of this change**, $0.53 is to partially offset capital expenditures of $22.8 million that will be made in the cable system in the 1987/1988 operating year** to maintain and improve the quality and reliability of service, and to extend cable service to new areas, (subsection 18 .6). Included in these specified expenditures is $1.6 million which relate to replacement of subscriber drops and community programming equipment. **This corresponding $0.04 of the capital increase will not be implemented under subsection 18.6 until proposed amendment to the Regulations comes into effect**.
>
> "Rogers Cable TV-Toronto has filed documentation supporting the rate change with respect to subsection 18.6 with the Canadian Radio-television and Telecommunications Commission (CRTC). You can view this documentation at our office at 855 York Mills Road, Don Mills, Ontario, M3B 1Z1, during normal business hours. Comments can be sent to our office at this address. The documentation may also be seen at the CRTC offices at 1 Promenade du Portage, Hull, Quebec during normal business hours. The CRTC has the ability to intervene to disallow all or part of the capital expenditure portion of this increase. You may express your comments on the proposed increase by writing to the Secretary General, CRTC, Ottawa, Ontario, K1A 0N2, before August 10, 1987. CRTC Regulations require that a copy of your letter be sent to Rogers Cable TV-Toronto, Attention: Paul C. Coleman, Executive Vice-President and General Manager, at the above noted Toronto address." [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about July 15, 1987

27. The CRTC subsequently allowed the proposed $0.53 increase pursuant to subsection 18(6) of the Regulations.

28. On or about June 1, 1988, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective September 1, 1988, increasing their monthly charge from $10.88 to $13.10, pursuant to subsections 18 (2), 18 (3), 18 (4), 18 (6), 18 (7) and 18 (8) of the Regulations. Subscribers were notified that $0.53 of this proposed change was pursuant to subsection 18 (6) of the Regulations to "partially offset capital expenditures of $22.9 million" which were to be made in the cable system in the 1988/1989 operating year by the cable company.

> "Of this change, $0.53 is to partially offset capital expenditures of $22.9 million that will be made in the cable system in the 1988/1989 operating year to maintain and improve the quality and reliability of service (subsection 18.6)
>
> ...
>
> "Rogers Cable TV-Toronto has filed documentation supporting the rate change with respect to subsections 18.6 and 18.8 with the CRTC. You can view this documentation at our office at 855 York Mills Road, Don Mills, Ontario, M3B 1Z1, during normal business hours. Comments can be sent to our office at this address. The documentation may also be seen at the CRTC offices at 1 Promenade du Portage, Hull, Quebec during normal business hours. The CRTC has the ability to intervene to disallow all or part of the capital expenditure and special circumstance portions of this increse [*sic*]. You may express your comments on the proposed increase by writing to the Secretary General, CRTC, Ottawa, Ontario, K1A 0N2 before June 30, 1988. A copy of your letter to the CRTC must be sent to Rogers Cable TV - Toronto, Attention: Mr. R. Engle, Executive Vice-President and General Manager, at the above noted Toronto address."
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about June 1, 1988

29. The $0.53 increase proposed pursuant to subsection 18(6) of the Regulations was subsequently allowed by the CRTC. The CRTC disallowed $0.01 of the proposed increase pursuant to subsection 18(2) and the proposed increase of $0.79 pursuant to subsection 18(8).

30. On or about July 15, 1989, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective September 1, 1989, increasing their monthly charge from $12.43 to $15.64, pursuant to subsections 18(2), 18(3) and 18(6) of the Regulations. Subscribers were notified that $1.37 of this proposed change was pursuant to subsection 18(6) of the Regulations to "partially recover capital expenditures" which had been incurred by the company.

> "Thirdly: In accordance with subsection 18.6, the rate will increase by **$1.37 per month to partially recover capital expenditures incurred by Rogers** resulting in the improvement in the quality of services to the customer and the upgrading of the cable system. Pursuant to this subsection of the Regulations, Rogers may increase its rate, unless the CRTC intervenes to disallow any part of the increase.
>
> "The details of Rogers justification for the proposed increase are set out in documentation filed with the CRTC, which is available for public review during normal business hours at our office (at 855 York Mills Road, Don Mills, Ontario, M3B 1Z1), as well as the offices of the CRTC (1 Promenade du Portage, Hull, Quebec). You may express your comments on the proposed increase no later than August 10, 1989 by writing to:
>
> " Secretary General, CRTC,
> " Ottawa, Ontario
> "K1A 0N2
>
> "A copy of your letter must be sent to our attention at the above noted address, attention: Mr. Ward Winters" [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about July 15, 1989

31. The $1.37 increase proposed pursuant to subsection 18(6) was subsequently allowed by the CRTC, a few of the other increases were not fully approved by the CRTC.

The introduction of the "Sunset Clauses"

32. On October 18, 1989, more than three years after the Regulations were introduced, CRTC - Notice of Public Hearing 1989-14 was issued, which announced a public hearing in regard to proposed changes to the Regulations.

33. According to that public notice, there had been an "increase in cable industry profitability" since 1986 and the CRTC stated that it was,

> "... concerned that a continuing trend of escalating basic service fees could ultimately have a negative impact on subscribers."
>
> CRTC - Notice of Public Hearing 1989-14, dated October 18, 1989, p.3

34. The CRTC also stated that it considered that the short-term goals of the capital expenditure rate increase mechanism had substantially been met.

35. Given these facts, the CRTC,

> "... proposed to discontinue the capital expenditure method for Class 1 systems."
>
> CRTC - Notice of Public Hearing 1989-14, dated October 18, 1989, p.11

36. In addition, the CRTC announced that it intended to add a "sunset" provision to prevent companies from collecting capital expenditure increases for more than 60 months, and

that this “sunset” provision would apply to all previous increases by Class 1 and Class 2 systems and for all future increases by Class 2 systems.

> “The Commission also intends to add a **‘sunset’** provision which would require that a capital expenditure increase in a given year be deleted from the basic monthly fee five years subsequent to the date of its implementation. At the effective annual recovery rate of 10%, **this will ensure that licensees recover no more than 50% of total eligible expenditures through this method**.” [emphasis added]
>
> CRTC - Notice of Public Hearing 1989-14, dated October 18, 1989, p.12

37. According to the CRTC, the proposed elimination of the capital expenditure method, the “sunset” provision and the other regulatory changes proposed in the notice, were designed,

> “... in order to ensure an appropriate balance between the interests of subscribers and the needs of licensees,”
>
> CRTC - Notice of Public Hearing 1989-14, dated October 18, 1989, p.10

38. In the same notice, the CRTC restated the requirement of the cable companies to provide advance notice of rate changes to subscribers so as to allow an opportunity for subscribers to submit comments to the CRTC. The CRTC claimed that all such comments from subscribers played an important role in the CRTC process.

> “In the case of fee proposals pursuant to subsections 18 (6) and 18 (8), the notice provided to each subscriber must contain the Commission’s address for convenience of those subscribers wishing to submit written comments on the proposed increase. The Commission takes into account all such comments in deciding whether or not to suspend or disallow any portion of the increase.”
>
> CRTC - Notice of Public Hearing 1989-14 , dated October 18, 1989, p.7

39. Notice of Public Hearing 1989-14-1 was subsequently issued by the CRTC to extend

the deadline for submissions to the public hearing, as requested by the Canadian Cable Television Association.

> "Further to a request received from the Canadian Cable Television Association asking for additional time to prepare its submission, the Commission hereby announces that this deadline is being extended to 22 December 1989."
>
> CRTC - Notice of Public Hearing 1898-14-1, dated November 23, 1989

40. Following the public hearing on the proposed changes to the Regulations, Public Notice CRTC 1990-53 was issued on May 15, 1990, almost four years after the CRTC had promised a two year review of the Regulations.

41. At that time, the CRTC announced that it would not eliminate the capital expenditure fee increase method for Class 1 systems, contrary to its proposal in its October 1989 public notice.

> "At the hearing, representatives of the cable industry argued strongly that the capital expenditure fee increase method should be retained for Class 1 systems. They emphasised the capital-intensive nature of the industry and the fact that ongoing upgrades are necessary in order to improve technical quality and reliability, and to expand channel capacity."
>
> Public Notice CRTC 1990, dated May 15, 1990, Section 2.3, p.1

42. In addition to retaining the capital expenditure method for Class 1 systems, the CRTC made another major financial concession for the benefit of the cable industry in relation to the proposed 5-year "sunset" provision for previous capital expenditure increases. The CRTC proposed to add subsection 18 (6.2) to the Regulations, to allow the cable industry to continue to collect until January 1, 1995, the increases which took effect during the period beginning on

August 1, 1986, and ending on May 14, 1990.

43. The CRTC's concession in this regard was designed to allow the cable industry to collect some capital expenditure increases from basic subscribers for significantly longer than the 60-month amortization period required to recover 50% of the eligible capital expenditures. For instance, cable companies that had increased their rates in January 1987 would recover 80% of the eligible capital expenditures from their subscribers. Companies that had enjoyed a growth in the number of basic cable subscribers over that 8-year period would recover more than 80% of such eligible capital expenditures.

44. At the same time, the CRTC announced its proposed addition of subsection 18 (6.1) to the Regulations, and made the commitment that,

> "All future capital expenditure increases would be terminated five years after the date they go into effect."
>
> Public Notice CRTC 1990, dated May 15, 1990, Section 2.3, p.2

45. According to the CRTC, the addition of subsections 18(6.1) and (6.2) to the Regulations (hereinafter the "Sunset Clauses"),

> "... is consistent with the Commission's view that **the capital expenditure fee increase method** is intended only to provide an incentive to licensees for certain types of desirable projects and **was never intended to provide for full recovery of eligible expenditures**." [emphasis added]
>
> Public Notice CRTC 1990-53, dated May 15, 1990, Section 2.3, p.2

46. The CRTC also announced its intention to amend the definition of eligible expenditure for subsection 18 (6) fees, stating that the,

> "... definition would be clarified to ensure that eligible capital expenditures include only those expenditures that would not have been incurred if the project in question had not been undertaken. Accordingly, expenses such as overhead, that cannot be related to a specific capital project and would have been incurred whether or not the project had been undertaken, would no longer be considered eligible.
>
> "Secondly, as proposed in the October notice, new plant construction would no longer be considered an eligible expenditure. The Commission notes that a large part of such construction relates to the servicing of new subdivisions in urban areas and is therefore required by regulation. Accordingly, the Commission considers that it is inconsistent with the incentive-based objective of the capital expenditure fee increase method to have subsection 18 (6) apply in these circumstances. Furthermore, the Commission notes that it does not favour the use of the capital expenditure method as an incentive to make expenditures that generate an additional revenue stream."
>
> Public Notice CRTC 1990, dated May 15, 1990, Section 2.3, p.2

47. According to Public Notice CRTC 1990-53, the Sunset Clauses and the other proposed changes to the Regulations,

> "... would reduce the magnitude of basic cable service fee increases in the future, while still allowing cable operators to earn a fair rate of return."
>
> Public Notice CRTC 1990-53, dated May 15, 1990, Introduction, p.2

48. Public Notice CRTC 1990-53 did not state the impact of the Sunset Clauses on rates for individual cable subscribers in the various cable systems. Consequently, any subscriber reading this notice would not be thereby informed about the amount of the reduction he or she was to receive as of January 1, 1995. Furthermore, this notice was not sent to individual subscribers.

49. At the same time, the CRTC announced in Public Notice CRTC 1990-53 that it was

changing the subscriber notification period from 40 to 60 days for certain proposed rate changes, including capital expenditure increases [subsection 18 (6)], and that it was increasing to 30 days the subscriber response period for proposed capital expenditure increases.

> "The Commission considers that these would improve notification to subscribers, simplify and standardise rules for notifications, and give the Commission more time to process submissions and take subscriber comments into account."
>
> Public Notice CRTC 1990-53, dated May 15, 1990, section 2.4, p. 5

50. Public Notice CRTC 1990-53 also directed the cable industry to develop an industry code that would establish standards regarding,

> **"... disclosure of detailed information to all subscribers with respect to connection fees, the basic monthly fee and its component parts (i.e. the base portion, pass-through portion, capital expenditure portion)** ... [and] notification procedures with respect to fee increases, including information as to when subscribers should provide comments to the Commission ...." [emphasis added]
>
> Public Notice CRTC 1990-53, dated May 15, 1990, III Related Issues, p.9

51. On or about July 1, 1990, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective September 1, 1990, increasing their monthly charge from $15.55 to $16.14, pursuant to subsections 18(2), 18(3) and 18(6) of the Regulations. Subscribers were notified that $0.02 of this proposed change was pursuant to subsection 18(6) of the Regulations to "partially recover capital expenditures" which had been made by the company.

52. In the same notice, Rogers Cable TV notified its subscribers in Toronto about its

proposed change to their monthly fees, effective October 1, 1990, increasing their monthly charge from $16.14 to $17.32, pursuant to subsection 18(8), “a special circumstances increase of $1.18 per month to offset capital and operating expenditures” of the company.

53. Rogers Cable TV did not notify its subscribers about their proposed rate reduction starting January 1, 1995. Neither did Rogers notify its subscribers that this $0.02 rate increase would be eliminated after 60 months.

> “Effective September 1, 1990:
>
> ...
>
> “3. In accordance with subsection 18.6, the rate will increase by **$0.02 per month to partially recover capital expenditures** resulting in the upgrading of the cable system. The CRTC may intervene to disallow any part of the increase.
>
> “Effective October 1, 1990:
>
> “4. In accordance with subsection 18.8, a special circumstances increase of $1.18 per month to offset capital and operating expenditures to improve the quality and dependability of the cable service. The CRTC may disallow any part of the increase.
>
> “Documents outlining our justification for the proposed price increase have been filed with the CRTC. These documents are available for public review during normal business hours at our office at 855 York Mills Road, Don Mills, Ontario M3B 1Z1 or at the offices of the CRTC (1 Promenade du Portage, Hull, Quebec).
>
> “You may express your comments on the proposed increase to the CRTC by writing to: The Secretary General
CRTC, Ottawa, Ontario K1A 0N2
>
> “Your letter must arrive no later than August 2, 1990.” [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about July 1, 1990

54. The CRTC subsequently allowed the proposed $0.02 increase pursuant to subsection 18(6) of the Regulations. The CRTC denied the proposed $1.18 increase pursuant to subsection 18(8) of the Regulations

55. The Sunset Clauses were added to the Regulations and were published in the *Canada Gazette* on January 17, 1991.

> SOR/91-96, January 17, 1991, Canada Gazette, Part II, Vol. 125, No. 3, p. 599, at pp. 601-2

56. Consequently, as of January 1991, millions of cable subscribers in Canada were legally entitled to receive rate reductions in the cost of their basic cable service, commencing January 1, 1995.

57. As a result of the introduction of the Sunset Clauses, the exact rate reductions that subscribers were entitled to receive on January 1, 1995, varied significantly between cable systems, as these reductions were based on the historic level of capital expenditure increases for each system. Consequently, subscribers who had in the past incurred the largest fee increases were now entitled to receive the largest rate reductions as of January 1, 1995.

58. For example, according to a document obtained from the CRTC, subscribers in Newmarket, Ontario, were to receive a monthly rate reduction of $4.60 on January 1, 1995, while the corresponding amount for subscribers in Kamloops, British Columbia, was $0.54. A small minority of subscribers were not entitled to receive any rate reduction because their cable companies had not increased their rates pursuant to subsection 18 (6) of the Regulations.

