151

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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ONTARIO MUNICIPAL BOARD REGARDING GUIDELINES FOR AWARDING COSTS

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Brief 151

TABLE OF CONTENTS

I. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group committed to the enforcement and improvement of existing environmental laws. Funded by the Ontario Legal Aid Plan, CELA also serves as a free legal advisory clinic for the public, and will act at hearings or in the courts on behalf of citizens and citizens' groups who are otherwise unable to afford legal assistance.

Since its inception, CELA has repeatedly advocated the expansion of opportunities for public participation in the environmental management, planning and decision-making process.[1] A constant theme of our activities in this regard has been the need to establish funding and costs mechanisms to allow citizens and public interest groups a meaningful opportunity to participate in the various public hearing processes that in law are available to them.

The need to provide such funding and costs is a matter that has been extensively examined and widely recognized by a variety of decision-making tribunals and commissions, including several within this province. The practice of facilitating public participation by making resources available to citizens and citizen groups is becoming an increasingly common phenomenon. However, it is clear that where intervenor funding is limited or unavailable, cost awards become the sine qua non of effective public participation and democratic decision-making within the regulatory and licencing context.

Accordingly, CELA was pleased to learn that the Ontario Municipal Board (OMB) has invited submissions on guidelines relating to the imposition of costs in OMB proceedings. The following brief begins with an articulation of the rationale of using cost awards to facilitate public participation. It then examines the practice of the OMB and other tribunals with cost-awarding

authority. We conclude by recommending cost award guidelines for the OMB.

II. REASONS FOR AWARDING COSTS TO INTERVENORS

A. Policy Arguments for Awarding Costs

The Ontario Legislature has often expressed its intent to encourage public participation in certain areas of regulatory decision-making by providing for public hearings under a variety of statutes, including the Ontario Municipal Board Act. The OMB convenes hearings and appeals under a number of provincial statutes, including the Consolidated Hearings Act, 1981, the Municipal Act, the Ontario Heritage Act, the Ontario Water Resources Act, the Pits and Quarries Control Act, the Planning Act, 1983 and others. In fact, a former member of the OMB has noted that the Royal Commission Inquiry into Civil Rights was quite unable to say that it had located all the powers of the Board under all applicable statutes.[2] However, most of the Board's work relates to land use planning, assessment appeals and municipal organization and expenditures,[3] and it is this jurisdiction that forms the focus of this brief.

Given the OMB's diverse authority, it is clear that the Board plays a unique and significant role in shaping the character of Ontario's urban and rural environment. Moreover, since section 95 of the OMB Act provides that appeals from the Board to Divisional Court are available for questions of law only, and since section 63 of the Planning Act, 1983 prohibits petitions to Cabinet with respect to matters under that Act, the OMB, in essence, often functions as the final arbiter of many disputes involving matters of public interest. In this respect, the OMB differs greatly from other administrative tribunals, such as the Environmental Assessment Board, which exercise purely advisory or licencing powers. As a result, all members of the public who are

interested in or affected by OMB decisions should be given a meaningful opportunity to effectively participate in public hearings held by OMB.

These public hearings are undoubtedly intended to ensure that opinions and information from a wide variety of interests will be considered before regulatory decisons are made by the OMB. In addition, the public hearing requirement ensures that persons who may be affected by OMB decisions will be given notice of the proceedings and an opportunity to present evidence and argument during those proceeings. However, the ability of many public interest intervenors to effectively participate in these hearings is often hampered by limitations in the financial resources they are able to commit to the process. This problem is becoming increasingly acute as hearings before the OMB and other tribunals become more complex and technical.

Often, the strength of a citizen group's case is dependent on the experts that can be hired on limited resources. A lack of funds usually means the group cannot afford to hire the most qualified experts, nor retain their services for the entire course of a lengthy hearing. Consequently, we believe that this lack of resources renders public participatory rights nugatory, and adversely affects the hearing process in that the OMB may be deprived of important evidence and opinions when making its decision on a particular matter. Therefore, in the absence of adequate intervenor funding, public participation in these hearings has, on many occasions, become meaningless, and the hearings have become largely one-sided as applicants are generally able to afford all the experts that are required.

