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Intervenor Funding and Access to Environmental Justice: Time for the Ontario Political Parties to revisit this issue?

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Summary

When the Intervenor Funding Project Act (IFPA) expired in 1996 there was concern that access to environmental justice would be seriously affected in Ontario and there is growing evidence that this has happened. Under IFPA, environmental groups and individuals were able to better contribute to tribunal hearings under the Environment Assessment Act and other laws because of financial assistance provided to them. We argue that participant and intervenor funding for participation in approval processes such as those created by the Environmental Protection Act, Environmental Bill of Rights, the Planning Act, the Endangered Species Act, 2007 and the Green Energy and Green Economy Act, 2009 would be beneficial and promote better decision making by government ministries and proponents. Early participation in planning can avoid surprises and controversies for decision-makers at later stages in the approval process.

Introduction

About 15 years ago, the Mike Harris government at Queen's Park allowed a key law, the Intervenor Funding Project Act (IFPA), to simply expire. Among many environmental lawyers there was dismay and concern. Some worried that public participation in hearings would be seriously undermined and others felt that environmental justice would be crippled.

Fifteen years later many of the fears have been borne out. The financial situation facing many non-profit and volunteer-based organizations arguably is very tough, and participation in lengthy tribunal hearings and some approval processes is often seen as a luxury. Legal and expert costs have continued to escalate. Some industries have adopted aggressive tactics in seeking approvals such as reliance on Strategic Lawsuits Against Public Participation (SLAPPs).[1]

As we argue below and in a series of articles to follow, it has become evident that citizens and non-government organizations (NGOs) are facing increased barriers to participating in environmental approvals, planning, assessment and hearing processes to the extent that existing federal, provincial, and territorial laws allow. In part this is due to the various effects of "downsizing," streamlining, and harmonization policies being implemented by all levels of government in Canada. In addition, there are greater demands on funding sources for all non-profit and volunteer-based organizations. Moreover, globalization and issues such as climate change are altering the complexity of legal and policy issues.

[1] Ministry of the Attorney General, *Anti-SLAPP Advisory Panel Report* and Background Material, 2010; online: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/

Why was funding for participation important? Should it be revived to level the playing field? What can groups do to achieve their goals in the event that they are unable to obtain adequate resources?

Early calls for Intervenor Funding

Some of the first formal calls for funding of citizen participation in environmental hearings in Canada were issued in briefs and reports prepared by the Canadian Environmental Law Association and the Canadian Environmental Law Research Foundation in the late 1970s. Having won the struggle for new laws such as the Ontario Environmental Assessment Act (EAA) and greater access to tribunals, in the 1980s ENGOs and citizen groups were finding they then lacked the resources to be able to participate and intervene effectively. For example, they were unable to retain legal representation and expert witnesses in the major hearings before the Environmental Assessment Board (EAB; now the Environmental Review Tribunal) and the Ontario Municipal Board (OMB) and other forums that were taking place.

The concept behind intervenor funding is fairly straightforward. By the mid 1980s many public hearing processes (for example, the Ontario Energy Board or OEB) were based on full-cost recovery, proponents-pay cost awards; cost awards to intervenors are determined at the end of the hearing to compensate them for their participation. Intervenor funding simply provides funding in advance of a hearing for those who cannot otherwise afford to participate without up-front funding. Intervenor awards are deducted from the cost awards at end.

Before the IFPA was passed in the late 1980s, cost awards for some large EAB hearings were made by Cabinet (Order in Council). From 1985 to 1996 over $5.5 million was awarded in this way - mostly for two hearings: Ontario Waste Management Corporation EA hearing ($3.2 million) and Class EA for Timber Management ($1.8 million). Problems were perceived with this process including: the approach was inefficient, uncertain and time consuming; the money came from tax dollars; and there was a strong potential for political biases to shape funding awards.

The Intervenor Funding Project Act

In June 1988, then Attorney General Ian Scott, introduced the Intervenor Funding Project Act in the Ontario Legislature. Scott had acted as commission counsel to the Berger Inquiry (1974-1978), the first major public inquiry in Canada to employ intervenor funding.[2] He strongly believed in the concept of intervenor funding and had been involved in hearings before the EAB, the OMB and the OEB in the 1980s where this had been a major issue and decisions had been challenged at Divisional Court and the Ontario Court of Appeal.