> Schedule in correspondence from CRTC Secretary General to Keith Mahar, dated July 24, 1995

The cable industries' "Code of Conduct"

59. On June 10, 1991, the CRTC approved the industry's "Cable Television Customer Service Standards" (hereinafter, the "Code of Conduct"). The Code of Conduct requires cable television companies to provide "clear and comprehensive billing for cable television services" and to,

> "inform customers 60 days in advance of **any monthly rate change** to the basic service; except that customers will be informed 90 days in advance of any monthly rate change to basic service related to subsection 18 (8) of the CRTC Cable Television Regulations". [emphasis added]
>
> Public Notice CRTC 1991-60 and the attached "Cable Television Customer Service Standards", dated June 10, 1991

60. The Regulations and the Code of Conduct were proposed to the public and adopted under the guise of providing subscribers with full disclosure about their cable charges, and providing an opportunity to subscribers of submitting comments to the CRTC in advance of the proposed changes to their fees. As indicated previously, the CRTC had reassured the public that it would consider all comments from subscribers before it determined whether certain rate changes were appropriate.

61. On or about November 1, 1991, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective January 1, 1992, increasing their monthly charge from $16.14 to $17.18, pursuant to subsections 18(2), 18(3) and 18(6) of the

Regulations. Subscribers were notified that $0.35 of this proposed change was pursuant to subsection 18(6) of the Regulations to “partially recover capital expenditures” which had been made by the company.

62. Rogers Cable TV did not notify its subscribers about its rate reduction in the cost of basic cable service required to commence on January 1, 1995, or about the elimination of its proposed $0.35 increase after 60 months, pursuant to the Sunset Clauses.

> ...
>
> “3. In accordance with subsection 18.6, the rate will increase **by $0.35 per month to partially recover capital expenditures which have resulted from the upgrading of the cable system for the period ending August 31, 1991**. The CRTC may intervene to suspend or disallow any part of this proposed increase.
>
> “Documents outlining our justification for the proposed rate increase have been filed with the CRTC. These documents are available for public review during normal business hours at our offices at 855 York Mills Road, Don Mills, Ontario M3B 1Z1 or at the offices of the CRTC (1 Promenade du Portage, Hull, Quebec).
>
> “You may express your comments on the proposed increase to the CRTC by writing to: The Secretary General CRTC, Ottawa, Ontario K1A 0N2.
>
> “Your letter must arrive no later than November 30, 1991.” [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about November 1, 1991

63. The CRTC subsequently allowed the proposed $0.35 increase pursuant to subsection 18(6) of the Regulations.

The Structural Hearing process

64. On Sept. 3, 1992, the CRTC announced, by CRTC Notice of Public Hearing 1992-13, that it would conduct a "Structural Hearing" concerning the structure of the broadcasting system.

65. This notice did not state that this hearing was to consider whether the CRTC would change the law and abandon its commitment to reduce subscriber rates. In particular, this notice did not state that the CRTC would consider removing the effect of the Sunset Clauses, did not state that the CRTC would consider introducing subsection 18 (6.3) to the Regulations, did not state that the CRTC would consider allowing cable companies to collect and retain revenues from basic cable subscribers that was not based on economic need or tied to a minimum level of profitability, did not state that the CRTC would consider allowing cable companies to collect and retain revenues from basic cable subscribers without accounting to the CRTC for the use of that money, and did not state that the CRTC would consider using cable rates as a lever to raise revenues for other purposes.

66. Furthermore, CRTC Notice of Public Hearing 1992-13 was not sent to cable subscribers.

67. Nonetheless, the CRTC stated that its process for the Structural Hearing should provide interested persons a full opportunity to make their views known in the written phase of the proceeding.

> "For this review, the Commission will hold a two-stage written comment

> process to ensure that issues to be discussed at the public hearing will have been canvassed as fully as possible in advance of the oral phase of this proceeding.
>
> "Accordingly, the deadline for the submission of written comments is December 4, 1992. In addition, prior to the commencement of the 1 March 1993 public hearing, interested persons and parties will be permitted to submit a written comment regarding any issue(s) raised in comments submitted during the first stage of the written proceeding. The deadline for written comments submitted as part of this second stage is 5 February 1993.
>
> "The Commission considers that this process should provide interested persons a full opportunity to make their views known in the written phase of this proceeding. In the interest of focusing and streamlining the oral phase of the proceeding, the Commission will not generally be prepared to concentrate on issues other than those raised by interested persons in the written comments."
>
> CRTC- Notice of Public Hearing 1992-13, dated September 3, 1992, p.11

68. On or about October 1, 1992, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective January 1, 1993, increasing their monthly charge from $16.16 to $18.02, pursuant to subsections 18(3), 18(6) and 18(8) of the Regulations. Subscribers were notified that $0.37 of this proposed change was pursuant to subsection 18(6) of the Regulations to "partially recover capital expenditures" which had been made by the company.

69. Rogers Cable TV did not notify its subscribers about its rate reduction in the cost of basic cable service required to commence on January 1, 1995, or about the elimination of its proposed $0.37 increase after 60 months, pursuant to the Sunset Clauses.

> "2. In accordance with subsection 18.6, the rate will increase by **$0.37 per month to partially recover capital expenditures which have resulted from the upgrading of the cable system for**

> **the period ending August 31, 1992**. The CRTC may intervene to suspend or disallow any part of this proposed increase.
>
> ...
>
> "Documentation outlining the details of our proposed rate increase have been filed with the CRTC. These documents are available for public review during normal business hours at our office at: 855 York Mills Road, Don Mills, Ontario M3B 1Z1 or at the offices of the CRTC (1 Promenade du Portage, Hull, Quebec).
>
> "You may express your comments on the proposed increase to the CRTC by writing to: The Secretary General, CRTC, Ottawa, Ontario K1A 0N2.
>
> "Your letter must arrive no later than November 1, 1992." [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its Subscribers in Toronto, dated on or about October 1, 1992

70. Rogers Cable TV had also introduced Full Cable Service, removing The Sports Network (TSN) from Basic Cable service and making it available on a discretionary package of services. As a result, Rogers Cable TV reduced its Basic Cable charge by $1.04 and added an additional fee for Full Cable Service. In the same notice, Rogers Cable TV notified its subscribers in Toronto that the monthly charge for Full Cable Service was increasing from $17.18 to $19.04 on January 1, 1993.

71. The CRTC subsequently allowed the proposed $0.37 increase pursuant to subsection 18(6) of the Regulations.

72. Notice of Public Hearing CRTC 1992-13-1 was issued on October 26, 1992 with additional rules for persons or parties wishing to appear at the CRTC public hearing.

> "Interested persons or parties wishing to appear at the public hearing must

first have participated in the 'intervention phase' of this proceeding."

Notice of Public Hearing CRTC 1992-13-1, dated October 26, 1992, p.2

73. On December 4, 1992, the Canadian Cable Television Association (hereinafter the "CCTA") submitted a written intervention to the CRTC requesting a number of significant changes to the Regulations.

CCTA Submission to the CRTC, "A View to the Future", dated December 4, 1992

74. The CCTA's proposals, if adopted, were to have implications for subscribers in the amount of hundreds of millions of dollars.

75. The CCTA submission to the CRTC dated December 4, 1992, was not sent to the subscribers who would be required to pay the cost of these proposals.

76. The Canadian Association of Broadcasters (hereinafter the "CAB") also submitted an intervention to the CRTC on December 4, 1992. In that submission, the CAB requested the CRTC to change its regulations in order to require cable companies to compensate broadcasters for carriage of their services.

CAB submission to the CRTC, dated December 4, 1992

77. The CAB submission included the findings of a subscriber survey by Angus Reid Group, Inc. which indicated that subscribers were not generally aware of the purposes for which their cable fees were being used.

> "Cable subscribers' perceptions of where the fees that they pay for their cable service go do not match where the funds actually go. To begin with, there is widespread lack of awareness, as over half of respondents report that they do not know what their cable fees are used for."
>
> CAB submission to the CRTC, dated December 4, 1992, Appendix 1, "Television Market Demand Study Report", p.2

78. On February 5, 1993, on the last day for written interventions to the CRTC prior to the "Structural Hearing", the CCTA filed another submission to the CRTC. This submission stated that the cable industry was willing to contribute up to one hundred million dollars ($100,000,000) to a fund to encourage Canadian programming if the CRTC adopted its financial proposals. One of the conditions of the CCTA's $100 million offer was the elimination of the Sunset Clauses.

> "The cable industry is making new commitments to Canadian programming in its February 5 response filing.
>
> ...
>
> "The CCTA recognizes from reviewing the submissions filed with the CRTC on December 4 and its extensive consultation efforts, that complimentary measures may be required to support the development of Canadian programming.
>
> **"Therefore, members of the Canadian cable television industry are prepared to commit to an industry initiative to provide new financing in the amount of up to $100 million over a five-year period to support particular Canadian programming initiatives**.
>
> "... the cable industry is prepared, despite the financial risk, to divert a portion of its resources to Canadian program production. To finance new programming, members of the industry with systems of 7,500 subscribers or more would **commit a maximum of 20 cents per subscriber per month to commence on January 1, 1995**. The industry is prepared to make this significant financial commitment with the adoption of its financial proposals." [emphasis added]
>
> CCTA submission to the CRTC, dated February 5, 1993, p. ii and p. 12

79. The CCTA submission to the CRTC dated February 5, 1993, was not sent to the subscribers who would be required to pay the cost if any of these proposals were to be implemented by the CRTC.

80. The Sunset Clauses were to save subscribers an estimated $600 million in cable fees over the five-year period commencing January 1, 1995. The cable industry was offering to contribute up to $100 million to a Canadian programming initiative over the same five-year period, based on a voluntary contribution of up to $0.20 per subscriber per month, if the CRTC adopted its financial proposals and eliminated the Sunset Clauses.

81. To put this offer into perspective, the cable operator in Newmarket, Ontario, was prepared to commit $0.20 per subscriber per month to a new Canadian programming initiative starting on January 1, 1995, if the CRTC changed the Regulations and, among other changes, did not make the company lower its rate to its subscribers in Newmarket by $4.60 per subscriber per month on January 1, 1995.

82. This proposal made by the CCTA was introduced on the last day of the second stage of the written intervention process. This was a brand-new proposal. There had been no prior notice whatsoever to indicate that the CRTC was about to consider extracting fees from subscribers for these sorts of purposes.

83. Cable television subscribers were not notified by the CRTC that the CRTC had now decided to expand the scope of the hearing so as to include this new proposal.

84. The February 5, 1993, submission by the CCTA also strongly opposed the proposal filed by the CAB to the CRTC on December 4, 1992, which requested compensation from the cable industry for the carriage of broadcast television stations. The CCTA submitted findings commissioned by Decima Research as part of its submission to the CRTC on February 5, 1993. According to the CCTA there was strong opposition from subscribers to the concept of diverting revenues from the cable companies to the broadcasters.

> "Fee for Carriage: Subscribers' reaction to the Canadian Association of Broadcasters' proposal which would redirect a portion of cable fees to local over-the-air private Canadian TV stations was also surveyed. Subscriber opposition to this proposal was substantial. Three quarters (74%) of cable subscribers report opposition to such a fee being charged with more than one-in four (27%) describing themselves as "strongly" opposed."
>
> CCTA submission to the CRTC, dated February 5, 1993, "A View to the Future: Step II", p. iv.

85. The CCTA, however, did not file any research to the CRTC to demonstrate any consumer support for its specific proposal of contributing up to $100 million (at a cost of $600 million in lost subscriber rate reductions) to establish a new Canadian program production fund.

86. The CCTA had also commissioned an analysis of the broadcasters' finances and stated that the CAB fee-for-carriage proposal was not justified on an economic basis and constituted bad public policy.

> "The findings of the Donner/Lazar analysis indicates that the private broadcasters cannot justify their proposal for a cable cross-subsidy on the basis of economic need. The CCTA is convinced that the broadcasters' proposals calling for a CRTC regulated fee-for-carriage of local broadcast signals constitutes bad public policy and would be contrary to the public interest."

> CCTA submission to the CRTC, dated February 5, 1993, "A View to the Future: Step II", p. vii.

87. The Structural Hearing commenced on March 1, 1993. At that time, the CRTC Chairman stated that the two-phase intervention process would allow the CRTC to focus on issues where there had been substantial disagreement among the intervenors.

> "As you know, we adopted a two-phase intervention process for this Hearing so that, by the time all of us arrived here today, we could focus on issues which had emerged as core elements or concerns or where there was substantial disagreement among intervenors or where the Commission requires additional information and clarification. In some cases, this may well mean that we will not need to question intervenors following their presentation.
>
> "Please do not interpret this as anything other than a desire not to waste your time and everybody else's with unnecessary questions."
>
> Transcript of CRTC public hearing, March 1, 1993, p.11

88. The Public Interest Advocacy Centre (hereinafter "PIAC") appeared at the hearing on March 1, 1993, on behalf of the National Anti-Poverty Organization and Rural Dignity of Canada. At the same time, PIAC addressed a submission on behalf of the British Columbia Public Interest Advocacy Centre representing the British Columbia Old Age Pensioners' Organization, the Council of Senior Citizens' Organizations of B.C., the Federated Anti-Poverty Groups of B.C., the Citizens' Association of B.C., the West End Seniors' Network and Local 1-217 IWA Seniors.

89. In its presentation, PIAC urged the CRTC to protect the financial interests of consumers and specifically requested that the Sunset Clauses be maintained and that basic cable rates never be used to subsidize other services.

> "While cable television service is not an essential of life, it is a basic fact of life for many low-income and senior citizens. The cost and nature of that service have an enormous impact on the lives of many Canadians. It is essential, therefore, that the Commission ensure that:
>
> "1. The cost of basic cable service be extremely affordable in comparison to the net monthly income of people on low fixed incomes such as Old Age Security and Guaranteed Income Supplement;
>
> "2. Basic cable rates never be used to subsidize the cost of specialized or discretionary services;
>
> "3. The "sunset clause" be retained;
>
> "4. A cap on capital expenditures be retained."
>
> Transcript of CRTC public hearing, March 1, 1993, p. 137-38

90. PIAC also voiced concern over the limited opportunity that was made available to consumer groups to address all the issues being addressed at the Structural Hearing.

> "In closing, and with respect to the Commission, we have some concerns about the limited opportunity that has been made available to consumer groups to develop and advance positions on these very substantial questions."
>
> Transcript of CRTC public hearing, March 1, 1993, p. 139

91. The CRTC did not inform PIAC that the scope of the hearing had now been expanded so as to consider the possibility of allowing cable companies to avoid the subscriber rate reductions required pursuant to the Sunset Clauses if the cable companies voluntarily contributed 50% of the amount to a Canadian program production fund.

92. The CAC appeared at the CRTC public hearing on March 2, 1993, and opposed saddling consumers with costs which were to allow cable companies to fight off competition or

which were to allow front-end loading of capital costs of new technologies for the industry.

> "The CRTC should not allow the rhetoric and drum beating of the cable industry to trick it into endorsing increased costs to consumers so that the cable industry can fend off potential competition.
>
> ...
>
> "If we are talking about front-end loading of capital costs, this is an ideal situation where financial markets would be interested in participating. I don't think that it would necessarily be equitable for consumers to pay for those up-front costs."
>
> Transcript of CRTC public hearing, March 2, 1993, p. 417 and 476

93. The CRTC did not inform the CAC that the scope of the hearing had now been expanded so as to consider the possibility of allowing cable companies to avoid the subscriber rate reductions required pursuant to the Sunset Clauses if the cable companies voluntarily contributed 50% of the amount to a Canadian program production fund.

94. On March 3, 1993, representatives from the CCTA appeared at the hearing. At that time, a CCTA representative said that the cable industry was willing to take the financial risk of its $100 million offer.

> "So we took $100 million of what we felt were our requirements and decided they -- we would take the financial risk on the $100 million and we make it available to producers."
>
> Transcript of CRTC public hearing, March 3, 1993, p.611

95. In reply to this statement, the CRTC Chairman pointed out that consumers were the ones taking the financial risk of the CCTA proposal.