In addition, most applicants at these hearings can often pass their hearing costs on to their customers through increased rates, or can claim hearing costs as a tax-deductible business expense.[4] Public interest intervenors, on the other hand, do not represent interests as economically self-serving as those of the

applicant or of other interested parties. For example, a citizen group does not realize an immediate economic benefit that may be used to off-set its costs, even if the group is successful in its opposition to a particular application. Furthermore, tax write-offs are not generally available to public interest intervenors. Therefore, it seems fair and equitable to ensure that public interest intervenors are reimbursed in whole or in part from those parties who stand to gain financially from OMB decisions.

Viewed in this light, cost awards may be seen as an extremely useful mechanism to redress the imbalance of resources between applicants and intervenors. Further, by granting costs to intervenors in appropriate circumstances, the OMB can ensure that it is apprised of all arguments and options before making a final decision.

In our view, the Alberta Public Utilities Board has succinctly stated the case for awarding costs to intervenors:

> The Board believes it is essential to hear opposing and varying opinions of expert witnesses for the proper determination of the complex issues which arise.... Without the active participation of intervenors represented by able counsel and without having the benefit of the testimony of expert witnesses whose qualifications are equal to those presented by the company, the Board would have an almost impossible task to adjudicate fairly.
>
> If interested parties to a utility rate hearing were required to bear their own costs, the financial strain would be prohibitive and municipalities and other groups of consumers and interested parties would be unable to participate to the extent required for a full and complete inquiry into a utilities application. This would result in a utilities hearing being one-sided affairs and the Board would be deprived of the benefit of having both sides of the case presented with equal vigour.[5]

B. Overcoming the Common Law Rules of Costs

The general common law rule is that "costs follow the event." The party who wins a lawsuit is entitled to compensation from the losing party for the expense incurred in bringing or defending the action. The purpose of this rule is twofold: to indemnify successful litigants, and to discourage unnecessary or frivolous litigation.

Neither objective is, in our view, at all appropriate to carrying out public hearing functions. The justification for this view largely relates to the fundamental differences in the nature, function and purpose of court and administrative proceedings respectively.

1. Private vs. Public Interests

Civil litigation actions typically involve the adjudication of rights between private litigants, and the granting of compensatory damages or equitable relief to the party whose rights have been wrongfully infringed. Civil proceedings are decidedly adversarial. There are winners and losers. By contrast, proceedings before administrative tribunals, including the OMB, are more inquisitorial in nature, although some participants may take adversarial positions on certain issues. This view has been recognized by the OMB in Re Township of Innisfil Restricted Area By-Law 78-80:

> As referred to earlier, the Board is not a Court of law; there is no lis before it; the issues it hears have not been defined by the exchange of pleadings; and its very reason for existence, the administrative safeguarding of the public interest, calls for its granting a right of audience to almost any person who appears before it. A person appearing before the Board could be more properly called a "participant" rather than a "party".

> Its decisions are not in rem or in personam and transcend the interests of the immediate "parties": Re Cloverdale Shopping Centre Ltd. et al. and Twp. of Etobicoke et al., [1966] 2 O.R. 439, 57 D.L.R. (2d) 206.[6]

Another facet of this fundamental difference is apparent if one considers the substantive and procedural rules of civil litigation that are intended to discourage litigation and encourage out-of-court settlements where possible. The overwhelming majority of civil cases are, of course, resolved without the necessity of trial. On many occasions, however, a full and public vetting of matters that have proceeded to hearing before the OMB is regarded as legally desirable. By creating public hearing processes, in which many and diverse interests may participate, the Legislature has clearly expressed an intent to have certain types of disputes resolved in a very public manner.

2. View of the Courts

It is not surprising, then, that several courts have recognized that administrative tribunals should not be bound by the common law rules of costs. For example, in Re Municipal and Public Utilities Board, the Manitoba Court of Appeal stated:

> Proceedings before the Public Utility Board belong to a different category and are necessarily dealt with...from a point of view that has no place in litigation between parties. The status and risks of suitors in an action are fixed by practice and authority. No rule has been laid down by the Board that persons shall have costs in the event of their failure. Whether such a rule should be adopted or not is a matter wholly for the Board. In the meantime, the matter is left by s.55 (the costs award power) in the Board's absolute discretion, untrammelled by the principles which necessarily control the discretion of the Court or a Judge.[7]

This view was recently confirmed by the Supreme Court of Canada in Bell Canada v. Consumers' Association of Canada et al., where

a cost award by the CRTC to public interest intervenors was upheld:

> Thus I am of the opinion that the word "costs" must carry the general connotation of being for the purpose of indemnification or compensation. In view, however, of the nature of the proceedings before the commission and the financial arrangements of public interest intervenors, the discretion conferred on the commission by s. 73 must, in my opinion, include the right to take a broad view of the application of the principle of indemnification or compensation. The commission therefore should not be bound by the strict view of whether expense has been actually incurred that is applicable in the courts.[8]

However, in the leading Ontario case of Hamilton-Wentworth Save the Valley Committee Inc., the Divisional Court quashed an order of the Ontario Joint Board which awarded interim costs to public interest intervenors. Mr. Justice Holland recognized that administrative proceedings may differ from court proceedings, but he distinguished the Manitoba utilities case and the Bell Canada case, supra, on the basis that they involve costs awarded after a public hearing. He further held that the Joint Board lacked the statutory authority to award "intervenor funding" in advance of the hearing, since "it is for the Legislature, in clear language, to so empower a board or tribunal, should it be found desirable as a matter of public policy."[9] Accordingly, as will be discussed, infra, CELA submits that the Ontario Legislature should amend section 96 of the OMB Act to clearly empower the OMB to award costs in advance to public interest intervenors.

Further, CELA submits that it is incumbent upon the OMB to expressly recognize all of the fundamental distinctions between judicial and administrative proceedings, and to develop cost award guidelines in accordance with the rationale that underlies the public hearing process.

III. EXISTING OMB PRACTICE REGARDING COSTS

Under section 96 of the Ontario Municipal Board Act, the OMB has a wide discretion to award costs:

> 96.-(1) The costs of and incidental to any proceeding before the Board, except as herein otherwise provided, shall be in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.
>
> (2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be taxed and allowed.
>
> (3) The Board may prescribe a scale under which such costs shall be taxed.

A review of OMB decisions reveals an apparent policy that costs are not to be awarded against parties unless their objection(s) are found to be frivolous or without merit. This position was enunciated by the Board in Hale v. Shar-Tem Holdings Limited:

> It is not the general policy of the Board to award costs where it feels the dispute was bona fide and the parties have acted reasonably.[10]

A similar view was expressed by the OMB in Re Central Wellington Planning Area Official Plan Amendment:

> Costs in the matter were requested by the County of Wellington and the Central Wellington Planning Board. This Board, however, is of the firm opinion that the hearing of this matter, regardless of any delays which may have been occasioned, is the right of the citizens of the Province of Ontario under the Planning Act, R.S.O. 1970, c. 349, and unless the objection or objections be deemed to be frivolous or without merit, no order as to costs should issue. The objections to the proposal were stated with certainty, clarity and with a great deal of merit, and certainly were anything but frivolous. there will therefore be no order as to costs.[11]

There has, however, been a recent trend on the part of the OMB to award costs in certain limited circumstances. Indeed, Roger Beaman has identified three general situations in which costs may be awarded by the OMB.[12]

A. Delays and Adjournments

In certain cases, costs have been awarded where there has been some form of procedural irregularity not related to the merits of the matter. For example, costs of the day ($300) were awarded to a party represented by counsel where a hearing had to be adjourned because the municipality had twice failed to effect proper service of the hearing notice.[13] Similarly, costs on a solicitor and client basis was awarded against a municipality where the OMB found that the municipality should have appeared at an earlier Land Division Committee hearing rather than waiting to initiate an unnecessary albeit successful appeal to the OMB.[14] Costs of $1,000 were also awarded to a ratepayers' group where the OMB had adjourned a hearing to allow the parties to reach a compromise; however, the municipality refused to compromise and the Board found the municipality adduced no new evidence when the hearing resumed.[15] These and other cases clearly demonstrate that costs are likely to be awarded by the OMB when a party initiates an unnecessary hearing or adjournment.

B. Costs Following Dismissal

Costs are sometimes awarded by the OMB after the Board hears the evidence and finds that the case is without merit. For example, costs have been awarded against municipalities where applications for zoning changes have been dismissed for insufficient evidence[16] or other legal defects.[17] Similarly, costs were awarded against a municipality where its objections were found to be without merit, and where its counsel cross-examined witnesses but called no expert evidence.[18] However, in another case where a non-suit was granted after 25 hearing days, the Board declined

to award costs against the municipality since "it would be unfair to further penalize the citizens."[19] Similarly, the OMB did not award costs against a ratepayer whose appeal was dismissed on the basis of standing; the Board found that the appellant was sincere and well-intentioned, but did not live on or near the properties in question.[20] Keeping these exceptions in mind, this line of cases suggests that costs are more likely to be awarded by the OMB when a non-suit is granted against municipalities rather than ratepayers' associations.