[2] See R. Anand and I. G. Scott, "Financing Public Participation in Environmental Decision-Making," (1982) 66 Canadian Bar Review 81.

The Act permitted panels of the Environmental Assessment Board, the Ontario Energy Board, and Joint Boards under the Consolidated Hearings Act (e.g. combined EAB and OMB hearings) to provide funding to public interest intervenors for such things as legal fees and expert witnesses. Proponents were required to pay the cost of funding, unless this would impose substantial hardship, in which case the Board could proportion costs between intervenors and the proponent.

The statute was enacted in December 1988, with the support of both opposition parties. Although the legislation was initially sunsetted so that it expired in March 1992, it was renewed and extended for another four years so that it finally expired on March 31, 1996.

The public policy objectives of the IFPA included:

- ensuring that Boards receive quality information including access to full and fair representation of interests upon which to base their decision-making; and
- ensuring public access to hearings was not unfairly restricted solely on ability to pay, by providing a mechanism in advance of hearings to permit participation by individuals and groups who represent legitimate interests and who otherwise lack resources to participate in hearings.

The passage of the IFPA was perceived as a major victory for the province's non-governmental organizations. Between 1989 and 1995, $32.3 million was allocated by proponents to 155 intervenors for 18 different hearings.[3] The lion's share of this, 77% ($25 million), was allocated by the EAB during the Ontario Hydro Demand Supply Plan (DSP) Hearing which began in 1990. The DSP was analogous to the 20-year Integrated Power System Plan first released by the Ontario Power Authority in 2007.

Not all intervenor applicants under the IFPA were recognized as bona fide intervenors eligible to receive funding. In the 21 OEB and EAB hearings held from April 1, 1989 and December 15, 1991 there were 302 applications for intervenor status. Sixty-one of those groups also applied for funding, and 37 (or 61% were awarded intervenor funding), providing an indication that awards were controlled by the tribunals. In more than half of EAB and OEB hearings where there was intervenor funding provided to groups, it was under $100,000.

There was evidence by the mid 1990s the many businesses that had participated under the new system understood that the IFPA had achieved many of its goals. Indeed, a 1995 survey conducted by the OEB and EAB indicated that businesses supported the principle of continued intervenor funding, At the same time, many companies believed it should be streamlined - made more cost-effective by requiring intervenors to participate in pre-hearing planning and "issue scoping."

[3] Some of these statistics are based on an unpublished internal review of the IFPA prepared by MOE staff in 1995 and made available to CELA and others in late 1995 following FOI requests. Contact MOE's Public Information Centre for further information.

Despite efforts by environmental groups[4] and other stakeholders to ensure the IFPA was renewed, many industry associations and lobby groups including the Canadian Federation for Independent Business, Ontario Waste Management Association, and Ontario Chamber of Commerce were opposed and the law was allowed to expire by the Harris government.

Meanwhile amendments to the Environmental Assessment Act passed later in 1996 formally recognized the benefits of early consultation by legally requiring proponents to consult with the public prior to submitting an environmental assessment and developing Terms of Reference documents. In addition, a guideline on EA consultation developed by the Ministry of the Environment (MOE) in December 2000 suggested that proponents should voluntarily consider providing funding to stakeholders for peer review of technical work produced for the EA.[5] Moreover, the final policy guideline (Code of Practice) on EA consultation approved by MOE in 2007 elaborates on this idea by encouraging proponents to voluntarily provide "participant support".[6] Proponents can do this by:

- Identifying the particular needs of and resources available to those participating.
- Being aware of the type of input sought from interested persons relative to the technical complexity of the EA.
- Considering the availability of financial and human resources to the proponent.

A number of benefits of voluntary participant support are listed. [7] However, the document also notes that providing participant support "does not ensure a smooth, issue-free process" and not providing participant support has no effect on whether a proposed undertaking is approvable. At the time of writing this article, Iler Campbell was unaware of a study that has reviewed implementation of this MOE guidance or relevant statistical data.