> "Mr. Bambrough, you mentioned the risk the cable company is taking in

> offering this $100 million on a once-only basis. ... isn't the risk really taken by the subscribers? They are the ones taking the risk. They are the ones who are carrying the ball here."
>
> Transcript of CRTC public hearing, March 3, 1993, p.613

96. The CRTC also addressed the fact that the CCTA had inflated the amount of the potential fund in their submission. The CRTC stated that it was not possible to reach the $100 million amount based on $0.20 per basic cable subscriber per month over the five-year period commencing January 1, 1995.

97. On March 4, 1993, Rogers Cablesystems appeared at the CRTC hearing. The President of Rogers Communications Inc. (the parent company of Rogers Cablesystems) addressed the CAB fee-for-carriage proposal at the beginning of the company's presentation, calling it a "tax" on subscribers.

> "This fee, based on guaranteed access, is no more than a 'must carry - must pay' tax on cable subscribers. It is one industry subsidizing another industry, without that second industry being willing to accept rate-of-return restrictions on their industry as cable has.
>
> "I have much regret that this broadcaster subsidy proposal has consumed so much time and energy."
>
> Transcript of CRTC public hearing, March 4, 1993, p. 1011

98. Rogers Cablesystems is the largest member of the CCTA and it fully supported the proposal by the CCTA for the cable industry to voluntarily subsidize the Canadian production industry if the CRTC adopted the cable industry's financial recommendations for changes to the Regulations.

99. The CRTC Chairman stated that the cable industry proposal was asking for a lot of money from consumers.

> "As you know, at one level we are the subscribers' last line of defence and, therefore, since you are asking the subscribers for quite a lot of money, we are obliged to ask a few questions that an average subscriber might want to ask."
>
> Transcript of CRTC public hearing, March 4, 1993, p. 1147

100. The CRTC Chairman pointed out to Rogers Cablesystems that the CCTA proposal would allow the cable industry to overcharge basic cable subscribers in order to subsidize other business ventures (competitive services that are not regulated under the *Broadcasting Act*) and that **subscribers would probably not even notice this happening**.

101. The CRTC Chairman did not object to the cable industry's proposed amendments to the Regulations. To the contrary, Chairman Spicer stated that the CRTC would consider the CCTA proposals if the cable industry "firmed up" its commitment to contribute money to the new programming fund for production companies.

> "First we saw $100 million and then we found out very quickly it was over five years. It was only up to $100 million. We learned yesterday it's voluntary. I appreciate that your company made a firm commitment. ...
>
> "Still, we haven't got money on the table, numbers on the table that we can count on. I don't think you would ever sign a business deal in which the other guy had to give you $100 million but on a voluntary basis.
>
> "**You are asking us to soak** -- well, let's say to invite the **Canadian subscribers** to come up with quite a lot of money for your industry to build an infrastructure which would be used no doubt to defend Canadian programming, but also down the road five years a whole lot of other services that have nothing to do with what normal people call television what with home shopping, banking, and things in which the industry will

> make some honest money, and good for them. But we should know what we are asking these people to pay for.
>
> "It seems to me the quid pro quo is not as firm as the demand you are making upon the subscriber. Your industry wants the subscribers commitment to the industry to be absolutely firm and to come right off their cable bill. **They probably won't even notice it**. But the industry's commitment to the subscriber and to Canada and to the creative community, which will be the immediate beneficiary, is very shaky.
>
> "We have to take that into account. If there is anything you can do within the industry to firm up that commitment, that major quid pro quo which I say in the name of my colleagues, we find extremely promising. It's a new door that you have opened. **We think it is a very useful and exciting path for the industry to consider**. But if we are going to really consider this range of proposals you are putting forward, that among other things would have to be firmed up very considerably." [emphasis added]
>
> Transcript of CRTC public hearing, March 4, 1993, p. 1153-54

102. In reply, the President of Rogers Communications Inc. said that the protection of the Canadian broadcasting system required some "suffering" from cable subscribers.

> "If we are here to protect the broadcasting system as well, if that is so, then there has to be some suffering from all of us, from the cable industry, from the broadcasters, from the subscribers. There is a price to being a Canadian."
>
> Transcript of CRTC public hearing, March 4, 1993, p.1156

103. A few moments later, the President of Rogers Communications Inc. added that Canadians are not always willing to pay the price for making Canada a great country.

> "Canadians are always talking -- we love our country and we want to make it a great country. But as you travel from one part of the country to another, as you know, people are not always prepared to pay the price."
>
> Transcript of CRTC public hearing, March 4, 1993, p.1161.

104. Alliance Communications Corporation, a "fully integrated film and television production, development, financing and distribution company with offices in Toronto, Montreal, Vancouver, Los Angeles, and Paris" appeared at the CRTC public hearing on March 22, 1993.

105. Alliance supported the concept of consumers subsidizing the cost of universal addressability and digital video compression for the cable industry if the cable industry gave some money to a fund for the independent production companies in Canada. Alliance stated that the contribution to such a fund should be a minimum of $0.45 per month per basic cable subscriber.

> "We propose that:
>
> "1. The CRTC endeavour to assist the move to digital video compression and universal addressability by Canadian cable operators through an extension of the current capital expenditure rules, but only for investments in one or both of those technologies and only for those cable companies or MSOs who contribute on a continuing monthly basis to the Canadian independent production fund.
>
> ...
>
> "3. The minimum contribution for participating cable operators should be 45 cents per month per basic cable subscriber...
>
> Transcript of CRTC public hearing, March 22, 1993, p. 5107-08

106. Furthermore, Alliance did not want an investment fund which would require some type of repayment by the production companies financially benefiting from the fund. Instead, Alliance advocated non-equity funding. In other words, it supported free money for the production companies from the fund.

107. Under questioning from the CRTC Chairman, Alliance added that cable companies that contributed to a fund for production companies should be allowed to charge their subscribers a premium not available to companies that did not contribute to such a fund.

> "... the cable industry is looking for something, something that they need and something that probably is good for the system, and they are looking for some assistance in funding the cost of digital video compression and universal addressability. It seems to us that the CAPEX provisions are the natural way to deal with that and that's why we proposed that tying that opportunity to a contribution to the fund is a good way to go.
>
> "It then leaves it up to the cable operator to decide how they are going to invest their money. If a cable operator says "I am not going to invest in the fund", then they are going to have to put some money into keeping up with the technology or they will fall behind and someone else will take over for them."
>
> Transcript of CRTC public hearing, March 22, 1993, p. 5119-20

108. Atlantis Films Limited, another television production and distribution company, appeared at the CRTC public hearing on March 25, 1993, and also supported the concept of a non-equity subsidy for production companies from revenues collected from cable subscribers. Atlantis, however, wanted more than $100 million for the fund.

> "... we believe that the $100 million on the CCTA proposal is not nearly enough money and should be substantially more. We think that at least double that amount is needed at a minimum. We think that would be reasonable and fair."
>
> Transcript of CRTC public hearing, March 25, 1993, p. 5955

109. The **final presentation** made to the Structural Hearing was presented by Shaw Cablesystems Ltd., appearing on March 26, 1993.

110. At that time, Shaw Cablesystems presented a **brand-new proposal** from the cable industry regarding the industry's conditional commitment to establish a new Canadian program production fund. The cable industry was now willing to extend the contributions to the fund beyond five years so as to reach the $100 million level if the CRTC changed the Regulations as the CCTA had requested. A list of companies that were now committed to the fund was also made available to the CRTC by Shaw Cablesystems.

> "At the commitment of 20 cents per subscriber per month, that equated to $12.4 million a year. The industry is committed to continue this program until $100 million is raised. So, that means that in eight years $100 million will be contributed to Canadian programming."
>
> Transcript of CRTC public hearing, March 26, 1993, p. 6320

111. The CRTC Chairman was pleased that the cable industry was adjusting its proposal during the Structural Hearing.

> "As you know, gentlemen, you heard from Alliance Communications and others that the production industry is sceptical about any fund that is voluntary.
>
> "I must say, the fund is firming up in these final days of the hearing, and that is excellent news for everybody."
>
> Transcript of CRTC public hearing, March 26, 1993 p. 6324-25

112. The CRTC Chairman asked the President of Shaw Cablesystems if it was reasonable to adopt Alliance's proposal to allow cable companies to charge a premium to their basic subscribers if the companies contributed to a production fund. The President of Shaw Cablesystems said that the Alliance proposal was fair.

> "THE CHAIRMAN: If you are not enthralled by the idea of a fixed percentage of your revenues as a contribution to the Canadian

production industry, what about the Alliance proposal of linking the capex privileges to your contribution to this voluntary fund? In other words, only those who contribute generously at the rate that you are suggesting, or more generously, to this fund would be able to take advantage of the capex privileges you are asking for.

"Is that a reasonable way of proceeding.

"MR. SHAW, Sr.: I guess the proposal that was put on the table by CCTA and supported by the industry is that a part of capex, and particularly the pre-90 capex, that that portion go to this fund.

"When we received that capex pre-90, it was our money to better our plant and that we would keep it. The Commission saw fit to not want that to take place. We have used that money for 10 years. I could see a portion of that or a greater portion of that, depending upon your decision and your deliberation, going to programming if you so desire. And that is your decision.

"THE CHAIRMAN: I guess the impact of the Alliance proposal would be that CFCF and Videotron would not get the capex provisions if they would not contribute to the fund.

"MR. SHAW, Sr. : And would either then go back to the subscriber or would go to the fund.

"THE CHAIRMAN: Yes. Is that a reasonable basis?

"MR. SHAW, Sr. : That is right. It is reasonable.

Transcript of CRTC public hearing, March 26, 1993, p. 6330-31

113. The **CRTC never asked cable subscribers** or representatives from CAC or PIAC if this concept was reasonable. As the above-noted presentation by Shaw Cablesystems was the final presentation before the Structural Hearing, cable subscribers, CAC and PIAC were never given any opportunity to comment on this proposal.

114. In fact, the public record demonstrates that the CRTC spent very little time with the public interest groups at the hearing relative to the time spent with the representatives from the

cable industry.

115. There are a combined total of only 64 pages of transcript between the CAC and PIAC presentations to the CRTC during the Structural Hearing, while a total of approximately 1553 pages of transcript is dedicated to the presentations made by the cable industry associations and companies during the same hearing.

The Diversion Clause and the Cable Production Fund

116. On June 3, 1993, a few months after the conclusion of the Structural Hearing, Public Notice CRTC 1993-74 was issued, a 46-page document plus an appendix.

117. The CRTC announced several proposed changes to the Regulations which were designed to financially benefit the cable industry at a cost to basic subscribers. Some of these proposed changes were in direct opposition to some of the positions advanced by PIAC and CAC during the Structural Hearing.

118. Within that long document, the CRTC announced "that its jurisdiction to require each element of the broadcasting system to contribute to Canadian programming is clear" and that it intended "to make certain changes to its cable rate regulation mechanisms" and that the purpose of these changes was "to provide significant financial support for Canadian programming."

> "In its 4 February 1993 written submission, the CCTA announced that those of its members having 7,500 subscribers or more would be prepared, collectively, to contribute approximately $20 million per year, for a

maximum of $100 million over a 5-year period, to a fund that would support independent production of under-represented Canadian programming in the areas of drama series, documentaries and children's programs. The CCTA indicated that the cable industry's commitment to establish the fund was tied to the Commission's acceptance of certain other proposals for changes to the regulation of subscriber fees.

"At the hearing, it was clarified that the CCTA proposal was for a voluntary fund, and that even with full participation by all systems with 7,500 subscribers or more, the maximum annual contribution would amount to approximately $16.8 million over the five-year period, rather than the $20 million indicated in the written brief.

"The CCTA proposal underwent further revisions during the course of the hearing, such that, by the end of the proceeding, the voluntary annual contributions would have represented approximately $12.4 million over an eight-year period to reach the $100 million target.

"The CAB did not support the establishment of a cable-financed programming fund, primarily on the grounds that it would not address the broadcasters' call for compensation for carriage of their signals. **However, reaction by most parties to the concept of a cable fund was generally favourable. The major criticisms were that the likely contribution would not be large enough to meet the need**, and that the voluntary nature of the proposal does not guarantee a minimum level of funding.

"The Commission's Position

"The Commission has carefully considered the opinions expressed by the parties on the CAB proposal. The Commission is satisfied that its jurisdiction to require each element of the broadcasting system to contribute to Canadian programming is clear, and that the nature, extent and mechanism of that contribution is entirely within its discretion. However, the Commission is of the view that explicit recognition of a right to compensation for the retransmission of local signals is essentially a copyright issue and would most appropriately be dealt with by bodies other than itself.

"The CAB and CCTA agreed that new initiatives for funding are essential to ensure that Canadian programs remain available and attractive to Canadians. Although the Commission rejects the CAB compensation for carriage proposal, it considers that additional financial support for the production of Canadian programming is essential. While the CCTA proposal for a Canadian programming fund has merit, the Commission agrees with many parties at the hearing that the cable fund proposed by the

> CCTA would not generate the amount of funds necessary to ensure significant support for Canadian programming.
>
> "Accordingly, **the Commission**, by majority vote, **intends to make certain changes to its cable rate regulation mechanisms, the purpose of which is to provide significant financial support for Canadian programming**. Specifically, the Commission intends to link contributions by cable licensees to a production fund to the capital expenditure (CAPEX) component of the cable fee structure.
>
> "This mechanism, described in more detail in the following section of this notice, would generate a significantly higher level of funding than the amount that would have been available under the CCTA proposal. The Commission estimates that the proposed mechanism will generate approximately $300 million over the first five years of the fund." [emphasis added]
>
> Public Notice CRTC 1993-74, dated June 3, 1993, p.16-18

119. A few pages later, the CRTC noted how this $300 million for the programming fund was to be raised. The CRTC stated that the Sunset Clauses were to be maintained in the Regulations but that it intended to suspend implementation of the Sunset Clauses for those licensees who contributed half of the money affected by the Sunset Clauses to a "new fund" to encourage the production of Canadian programming.

> "In Public Notice CRTC 1990-53, the Commission determined that individual capital expenditure increases would be terminated five years after the date they were implemented. The Commission has decided to maintain this "sunset" provision in the regulations. However, in consideration of the need to provide additional funding for the production of Canadian programming, the Commission, by majority vote, intends to suspend implementation of the reductions required by the "sunset" provision for those licensees who contribute 50% of the amount by which the basic monthly fee would otherwise be reduced to a new fund for Canadian programming. Thus, for the initial five-year period, contributions to the fund will be generated by revenues currently included in the existing basic monthly fee.
>
> "As noted earlier, the Commission estimates that this proposed mechanism will provide approximately $300 million over five years for the production

> of new Canadian programming, as opposed to the $100 million proposed by the cable industry. This same mechanism will apply to future capital expenditures as a means to ensure that funding for Canadian programming will be ongoing, rather than for a limited number of years as proposed by the cable industry. Also, as noted earlier, a subsequent public notice will be issued, calling for comments on the operational and organizational details of the fund.
>
> "The Commission considers that this regulatory approach recognizes that strong, unique and attractive Canadian programming is essential to anchor and support the Canadian broadcasting system in an era of increasing competition, fragmentation and choice."
>
> Public Notice CRTC 1993-74, dated June 3, 1993, p.23

120. The CRTC proposed to raise money from basic cable subscribers for a new Canadian production fund (hereinafter the "Cable Production Fund") through the addition of subsection 18 (6.3) to the Regulations (hereinafter, this subsection will be referred to as the "Diversion Clause").

121. Despite the fact that the CRTC stated that it had authority to require each element of the broadcasting system to contribute to Canadian programming, the proposed Diversion Clause did not require cable companies to contribute to the Cable Production Fund. Instead, the Diversion Clause was to permit cable companies to decide whether they would contribute or not.