C. Costs After Decisions on the Merits

Generally speaking then, the OMB has displayed a reluctance to award costs where the dispute is bona fide and the parties have acted reasonably. For example, in a case where the applicant was entirely successful after a lengthy hearing, the Board declined to award costs where "it would be unduly punitive to award costs" against a citizen group.[21] In another case, however, the OMB overcame its reluctance to award costs by awarding $13,000 to a ratepayers' group against a municipality which was not, strictly speaking, the proponent of a rezoning application which was ultimately dismissed.[22] More recently, the Board awarded costs of $2,600 against a citizen group on the grounds that the group's participation only resulted in "an increase in the public exposure of the proposed undertaking, and this result was obtained at the inconvenience and expense" of the municipalities and applicant.[23] This cost order, however, was quashed on appeal to the Cabinet,[24] and has resulted in this review of OMB cost practices. It should also be pointed out that this cost order clearly contradicted the OMB's existing policy on costs.

In summary, the OMB generally appears to have adopted a "one-way" cost rule, particularly with respect to public interest intervenors. As one commentator notes, "the policy of the Board is to award costs to deserving citizens' groups, but never against them; however, the OMB rarely awards costs."[25] This view is

shared by another author who writes:

> The Board's natural reluctance against costs is rapidly being overcome and the trend should continue under the new [Planning] Act... It seems that the standard on municipalities is somewhat higher, particularly where opposing ratepayers are concerned. On the other hand, ratepayers and ratepayers' groups seem to be dealt with tolerantly.[26]

IV. PRACTICE OF OTHER TRIBUNALS REGARDING COSTS TO INTERVENORS

A. The Joint Board (Ontario)

Under the Consolidated Hearings Act, 1981, a Joint Board, consisting of members of the OMB and the Environmental Assessment Board, may be established to consider undertakings which may result in more than one public hearings under each of their respective jurisdictions. The Joint Board, which has a costs power comparable to that of the OMB, has articulated the following criteria regarding the awarding of costs:

1. The characteristics of the proponent.
2. Whether there is a clear ascertainable interest to be represented and a specific purpose for the assistance.
3. Whether a separate and adequate representation of a particular interest assisted and substantially contributed to the hearing.
4. Whether there is a need.
5. Whether there was demonstrated a delineated purpose for expenditure of funds.
6. Accountability for the expenditure.
7. Whether there has been a co-ordinated effort to bring a number of interests within one representative group; whether the particular interest has established a record of concern and a demonstrated commitment in a responsible way to that concern.
8. Whether there has been a better understanding of issues.
9. Whether the costs address an economic imbal ance among the parties.[27]

As the Joint Board noted, the list is neither an exclusive nor exhaustive, "for the courts have held that while it is proper for an administrative tribunal to have policy for its own guidance, it must not follow the policy slavishly.[28]

To date, the Joint Board has awarded costs to intervenors in virtually all cases, regardless of whether the intervenors were successful or not. It is also important to note the quantum of costs which have been awarded by the Joint Board, as these costs have ranged from $50,000 to $100,000.[29] Accordingly, it is clear that the Joint Board has taken a generous and liberal approach to cost awards. In addition, the Joint Board has seen fit to develop a standard-form application for costs which identifies the types of costs which may be awarded. These include technical and research costs, legal costs, hearing preparation costs and out-of-pocket expenses.

B. The Ontario Energy Board

The OEB enjoys a costs power that again is quite similar to that of the OMB. In 1985, the OEB released a report which recommended that costs be awarded to intervenors in various proceedings before the OEB. The rationale for a policy was clearly set out in the report:

> Removal of the financial barrier to meaningful intervention on the part of interests having genuine concerns would, in the Board's view, enhance public awareness of and confidence in the regulatory process. Furthermore, without the informed intervention that the Board sees as necessary, there is a real danger that rate hearings will become non-representative of all of the interests which the Board should consider in reaching decisions. The Board is not interested in the quantity of interventions per se; rather it seeks to provide a forum in which balanced representations can be received from those who have something of value to contribute to the hearing. The Board has concluded that inter-

> venors making such contributions should be recognized through the awarding of costs.[30]

Accordingly, the OEB recommended that costs should be made to an intervenor who:

> a) has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome;
> b) participates responsibly in the proceeding; and
> c) contributes to a better understanding of the issues by the Board.[31]

Since the publication of these criteria, the OEB has awarded costs to public interest intervenors on a regular basis, particularly within the context of rate hearings.[32] In practice, the OEB determines which percentage of the intervenor's costs are payable by the applicant, and then refers the matter to the Board's solicitor who acts as a taxing officer. After the taxing officer receives receipts and submissions on costs, the Board makes an order for 50% to 100% of amount allowed by the taxing officer.

