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SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ENVIRONMENTAL ASSESSMENT BOARD REGARDING THE INTERVENOR FUNDING PROJECT ACT

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INTERVENOR FUNDING PROJECT ACT QUESTIONNAIRE

1. Do you think intervenor funding should continue to be available? (Y) N

2. Should there be permanent intervenor funding legislation? (Y) N

3. Should the legislation include provision for funding provided by the proponent on a voluntary basis prior to the referral of an application to the tribunal ("participant funding")? (Y) N

4. Instead of the individual tribunals, should an independent intervenor funding agency be established to decide on intervenor funding applications and to administer all intervenor funding programs? Y (N)

5. Should the amended legislation include measures to either limit the funds available to public sector proponents for the preparation of their cases or make it known that there will be some proportionality in funds awarded to intervenors relative to funds available to public sector proponents? (Y) N

6. Should intervenor funding be extended to tribunals other than the Environmental Assessment Board, Joint Boards and the Ontario Energy Board? If yes, to which tribunals? (Y) N

7. Should funding be decided by the same panel that hears the merits of an application? Please explain. Y (N)

8. The following list sets out some of the current provisions of the funding legislation. Please indicate in the box whether you think the general principles in these specific provisions should be continued (C) or discontinued (D). If you suggest discontinuance, please give your reasons or any suggestions for improvement on a separate page.

   "Funding may be awarded only in relation to issues which, in the opinion of the funding panel, affect a significant segment of the public" (C) D

   "Intervenor funding may be awarded only in relation to issues which, in the opinion of the funding panel, affect the public interest and not just private interests." (C) D

   "The financial resources of the intervenor are relevant to whether funding should be awarded." (C) D

"Efforts to raise funds from other sources is a relevant consideration." C D

"The funding panel considers whether separate and adequate representation of the interest would assist the Board and contribute substantially to the hearing." C D

"The intervenor must show that it has an established record of concern for and commitment to the interest." C D

"Attempts to bring related interests into umbrella groups are considered." C D

"A clear proposal for the use of funds awarded is required." C D

"The intervenor must have appropriate financial control to ensure that awarded funds are spent for the purposes of the award." C D

"Lawyers in private practice receive funding at the legal aid rate." C D

"Funds reasonably available to the intervenor from other sources should be deducted from the funding award." C D

9. Eligible disbursements are: disbursements for consultants, expert witnesses, typing, printing, copying and transcripts. Should the definition of eligible disbursements be expanded? If yes, what should be included? Y N

10. Should the funding panel be able to reduce the size of the award or refuse to make an award if it is of the opinion that significant financial hardship would result to the funding proponent? Y N

11. Should an intervenor be liable to repay a funding award if it fails to comply with the conditions of the award? Y N

12. Should an intervenor be liable to repay some portion of a funding award if the costs ultimately awarded are less than the funding award? Y N

13. Should supplementary funding be available? (Y) N

14(a) Should the hearing panel be able to proceed with matters such as issue identification during the intervenor funding process? (Y) N

14(b) Should the hearing panel be able to make rulings on jurisdictional, relevance, and procedural issues during the intervenor funding process that are referred to it by the funding panel? Y (N)

15. Should the funding panel consider applications for supplementary funding instead of the panel hearing the application for approval of an undertaking? (Y) N

16. Should intervenors be required to contribute their own funds toward their hearing expenses? (Y) N

17. Should the legislation provide for an appeal of a funding decision? (Y) N

Should the appeal be to the Minister or Cabinet? Y (N)

Should the appeal be to the Courts? (Y) N

Should proceedings be stayed pending the determination of an appeal? (Y) N

18. Should the Board be able to decide on funding applications without an oral hearing? (Y) N

19. Have you been involved in an intervenor funding application in Ontario? (Y) N

20. Would you like to receive a copy of any report we prepare? If you do, but wish your response to this questionnaire to be anonymous please return the enclosed label under separate cover. (Y) N

The above questions have been set out to make collation of the information received easy. We would, however, also be interested in the reasons for your answers to any of the above questions, your general views concerning the strengths and weaknesses of the present IFPA, its application, its interpretation by funding panels to date, what additional criteria might apply, etc.

If you have suggestions of a different model for funding intervenors, please provide us with details.

Do you have additional concerns or suggestions? o:\wordfile\cc0202\ifpa.q2

ADDENDUM

CELA's ADDITIONAL COMMENTS ON THE IFPA QUESTIONNAIRE

Each of the following paragraphs corresponds with the numbered questions in the questionnaire.

1. Intervenor funding should continue to be available in Ontario. Intervenor funding has succeeded in facilitating meaningful public participation in hearings subject to the IFPA, and has generally resulted in better and more credible decision-making.