122. The proposed Diversion Clause, however, was to use basic cable rates as a financial incentive to maximize the contributions from cable companies to the Cable Production Fund. Companies were to either reduce their rates for basic cable service or avoid the reductions by diverting 50% of these funds to the Cable Production Fund.

123. As a result of the proposed Diversion Clause, in order to raise $300 million for the Cable Production Fund, basic cable subscribers were to pay $600 million to their cable companies. In addition, cable subscribers would pay G.S.T. and P.S.T. on this $600 million.

124. Furthermore, the cost of the Diversion Clause was not equally distributed across the class of cable television subscribers. The cost to subscribers of the Diversion Clause and the Cable Production Fund would vary significantly, since the amount of the individual subscribers' rate reductions varied from cable system to cable system.

125. Fifty percent of the money to be collected from subscribers pursuant to the Diversion Clause and which would be retained by the cable companies was not justified on the basis of economic-need or tied to a minimum level of profitability. Furthermore, this money could be used by the cable companies for any purpose whatsoever. There was no requirement that these funds were to be used in the provision of basic cable service.

126. The decision of the CRTC to create the Diversion Clause was opposed strongly by at least three CRTC Commissioners.

127. Commissioners David Coleville, Beverley Oda and Rob Gordon issued a dissenting opinion against the Diversion Clause which was attached to the 47-page document as an appendix.

128. In their dissenting opinion, the Commissioners pointed out numerous problems with

the majority decision to implement the Diversion Clause.

> "1. We are opposed to the majority decision to allow for the elimination of the subscriber rate reduction (sunset) provisions for capital expenditures (CAPEX). We cannot accept breaking a commitment made to subscribers that the capital expenditure component of their rates would decrease after five years. The value of these rate reductions would have been up to $85 million beginning in 1995, totalling approximately $600 million for the period 1995-1999. These funds, which were intended to be returned to subscribers as rate reductions, will flow instead half to cable operators and half to Canadian program production.
>
> "2. If the majority decision is implemented by a change to the regulations, other reasons for our opposition are:
>
> "-the balance between the interests of the subscriber (affordability) and the cable operator (capital requirements) which was achieved in the existing capital expenditure rate mechanism is lost;
>
> "-the possible elimination of 'sunset' is not needed to fund the technical upgrades identified by the cable industry;
>
> "-the amendment to 'sunset' provisions enables the cable operator to retain 50% of the intended subscriber rate reduction, a source of revenue not based on economic need or a minimum level of profitability;
>
> "-a subscriber's contribution to the program fund relative to the contribution by subscribers of other systems will be disproportionate since it is based on a cable operator's historical level of capital investment;
>
> "-the voluntary nature of the new mechanism does not ensure the level of funding for Canadian programming anticipated in today's decision;
>
> "-the public interest objective to ensure adequate funding for Canadian programming should be addressed equitably across the broadcasting system, not charged to only some cable subscribers.
>
> "3. The proceeding leading to this public notice raised many issues related to cable and broadcast television services and the Canadian production industry. Two major issues were the cable industry's need for digital video compression and addressability in its networks including options to fund this capital project and secondly the need for additional funding for the domestic program production industry.
>
> "4.The Canadian Cable Television Association and most of its members linked these two issues of rate regulation and program funding. The

Association requested a number of rate regulation modifications. These included allowing the addressable decoder as a capital expenditure under subsection 18 (6) and removing the five-year sunset provision. Most of the major cable licensees proposed to voluntarily contribute to a program production fund if the Commission agreed to adopt these changes.

“5.Before detailing our position on the ‘sunset’ issue, we wish to state that we support the adoption of universal addressability by the cable industry and agree to rate regulation amendments necessary for the industry to finance its capital program. These amendments should be equitable and consistent with the objectives of the CAPEX regulations.

“6. In addition we are prepared to recognize the cable industry’s voluntary offer to provide funding for Canadian program production. In accepting this latter point, we note the Commission has not determined that the cable industry has any inherent responsibility to provide direct support for the production industry. The cable industry directly supports Canadian programming through community programming channels and individual, privately established funds or more directly through their participation in other broadcasting services.

“7. The Commission adopted the capital expenditure provisions for all class 1 and 2 systems in 1986 [s.18(6)]. These provisions allow annual rate increases, which would recover up to 50% of the capital expenditures allocated for the improvement of basic cable service, amortized over a five-year period. The CAPEX provisions were not intended as a cost recovery mechanism and eligibility is not tied to any economic need or minimum profitability level.

“8. As stated in Public Notice CRTC 1986-182, this measure was adopted as an incentive:

> ... to encourage licensees to rebuild and improve old plant and equipment, to increase channel capacity and to improve the technical capabilities of their systems so that the delivery of services to subscribers will be facilitated and their quality improved.

“9. During its 1990 review of the cable television rate regulations, the Commission considered eliminating the CAPEX provisions. However the cable industry argued strongly that the CAPEX fee increase mechanism should be retained to encourage the continued improvement of technical quality and reliability and the further expansion of channel capacity.

“10. Based on arguments heard at the 1990 public hearing, the CAPEX provisions were maintained with a few modifications. These included a

3% upper limit on each licensee's 18 (6) rate increase and a confirmation of the "sunset" proposal applicable to all 18 (6) increases implemented before the date of the public notice (15 May 1990), and to future capital expenditure rate increases.

"11. In arriving at this decision the Commission sought to balance the needs of the cable licensee to invest in capital improvements with the interests of the subscriber in maintaining reasonable rates. In Public Notice CRTC 1990-53, the Commission stated:

> Cable subscribers should benefit from the revised capital expenditure provisions in a number of ways. Specific system improvements would be carried out before the associated fee goes into effect. Concerns about continued affordability of monthly fees would be addressed by means of the annual limit and the five-year sunset provision.
>
> Further, the Commission notes that, after five years, the capital expenditure components of the basic monthly fee would in fact decrease unless a licensee continues capital spending on system improvements at close to historic levels.

"12. Thus, the Commission made a commitment to cable subscribers in 1990 that the CAPEX components of rates for any given year would sunset five years later and rates would decrease accordingly. The first round of these rate reductions was due to take place in 1995. The majority decision of the Commission allows for the elimination of this 1990 commitment and the corresponding rate reductions in 1995. We cannot support this decision.

"13. Amendments to the sunset provisions might be considered on a going- forward basis, after fulfilling the 1990 commitment, if it were conclusively demonstrated the cable industry needed such a change to finance digital video compression and addressability. However, analysis of the available data suggests that the cable industry could have adequately financed the technical upgrades with only those regulatory changes needed to recognize the cost of the addressable decoder - without amending the sunset provisions. Among the regulatory amendments proposed today, a portion of the cost of the addressable decoder is permitted to qualify for CAPEX rate increases and a separate annual upper limit on rate increases for these devices has been set. These amendments alone would have provided the needed resources.

"14. The proposed amendments which provide for a suspension of the sunset provision tie these sunset provisions to a contribution to the program production fund. Those cable operators who wish to take

> advantage of the amendment will retain half of that portion of the cable rate that otherwise would have gone to rate decreases for subscribers. The other half will go to the program production fund. In 1995, of the intended approximately $85 million rate reduction, up to $42.5 million will fund Canadian programming while an equal amount will be kept by the cable operators. In addition, the voluntary nature of the new mechanism does not ensure the level of funding for Canadian programming anticipated in today's decision.
>
> "15. Since contributions to the program fund are linked to the elimination of sunset on a system-by-system basis, only subscribers to certain cable systems will contribute to the fund. **Cable subscribers will be disproportionately made to pay depending on the historic capital investment undertaken by each cable licensee**.
>
> "16. Once it has been determined that increased funding is required for Canadian program production, this public interest issue should be addressed reasonably and equitably on a national or system-wide basis. All Canadian television viewers should share in both the costs and the benefits of quality Canadian programming.
>
> "17. We have considerable difficulty with the notion of changing rate regulation provisions just before the rate reductions associated with those provisions come into effect, thus disadvantaging the cable subscriber. **In this case, funds related to capital expenditures are redirected to program production. Cable rates should be justified on their own merits, not used as a lever to extract revenues for other purposes**." [emphasis added]
>
> Minority decision of the CRTC regarding subsection 18 (6.3), resulting from the "Structural Hearing" decision, Public Notice CRTC 1993-74, dated June 3, 1993 appendix

129. The CRTC's majority decision did not address the many public policy concerns addressed in the minority dissenting opinion.

130. Since Rogers Cablesystems had in the past the largest increases in its rates for capital expenditures, Rogers Cablesystems was the biggest beneficiary of the CRTC decision to introduce the Diversion Clause. Consequently, subscribers of Rogers Cablesystems were to pay

the most as a result of the Diversion Clause.

> Schedule in correspondence from CRTC Secretary General to Keith Mahar, dated July 24, 1995

131. The CRTC did not explain why it failed to order, instead, each cable company to contribute an equal percentage of their gross revenues to a new Canadian program production fund. Such a regulation would have provided the same level of funding for Canadian programming, while doing so on an equitable basis and saving subscribers the hundreds of millions of dollars which were to be retained by the cable companies for unspecified purposes under the Diversion Clause. By comparison, the CRTC subsequently ordered all Direct-To-Home (DTH) satellite companies in Canada to “contribute a minimum of 5% of their gross annual revenues to the production of Canadian programming”.

> Public Notice CRTC 1995-217, dated December 20, 1995

132. According to the CRTC, in addition to the three Commissioners who chose to make their dissent public on the Diversion Clause, the other CRTC Commissioners who voted on this matter were Keith Spicer, Fernand Belisle, Louis R. Sherman, Adrian Burns, Garth Dawley, Yves Dupras, Edward Ross, Gail Scott, Peter Senchuk, Claude Sylvestre and Sally Warren.

> Correspondence from Cable Watch to CRTC Access to Information and Privacy Co-ordinator, dated January 12, 1996
>
> Correspondence from CRTC Access to Information and Privacy Co-ordinator to Cable Watch, dated January 19, 1996, p.2
>
> Correspondence from Cable Watch to CRTC Secretary General, dated March 11, 1996

133. The CRTC, however, has subsequently refused to identify how each CRTC Commissioner voted on the Diversion Clause. Consequently, it is impossible to determine the final vote on the Diversion Clause and it remains a mystery to interested members of the public.

> "You should note that the record of how each member votes on a particular matter has never been revealed except in those instances where members made their vote known by expressing a dissenting opinion attached to a Commission decision."
>
> Correspondence from CRTC Secretary General to Cable Watch, dated March 22, 1996, p.1

134. An appendix to this decision included the text of the proposed Diversion Clause. Nothing in this decision or appendix, however, inform individual consumers of the specific cost implications of the Diversion Clause on their monthly cable rates.

135. Given the complex nature of the Regulations and the limited information provided by the CRTC in the majority decision, it is unclear how members of the media or ordinary consumers reading the lengthy CRTC decision could possibly understand all the financial and public policy implications of the Diversion Clause from its description in the public notice.

136. Furthermore, the above noted Public Notice CRTC 1993-74 was not distributed to individual cable television subscribers.

137. Public Notice CRTC 1993-105 was issued on July 15, 1993, and the Commission called for comments as to what would be the most appropriate policies for program eligibility,

access, specific funding mechanisms and administration of the Cable Production Fund.

138. On October 7, 1993, in accordance with its earlier announcement, the CRTC issued Public Notice CRTC 1993-137, with an attached schedule containing many proposed amendments to the Regulations. Buried in this schedule was the proposed Diversion Clause. This notice, however, did not clearly state that the proposed Diversion Clause would have the result of cancelling the scheduled rate reductions that were due to subscribers as of January 1, 1995. Neither did this notice indicate the amounts of money that were at stake for individual cable television subscribers.

139. There is no evidence that Public Notice CRTC 1993-137 or any previous CRTC announcement successfully communicated to the members of the public that the proposed Diversion Clause would have a direct effect on their cable television rates pursuant to their contracts with their cable television service providers.

140. Furthermore, no CRTC document informed subscribers of the precise impact that the Diversion Clause would have on their monthly bills starting January 1, 1995.

141. On or about November 1, 1993, Rogers Cable TV notified its subscribers in Toronto about its proposed changes to their monthly fees, effective January 1, 1994, increasing their monthly charge from $18.01 to $18.50, pursuant to subsections 18(3) and 18(6) of the Regulations. Subscribers were notified that $0.41 of this proposed change was pursuant to subsection 18(6) of the Regulations to “partially recover capital expenditures” which had been

made by the company.

142. Rogers Cable TV did not notify its subscribers about its rate reduction in the cost of basic cable service required to commence on January 1, 1995, or about the proposed Diversion Clause and its potential impact on its scheduled rate reduction, or about the Cable Production Fund, or about the elimination of its proposed $0.41 increase after 60 months (unless the Diversion Clause was introduced and the cable company elected to contribute $0.205 to the Cable Production Fund).

> "In accordance with subsection 18.6, the rate will increase by **$0.41 per month to partially recover capital expenditures which have resulted from the upgrading of the cable system for the period ending August 31, 1993**. The CRTC may intervene to suspend or disallow any part of this proposed increase.
>
> "Documents outlining the details of our proposed rate increase have been filed with the CRTC. These documents are available for public review during normal business hours at our office at: 855 York Mills Road, Don Mills, Ontario M3B 1Z1 or at the offices of the CRTC (1 Promenade du Portage, Hull, Quebec)
>
> "You may express your comments on the proposed increase to the CRTC by writing to: The Secretary General, CRTC, Ottawa, Ontario K1A 0N2.
>
> "Your letter must arrive no later than November 30, 1993." [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about November 1, 1993

143. In the same subscriber notice, Rogers Cable TV notified its subscribers in Toronto that its Full Cable Service rate was increasing effective January 1, 1994, by $2.16, from $20.79 to $22.95.

144. The CRTC subsequently allowed the proposed $0.41 increase pursuant to 18(6) of the Regulations.

145. On January 25, 1994, the Diversion Clause was added to the Regulations.

> SOR/94-133, January 25, 1994, Canada Gazette, Part II, Vol. 128, No. 3, p. 995, at pp. 999-1000

146. Subsequent to the enactment of the Diversion Clause, on February 3, 1994, the CRTC issued Public Notice CRTC 1994-7. This notice revealed that its earlier Public Notice CRTC 1993-137, which had requested comments on the CRTC's proposed amendments to the Regulations (which at that time included its proposal to add the Diversion Clause to the Regulations), had generated only "25 comments that addressed the proposed amendments to the cable television regulations." This notice stated that it addressed only serious concerns from these 25 parties. This notice did not discuss the Diversion Clause, which suggests that none of these 25 parties had "raised serious concerns" about the Diversion Clause.

147. Public Notice CRTC 1994-10, issued February 10, 1994, announced some of the logistics of the Cable Production Fund. The CRTC noted that the Fund was to be administered by an independent Board made up of representatives from the "Canadian production community, the cable industry and Canadian broadcasters". The CRTC did not require that the Board include representation from the millions of Canadian subscribers paying for the Fund.

148. The CRTC also issued a news release on February 10, 1994 regarding the new Cable Production Fund. This news release did not mention that this fund would have a direct impact on

the rates charged to basic cable subscribers. CRTC Chairman Keith Spicer was simply quoted in the CRTC press release as stating, “We hope and expect that most cable companies will participate in the fund so that they will generate roughly $300 million in the first five years.”

> CRTC news release, “CRTC announces principles for new Canadian Production Fund, February 10, 1994

149. Keith Mahar, a broadcasting industry insider since August 1987, with knowledge of the Regulations and the CRTC, had become,

> “... increasingly concerned that certain CRTC regulations, decisions, policies and practices were not in the best interest of the public”
>
> Affidavit of Keith Mahar, May 14, 1995, Ontario Court (General Division) Court file No. RE 5336/96, Mahar v. Rogers Cablesystems Limited

150. Mr. Mahar resigned from his managerial position at CHUM Limited on September 5, 1994, so as to publicly address some of the deficiencies in the CRTC process.

