

THE REGIONAL MUNICIPALITY OF HALTON

Report to: Chairman and Members of the Solid Waste
Management Committee

From: K. S. Anderson, Regional Solicitor

Date: March 04 1986

Report No: RS 20/86

Re: Grant Request - West Burlington Citizens Group -
Landfill Approvals Process - "Intervenor Funding"
Law File: 1986-104

RECOMMENDATION:

1. THAT Report RS 20/86 concerning the Legal background and status of the issue of intervenor funding in the Province of Ontario be received for information.
2. AND THAT the grant request by the West Burlington Citizens Group for "intervenor funding" with respect to the Region's Landfill Approvals Process not be approved at this time.
3. AND THAT the Regional Clerk be requested to notify the West Burlington Citizens Group of the Regional Council decision.

REPORT:

Question:

What are the various options available to Halton with respect to intervenor funding?

Summary:

1. Intervenor funding is a procedure whereby interested participants may apply to a designated public authority in some prescribed manner and subject to whatever terms and conditions may be imposed for funds to enable the applicant to participate in any hearing or approval process. This is contrasted with "costs".

Intervenor Funding Issues:

In Ontario the subject of intervenor funding has been especially well canvassed. In 1975, Professor Michael J. Trebilcock wrote the article "Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?" for the Osgoode Hall Law Journal. Professor Trebilcock noted barriers to participation in regulatory process and hearings for the following reasons:

1. Diffusion of consumer interest;
2. Lack of homogeneity among consumers;
3. The "free rider" phenomena.

In 1982 the current Attorney General for Ontario, Ian G. Scott Q.C., co-authored a review entitled "Financing Public Participation in Environmental Decision Making" for the Canadian Bar Review. This material reviews the concerns to be addressed within this report and provides a framework and basis for the remainder of this report. Because the article is comprehensive and important, a photocopy of the article is placed within the councillors' lounge for review.

Background to Intervenor Funding:

The introduction to Mr. Scott's article provides some insight into the current status of the regulatory process in Ontario and the emerging view of intervenor funding. Mr. Scott has indicated ".....the routine application of traditional cost rules leads to results that are not only severe, but inappropriate, in that these rules effectively prevent the initiation of public interest interventions before the various tribunals that are entrusted with environmental decision making."

The author reviews two traditional objections which are raised against the promotion of "public interest" litigation and intervenor funding. These are the prospective overloading of the courts and other tribunals and the encouragement of unmeritorious litigation. Mr. Scott dismisses these objections based upon the empirical data which refutes such notions and upon the responsibility for resourcing regulatory agencies or courts to properly deal with emerging issues.

The decision of the Divisional Court occurred in the summer of 1985. The Association of Municipalities of Ontario prepared AMO Report 85-7 "Intervenor Funding and Cost Awards by Provincial Hearing Bodies" and submitted that report to the Minister of Municipal Affairs, the Minister of the Environment and the Attorney General on December 10, 1985. For your convenience, a copy of that five-page report is attached to this report. You will note that AMO has mixed the notion of "costs" and "intervenor funding" by noting particular instances where intervenors can obtain advance funding of "costs". You will also note that it is the regulatory agency which is asked to establish the funds for the costs awards - not the applicant such as the Regional Municipality of Halton.

Proposals for Alleviating Economic Barriers to Litigation:

Essentially three areas have been targeted as appropriate to assist in alleviating economic barriers to litigation that face environmental public interest groups. These are comprised of the following:

1. Office of the Environmental Advocate;
2. Shifting the cost burden from private citizens and intervenors;
3. Streamlining of environmental litigation processes.

Of these three areas it is the shifting of the cost burden from private citizens and intervenors which is the primary focus of attention for this report. However, the other areas also address the fundamental issue concerning input from intervenor groups to the environmental process.

Shifting the Cost Burden:

Within shifting the cost burden, there are four models which have been considered, not only by Mr. Scott in his paper, but also by Professor Tribelcock and by the Administrative Law Section of the Canadian Bar Association. These are comprised of cost immunity, a one-way cost rule, public funding, and income tax deductibility.

1. Cost Immunity:

Cost immunity essentially indicates that any party to a hearing will bear his own costs at the hearing. While it means that an intervenor group would not be required to pay the costs of any of

method of funding public participation. Often, the funding method proposed is to require a "certification application" to an independent funding agency or to a funding adjudicator. Once again criteria, safeguards, etc. are required. As indicated in the article written by Mr. Scott "It is clear that any attempt to implement this type of proposal on a scale that would apply to a large number of tribunals and a heavy schedule of hearings would entail a considerable expenditure of time and money and the organization and maintenance of an administrative structure that was capable of managing a public fund and regulating access to it. Several steps would be required in the case of each piece of litigation". . . . "We therefore propose that a single agency for the funding of environmental advocacy be created and that discussion be initiated with a view to expanding its scope to cover other areas of citizen participation such as consumer interventions".

Other issues relate to the quantum of funding to be awarded in each case, the maximum amount to be allocated to each hearing or agency proceeding, apportioned among the various parties seeking reimbursement, a spending ceiling for each intervenor group in any one year, submitting compensation to examination-in-chief and cross-examination on certain issues only, etc.