C. The Manitoba Public Utilities Board

The Public Utilities Board of Manitoba has a general costs power that is also comparable to that of the OMB. In 1984, this Board also released guidelines regarding the award of costs to intervenors. The Board concluded that cost awards were necessary to ensure that intervenors can be better informed, and can more effectively test the applicant's case.[33] As a result, the following criteria were identified as the principal factors in determining whether or not costs should be awarded to intervenors:

1. Has the Intervenor made a substantial contribution to the proceedings and contributed to a better understanding of the issues before the Board.
2. Has the Intervenor participated in the hearing in a responsible manner and cooperated with other Intervenors who have a common objective in the outcome of the proceedings in order to avoid duplication of intervention.
3. Has the Intervenor sufficient financial resources to present the case adequately.
4. Does the Intervenor have a substantial interest in the outcome of the proceedings or represent the interests of a substantial number or class of utility customers[34]

D. The Canadian Radio-Television Telecommunications Commission

With similar statutory authority, the CRTC has also adopted a liberal approach to its cost powers. Under the CRTC Rules of Procedure, the Commission may award costs to any intervenor who:

(a) has, or is a representative of a group or class of subscribers that has an interest in the outcome of the proceeding of such a nature that the intervenor or group or class of subscribers will receive a benefit or suffer a detriment as a result of the order or decision resulting from the proceeding;
(b) has participated in a responsible way; and
(c) has contributed to a better understanding of the issues by the Commission.[35]

The CRTC's objectives, as set out in the Rules of Procedure, clearly contemplate public active participation in the decision-making process. Accordingly, the CRTC has used its costs powers widely to award costs to intervenors in order to achieve these objectives.

V. CELA'S PROPOSALS FOR OMB COSTS GUIDELINES

A. Reasons for Cost Criteria

The rationale for awarding costs to intervenors has been previously examined in Part II and elsewhere in this brief. However, CELA submits that the lack of clearly expressed cost criteria may itself present a barrier to public participation in the hearing process. Therefore, CELA submits that the OMB develop and publish forthwith unambiguous cost criteria in order to allow potential intervenors to assess their eligibility for costs in advance of OMB proceedings.

The cost criteria currently used by the Joint Board, the Ontario Energy Board, the Manitoba Public Utilities Board, and the CRTC, discussed supra, are remarkably similar despite the apparent differences in the tribunals' respective powers, duties and functions. Undoubtedly, the similarity of these criteria is due to the common purpose shared by the tribunals, viz. to facilitate greater public participation in the adminstrative decision-making process. Therefore, CELA strongly urges that the OMB adopt the costs principles employed by these various boards and tribunals. These principles have also been adopted by all federal Royal Commissions considering environmental matters, and have been succinctly summarized by the MacKenzie Valley Pipeline Inquiry headed by Mr. Justice Berger:

> (1) There [has] to be a clearly ascertainable interest that ought to be represented at the inquiry.
> (2) It should be clear that separate and adequate representation of that interest will make a necessary and substantial contribution to the inquiry.
> (3) Those seeking funds should have an established record of concern for and should have demonstrated their own commitment to the interests they seek to represent.

(4) It should be shown that those seeking funds do not have sufficient financial resources to enable them adequately to represent the interests and will require funds to do so.
(5) Those seeking funds should have a clear proposal as to the use they intend to make of the funds and should be sufficiently well organized to account for the funds.[36]

B. Types of Proceedings

While the OMB exercises power under a variety of statutes, CELA submits that cost awards should be available to intervenors in all OMB proceedings, provided the intervenors meet the criteria set out above. Regardless of whether a particular hearing falls under the Planning Act, the Pits and Quarries Control Act, the Ontario Water Resources Act or another statute, the hearing will likely be complex, require expert witnesses, and deal with matters of public interest.

C. Parties Eligible for Costs

CELA submits that all intervenors who meet the criteria set out in paragraph (A), supra, should be eligible for an award of costs.

However, the OMB should retain its discretion to award costs against intervenors where the intervention is found to be frivolous or vexatious.