151. While researching Rogers Communications Inc.’s application to the CRTC to request permission to acquire the assets of Maclean Hunter Limited, Mr. Mahar discovered a financial forecasting assumption on page 2006 of the Rogers Communications’ application. This forecasting assumption concerned the Cable Production Fund, and stated that,

> “Full contribution to the programming fund is assumed and therefore there is no CAPEX sunset.”
>
> Application by Rogers Communications to the CRTC to acquire Maclean Hunter Limited, Rogers Cable T.V. - Maclean Hunter - Toronto Assumptions used in forecasting 1994-1999, p.2006

152. Based on his knowledge of the Regulations, Mr. Mahar understood the implications of this assumption and proceeded to conduct further research in order to determine the exact financial implications to certain subscribers of Rogers Cablesystems.

153. On September 22, 1994, Mr. Mahar appeared at a CRTC public hearing and stressed to the CRTC that the public should be aware of the impact of the Diversion Clause on their January 1995 rates for basic cable service.

> "Furthermore, the public should be aware that the decision by RCI to voluntarily contribute to the programming fund is, in essence, a significant rate increase, since cable subscribers would otherwise realize a basic rate reduction as of January 1, 1995. In the case of Toronto, the rate reduction would have been $2.52 per month for Rogers' subscribers, and 39 cents per month for each Maclean Hunter basic cable subscriber."
>
> Transcript of CRTC public hearing, September 22, 1994, p.914

154. In response, the CRTC failed to order cable companies to notify their subscribers about their intentions to contribute to the Cable Production Fund or the direct impact of these decisions on rates to be paid for basic cable service, pursuant to the Diversion Clause, starting January 1, 1995, and subsequently.

155. On or about December 1, 1994, Rogers Cable TV notified its Toronto subscribers about its proposed changes to their monthly fees, effective February 1, 1995, increasing their monthly charge from $18.50 to $19.29. Subscribers were notified that $0.41 of this proposed change was pursuant to subsection 18(6) of the Regulations, to "partially recover capital expenditures" which had been made by the company.

156. Rogers Cable TV did not notify its subscribers of its intention to contribute to the Cable Production Fund and of the cost implications for its subscribers of this decision. Furthermore, Rogers Cable TV did not notify its subscibers about the elimination of its proposed $0.41 increase after 60 months unless it contributed 50% to the Cable Production Fund.

> "Details of Basic Cable Rate Increase
>
> "In accordance with the provisions of the Cable Television Regulations, 1986 (the Regulations) as adopted and amended by the Canadian Radio-television and Telecommunications Commission (CRTC), Rogers Cable T.V. Limited (Rogers) is applying to adjust its Basic Cable monthly rate by $0.79, which would increase the Basic Cable rate from $18.50 to $19.29 (excluding taxes), effective February 1, 1995.
>
> "Effective February 1, 1995:
>
> "1. In accordance with subsection 18(3), the Basic Cable rate will increase by $0.36 per month as a result of additional programming "pass through" costs in respect of the addition of WTN (Women's Television Network) and RDI (Reseau de l'information) to the Basic Cable service. The CRTC has approved a rate of $0.35 for WTN, and a rate of $0.10 for RDI. Effective February 1, 1995, MuchMusic will move from Basic Cable to New Cable Plus. As a result, the Basic Cable rate will be reduced by $0.09. The Regulations define pass through costs as that part of the Basic Cable rate that reflects amounts payable by Rogers to programming service providers.
>
> "2. In accordance with subsection 18(2.2), Rogers is also permitted to increase the Basic Cable rate by a $0.02 margin for each Canadian specialty service distributed on Basic Cable. As a result of the addition of WTN and RDI to, and the removal of MuchMusic from, Basic Cable, there will be an additional $0.02 net increase in the Basic Cable rate.
>
> "3. **In accordance with subsection 18.6, the rate will increase by $0.41 per month to partially recover capital expenditures which have resulted from the upgrading of the cable system for the period ending August 31, 1994**. The CRTC may intervene to suspend or disallow any part of this proposed increase.
>
> "Documents outlining the details of our proposed rate increase have been

> filed with the CRTC. These documents are available for public review during normal business hours at our office: 855 York Mills Road, Don Mills, Ontario M3B 1Z1 or at the offices of the CRTC: 1 Promenade du Portage, Hull, Quebec. You may express your comments on the proposed increase to the CRTC by writing to: The Secretary General, CRTC, Ottawa, Ontario K1A 0N2. Your letter must arrive no later than December 31, 1994. A copy must be sent to Rogers to the attention of Dan Clark, Director, Customer Service at the above Rogers address." [emphasis added]
>
> Subscriber Notification from Rogers Cable TV to its subscribers in Toronto, dated on or about December 1, 1994

157. The CRTC subsequently allowed the proposed $0.41 increase pursuant to subsection 18(6) of the Regulations.

158. None of these notices issued by Rogers Cable TV informed subscribers about their rate reductions that were required to commence on January 1, 1995, following the addition of the Sunset Clauses, about the Cable Production Fund, or about the Diversion Clause, or about its decision to contribute money to the Cable Production Fund and the impact of this decision on its rate for basic cable service.

159. There is no evidence that any of the cable companies in Canada that had decided to contribute to the Cable Production Fund had notified their subscribers in advance of January 1, 1995, of their intentions to contribute to the Fund and of the cost implications for their subscribers of this decision.

160. In January 1995, cable operators serving the majority of households in Canada elected to contribute money collected from their subscribers to the Cable Production Fund and invoke

the Diversion Clause, thereby avoiding rate reductions to their subscribers.

161. According to information obtained from the CRTC, 134 out of 138 Class 1 cable systems in Canada elected to contribute to the Cable Production Fund and to invoke the Diversion Clause.

> Schedule attached to correspondence from CRTC Secretary General to Keith Mahar, dated July 24, 1995

162. Consequently, as of that date these cable television companies had invoked the Diversion Clause in order to avoid decreasing their basic monthly fees. Thus, as of that date these cable television companies continued to charge their subscribers the same monthly price for cable television services, but as of that date a certain portion of their subscribers' monthly subscription fees were no longer fees which were to partially recover certain eligible capital expenditures for which documents had been provided to the CRTC to justify the cost to subscribers, and for which subscribers had been notified. Instead, these amounts were now being used to contribute significant amounts of money each month towards the Cable Production Fund, and an equivalent amount of money was retained by participating cable television companies for unspecified purposes.

163. Most cable television subscribers in Canada are similarly affected, although the financial impact on subscribers varies from place to place within Canada. However, it has been estimated that for all Class 1 cable television subscribers in Canada, the aggregate amount of money at stake over the course of the five-year period commencing January 1, 1995, is approximately $600 million, plus taxes.

List of Class 1 cable systems and their accumulated subsection 18 (6) increases

CRTC fact sheet concerning the Canadian Program Production Fund, dated June 1994

“Structural Hearing” decision, Public Notice CRTC 1993-74, dated June 3, 1993

CRTC Type C1 Report for Class 1 cable systems across Canada, detailing rate increases and fee components between August 1, 1986 to February 1, 1995.

164. For example, in regard to the cable television subscribers of Rogers Cablesystems in Toronto, the Diversion Clause had an effect on their cable television rates on January 1, 1995, that amounts to approximately thirteen percent (13%) of their total basic cable television fees.

165. If the Diversion Clause had not been created by the CRTC or invoked by Rogers Cablesystems, basic cable fees would have decreased by approximately thirteen percent on January 1, 1995, for subscribers to Rogers Cablesystems in Toronto

166. Cable subscribers have never been notified that they are paying a premium in the cost of basic cable service in order to raise money for the Cable Production Fund and to provide a source of revenue to their monopoly service providers for unspecified purposes. Neither have these subscribers been informed of this premium’s cost to individual subscribers.

167. During a public hearing on March 9, 1995, the CRTC Chairman said that the language used to communicate to members of the public about certain public policies was important in order to avoid resistance for the policies.

> "Have you got any plausible vocabulary to sell this to the public? Very often words matter. If somebody calls this a 'cable tax', you may have another consumer revolt on your hands ..."
>
> Transcript of CRTC public hearing , dated March 9, 1995, p. 802

168. On March 23, 1995, the President of Cogeco Inc., a cable company with several large systems in Canada, appeared at the same CRTC public hearing and acknowledged that the financial contributions being made monthly to the Cable Production Fund were contributions that were extracted from cable television subscribers.

> "And let's face it, when we lose a customers to a DBS operator or to a Telephone company operator, this is a customer from which we no longer receive the monthly contribution to the Canadian Cable Production Fund."
>
> Transcript of CRTC public hearing, Keeley Reporting Services, March 23, 1995, p.3227

169. On March 24, 1995, the CRTC issued Circular No. 410 to cable companies in Canada, regarding the exact guidelines for contributions to the Cable Production Fund, and clearly communicated to the cable companies that they had two choices: either lower their rates to their subscribers pursuant to the Sunset Clauses, or elect to contribute 50% of the scheduled subscriber rate reductions to the Cable Production Fund and avoid the reductions pursuant to the Diversion Clause.

170. In that CRTC Circular, the cable companies were told that if they contributed to the Cable Production Fund so as to avoid reducing their rates to their subscribers on January 1, 1995, that they were required to provide detailed information to the Fund with their monthly remittance. This information would allow the Fund to be in a position to verify that it had

received 50% of the diverted subscriber rate reductions.

171. Companies were also told that if they stopped contributing to the Fund they must lower their rate and would not be allowed to reintroduce this fee to their subscribers, unlike rate regulations pertaining to subsection 18(6) increases to subscribers prior to the 60-month termination due to the Sunset Clauses.

172. Furthermore, the fees collected and retained by the cable companies pursuant to the Diversion Clause did not need to be justified in the same manner as increases pursuant to 18(6) of the Regulations. Internal company auditors merely had to warrant that the other 50% had been sent to the Cable Production Fund. The money kept by cable companies could be spent on anything at the sole discretion of the cable company.

> "Licensees who elect Option (b) must submit, with their monthly remittance to the Fund, a reconciliation that clearly shows both the reduction otherwise required under subsection 18 (6.2) of the regulations, and all of the calculations used to arrive at the amount being remitted to the Fund for the month on account of the cumulative increases under subsection 18 (6) of the regulations charged during the period 1 August 1986 to 14 May 1990.
>
> ...
>
> "**Licensees are reminded that, where at any time they elect to discontinue contributions to the Fund** of any particular subsection 18 (6) fee increase, **they must reduce their authorized basic monthly fee** by the full amount of the increase **and may not, at any subsequent time, reintroduce that particular 18 (6) increase** amount to the rate base. [emphasis added]
>
> ...
>
> "**Licensees are required to have their auditors attest, through the 31 August Annual Return process, that they have complied with**

> **subsections: 18 (6.1), 18 (6.2) and 18 (6.3) of the regulations**. [emphasis added]
>
> CRTC, Circular No. 410, Cable Production Fund Contribution Guidelines, dated March 24, 1994, p.1-3

173. As a consequence of this Circular, the CRTC (the creator of the Diversion Clause), the cable companies (the benefactors of 50% of the money collected from subscribers pursuant to the Diversion Clause) and the Cable Production Fund (the benefactor of the other 50% of the money collected from subscribers pursuant to the Diversion Clause) were all in a position to know the exact cost of the Diversion Clause to individual subscribers each month. In stark contrast to this, however, the individual subscribers paying for the Diversion Clause had never been notified about the Cable Production Fund and its precise impact on their monthly cable television rates.

174. On or about March 25, 1995, Mr. Mahar obtained legal opinions which raised serious questions about the authority of the CRTC to introduce the Diversion Clause and subsection 18(5) of the Regulations.

175. On March 29, 1995, a Parliament Hill press conference was held by Mr. Mahar to address the public policy implications of the Diversion Clause and subsection 18(5) of the Regulations, the legality of the regulations, and the fact that subscribers were paying for the Diversion Clause without having received notice about the regulation and its cost. At that time, three members of Parliament associated with the Standing Committee on Canadian Heritage joined Mr. Mahar, his legal counsel and a representative from Democracy Watch , and called on the federal government to review the actions of the CRTC in this matter. The MPs were Dan

McTeague, a Liberal, Jan Brown, the Reform critic of Canadian Heritage, and Simon de Jong, the NDP critic of Canadian Heritage.

176. On March 29, 1995, the CRTC issued a news release in response to the Parliament Hill press conference held a few hours earlier.

> "OTTAWA/HULL -- There is absolutely no hidden tax. The Commission authorizes rates for basic cable services, which reflect necessary capital investments, as well as the costs of programming distributed by the cable companies. As the regulator of the Canadian broadcasting system, the CRTC must maintain balance between the interests of all its publics: consumers, creators and distributors.
>
> "The Commission's decisions are always taken after open public process -- in this case, a nationally televised hearing which, two years ago, considered 710 written submissions and 126 oral presentations. Inevitably, and taken in isolation, some decisions can be made to appear to favour one group over another. But in the long run, we must seek a balance of interests. Parliament's own *Broadcast Act* obliges us to maintain this balance. If anything, the heart of its mandate to the CRTC is to nurture "the production and distribution of more and better Canadian programming" (Section 3).
>
> "Of course consumers want choice. But consumers are also Canadians who want quality Canadian choices. Without the kind of support for high-standard Canadian programs offered by the cable production fund (established after the above open public hearing), there would not be many Canadian choices. There would be very little of Canada - its ideas, values, realities and heroes - on its own screens.
>
> "This desire for Canadian choices is not just what Parliament has clearly expressed in the *Broadcasting Act*. The Commission believes that it is also what the great majority of Canadians support.
>
> CRTC news release, "CRTC Statement on Allegations of Hidden Tax", March 29, 1995

177. On March 30, 1995 questions directed to the Prime Minister in the House of Commons regarding the Diversion Clause were left fundamentally unanswered. The governing

party's representative stated that the government could not interfere with the decision of the CRTC.

> **"Mrs. Jan Brown (Calgary Southeast, Ref.):** Mr. Speaker, my question is for the Prime Minister.
>
> ...
>
> "Why will the Prime Minister not protect the interests of Canadian consumers by getting rid of this hidden tax?
>
> ...
>
> "How can the Prime Minister justify this tax without having consulted the Canadian consumer?
>
> "**Hon. Sheila Finestone (Secretary of State (Multiculturalism)(Status of Women), Lib.):** Mr. Speaker , the hon. member should think through the outcome of her observations and her direction. It would mean that a worthy and considerate member of the ministry would have to resign as a result of interference in an arm's length organization."
>
> Commons Debates, Oral Questions, March 30, 1995, p.11299

178. The federal government did not initiate a review of the CRTC, the Diversion Clause, or the legality of this specific regulation.

179. When the federal government refused to review the actions of the CRTC, Mr. Mahar instructed his lawyers to challenge his own cable company, Rogers Cablesystems, under his personal contract for cable service.

180. On May 15, 1995, a Notice of Application was issued in Ontario Court (General Division) by Mr. Mahar against Rogers Cablesystems requesting declarations of his legal rights to advance notice of the Diversion Clause and its impact on his rate for cable service as of

January 1, 1995. The Court was also asked to order a retroactive refund to Mr. Mahar.

181. On May 16, 1995, the CRTC Chairman, the Secretary General, and the Executive Director, Telecommunications, appeared as witnesses before the Standing Committee on Canadian Heritage to provide evidence on the Main Estimates for the fiscal year ending March 31, 1996.

182. During the proceeding, Liberal MP Mr. McTeague questioned the CRTC Chairman about the Diversion Clause. The CRTC Chairman acknowledged that the money for the Cable Production Fund came from subscribers and said that Canadians had been notified about the Diversion Clause.

