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Proposal for a new Ontario Participant and Intervenor Funding Act filed with the Environmental Commissioner of Ontario

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When the *Intervenor Funding Project Act* (the "IFPA")[1] expired in 1996[2] there was concern that access to environmental justice would be seriously affected in Ontario. There is growing evidence that this has in fact occurred. Under IFPA, environmental groups and individuals were better able to contribute to tribunal hearings under the *Environment Assessment Act* and other laws through the provision of financial assistance.

Since the expiration of the IFPA, citizens and non-government organizations (NGOs) have faced increased barriers to participating in environmental approvals, planning, assessment and hearing processes. In addition to funding under IFPA no longer being available, legal and expert costs have continued to escalate, and some proponents have begun to use aggressive tactics such as strategic lawsuits against public participation (SLAPPs).

The authors argue that participant and intervenor funding for participation in approval processes such as those created by the *Environmental Protection Act*, the *Environmental Bill of Rights, 1993*, 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.

The Importance of Funding for Participation

Some of the first formal calls for funding of citizen participation in environmental hearings in Canada were made in briefs and reports by the Canadian Environmental Law Association and the Canadian Environmental Law Research Foundation in the late 1970s. In the 1980s, having won the struggle for new laws such as the Ontario *Environmental Assessment Act* (the "EAA") and greater access to tribunals, environmental NGOs and citizen groups were finding that they lacked the resources to be able to participate and intervene effectively.

The concept behind intervenor funding is fairly straightforward. By the mid 1980s many public hearing processes (for example, the Ontario Energy Board or OEB) required proponents to pay the full costs of intervenors, to compensate them for their participation. Cost awards to intervenors

[1] R.S.O. 1990, c. I.13 (http://www.e-laws.gov.on.ca/html/repealedstatutes/english/elaws_rep_statutes_90i13_e.htm).
[2] Repealed on April, 1, 1996; see IFPA, s. 16 (1)

were (and continue to be) determined at the end of the hearing; 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 the end.

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

The Intervenor Funding Project Act

In June 1988, then Attorney General Ian Scott introduced the IFPA in the Ontario Legislature. He strongly believed in the concept of intervenor funding and had been involved in hearings before the Environmental Appeal Board (EAB), the Ontario Municipal Board (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.

The IFPA 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 certain costs such 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 apportion costs between intervenors and the proponent.

The IFPA was enacted in December 1988, with the support of both opposition parties. 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 that public access to hearings was not unfairly restricted solely on the basis of 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, assisting 155 intervenors in eighteen different hearings.

Not all intervenor applicants under the IFPA were recognized as *bona fide* intervenors eligible to receive funding. In the twenty-one OEB and EAB hearings held between April 1, 1989 and December 15, 1991 there were 302 applications for intervenor status. Sixty-one of those groups also applied for funding, and thirty-seven (or 61%) were awarded intervenor funding. It is evident that most tribunal panels took a careful approach to interpreting the criteria set out in the IFPA and restricted the availability of funding awards, creating a basic competence threshold for intervenors to ensure that hearing interventions funded by proponents were useful and informative. In retrospect, this seems especially true with respect to hearings on private sector proposals because the panels demonstrated stinginess with allocating funds to intervenors wishing to oppose private corporate-sponsored projects such as the KMS incinerator in Peel Region which was subject to a lengthy EAB hearing in 1988-89.

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

Despite efforts by environmental groups 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 the Ontario Chamber of Commerce were opposed and the law was allowed to expire by the Harris government.

Meanwhile subsequent amendments to the *Environmental Assessment Act* in 1996 formally recognized the benefits of early consultation by legally requiring proponents to consult with the public prior to developing terms of reference and submitting an environmental assessment. 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. Moreover, the code of practice on EA consultation approved by MOE in 2007[3] elaborates on this idea by encouraging proponents to voluntarily provide "participant support". 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.[4]

A number of benefits of voluntary participant support are listed. 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.[5] We are unaware of any study that has reviewed implementation of this MOE guidance or relevant statistical data.

There may have been less political pressure to provide IFPA-like funding in part because 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 (ERT; successor to the EAB). However, since 1998, no public hearings at the ERT have been conducted under the EAA.

Proposal for a New Ontario Participant and Intervenor Funding Act

In mid-January 2012 the authors filed an application for review with the Environmental Commissioner of Ontario (ECO) under the *Environmental Bill of Rights, 1993* requesting a review of existing laws, regulations and policies related to public participation in hearings under the *Environment Assessment Act* and other environmental and planning laws.

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[3] Online: http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079520.pdf.
[4] At page 54.
[5] *Ibid.*

We are requesting a review of a number of existing laws related to the growing participation gap and that a new law be enacted. We tentatively call it the "Ontario Participant and Intervenor Funding Act" in recognition of the fact that the objectives of the law would be the promotion of early participation in decision-making as well as the funding of participation in approval processes and hearings before a wide range of tribunals.

We note that the issue of provision of funding for public interest intervenors in environmental hearings in Ontario was last publicly reviewed in 1992 by two professors at the University of Windsor and did not result in any further amendments to the law.

We further contend that provision of participant and intervenor funding for participation in approval, planning, consultation and decision-making processes such as those created by the *Environmental Protection Act*, *Environmental Bill of Rights, 1993*, the *Planning Act* and the *Endangered Species Act, 2007* would be beneficial and promote better decision-making by government ministries and proponents. Approvals and policy and planning processes related to various other Ontario laws such as the *Green Energy and Green Economy Act, 2009*, the *Environmental Assessment Act*, the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Aggregates Resources Act* also should be captured under this review.

In this time of fiscal restraint, we recognize that government may not be receptive to such a proposal. However, experience under the *Environmental Bill of Rights, 1993* for the past seventen years shows that early participation in planning can avoid surprises and controversies for decision-makers at later stages in the approval process, which is beneficial and often less costly to all parties involved.

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To obtain the full submission to the ECO, please contact the authors.