Part of the reason why there may have been less political pressure to provide IFPA-like funding is that the OEB continues to maintain a clear policy on intervenor funding, partly as a result of court decisions made on funding in the 1980s. Moreover, cost awards, although rarely granted, also can be issued by the OMB and the Environmental Review Tribunal. However, since 1998 no public hearings at ERT have been conducted under the EAA.

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[4] For example, CELA filed a detailed application for review under the Environmental Bill of Rights on the need for new law in late 1995. See ECO, Keep the Door Open: Annual Report 1996, Toronto: ECO, April 1997.

[5] MOE, Guideline on consultation in the environmental assessment process, December 2000, Draft; p.25.

[6] MOE, Code Of Practice - Consultation In Ontario's Environmental Assessment Process, 2007; http://www.ene.gov.on.ca/environment/en/resources/STD01_076108.html

[7] Supra, p. 40. The benefits of providing participant support listed in the Code, supra, are that it:
- Encourages the participation of interested persons.
- Attempts to ensure that no one is prevented from participating to the degree to which they would like.
- Promotes early identification of concerns.
- Acknowledges the volunteer efforts of participants.
- Enhances the credibility of both the environmental assessment process and the proponent.

What Other Jurisdictions are doing or have done

Canadian Environmental Assessment Agency

Until 1990, participant funding in panel reviews under the federal Canadian Environmental Assessment Review Process (CEARP) was made available voluntarily on an ad hoc basis by project proponents.[8]

In 1990 a six-year program for funding federal participation in panel reviews was launched with Green Plan funding. The program was granted $8.5 million in funding (for the entire six-year period).[9] After the start of the program participant funding was awarded in many reviews (approx. one in three). For example: $103,600 was awarded to 17 participants for the 1991 hearings on the Oldman River Dam and $128,500 was awarded to three groups for a review of the Halifax Harbour Cleanup Project. For most reviews in which participant funding was made available, $100,000 to $200,000 was awarded. This pattern provided the early precedents that have guided awards since then.

In 1992, the Canadian Environmental Assessment Act was enacted and the Canadian Environmental Assessment Agency (CEAA) was created. In 1994 the Canadian Environmental Assessment Act was amended to require the maintenance of a participant funding program.[10]

The participant funding program assists members of the public in preparing for and participating in background scoping meetings which identify the factors proponents will address in their environmental impact statement (EIS), reviewing the EIS, and preparing for and participating in the mediation or panel hearings. Funding can be granted to individuals and non-profit organizations on either side of the issue (i.e. opposed to a project or in favour of it), but priority is given to those who demonstrate that the project has a direct impact on their life or means of earning a living. In applying for funding, applicants are asked to:

- demonstrate their need for financial assistance;
- demonstrate any direct interest in the potential environmental effects of the project, such as a direct effect on their way of life or means of earning a living;

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[8] The first of such ad hoc decisions took place in August 1981 when $325,000 in participant funding was distributed by a committee supervised by the Department of the Environment. The funds were allocated for a review of a Canadian Pacific Railways project in Rogers Pass, Glacier National Park, British Columbia. Other major projects also received funding through ad hoc processes. For example, $1 million was provided to 32 groups and municipalities by the Department of Indian Affairs and Northern Development for a review of three companies' plans for Beaufort Sea Oil Drilling operations. See Rod Northey, The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order. Toronto: Carswell, 1994, p. 522.

[9] Rod Northey, The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order. Toronto: Carswell, 1994, p. 493.

[10] Section 58 states, simply, that "For the purposes of this Act, the Minister shall establish a participant funding program to facilitate the participation of the public in mediations and assessments by review panels" (*Canadian Environmental Assessment Act,* S.C. 1992, c.37).

- prepare a clearly defined plan of activity consistent with the terms of reference for the mediation or review panel; and
- consider the possibility of cooperative participation with other groups.[11]

Each public review is given an allocation from the program, and a funding administration committee is established. The committee is independent of the panel or mediator and the proponent. The committee makes recommendations to CEAA and the President of the Agency reviews these recommendations and approves them. Usually, funding is announced by the Minister of the Environment.

The list of eligible expenses is broad, including professional fees, salaries of those employed specifically for the review (not on the payroll of the organization before review), travel expenses, purchase of information materials, professional services, rental of space, office supplies, telephone and fax charges, translation services, and advertising.