> “**Mr. McTeague (Ontario):**
>
> ...
>
> “... I’d like to get some of your comments on how you justified what I believe was a hidden tax.
>
> “**Mr. Spicer:** Gladly, Mr. McTeague, and thank you. That’s a very important question, which a lot of people are asking, thanks to you, a couple of your colleagues and Mr. Mahar. Let me see if I can set some of your concerns to rest.
>
> “We did not create a tax. We do not have the right to do so. Parliament has the right. It is certainly not a hidden tax, because we did it openly. What we created was not a hidden tax. We created a system of voluntary contributions, openly discussed and openly arrived at.
>
> “**Mr. McTeague:** Whose funds are you talking about?
>
> **“Mr. Spicer:** The cable companies have a choice.
>
> **“Mr. McTeague:** But they’re getting those moneys from the supplier. [*sic*; subscriber?]

> **"Mr. Spicer**: But they would be the ones we would tax. We wouldn't tax consumers.
>
> **"Mr. McTeague:** You're saying you've volunteered money by the cable companies, but the money doesn't actually come from the cable companies; it's a continuation of money taken from subscribers. Is that correct?
>
> **"Mr. Spicer:** As I said to Madam Tremblay, every nickel in the broadcasting system comes eventually from ordinary Canadians.
>
> **"Mr. McTeague:** Did you give notification to Canadians that this was going to happen?
>
> **Mr. Spicer:** Oh, yes we did.
>
> Evidence, Standing Committee on Canadian Heritage, Chair: John Godfrey, Meeting No. 84, Tuesday, May 16, 1995, p.84:31-32

183. Mr. Mahar's Application Record was filed with the Ontario Court (General Division) on May 17, 1995. The Application record asserted that Rogers Cablesystems never notified its subscribers about the Cable Production Fund and the impact on its subscribers of its decision to contribute to the Fund.

184. On July 24, 1995, notice was sent from Mr. Mahar's legal counsel to cable companies across Canada regarding his legal proceeding against Rogers Cablesystems and the fact that the proceeding might have financial implications for other cable companies.

> Correspondence from Christopher Leafloor to Class 1 cable system operators, dated July 24, 1995

185. On August 1, 1995, a letter was sent from Mr. Mahar's legal counsel to the President and C.E.O. of the CCTA, with a copy of the above noted notice sent to cable companies. This letter was provided to the CCTA so as to ensure that all potentially affected cable companies in

Canada were properly notified about the potential financial implications of Mr. Mahar's legal proceeding.

> Correspondence from Christopher Leafloor to Richard Stursberg, President and CEO, CCTA, dated August 1, 1995

186. On August 15, 1995, the President and CEO of the CCTA replied to Mr. Mahar's legal counsel, and stated that,

> "CCTA will notify its members regarding the proceeding initiated by your client, as appropriate."
>
> Correspondence from Richard Stursberg, President and CEO of the CCTA to Christopher Leafloor, dated August 15, 1995

187. Rogers Cablesystems has never disputed any of the facts submitted by Mr. Mahar in his Application Record.

188. Cable Watch was subsequently incorporated as a non-profit organization. Mr. Mahar is one of the founding directors of Cable Watch and acts as its spokesperson.

189. On August 25, 1995, Rogers Cablesystems filed a motion in Ontario Court (General Division) to have Mr. Mahar's application dismissed on jurisdictional grounds. The motion asserted that the CRTC had exclusive jurisdiction over this matter.

190. On October 3, 1995, Mr. Justice Sharpe heard the motion on jurisdiction. On October 4, 1995 Sharpe J. decided that the CRTC has exclusive jurisdiction over the dispute raised in Mr. Mahar's application. Accordingly, Sharpe J. did not make any ruling on the merits of Mr.

Mahar's application. Sharpe J. concluded that,

> "... the task of deciding this case has been specifically assigned by Parliament to the CRTC. ... Assumption of jurisdiction by this court would not only evade the CRTC, it would also remove the case from the authority of the Federal Court of Appeal which is mandated to review the CRTC."

191. Rogers Cablesystems subsequently requested an order of costs against Mr. Mahar in the amount of approximately $55,000.

192. On October 30, 1995, Mr Justice Sharpe decided that Mr. Mahar would not be required to pay any of the legal costs incurred by Rogers Cablesystems, since,

> "[t]he issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved. It is true that many of the cases in which an unsuccessful public interest litigant has been relieved of the usual cost order have involved suits against the government and the respondent here is a private entity. However, the respondent does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which that monopoly is enjoyed. ... The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interests. An unrelenting application of these rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants. Such a consequence would be undesirable with respect to proceedings such as the present one which was, in my view, brought on a *bona fide* basis and which raised a genuine issue of law of significance to the public at large."

193. While Rogers Cablesystems never notified its subscribers about the Cable Production Fund or about the Sunset Clauses, or about the financial impact of its decision to contribute to the Cable Production Fund, Rogers Communications Inc. notified its shareholders about these

events.

> "The revenue gains in Cable Television, as compared to pro forma 1994 results, reflect basic and Cable Plus increases implemented on March 1, 1995. Operating income before depreciation and amortization continues to be negatively affected by contributions to the Cable Production Fund (as a result of capital expenditure sunset)."
>
> Rogers Communications Inc., "Rogers Announces Third Quarter 1995 Results", Toronto, November 2, 1995, p.2

194. In fact, shareholders in Rogers Communications Inc. were better informed about these matters than the cable subscribers paying for the Cable Production Fund.

195. On November 28, 1995, Cable Watch filed a complaint with the CRTC pursuant to s. 12 of the *Broadcasting Act* regarding the CRTC's introduction of the Diversion Clause and the use of the Diversion Clause by participating cable companies without notification to individual subscribers.

196. At that time, Cable Watch requested that all the money collected from subscribers by cable companies pursuant to the Diversion Clause without advance subscriber notification be refunded to subscribers (equalling approximately $100 million at that time), and that cable rates be reduced by the amount collected in each system pursuant to the Diversion Clause.

197. On January 30, 1996, CRTC Vice-Chairmen Fernand Belisle and David Colville, Cable Watch spokesperson Keith Mahar, and others, made presentations at a one-day conference organized by Insight Information Inc. and The Globe and Mail, titled, "The Changing Role of The CRTC". At the end of the day there was an opportunity for questions to the CRTC Vice-

Chairmen and others.

198. At that time, Fernand Belisle, the CRTC Vice-Chairman Broadcasting, stated that the CRTC fundamentally disagreed with the issues raised in the Cable Watch complaint about the Diversion Clause. Mr. Belisle stated that the CRTC would not provide any additional notice to subscribers about the Diversion Clause unless ordered to do so by the Federal Court.

> **Cable Watch Spokesperson Keith Mahar**: "Mr. Belisle ... When are you going to have cable companies provide full notification to their subscribers about the cost implications of this regulation in accordance with statutory rights, or is the CRTC willing to go to Federal Court to hide the cost of this public policy from the public?
>
> **CRTC Vice-Chairman Fernand Belisle**: "Well Mr. Mahar I think that you know that we disagree on your interpretation of notification to the subscribers.
>
> "You have gone in front of the courts to show that the Commission is wrong. I think that you want, ah you will probably go in front of the Federal Courts to see if the process we followed and the public notification and the public hearings that we had in terms of amending the regulation which created the Cable Fund is valid. And I think that we disagree on the methods used.
>
> "You don't believe that we followed the proper rules. The Commission feels that it followed the proper rules in amending the regulation and since [*sic*] we would [*sic*] probably end up in Federal Court to decide who is right and wrong."
>
> January 30, *Insight Information Inc*. and *The Globe and Mail conference*, "*The Changing Role of the CRTC*", at the Four Seasons Hotel, Toronto, on 1996, *CPAC* 1996 *Cable Parliamentary Channel*, Tape 4

199. The CRTC Vice-Chairman was immediately challenged by member of Parliament Dan McTeague about this position. The CRTC Vice-Chairman stated that the case would have to be determined in Federal Court.

> **CRTC Vice-Chairman Fernand Belisle:** "I think that there is no other option if you want to re-fight the 93 decision is [*sic*] probably to go to the Federal Court to see if the Commission's amendments of its regulation was valid or not."
>
> January 30, *Insight Information Inc*. and *The Globe and Mail conference*, "*The Changing Role of the CRTC*", at the Four Seasons Hotel, Toronto, on 1996, *CPAC* 1996 *Cable Parliamentary Channel*, Tape 4

200. On the same day, January 30, 1996, the CAC sent a letter to the CRTC Chairman requesting information about the status of the Cable Watch complaint and advocating a public hearing into the matter.

> "The Consumers' Association of Canada is inquiring as to the status of Cable Watch's complaint. The issues raised merit a full review, in CAC's opinion, and we join with Cable Watch in asking the Commission to respond expeditiously."
>
> Letter from Consumers' Association of Canada to CRTC Chairman, dated January 30,1996

201. On March 8, 1996, after being informed about the issue by Mr. Mahar, the Alliance of Seniors to Protect Canada's Social Programs sent a fax to the CRTC Chairman related to the Cable Watch complaint.

> "At a time when cuts are being made to essential services for ordinary Canadians, it is totally unacceptable that consumers are being overcharged for basic cable service by their cable companies with the permission of the CRTC.
>
> "Please confirm the status of the complaint filed with the CRTC by Cable Watch on November 28, 1995, regarding the collection of fees from basic cable subscribers pursuant to subsection 18(6.3) of the *Cable Television Regulations, 1986*."
>
> Letter from the Alliance of Seniors to Protect Canada's Social Programs to CRTC Chairman, dated March 8, 1996

202. Despite the earlier statements made by the Vice-Chairman of the CRTC on January 30, 1996, to the effect that the CRTC had already decided that it disagreed with all the issues raised in the Cable Watch complaint, on March 8, 1996, the CRTC informed Rogers Cablesystems, CCTA, Cable Watch and CAC that it had not yet rendered its ruling on the Cable Watch complaint. The CRTC requested submissions from Rogers Cablesystems and CCTA on all aspects of the complaint, to be followed by an opportunity for Cable Watch to respond to their submissions.

> "The Commission has carefully reviewed the contents of Cable Watch's complaint and has decided that prior to rendering its determination on the significant matters raised in the letter, it should first seek comments from the cable operator originally involved in the litigation process mentioned in Cable Watch's letter as well as from the Canadian Cable Television Association (CCTA).
>
> " ... As the Commission intends to deal with this matter promptly, the response is expected from you within 15 days of receipt of this letter"
>
> Correspondence from CRTC Secretary General to Rogers Cablesystems Limited and CCTA, copied to CAC and Cable Watch, dated March 8, 1996, p.2

203. The deadline for submissions were subsequently extended for all parties.

204. On March 29, 1996, submissions were filed by the CCTA and Rogers Cablesystems with the CRTC in relation to the Cable Watch complaint. Both parties stated that the Cable Watch complaint had no merit, stating that both the CRTC and cable companies had acted properly in relation to the Diversion Clause.

> Correspondence from Rogers Cablesystems Limited to Christopher Leafloor, dated March 29, 1996, copied to CRTC, CCTA and CAC

Correspondence from CCTA to Christopher Leafloor, dated March 29, 1996, copied to CRTC, Rogers Cablesystems Limited and CAC

PART III: THE ISSUES AND THE LAW

205. Cable Watch has requested rulings that the CRTC and cable television companies failed to fully inform cable television subscribers of the cost consequences of their intentions to embark on a process that would create and then permit cable television companies to invoke the Diversion Clause, and that as a result cable television subscribers are entitled to significant fee reductions and refunds in regard to all funds that have been collected from subscribers as a result of the Diversion Clause. These requests are based on the following submissions:

(1) The CRTC failed to properly notify cable television subscribers of its proceedings that led to the creation of the Diversion Clause

(2) Cable television companies failed to properly notify their subscribers of their intentions to invoke the Diversion Clause

(3) Generally, the CRTC does not make sufficient efforts to notify cable television subscribers of matters that are of interest to subscribers

(4) The CRTC exceeded its jurisdiction when it created the Diversion Clause

(5) Pending a final resolution of the above issues, the CRTC should issue an interim order that all funds diverted by the Diversion Clause should be paid into a trust fund

(1) The CRTC failed to properly notify cable television subscribers of its proceedings that led to the creation of the Diversion Clause

206. Cable Watch submits that the CRTC failed to properly notify cable television subscribers of its intention to conduct a proceeding that may have the possible result that a regulation would be created such as the Diversion Clause. This submission is based on the following grounds:

> (a) The rules of fairness and natural justice require that cable television subscribers be given advance notice of the CRTC's intention to initiate a proceeding which would have significant cost consequences for cable television subscribers
>
> (b) Cable television subscribers' existing rights to notice may be removed only by clear and explicit statutory language
>
> (c) The CRTC failed to properly notify cable television subscribers of its intention to initiate a proceeding which would have significant cost consequences for cable television subscribers

(a) The rules of fairness and natural justice require that cable television subscribers be given advance notice of the CRTC's intention to initiate a proceeding which would have significant cost consequences for cable television subscribers

207. When a governmental organisation proposes to alter the rates charged to subscribers, that organisation is required to give to the affected persons advance notice of the proposed alterations. If the organisation fails to give proper advance notice, this failure amounts to a breach of the principles of fairness and natural justice. In such a situation, it is appropriate for the courts to intervene.

> "The applicants allege the PUB [public utility board] failed to give notice.

> The respondents take the position that the appropriate notice was given.
>
> ...
>
> "Where, as in this case, there is no statutory provision specifying the notice to be given the general rule is that it must be sufficient to allow the affected person to know how he or she might be affected and to prepare to make representations. ...
>
> ...
>
> ... In the end it is the ratepayers who must pay the difference either through the surcharge or increased taxation, unless of course the municipalities could function without the income. The ratepayers are therefore vitally interested in the outcome of the hearings and were entitled to notice.
>
> *Conception Bay South (Town) et al. v. Board of Commissioners of Public Utilities (Nfld.) et al.* (1991), 95 Nfld. & P.E.I.R. 106 (Nfld. S.C.T.D.), *per* Cameron J., at pp. 110, 112 and 114

208. Similarly, the CRTC is required, pursuant to the principles of fairness and natural justice, to ensure that cable television subscribers are provided with advance notice of any proceedings that may have a significant affect on the fees paid by subscribers. For example, when the CRTC considers, pursuant to the former subsection 19 (2) of the *Broadcasting Act*, whether to amend the licence of a cable television licensee so as to permit the licensee to increase its fees charged to subscribers, the *Broadcasting Act* requires that the CRTC must first hold a public hearing that "reflects a consideration of the public interest as well as a consideration of the private interest of the licensee".

> "To be such a public hearing, it would, in my view, have had to be arranged in such a way as to provide members of the public with a reasonable opportunity to know the subject-matter of the hearing, and what it involved from the point of view of the public, in sufficient time to decide whether or not to exercise their statutory right of presentation and to prepare themselves for the task of presentation if they decide to make a presentation. In other words, what the statute contemplates, in my view, is

> a meaningful hearing that would be calculated to aid the Commission, or its Executive Committee, to reach a conclusion that reflects a consideration of the public interest as well as a consideration of the private interest of the licensee; it does not contemplate a public meeting at which members of the public are merely given an opportunity to 'blow off steam'."
>
> *Re Canadian Radio-Television Commission and London Cable TV Ltd.* (1976), 67 D.L.R. (3d) 267 (Fed. C.A.), *per* Jackett, C.J. at p. 270; appeal dismissed on the grounds that it had become moot, at *sub. nom. Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada* (1977), 77 D.L.R. (3d) 641 (S.C.C.)

209. The advance notice given to those who have an interest in the proceedings must be a notification that is "reasonable in the circumstances."