2. Although there have been some implementation difficulties, the IFPA should be regarded as a successful pilot project. It is now time to entrench intervenor funding on a permanent legislative basis, strengthened by the amendments outlined below.

3. CELA has firmly supported the concept of participant funding, and has consistently maintained that such funding should be made available by the proponent at the earliest possible opportunity. While some proponents have recently provided participant funding on a voluntary basis, this practice does not appear to be widespread. Accordingly, CELA submits that the legislation must provide for participant funding on a mandatory basis. The benefits of such a provision include: enhanced ability of intervenors to participate in the early planning/design of undertakings; enhanced ability to identify, scope or possibly settle issues in dispute at a much earlier stage; and significant savings in hearing time and costs for all parties.

4. CELA does not agree with the creation of a separate intervenor funding agency to administer all intervenor funding programs. Not only would such a proposal result in a new and cumbersome level of bureaucracy, but it also does not appear to be feasible in the current fiscal situation. Moreover, a separate and distinct agency would likely lack the hands-on expertise of the individual tribunals in identifying fundable issues and assessing the eligibility of funding applicants. CELA prefers the case-by-case approach currently employed by funding panels under the IFPA.

5. Although fixed limits on proponent spending appear desirable, CELA doubts that funding panels would be willing or able to establish firm and enforceable limits on how much public sector proponents (such as ministries, agencies or municipalities) or private sector proponents can spend on the hearing. It is also doubtful that the funding panels can go back in time and attempt to dictate how much can be spent in

years-long pre-hearing preparation by proponents. There are also practical barriers to implementing such limits: absent any provisions requiring full cost accounting by proponents, how are funding panels going to know how much was really spent? For these reasons, CELA submits that fixed limits are unrealistic, and that the best that can be hoped for is some attempt at parity or "proportionality". One of the primary goals of intervenor funding is to "level the playing field" between proponents and intervenors. This may be accomplished through several means: higher initial funding awards; more frequent use of supplementary funding; interim and final cost awards at an appropriate scale; and sanctions to discipline proponents who unnecessarily prolong hearings, fail to adequately disclose their case during pre-hearing stages, or continually amend the undertaking or their evidence throughout the hearing so as to create a moving target. This approach will also require full financial disclosure, in affidavit form and subject to cross-examination, by the proponent at funding hearings.

6. Intervenor funding should be extended to the Environmental Appeal Board, Ontario Municipal Board, all appellate bodies prescribed under the Environmental Bill of Rights, and such other tribunals as may be designated by regulation.

7. CELA strongly submits that funding applications should not be determined by the hearing panel. Initial and supplementary funding applications should always be heard by a separate and independent funding panel to ensure impartiality of the decision-maker during the hearing.

8. The following sets out CELA's position on the current provisions of the IFPA:

Funding may be awarded only in relation to issues which, in the opinion of the funding panel, affect a significant segment of the public.

CELA supports this provision in principle, but notes that there have been difficulties in interpreting and applying this provision. CELA suggests that the phrase "in the opinion of the funding panel" should be deleted to make this a more objective test, and further proposes the following re-wording: "Funding may be awarded only in relation to issues which significantly affect the public".

Intervenor funding may be awarded only in relation to issues which, in the opinion of the funding panel, affect the public interest and not just private interests.

Again, this provision is supportable in principle, but CELA recommends the deletion of the phrase "in the opinion of the funding panel". It may also be desirable to add "commercial" interest to "private" interest (i.e. "not just private or

commercial interest"). Municipalities should also be expressly excluded from receiving intervenor funding. While CELA is sympathetic to small municipalities involved in lengthy hearings, most municipalities are in a far superior financial position than individuals or citizens' groups applying for intervenor funding. Moreover, municipalities have a variety of ways to raise revenue to underwrite their intervention, and they often have in-house counsel or staff who can participate in hearings to protect the municipal interest. In any event, it is still possible for municipalities to apply for costs (or interim costs) to recover their hearing-related expenses.

The financial resources of the intervenor are relevant to whether funding should be awarded.

This factor is relevant but not determinative.

Efforts to raise funds from other sources is a relevant consideration.

Again, this factor is relevant but not determinative. It should be noted that the issue of fund-raising has resulted in a varied and sometimes unpredictable response from funding panels (i.e. arbitrary deductions from funding awards, or excessive fund-raising requirements). Flexibility is the key here: many public interest intervenors experience considerable difficulty in raising funds from their members or the public at large for specific cases. Fund-raising efforts may also divert scarce time and resources from case preparation or other organizational activities. Fund-raising requirements must therefore be reasonable, and contributions-in-kind should count towards fund-raising requirements.

The funding panel considers whether separate and adequate representation of the interest would assist the Board and contribute substantially to the hearing.