All participants and intervenors must sign an agreement with CEAA to provide an accounting of funds, that they are involved in pre-hearing scoping, and there is a holdback of some funding pending the completion of the hearing.

Manitoba

Other jurisdictions also have legislated funding. In 1991 Manitoba legislated intervenor and participant funding for EA hearings under its Environment Act; regulations[12] specify proponent payment, controls through a holdback, and requirements for funding to be withheld or returned by intervenors whose participation is poor.[13] One 2002 study conducted indicates that the Manitoba government "should make greater use of the participant funding provisions" of its EA legislation to facilitate travel and fund participant research.[14]

Alberta

In the early 1990s, Alberta legislated intervenor funding under the Natural Resources Conservation Board Act and Energy Resources Conservation Act, and the provisions are

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[11] Canadian Environmental Assessment Agency, Guide to the Participant Funding Program under the Canadian Environmental Assessment Act, CEAA, 2004; revised 2008.

[12] Manitoba Regulation 125/91 under *Environment Act*.

[13] Manitoba Clean Environment Commission (CEC), Participants Handbook, undated; http://www.cecmanitoba.ca/resource/file/Participants_Handbook.pdf

[14] John Sinclair et al., Public hearings in environmental assessment: towards a civics approach, Natural Resources Institute, University of Manitoba, 2002. The study argues that Manitoba should amend the legislation to allow for the administration of funding programs by the CEC, and to allow for funding awards in two main areas: (i) facilitating participation (e.g. covering the cost of travel) and (ii) funding research by participants as sanctioned by the CEC panel. The authors also contend that that funding is also relevant to *assessing* information. Credible research by intervenors can help assess information submitted by project proponents and government agencies. See: www.mbeconetwork.org/index.php/download_file/-/view/367/

administered by respective boards under those Acts (Natural Resources Conservation Board, Energy Resources Conservation Board). Eligibility rules differ from other laws to the extent that individuals or groups must show that they are directly affected by project.[15]

British Columbia

Like Ontario, BC's legislation for most energy utilities approvals (i.e. those under the Utilities Commission Act) specifies that the proponent will pay the costs of participant funding.

In 1993 the province established an "Interim Participant Assistance Policy." Between 1993 and 2001, the policy was used by all provincial agencies, boards and commissions that offered assistance for participation, including the BC Environmental Assessment Office, and was used by the Commission on Resources and the Environment before its work was completed in 1995. Participant assistance was defined in the policy as "resources (including funds, services, information, facilities, etc.) provided to the public and aboriginal groups/governments by the provincial government to support the preparation and presentation of information that might not otherwise be available to the decision-making process".[16] Funding was provided by the government from consolidated revenues and participants were required to meet eligibility criteria similar to those in Ontario's IFPA.

SCC clarifies when courts can order governments to fund public interest litigation

In early February 2011, the Supreme Court of Canada (SCC) ruled in *R. v. Caron* that superior courts are empowered to order governments to fund public interest litigation before statutory courts and tribunals.[17] The SCC ruled that superior courts possess an inherent jurisdiction to render assistance to inferior tribunals to enable the latter to administer justice fully and effectively, although this assistance can be rendered only in exceptional circumstances where intervention of the superior court is essential to avoid a serious injustice to the public interest.

R. v. Caron is the court's third major SCC ruling in a series on funding public interest litigants that started with *British Columbia (Minister of Forests) v. Okanagan Indian Band.*[18] The *Okanagan* case, which empowered judges to order the state to pay advance costs to public interest litigants, was narrowed by the SCC in 2007 in *Little Sisters Book and Art Emporium v. Canada #2*.[19] In the latter case, the SCC circumscribed such awards as "rare and exceptional" and as "a last resort before an injustice results for a litigant and for the public at large."

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[15] See for example, s. 11 of the Natural Resources Conservation Board Act http://www.qp.alberta.ca/574.cfm?page=N03.cfm&leg_type=Acts&isbncln=9780779744923

[16] British Columbia Environmental Assessment Office. Guide to the British Columbia Environmental Assessment Act, (Victoria: British Columbia Environmental Assessment Office, 1995).