> "In any event, it is well established that where the form or content of the notice is not laid down it must be reasonable in the sense that it conveys the real intentions of the giver and enables the person to whom it is directed to know what he must meet.... In *Samejima v. R.*, [1932] S.C.R. 640, 58 C.C.C. 300, [1932] 4 D.L.R. 246, Duff J. said of a deportation order that it 'must be an order directing the investigation of facts alleged in a complaint made to him (the Minister); and such facts, unless the enactment is to be reduced to the merest parade of words, must be alleged, of course, in such a manner as to make the allegation reasonably intelligible to the person against whom the investigation is directed.' ...
>
> ...
>
> "Even in the absence of express statutory requirement it is trite law that where property rights or interests may be affected notice must be given and even in the absence of a statutory direction as to form and content a notice given must be reasonable in the circumstances.
>
> "I accept the following statement of Gale C.J.O. as the basis for considering the adequacy of notice. It is taken from the Court of Appeal's decision in *R. v. Ont. Racing Commission, Ex. Parte Taylor*, [1971] 1 O.R. 400, 15 D.L.R. (3d) 430 (C.A.). He said at p. 432 (D.L.R.):
>
>> I now turn to the other issue as to whether or not the respondent was denied natural justice by the action of the board. The cases establish beyond peradventure that whether a notice given in any

> particular case is sufficient depends entirely upon the circumstances of the case.
>
> ...
>
> "In my opinion this in an appropriate approach. One should take the circumstances into account in determining whether a notice was 'reasonable'. That concept is no stranger to our law, as my earlier reference to Chief Justice Gale's judgment for the Court of Appeal in *Ex parte Taylor* attests. There is no question that Hydro made a conscientious effort to publicize its proposed expansion before the Board's hearings commenced yet there is simply no basis for concluding that, as a result, all, or even most, affected persons in the M3 route study area would, as a result, comprehend from the notice given that their property might be affected. One could thus totally disregard the testimony of individuals, or of Mr. Gilbert on behalf of members of COC, to the effect that they did not so comprehend the notice, and still conclude, I think inevitably, that the notice was inherently defective."
>
> *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. And Ontario Hydro et al.* (1984), 8 Admin. L. R. 81 (Ont. Div. Ct.), *per* Reid J. at pp. 113-14 and 121

(b) Cable television subscribers' existing rights to notice may be removed only by clear and explicit statutory language

210. Cable television subscribers' *common law rights* to receive advance notice may be removed by legislation only if the legislation explicitly and clearly removes these rights.

> "As Hogg J.A. stated in *Re Gordon MacKay & Co. and Dominion Rubber Co.*, [1946] 3 D.L.R. 422 (Ont. C.A.), at p. 425:
>
> > The common law rights of the subject are not to be taken away or affected except only to such extent as may be necessary to give effect to the intention of Parliament when clearly expressed or when such result must follow by necessary implication, and if the rights of persons are encroached upon, this intention must be made manifest by the language of the statute, if not by express words then by clear implication and beyond reasonable doubt."
>
> *Bhatnager v. Canada (M.E.I.)*, [1990] 2 S.C.R. 217, *per* Sopinka J., at p.

228

211. Furthermore, cable television subscribers' *statutory rights* to receive notice may be removed by legislation only if the legislation explicitly and clearly removes these rights.

> "In *Nicholls et al. v. Cumming* (1877), 1 S.C.R. 395, Ritchie J. made the following statement at p. 422:
>
> > When a statute derogates from a common law right and divests a party of his property, or imposes a burden on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly and ... it is equally clear that no provisions for the benefit of protection of the subject can be ignored or rejected.
>
> "In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced."
>
> *Morguard Properties Ltd. v. City of Winnipeg* (1983), 3 D.L.R. (4th) 1 (S.C.C.), *per* Estey J., at p. 13

212. There is nothing in either the *Broadcasting Act* or the Regulations that explicitly denies cable television subscribers their statutory or common law rights to receive advance notice of proceedings which may have a significant effect on the rates paid by subscribers. Consequently, cable television subscribers continue to be entitled, pursuant to the principles of fairness and natural justice, to receive advance notice of any proceedings which may have a significant effect on the rates that they pay to cable television companies. Furthermore, this advance notice must be "reasonable in the circumstances" so that it largely succeeds in conveying to cable television subscribers the nature of the interests that are at stake in the

CRTC's proposed proceeding.

(c) The CRTC failed to properly notify cable television subscribers of its intention to initiate a proceeding which would have significant cost consequences for cable television subscribers

213. Cable Watch submits, however, that the CRTC failed to properly notify cable television subscribers that the CRTC was about to commence a proceeding that may have a significant effect on the rates paid by cable television subscribers.

214. This failure to give proper notice occurred in a context in which, between 1986 and 1995, cable television companies had sent various notices to their subscribers in regard to increases in monthly fees due to capital expenditures. These notices were sent to subscribers in the context of a regulatory system that had indicated to the public that "capital expenditure" increases were to partially recover eligible capital expenditures made by the cable companies, and were designed to allow cable companies to recover only fifty percent (50%) of its expenditures on capital improvements, amortised over a five-year period. Thus, when these increases were allowed by the CRTC, subscribers were entitled, pursuant to their contracts with cable television companies, to expect that these increases were for the purpose for which they had been notified and that their monthly fees would be correspondingly decreased after this purpose had been served.

(2) Cable television companies failed to properly notify their subscribers of their intentions to invoke the Diversion Clause

215. Cable Watch submits that cable television companies failed to properly notify their subscribers of their intentions to invoke the Diversion Clause. This submission is based on the following grounds:

> (a) As of January 1, 1995, the cable television companies that contributed to the Cable Production Fund significantly altered their fees charged to their subscribers
>
> (b) These alterations made to the fees charged to cable television subscribers constituted increases to the "base portion" of subscribers' fees
>
> (c) The Cable Television Regulations and contracts between cable companies and their subscribers required these companies to give advance notice of these alterations to subscribers' cable fees
>
> (d) The cable industry's "Code of Conduct" requires that cable television subscribers be given advance notice of these alterations to cable fees
>
> (e) The rules of fairness and natural justice require that cable television subscribers be given advance notice of these alterations to their cable fees
>
> (f) The cable television companies failed to properly notify their subscribers of their intentions to invoke the Diversion Clause as of January 1, 1995

(a) As of January 1, 1995, the cable television companies that contributed to the Cable Production Fund significantly altered their fees charged to their subscribers

216. The "mischief rule" of statutory interpretation may be used to interpret delegated legislation, and thus may be used to assist in the interpretation of the Regulations. Mr. Justice

Estey summarised the "mischief rule" as follows:

> "It has, of course, been long settled that, in the interpretation of a statute ..., the report of a commission of inquiry such as a Royal Commission may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the words employed by the Legislature in the statutory provision in question and the context of that provision within the statute. ... The logic is, of course, inexorable that the Legislature may well have determined not to follow the recommendations set out in the report of the commission which had earlier been placed before the house. On the other hand, as we have seen in *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs, and Trade-Marks*, [1898] A.C. 571 at p. 575, Lord Halsbury L.C. stated:
>
> > ... no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission."
>
> *Morguard Properties Ltd. v. City of Winnipeg* (1983), 3 D.L.R. (4th) 1 (S.C.C.), at pp. 4-5, *per* Estey J.

217. Accordingly, the "mischief rule" directs that when interpreting a provision of legislation or delegated legislation, the proper meaning of the provision may often be understood if one looks to the "mischief" that the provision was intended to resolve.

218. According to the "mischief rule", the notice provisions in the Regulations were designed to ensure that subscribers have advance knowledge of proposed significant changes to their cable television fees.

219. The Sunset Clauses provide as follows:

> 18. ...

> (6.1) Subject to subsection (6.3), where 60 months have elapsed following an increase pursuant to subsection (6) or that subsection as it read immediately prior to the coming into force of this subsection, that took effect on May 15, 1990 or later, a licensee shall decrease its basic monthly fee by an amount equal to that increase.
>
> (6.2) Subject to subsection (6.3), on or before January 1, 1995, a licensee shall decrease its basic monthly fee by an amount equal to the total of all increases pursuant to subsection (6) as it read immediately prior to the coming into force of this subsection, that took effect during the period beginning on August 1, 1986 and ending on May 14, 1990.

Cable Television Regulations, 1986, as amended by SOR/94-133, January 25, 1994, *Canada Gazette*, Part II, Vol. 128, No. 3, p. 995, at pp. 999-1000

220. According to the “mischief rule”, the Sunset Clauses were designed to ensure that CAPEX Levies were charged to subscribers for only five years rather than as a permanent increase in the cost of cable television service. These clauses were designed to avoid the mischief of subscribers having to pay increased fees on a permanent basis for capital expenditures made by cable television companies for which these companies have already been adequately compensated.

221. This indicates that the purpose of the Sunset Clauses is to ensure that CAPEX Levies are recovered from subscribers for no more than five years after the original capital expenditure is made.

222. The Diversion Clause provides as follows:

> 18. ...

> (6.3) The requirement to decrease the basic monthly fee pursuant to subsections (6.1) and (6.2) is suspended so long as a licensee contributes one half of the amount referred to in subsections (6.1) and (6.2) to the production of Canadian programming, as mentioned in Public Notice CRTC 1993-74.

Cable Television Regulations, 1986 (as amended)

223. According to the “mischief rule”, the Diversion Clause was designed to provide funding for the production of under-represented Canadian programming. This clause was designed to avoid the mischief of too little funds being available for the production of Canadian programming.

224. This indicates that the purpose of the Diversion Clause is to divert significant funds, which formerly had been CAPEX Levies, to a new fund to encourage Canadian Programming. Incidental to this, the Diversion Clause also diverts an equal amount of money back into the coffers of the cable television companies.

225. Thus, although the Diversion Clause states that it has “suspended” the operation of the Sunset Clauses, it has not operated as a true suspension of the Sunset Clauses. Normally, when a provision is “suspended” it has the effect of maintaining the *status quo* during the time of the suspension, although it does not have the effect of revoking the provision altogether.

> “I think it is clear that etymologically ‘suspend’ and ‘revoke’ have different meanings. According to the Shorter Oxford English Dictionary ‘suspend’ means:
>
> 1. To debar, usually for a time, from the exercise of a function or enjoyment of a privilege;
>
> 2. To put a stop to, usually for a time; *esp.* to bring a

> (temporary) stop; to intermit the use or exercise of, put in abeyance.
>
> The same authority gives a number of meanings to 'revoke', of which the following appears to be the most applicable to its use here:
>
> 4. To annul, repeal, rescind, cancel."
>
> *R. v. MacPhee* (1970), 11 C.R.N.S. 123 (N.S. Co. Ct.), *per* McLellan Co. Ct. J., at p. 128

226. But the Diversion Clause does not maintain the *status quo*. Instead, this clause has the effect, over the course of the next five years, of diverting $300 million from CAPEX Levies to the Canadian Production Fund. Consequently, the Diversion Clause does not suspend the operation of the Sunset Clauses. Instead, the Diversion Clause is a substantive regulatory provision that diverts millions of dollars towards purposes wholly different from the purposes for which the CAPEX Levies were initially allowed.

227. As of January 1st, 1995, most cable television companies invoked the Diversion Clause so as to avoid reducing their basic monthly fees charged to their subscribers. As of that moment, the funds affected by the Diversion Clause were no longer properly classified as CAPEX Levies.

(b) These alterations made to the fees charged to cable television subscribers constituted increases to the "base portion" of subscribers' fees

228. According to definitions stipulated in section 2 of the Cable Television Regulations, the "basic monthly fee" has three components.

2. In these Regulations,

...

"base portion" means the basic monthly fee, exclusive of

(a) the pass-through portion increased pursuant to subsection 18 (3); and

(b) that part of the basic monthly fee increased pursuant to subsection 18 (6);

...

"basic monthly fee" means the total amount that a licensee is authorized by the Commission to charge to a subscriber on a monthly basis for provision of the basic service to a cable outlet to which a television receiver, FM receiver, channel converter or other terminal device may be connected, in the subscriber's household or premises, but does not include federal or provincial taxes;

Cable Television Regulations, 1986 (as amended)

229. According to these definitions, the "basic monthly fee" is equivalent to the sum of the following three distinct components of the fee:

(a) the "base portion",

(b) charges for capital expenditures that have been allowed by the CRTC pursuant to subsection 18 (6) of the Regulations, and

(c) charges for the "pass-through" portion of the fee that have been allowed by the CRTC pursuant to subsection 18 (3) of the Regulations.

230. This new charge collected pursuant to the Diversion Clause is not an increase allowed pursuant to subsection 18 (6) of the Regulations. Instead, the Diversion Clause creates new charges that are designed to fund the Cable Production Fund and provide a "bonus" to the cable television companies. Furthermore, this new charge is not a "capital expenditure" increase, since

it is not described by the definition of "capital expenditure" that is found in subsection 18 (5) of the Regulations.

> 18. ...
>
> (5) For the purpose of subsection (6),
>
> "capital expenditure" means the capital expenditures that a licensee has incurred in respect of an activity or transaction during, subject to paragraph (d), the twelve month period beginning on September 1 in any year, that would not have been incurred if the activity or transaction had not been undertaken, where the activity or transaction is
>
> (a) the purchase or capital lease of the licensee's head end, to the extent that the purchase or capital lease relates to the reception or processing of the basic service,
>
> (b) the replacement or rebuilding of the licensee's distribution system or subscriber drops to upgrade the quality of service provided, to the extent that the replacement or rebuilding relates to the distribution of the basic service,
>
> (c) the purchase or capital lease of equipment used exclusively for community programming to enhance the quality or increase the quantity of community programming, or
>
> (d) the purchase or capital lease, up to a maximum of $150.00, of one addressable digital decoder installed in a subscriber's household or premises during the twelve-month period, whether the purchase or capital lease occurs during or prior to that twelve-month period;

Cable Television Regulations, 1986 (as amended)

231. Since this new charge is neither a "capital expenditure" increase authorized by subsection 18 (6) of the Regulations nor a "pass-through portion" authorized pursuant to subsection 18 (3), therefore, according to Regulation's definition of "base portion", this new charge must be part of the "base portion" of the "basic monthly fee".

> 2. In these Regulations,
>
> ...
>
> "base portion" means the basic monthly fee, exclusive of
>
> (a) the pass-through portion increased pursuant to subsection 18 (3); and
>
> (b) that part of the basic monthly fee increased pursuant to subsection 18 (6);
>
> ...
>
> Cable Television Regulations, 1986 (as amended)

232. Therefore, when the cable television companies invoked the Diversion Clause so as to avoid a reduction in the cost of basic cable television service, at that moment they had increased the "base portion" of their fees.

(c) The Cable Television Regulations and contracts between cable companies and their subscribers required these companies to give advance notice of these alterations to subscribers' cable fees

233. Subsections 18 (8), (9) and (10) of the Regulations require that whenever a cable television company intends to increase the "base portion" of its "basic monthly fee", the company must give notice to its subscribers at least 90 days prior to the date of the proposed increase. Thus, according to the Regulations, cable television companies were required to give

to all of their subscribers at least 90 days advance notice of their intention to increase the "base portion" of their monthly fees as of January 1st, 1995.

> Subsections 18 (8), (9) and (10) of the Cable Television Regulations, 1986 (as amended)

234. It is either an explicit or implied term of the contracts between cable television subscribers and cable television companies that these companies, when adjusting their rates, must comply with the *Broadcasting Act*, Regulations and the policies of the CRTC.

235. Furthermore, it is an implied term of the contracts between cable television companies and their subscribers that these companies, as monopoly providers of services under an indefinite term contract, must provide their customers with notice of significant alterations to its monthly fees.