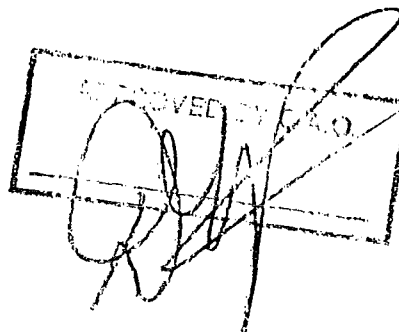
As can be seen, this is the method by which is the subject of the application by the West Burlington Citizens' Group. However, this method may be more appropriately addressed outside of the Regional context. Much of the literature indicates that if a significant and meaningful policy is being developed with respect to the funding intervenor groups, then this should be done at a higher level than the Region, and should be promulgated by the regulatory agencies or boards which conduct the hearings. Indeed, in a number of cases, it is these boards such as the Consolidated Hearing Board who are envisaged as providing funding which will enable them to improve the overall hearing process. To establish such intervenor funding in a responsible longterm manner requires work with authorities outside of the Region of Halton and requires a more detailed examination of Halton's position with respect to such funding into the process of administrative regulation in Ontario.

Attached as confidential Attachment "B" to this report is a copy of a letter from the Region's Legal Counsel Osler, Hoskin and authored by Doug Hodgson. You will note that Mr. Hodgson identified that there may be times when an applicant will wish to ensure funding, however, Mr. Hodgson does not conclude that this instant case is one where the Regional Municipality of Halton should be providing intervenor funding. I have reviewed this material and discussed it with Doug Hodgson and agree with his opinion.

Thus the above recommendations have been made.

Respectfully submitted


Kenneth S. Anderson
Regional Solicitor
KSA:vp



The Hamilton-Wentworth case reflects the increasing involvement and impact of provincially established regulatory boards and tribunals upon the affairs of citizens and municipal governments. Practical realities make it impossible for the provincial legislature to exercise its total powers. The Province of Ontario cannot directly implement all the legislation necessary to regulate the day-to-day affairs of the people of the province. As a result, considerable discretion in legislative authority has been transferred to provincial boards, commissions and tribunals.

These provincial tribunals have been delegated the authority and responsibility of resolving issues encompassing highly complex political and technical matters. This is exacerbated by the fact that these tribunals have created a series of intricate rules of practice for the purpose of carrying out their individual legislative mandates. Thus arises the need for all participants in the process to demonstrate a high level of expertise in order to play an effective and meaningful role throughout the entire hearing process.

FUNDING PUBLIC PARTICIPATION

In Canada, and in Ontario, a high value is placed on public participation. We allow time off for voting, and contributions to federal and provincial political parties are tax deductible.¹ The provincial government strongly encourages public participation within the regulatory process, particularly with respect to the Planning Act and the Environmental Assessment Act.

The Association of Municipalities of Ontario also supports and encourages public participation within the regulatory process on the basis that such participation enhances decision-making and does not lead to unnecessary and costly delays in the project approval process.

In order to ensure effective decision-making through public participation, the Association recommends that the provincial ministries responsible for the legislation under which hearings take place should establish funds for cost awards and advance funding. However, the Association does not support the provision of funds to individuals or groups simply because they wish to participate; funding should only be awarded where the decision-making process has been or will be enhanced.

This recommendation is certainly not without precedent. "American attempts at regulatory reform have focussed on cost awards by the agencies from their own budgets."² Federal precedents include the Berger Commission Inquiry into the MacKenzie Valley Pipeline and the Lysyk Commission Inquiry into the Alaska Highway Pipeline. As well, "the Alberta Energy

In view of the above, the Association recommends:

That public interest ~~interventions~~ should be facilitated primarily through a system of cost awards; and

That advance funding be considered only in those instances where it can be fully demonstrated that it is required and essential for the purposes of the proceedings, and where advance funding is being considered, that the funding decision should not be made by the hearing body, but by the ministry responsible for the legislation or an office such as the Attorney General's.

FUNDING CRITERIA

While AMO recommends that provincial hearing boards should establish funds for public interest intervention, and that cost awards should be favoured over advance funding, it is important that funding criteria be established to ensure that interventions will be worthwhile and to ensure objectivity on the part of the funding body.

As previously mentioned, the regulatory process is extremely complex and the rules of practice quite intricate. Consequently, the regulatory process can become tedious and time-consuming. Funding criteria are necessary to ensure that the process is not further delayed by frivolous objections. Therefore, AMO recommends:

That all provincial hearing boards, task forces, commissions, etc. adopt funding criteria; and

That in terms of cost awards, a criterion be included indicating that costs be awarded only where the participant has represented a substantial public interest and made a worthwhile contribution to the resolution of the issues at hand and where the intervention was carried out in a meaningful and efficient manner; and

That in terms of advance funding, a criterion be included indicating that advance funding be awarded only in those instances where it can be fully demonstrated that such funding is needed for the purposes of the intervention, that the intervening body has the ability and capacity to carry out its proposed intervention in a meaningful and efficient manner, and that the intervention will make a worthwhile contribution to the resolution of the issues at hand.