D. Types of Expenses

It is submitted that all expenses that have been legitimately incurred in the preparation and presentation of an intervention should be recoverable. These expenses should include the following costs:

1. counsel fees (both "in-house" and external);

2. fees of expert witnesses including preparation and presentation;
3. consultants' fees;
4. an honorarium at a per diem or pro rata rate for individuals preparing and appearing on their own behalf or on behalf of a group;
5. staff time spent in preparation and presentation;
6. disbursements reasonably incurred and receipted, relating to the proceedings; and
7. transcript and photocopying costs.

The Board should, in addition, retain the discretion to award costs for items not covered in these broad categories.

E. Who Pays Costs

It is submitted that the applicant should pay intervenor costs in OMB proceedings. This is the practice of virtually all administrative tribunals presently awarding costs, and is reasonable given that most if not all applicants have superior resources and stand to gain financially by OMB approvals. However, where the OMB finds an intervention to be frivolous and vexatious, the Board should consider awarding costs against the intervenor, particularly where the intervenor is the applicant's business competitor and whose objections are without merit. Nevertheless, the OMB should be extremely reluctant to award costs against a citizen or citizen group that seeks to raise matters of wide public interest.

F. Applicant's Costs

Generally speaking, the applicant's hearing costs can be passed on to consumers or ratepayers, and are regarded as part of the normal cost of doing business. However, where costs are awarded against an intervenor, CELA submits that the applicant's costs should be subject to the same scrutiny as intervenor costs, and

that the OMB should disallow an applicant's costs which are found to be imprudent or unnecessary.

G. Interim Costs

Interim or advance costs are often necessary in certain cases to ensure that public interest groups can participate effectively in administrative proceedings, particularly where intervenor funding is unavailable. In the absence of other resources, intervenors may prudently decline the costs of retaining experts and incurring substantial disbursements with only the hope that costs will be recovered at the end of the hearing.

Unfortunately, the Ontario Divisional Court recently held that administrative tribunals cannot award costs in advance unless specifically authorized by statute to do so.[37] Accordingly, CELA recommends that section 96 of the OMB Act be amended so as to give the Board the discretion to award costs in advance to public interest intervenors. In order to receive these interim costs, intervenors should submit detailed budgets to the OMB for approval, and there should be a full accounting for expenditures at the end of the hearing.

H. Tariffs and Taxation

CELA submits that the OMB should develop and publish a tariff for allowable costs, although the Board should retain the discretion to increase certain tariff items in appropriate circumstances. A published tariff should be useful to both intervenors and applicants since it would provide an approximate range of costs that may be awarded. In cases of dispute, CELA recommends that any party can have their account taxed by a person appointed by the OMB as a taxing officer.

I. Who Decides Costs

The panel of OMB members hearing a particular matter is in the best position to decide whether the criteria for intervenor costs have been satisfied. Therefore, this panel should have the jurisdiction to award interim and ex post facto costs, but disputes as to quantum should be referred to the OMB taxing officer.

J. Burden of Proof

CELA submits that while an intervenor should be required to file an application for costs along with all necessary documentation, there should be a presumption that intervenors at OMB proceedings are prima facie entitled to costs. The burden would then shift to the applicant to demonstrate why intervenor costs should not be awarded in a particular case.

K. Safeguards

As indicated earlier in this brief, we believe that costs should only be denied if the OMB finds that the intervention was frivolous or vexatious. Where costs are awarded to intervenors by the Board, full accounting and documentation requirements, along with the possibility of taxation, should act as a sufficient safeguard against abuse.

VI. CONCLUSIONS

We welcome this opportunity to comment on the issue of costs, and we urge the OMB to develop criteria or guidelines which will ensure that members of the public can effectively exercise their right to participate in OMB proceedings. In our view, the citizens of Ontario must be confident that they will not be

penalized for seeking, in good faith, to exercise the participatory rights that the Legislature has accorded them.

As a result, the OMB must exercise its costs powers broadly by routinely awarding costs to intervenors in appropriate cases, and by generally declining to award costs against intervenors in all but the most exceptional circumstances. In this sense, CELA adopts the reasoning in a recent decision of the OMB:

> This board has traditionally regarded the ability of "persons" to resort to the hearing process of this board as a <u>right</u> given by the Legislature under various statutes and such persons are not to be generally deterred by the prospect of an adverse award of costs.[38]

NOTES

1. Frank Giorno, A Brief to Ontario's Minister of the Environment on Intervenor Funding. Submitted to the Minister of the Environment on July 17, 1984. Toronto, and Toby Vigod, Submissions to the Ontario Energy Board Regarding the Awarding of Costs and Related Matters. Submitted to the Ontario Energy Board on October 26, 1984. Toronto.