236. These requirements for advance notice apply to the cable television companies' January 1, 1995, invocation of the Diversion Clause. Between 1986 and 1995, cable television companies had sent various notices to their subscribers in regard to increases in monthly fees due to capital expenditures. These notices were sent to subscribers in the context of a regulatory system that had indicated to the public that "capital expenditure" increases were designed to allow cable companies to recover only fifty percent (50%) of its eligible expenditures on capital improvements, and that these partial recoveries were to be amortised over five years. Thus, when these increases were allowed by the CRTC, subscribers were entitled, pursuant to their contracts with cable television companies, to expect that their monthly fees were for the purposes for which they had been notified and would be correspondingly decreased once this purpose had

been fulfilled.

237. Consequently, when cable television companies failed to provide their customers with advance notice of their intention to invoke the Diversion Clause as of January 1, 1995, these companies violated not only the notice requirements of the Regulations but also their contractual obligations to provide their customers with advance notice of any significant alterations to their cable rates.

(d) The cable industry's "Code of Conduct" requires that cable television subscribers be given advance notice of these alterations to cable fees

238. The cable industry's Code of Conduct has been formally considered by the CRTC and approved by the CRTC. Consequently, the Code of Conduct has become a part of the "federal regulatory regime" applicable to cable television companies.

> *Attorney-General of Quebec v. Irwin Toy Ltd.* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at p. 601

239. This Code of Conduct requires cable television companies to ensure that their bills exhibit "clarity of billing" and inform their subscribers of **any monthly rate change** to their fees for cable service. Consequently, when cable television companies altered their subscribers' fees by diverting a significant percentage of the basic cable rate to the Cable Production Fund, at that moment the Code of Conduct required these cable television companies to inform their subscribers of these alterations.

(e) The rules of fairness and natural justice require that cable television subscribers be given advance notice of these alterations to their cable fees

240. Even if an organisation appears at first glance to be a non-statutory organisation, it may nonetheless be the sort of organisation which is subject to judicial review and is also bound to observe the rule of natural justice. For example, a university was required to observe the rules of natural justice for the reason that the university had a "public responsibility that should be subject to some measure of judicial control". Similar determinations have been made in regard to religious organisations.

> "Whatever may be the case in respect of disputes over tenure or terms of employment between members of the teaching staff and the university, which can probably only be resolved in an action for breach of contract, it is my opinion that the prerogative writs of *certiorari* and *mandamus* are available to a student who has been denied natural justice in respect of his examinations. The university has been entrusted with the higher education of a large number of the citizens of this Province. This is a public responsibility that should be subject to some measure of judicial control. The university was created by statute, and s. 48 of the 1947 Act specifically provides that the senate shall hear and determine appeals from decisions of the faculty and school councils upon applications and memorials by students and others and this power is now vested in the governing council. In my opinion, the determination of such an appeal is a judicial act made in the exercise of a statutory power and as such is subject to judicial review."
>
> *Re Polten and Governing Council of the University of Toronto* (1975), 8 O.R. (2d) 749 (Div. Ct.), *per* Weatherston J., at p. 764
>
> See also: *Davis v. United Church of Canada* (1991), 8 O.R. (3d) 75 (Gen. Div.) at pp. 78 and 88-89

241. These principles of fairness and natural justice may apply, as well, to purely contractual relationships within the context of voluntary associations (otherwise known as

"domestic tribunals") such as certain sorts of clubs, professional associations and religious organisations.

> "... it is appropriate for a court to ascertain whether this type of body has acted within its jurisdiction (by applying a test of correctness); that its decision within its jurisdiction are not patently unreasonable; and that it has not breached duties of natural justice or fairness."
>
> *Kaplan v. Canadian Institute of Actuaries* (1994), 6 C.C.P.B. 236 (Alta. Q.B.), *per* Hunt J., at pp. 250-51
>
> See also: *Lakeside Colony of Hutterian Brethren v. Hofer* (1992), 97 D.L.R. (4th) 17 (S.C.C.), at pp. 20-21
>
> See also: *Ripley v. Investment Dealers Assn. of Canada (No. 2)* (1991), 108 N.S.R. (2d) 38 (N.S. S.C.A.D.) at pp. 44-47, leave to appeal refused (1992), 113 N.S.R. (2d) 90n (S.C.C.)

242. The modern law on this point has been stated forcefully by Lord Denning in *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.). In *Kaplan*, Mr. Justice Hunt relied on an often-cited passage from *Lee* which demonstrates that it is more likely that the rules of fairness and natural justice will be found to apply to a contract if one of the parties to the contract has no real choice either about whether to enter into the contract or about the terms of the contract.

> "... It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. **In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee**." [emphasis added]

> *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.), *per* Lord Denning; quoted by Hunt J. in *Kaplan v. Canadian Institute of Actuaries* (1994), 6 C.C.P.B. 236 (Alta. Q.B.), at p. 250

243. When cable television companies contract with their subscribers, these companies function in a manner which is more like that of a governmental entity than that of a private entity. This is due to the fact that these companies' contracts with their subscribers are in the context of a highly regulated statutory regime and these companies "enjoy the substantial benefit and protection of a statutory monopoly".

> "In my view, it is appropriate in this case to exercise my discretion in favour of the applicant [Keith Mahar] and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved. It is true that many of the cases in which an unsuccessful public interest litigant has been relieved of the usual cost order have involved suits against the government and the respondent here [Rogers Cablesystems Limited] is a private entity. However, the respondent does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which that monopoly is enjoyed."
>
> *Re Mahar and Rogers Cablesystems Limited* (1995), 25 O.R. (3d) 690 (Gen. Div.), *per* Sharpe J., at p. 704

244. Consequently, cable television companies are bound by the rules of fairness and natural justice in regard to their dealings with their subscribers in accordance with the authority given to them as regulated statutory monopolies.

245. The alterations made by cable television companies to their subscribers' monthly subscription charges, effective January 1, 1995, were alterations that very significantly affected

the fees and services charged by these companies to all of their subscribers throughout Canada.

246. Consequently, when these cable television companies made these alterations to their services and fees, these companies were required, pursuant to the principles of fairness and natural justice, to give advance notice to their subscribers of these alterations to these monthly subscription fees.

(f) The cable television companies failed to properly notify their subscribers of their intentions to invoke the Diversion Clause as of January 1, 1995

247. As outlined above, cable television companies were legally obligated to provide their customers with advance notice of their intentions to invoke the Diversion Clause as of January 1, 1995.

248. These companies, however, failed to provide their customers with any notice, whether advance or subsequent, of their invocation of the Diversion Clause as of January 1, 1995.

(3) Generally, the CRTC does not make sufficient efforts to notify cable television subscribers of matters that are of interest to subscribers

249. The above submissions indicate that the CRTC failed to ensure that cable television subscribers had proper advance or subsequent notice that the CRTC would conduct a hearing which may have the effect of significantly altering the cable fees paid by subscribers.

250. Furthermore, the above submissions indicate that the CRTC failed to ensure that cable television companies had provided their subscribers with proper advance or subsequent notice that these companies had invoked the Diversion Clause in a manner that had a significant effect on the fees charges to subscribers.

251. Unfortunately, however, these are not isolated events. Generally, the CRTC does a very poor job of communicating important information to cable television subscribers. The above examples are just two instantiations of a general problem.

252. An illustration of this is the manner in which the CRTC issues public notices in newspapers. For example, the following is the complete text of a public notice issued by the CRTC in the *Globe and Mail* on January 24, 1996 (p. A9):

> "Notice of Change relating to a Public Notice CRTC 1995-128-1. Further to Public Notice 1995-128 dated 28 July 1995 relating to Order in Council P.C. 1995-398, the Commission announces that it will hold a public hearing commencing on 5 February 1996, 9:00 A.M., Conference Centre, Phase IV, 140 Promenade du Portage in Hull, QC. Complete text of this notice of change relating to a public notice may be obtained by contacting the Public Examination Room of the CRTC in Hull, at (819) 997-2429; or through the CRTC offices in Montreal (514) 283-6607, Vancouver (604) 666-2111, Winnipeg (204) 983-6306, Halifax (902) 426-7997 or by consulting CRTC's Home Page: http://www.crtc.gc.ca."

253. As far as 99.99% of the public would be concerned, this notice conveys no information whatsoever. In this regard, this notice would be equally effective if it was written in Latin.

254. Typically, a CRTC public notice appears in tiny print in one huge paragraph that may run on for thousands of words. The language is obscure. There is no use of bullet points or white space that may assist the eye in focusing on the most important information. The CRTC makes no attempt to express clearly in simple language exactly what significance this notice may have on the cable television rates paid by subscribers.

255. The CRTC could do much better than this. These notices cold be designed differently. Furthermore, these notices could be broadcast on cable television community channels and included in the bills sent out to cable television subscribers. The CRTC has on many occasions stated that its mandate is to protect the interests of consumers, and to do so, it should change its procedures regarding notice.

(4) The CRTC exceeded its jurisdiction when it created the Diversion Clause

256. The Diversion Clause has two purposes: to permit money received from cable television subscribers to be contributed to a fund for the production of Canadian programming, and to permit an equal amount of money to be retained by those cable television companies that have decided to contribute their subscribers' money to the fund. Both of these purposes, however, are outside of the scope of the regulatory powers given to the CRTC by the *Broadcasting Act*.

257. Section 3 (1) (e) of the Broadcasting Act provides as follows:

> 3. (1) It is hereby declared as the broadcasting policy for Canada that,
>
> ...
>
> (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
>
> *Broadcasting Act*, S.C. 1991, c. 11

258. Subsection 3 (1) (e) of the *Broadcasting Act* states that the Canadian *broadcasting system* should encourage Canadian programming. This permits the CRTC to require cable television *companies* to contribute to a fund to encourage Canadian programming. However, subscribers are not part of the "broadcasting system". The *Broadcasting Act* does not even refer to the existence of cable television subscribers. Consequently, there is nothing in subsection 3 (1) of the Act that would permit the CRTC to require *cable television subscribers* to contribute to such a fund.

259. Consequently, the CRTC does not have the legal authority to create a regulation that requires subscribers to contribute to a fund to encourage Canadian programming.

260. Furthermore, the Diversion Clause permits cable television companies to keep the remaining fifty percent of the intended fee reduction that is not contributed to the fund for Canadian programming. The cable television companies do not require this money for capital expenditures, since other regulations ensure that they have adequate funds for this purpose. The cable television companies do not require this money to ensure their "profitability", since other regulations ensure that they have adequate funds for this purpose. The cable television

companies do not require this money to ensure that they have an incentive to contribute to the Canadian programming fund, since the CRTC has the authority to simply require cable television companies to contribute to the fund. Consequently, it is unclear why the CRTC has enacted a regulation that permits cable television companies to retain this money.

261. Consequently, there is no statutory object of the *Broadcasting Act* that would justify the retention by cable television companies of half of what otherwise would have been a fee reduction in subscription rates. Furthermore, this aspect of this regulation appears to be inconsistent with subsection 3 (1) (t) of the *Broadcasting Act*, which requires the CRTC to ensure that cable companies provide their services at “affordable rates”. The CRTC had previously determined that this particular rate reduction was necessary because of subscribers’ concerns about the “affordability” of cable services. Thus, the CRTC’s subsequent regulation that permits the cable companies to keep half of this rate reduction is a regulation that is inconsistent with subsection 3 (1) (t) (ii) of the *Broadcasting Act* and with one of the CRTC’s own decisions on the “affordability” of subscription fees.

262. There is an additional reason why the Diversion Clause is beyond the jurisdiction of the CRTC and the *Broadcasting Act*. The Diversion Clause has not been invoked by all cable television companies, thus some cable television subscribers are not required to contribute to the Cable Production Fund. Furthermore, the Diversion Clause has had the effect that different subscribers contribute to the Cable Production Fund at vastly different rates. Some subscribers contribute only pennies per month, while other subscribers contribute several dollars per month.

263. These inequitable contributions to the Cable Production Fund are contrary to section 3 (1) (e) of the Broadcasting Act, which requires that **each element** of the Canadian broadcasting system “shall contribute in an appropriate manner.”

(5) Pending a final resolution of the above issues, the CRTC should issue an interim order that all funds diverted by the Diversion Clause should be paid into a trust fund

264. Cable Watch has requested that the CRTC should issue an interim order that the cable television companies and Cable Production Fund should pay into a trust fund all funds diverted as a consequence of the January 1, 1995, invocation of the Diversion Clause by the cable television companies.

265. When considering whether to issue an interim order pending a final resolution of a legal proceeding, the test to be used is the three-part *American Cyanamid* test:

> 1. Whether the applicant has established that there is a serious issue to be tried;
>
> 2. Whether the applicant has established that irreparable harm may be suffered if the interim order is not issued; and
>
> 3. Whether the applicant has shown that the balance of convenience lies in its favour.
>
> *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311

266. Cable Watch submits that its request satisfies this test, and that accordingly an interim order should be issued by the CRTC.

267. Firstly, Cable Watch has demonstrated that its complaint has raised a serious issue that must be resolved. This was acknowledged by Mr. Justice Sharpe, as follows:

> "In my view, it is appropriate in this case to exercise my discretion in favour of the applicant [Keith Mahar] and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved. ... An unrelenting application of those [costs] rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants. Such a consequence would be undesirable with respect to proceedings such as the present one which was, in my view, brought on a bona fide basis and raised a genuine issue of law of significance to the public at large."
>
> *Re Mahar and Rogers Cablesystems Limited* (1995), 25 O.R. (3d) 690 (Gen. Div.), *per* Sharpe J., at pp. 704-5

268. Secondly, Cable Watch has demonstrated that irreparable harm may be suffered if the interim order is not issued. Significant amounts of money have already been collected from cable television subscribers as a result of the invocation of the Diversion Clause by the cable television companies. Additional significant amounts of money continue to be collected each month. Half of this money is being forwarded to the Cable Production Fund, and is accordingly disbursed. In the event that Cable Watch is ultimately successful with its complaint, it will likely be impossible to recover these funds once they are disbursed. The remaining half of the money collected by cable television companies pursuant to the Diversion Clause is deposited into these companies general revenues. It is likely that these funds are used by the cable television companies to pay for ongoing operating expenses. In the event that Cable Watch is ultimately successful with its complaint, it will likely be impossible to recover these funds. Consequently, if no interim order is issued and Cable Watch ultimately is successful in its complaint, cable

television subscribers would be in danger of not recovering their funds and would thereby suffer irreparable harm.

269. Thirdly, Cable Watch has demonstrated that the balance of convenience lies in its favour. If an interim order is issued and Cable Watch is unsuccessful in its complaint, these funds will be available to be returned to the Cable Production Fund and cable television companies. If, however, the interim order is not issued and Cable Watch is successful in its complaint, cable television subscribers will suffer irreparable harm. Accordingly, the balance of convenience favours the granting of the interim order.

PART IV: ORDER REQUESTED

270. Cable Watch requests the CRTC:

(a) to issue an interim order that, pending a final resolution of this complaint, cable television companies and the Cable Production Fund are required to deposit into a trust fund all funds collected from cable television subscribers pursuant to subsection 18 (6.3) of the Regulations;

(b) to issue a final order that the CRTC failed to fully inform cable television subscribers of the cost consequences of subsections 18 (6.1), (6.2) and (6.3) of the Regulations;

(c) to issue a final order that the cable television companies that contributed to the Cable Production Fund have significantly altered their fees charged to their subscribers, but these alterations were made without first providing cable television subscribers with proper advance notice of these alterations; and

(d) to issue a final order that as a result of this failure to give proper advance notice, these cable television companies were not entitled to alter their fees pursuant to subsection 18 (6.3) of the Regulations as of January

1, 1995, and should now refund to their subscribers all of the funds collected without proper notice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

____

Christopher K. Leafloor
Counsel to Cable Watch

DATE: May 20, 1996