[17] R. v. Caron, [2011] S.C.J. No. 5

[18] [2003] S.C.J. No. 76

[19] [2007] S.C.J. No. 2

While the Caron decision is welcome news, it highlights the need for governments to address funding gaps themselves rather than spur a patchwork of case-by-case applications to the courts for interim cost awards. It seems implausible that the superior courts, with limited powers to deal with cases brought to their attention, will remedy the chronic problems and serious injustices that plague many tribunals and limit public participation in government decision-making. These structural problems with access to justice have been created by governments through cuts and severe constraints to the federal Court Challenges Program, civil legal aid programs, participant funding and other similar mechanisms.

Does Ontario need a new law on funding?

In recent years, much of the focus of public policy discussion around public participation has been on Strategic Lawsuits Against Public Participation (SLAPPs) and the cost awards sometimes sought by developers at OMB and ERT hearings. In response, the Ontario government appointed an Anti-SLAPP Advisory Panel in 2010 and it issued a report in October 2010 calling for new procedural legislation to support existing legal rights.

But anti-SLAPP legislation is only part of the challenge with respect to protecting access to environmental justice.

As the 2011 election campaign heats up, the Ontario political parties should take another look at the need for a new broader participant and intervenor funding law to replace the IFPA.

While the Intervenor Funding Project Act is unlikely to be revived in its original format, the comments of government decision-makers and industry on the *IFPA* in 1995 provide some indication of why participant and intervenor funding for participation in processes such as those created by the Environmental Bill of Rights (EBR), the Planning Act, the Endangered Species Act, 2007 and the Green Energy and Green Economy Act, 2009 might be beneficial. Under the IFPA, environmental groups and individuals were able to better contribute to tribunal hearings because of financial assistance provided to them.

A new participant funding law, if working properly, also has the potential to promote better decision making by government and proponents by ensuring that participation and funding is transparent, equitable, and certain for intervenors. Early participation in planning can avoid surprises and controversies for decision-makers at later stages in the approval process.

For example, the *EBR* does not include provisions for funding individuals or organizations that wish to participate through *EBR* processes. Industry members of the Task Force that drafted the EBR insisted that such a provision not be included in the new law, partly because the IFPA already was in place but also because they felt this would provide ENGOs and the public with an unfair advantage.[20]

[20] Task Force on the Ontario Environmental Bill of Rights. Report of the Task Force on the Ontario Environmental Bill of Rights. Toronto: Queen's Printer, 1992.

Morgan Gardner, in a report published by the Ontario Environment Network in 1993, warned that the public might not be able to afford to use the new rights provided under the *EBR*. She wrote:

> Economic barriers ... stand to impede the utilization and meaningfulness of these rights, due to the absence of a provision for public participation funding. Many environmental and citizen's groups lack the financial resources necessary to use these rights provided under the Bill.[21]

In the past 16 years, environmental groups have conveyed concerns about the cost of *EBR* participation and missed opportunities to the Ontario government, the media and the Environmental Commissioner of Ontario on numerous occasions. The most significant costs reported are for professional fees for lawyers and consultants. Lawyers are almost essential for some *EBR* participation opportunities, such as filing applications for leave to appeal on complex environmental and energy project approvals issued under the Environmental Protection Act and the Ontario Water Resources Act.

In the case of EBR Applications for Investigation and Review some of the best researched and prepared applications have come from applicants assisted by lawyers. Community groups often lack the technical expertise necessary to evaluate a proposal for a new Act, regulation, policy or instrument. Consultants such as engineers, hydrogeologists, biologists and planners can help them to do so. However, consultants, like lawyers, are expensive and for smaller environmental groups may be out of reach most (if not all) of the time. Larger groups may be able to afford consulting fees for some cases, but may find themselves dropping some matters because of the costs.

Conclusion

Since many observers would argue that it seems unlikely that a future Ontario government will enact a new law to reestablish intervenor and participant funding, a key question becomes this: how can environmental and citizen groups use their scarce resources to effectively participate in decision-making processes that affect their interests?

In the coming weeks we will explore this question in a series of blog postings on this site.

[21] Morgan Gardner, The Importance of Public Participation Funding: A Study of Non-Litigation Funding for the Proposed Ontario Environmental Bill of Rights. Guelph, ON: Ontario Environment Network, November 1993; p. iv.