2. Marie Corbett, "The Ontario Municipal Board: Planning and Zoning Cases" (1976), 14 Osg. Hall LJ 93, at p. 95.

3. Ibid.

4. The Economic Council of Canada has concluded that taxpayers subsidize approximately 50 percent of private companies' hearing costs through government grants and tax breaks.

5. Decision 30202, p. 7, dated March 29, 1971.

6. Re Township of Innisfil Restricted Area By-Law 78-80 (1981), 13 OMBR 111 (OMB) at pp. 122-23.

7. Re Municipal and Public Utilities Board, [1930] 1 W.W.R. 615 (Man.C.A.) at p. 618.

8. Bell Canada v. Consumers' Association of Canada et al. (1986), 26 D.L.R. (4th 573 (S.C.C.) at pp. 586-87.

9. Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Community Inc. et al. (1985), 51 O.R. (2d) 23 (Ont.Div.Ct.) at p. 41.

10. Hale v. Shar-Ten Holdings Limited (1980), 11 OMBR 284 (OMB) at p. 288.

11. Re Central Wellington Planning Area Official Plan Amendment (1978), 8 OMBR 263 (OMB) at p. 284.

12. Roger Beaman, "Remarks Relating to Costs at the Ontario Municipal Board," in The Planning Act, 1982 - New Wine, Old Bottles (Toronto: CBAO, 1983) p. 2.

13. Re Township of Flanborough Restricted Area By-Law 80-51-B-Z (1981), 12 OMBR 482 (OMB).

14. Regional Municipality of Halton v. Norton (1980) 12 OMBR 247 (OMB).

15. Re Townships of Anson, Hindon and Minden Restricted Area By-Law 7943 (1981), 13 OMBR 398 (OMB).

16. Re Townships of Anson, Hindon and Minden Restricted Area By-Law 80-43 (1981), 12 OMBR 236 (OMB).

17. Re Town of Strathroy Restricted Area By-Law 47-79 (1980), 11 OMBR 291 (OMB).

18. Re North York Planning Area Official Plan Amendment D-4-5-27 (1982), 14 OMBR 108 (OMB).

19. Re Official Plan of Town of Richmond Hill Planning Area (1980), 11 OMBR 1 (OMB).

20. Harper v. Township of Anderdon Committee of Adjustment (1981), 13 OMBR 99 (OMB).

21. Re Mississauga Planning Area Official Plan (A.P.P.E.A.L.) (1981), 13 OMBR 170 (OMB).

22. Re Township of Innisfil Restricted Area By-Law 78-80 (1981), 13 OMBR 111 (OMB).

23. Re Pelham Planning Area Official Plan Amendment 9 (1986), 18 OMBR 270 (OMB).

24. Order-in-Council, dated February 5, 1987.

25. D. Estrin and J. Swaigen, Environment on Trial (Toronto: CELRF, 1978) at p. 475.

26. Beaman, supra, note 12, at p. 9.

27. Re Ontario Hydro - Southwestern Ontario Transmission System Expansion Program (1982), 11 CELR 53 (Jt.Bd.).

28. Ibid.

29. $61,700 was awarded to a citizens' group against the successful proponent in Re Victoria Hospital Corporation Energy from Waste Facility (1983), 15 OMBR 129 (Jt. Bd.).

30. E.B.O. 116 - Awarding of Costs and Related Procedural Matters (Toronto: OEB, 1985) p. 178.

31. Ibid., p. 187.

32. David Poch, counsel, Energy Probe, personal communication with the author, June 8, 1987.

33. Order No. 53/84 (April 4, 1984). Guidelines Concerning the Awarding of Costs to Intervenors.

34. Ibid.

35. CRTC Telecommunications Rules of Procedure (SOR/79-554), s. 44.

36. Inquiry Budget, Funding of Intervenors (Yellowknife, 1976) p. 2.

37. Supra, note 9, p. 43.

38. Town of Fort Erie v. Battey (1986), 19 OMBR 189 (OMB) at p. 195.

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

243 Queen Street W., 4th Floor, Toronto, Ontario M5V 1Z4, telephone (416) 977-2410

May 10, 1988

Mr. H. Stewart, Chairman
Ontario Municipal Board
180 Dundas Street West
Toronto, Ontario
M5G 1E5

Dear Mr. Stewart:

Re: Guidelines Regarding the Imposition of Costs

As you may recall, the Canadian Environmental Law Association (CELA) submitted a brief in June, 1987 to the OMB regarding guidelines for awarding costs. In this brief, CELA, inter alia, outlined the rationale for routinely awarding costs to public interest intervenors, and argued that the OMB's current lack of clearly expressed cost criteria may itself present a barrier to public participation in OMB proceedings.

It has now been ten months since these submissions were made; however, the Board has yet to promulgate any cost criteria to guide members of the OMB and the public. Accordingly, CELA believes it is necessary to raise this matter again, and to briefly comment on some OMB cases which have been decided and/or reported since June, 1987.

PART I - REASONS FOR AWARDING COSTS TO INTERVENORS

The reasons for expanding opportunities for public participation within the regulatory and licencing context are well known, and include the following:

* there is a legislative intent to encourage public participation by providing for public hearings under numerous statutes

* greater public participation ensures that a wider variety of opinions and evidence will be brought before tribunals for consideration

* greater public participation leads to more democratic decision-making, as it generates confidence in the legitimacy of the process and the acceptability of the ultimate decision

While it is laudable that the OMB has, in general, declined to award costs against unsuccessful intervenors, it is our view that the Board's consistent refusal to award costs to intervenors has had the same inhibiting effect outlined above, and will discourage citizens from exercising the participatory rights that are available in law to them.

Finally, in the gravel pit case mentioned above[12], there appears to be some confusion among certain OMB members regarding the distinction between "costs" per se and "intervenor funding". Our reading of the caselaw[13] and the relevant Cabinet orders-in-council suggests that money made available to a party in advance or during a proceeding can be characterized as "intervenor funding", while a monetary order made at the conclusion of proceedings pursuant to specific statutory authority is "costs". Therefore, it is improper and incorrect for OMB members to refuse to even consider awarding costs at the hearing's conclusion to a public interest intervenor on the grounds that such a request constitutes "intervenor funding".

PART III - CONCLUSION

The issues outlined in this letter have been previously raised by CELA in various editorials[14], petitions to Cabinet, and submissions to the OMB; however, we have yet to see any reform in the structure and exercise of the Board's cost powers. Therefore, we would again urge the Board to quickly develop and publish cost guidelines which will ensure that Ontario citizens can effectively exercise their statutory right to particiapte in OMB proceedings. In our view, not only must public interest intervenors be confident that they will not be penalized for seeking, in good faith, to exercise their participatory rights, but they must also be entitled to recover all reasonable expenses incurred during the exercise of these rights.

Yours sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Rick Lindgren
Counsel

cc - The Honourable Ian Scott, Attorney General

NOTES

1. Letter dated January 22, 1988, J.G. Malcolm to T.L. Green, Foundation for Aggregate Studies

2. Don Mills Residents Inc. v. Bramalea Ltd. (1986), 19 OMBR 451 (OMB)

3. Re Township of Molmer and Cox Construction Limited (1987, unreported)

4. Re City of Toronto O.P.A. 392 (1987), 20 OMBR 257 (OMB)

5. See Part IV of CELA's previous brief

6. Re City of Scarborough O.P.A. 642 (1987), 20 OMBR 274 (OMB)

7. Re City of Orillia Zoning By-Law 1986-74 (1986), 19 OMBR 508; Day v. Township of Ameliasburgh (1986), 19 OMBR 476 (OMB); Gilbert et al v. Town of Oakville (1986), 19 OMBR 328 (OMB)

8. Re Town of Wallaceburg Zoning By-Law 86-23 (1986), 19 OMBR 328 (OMB)

9. Supra, note 4

10. "There is some requirement of acountability to be considered [in ordering costs against a ratepayers group]": Don Mills Residents Inc. v. Bramalea Ltd., supra, note 1.

11. Re Township of Stafford Zoning By-Law 713 - 84 (1987), 20 OMBR 369 (OMB)

12. Supra, note 3

13. Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee Inc. et al (1985), 51 O.R. (2d) 85(Ont Div. Ct.); Bruce Township v. Thornburn et al. (1986), 17 O.A.C. 127 (Ont. Div. Ct.)

14. Steven Shrybman, "The Modest Cost of Public Participation", Ontario Lawyers Weekly, March 13, 1987