CELA agrees with the need to avoid repetition and duplication of effort within hearings, and therefore supports this provision in principle. However, there have been problematic interpretations of this provision by funding panels, and in some instances, funding has been improperly denied or intervenors have been inappropriately forced into coalitions even where their interests are not necessarily ad idem. In CELA's view, funding panels should be interpreting this provision in a manner similar to judicial interpretations of Rule 13 of the Rules of Civil Procedure: the question is not whether the intervenor wants to address the same issue as other parties, but whether the intervenor has a different perspective on the issue or can otherwise contribute to a better understanding of the issue by the hearing panel. Thus, the mere fact that another party or a regulatory agency will be addressing a particular issue -- such as groundwater

contamination -- should not automatically preclude others from seeking or receiving funding to address the same issue.

The intervenor must show that it has an established record of concern and commitment to the interest.

This provision is supportable in principle, although there must be some flexibility to permit newly formed or ad hoc groups or coalitions to obtain funding in appropriate circumstances, provided that they can demonstrate a serious interest or concern for the matter. Similarly, there needs to be flexibility in applying this criterion when the subject-matter of the hearing is relatively new; in such cases, there may not be groups with "established" records of concern.

Attempts to bring related interests into umbrella groups are considered.

Where appropriate, coalition-building should be encouraged in order to minimize hearing costs and maximize participation opportunities. However, coalitions should not be arbitrarily "forced" together by funding panels where the interests of the parties involved are not ad idem.

A clear proposal for the use of funds is required.

CELA supports this common sense requirement, but submits that the intervenor must be the master of its case, subject to proper accounting and financial controls. Intervenors must be permitted some flexibility to utilize or re-direct funds as may be required, particularly in lengthy, dynamic hearings where undertakings or evidence may significantly change or evolve.

The intervenor must have appropriate financial control to ensure that awarded funds are spent for the purposes of the award.

Where an intervenor is represented by counsel, intervenor funding may be placed directly into the lawyer's trust account and drawn upon as required in accordance with Law Society rules and a final accounting for all expenditures. Where an intervenor is unrepresented, a responsible representative may be named by the funding panel to hold and disburse funds in accordance with the approved funding application, subject to a final accounting for all expenditures. In all cases, intervenors should have financial autonomy and full authority over case preparation and presentation, unless impropriety or misappropriation is evident. There are sufficient safeguards built into the IFPA to ensure proper use of intervenor funding, and proponents' concern over the misuse of intervenor funding is overstated and unsupported by the IFPA track record.

Lawyers in private practice receive funding at the legal aid rate.

In previous IFPA submissions, CELA has submitted that if the legal aid rate is used as the base rate, then funding panels should be empowered to "top off" the rate in appropriate cases to attract senior counsel who otherwise cannot afford to take on cases at the legal aid rate. However, the experience under the IFPA has demonstrated that there is no shortage of junior, intermediate and senior counsel willing to represent intervenors. Similarly, there is no evidence that using the legal aid rate has prejudiced intervenors in their ability to retain experienced counsel or to participate effectively in hearings. Accordingly, CELA has no objection to the continued use of the legal aid rate for the purposes of intervenor funding awards, particularly since cost awards are available at the conclusion of the hearing. At the same time, however, CELA submits that particularly lengthy hearings can pose problems for counsel working at legal aid rates. For this and other reasons, CELA therefore submits that the legislation should be amended to empower the Boards to make interim cost awards. If this is done, then the debate over use of the legal aid rate becomes somewhat academic.

Funds reasonably available to the intervenor from other other sources should be deducted from the funding award.

CELA submits that such deductions are often arbitrary, unnecessary, and speculative. The financial means of the intervenor have presumably already been taken into account in fixing the quantum of the award under section 7(2) of the IFPA. Further deductions under section 7(3)(c) are therefore unjustified.

9. In CELA's view, all reasonable hearing-related expenses should be fundable. At a minimum, the following expenses should be on the list of eligible disbursements:

- fees for consultants other than expert witnesses or case managers;

- honoraria on a <u>per diem</u> or <u>pro rata</u> basis for individuals preparing or appearing on their own behalf or on behalf of a group;

- staff research, preparation or presentation;

- travel, accomodation and meal allowance;

- telephone, fax, courier, postage, stationary, and other telecommunication or computer services; and

- translation services and community outreach.

Accordingly, the question should be: what should not be on the list of eligible disbursements? In all instances, the funding panel would retain discretion to determine whether a particular expense is reasonably related to the hearing.

10. Although CELA is sympathetic to the plight of the few small proponents caught by the IFPA, CELA remains concerned about the potential for abuse of this "significant financial hardship" provision. Overuse of this provision sends out the wrong signal to private proponents in particular, who would be encouraged to set up a shell corporation with few assets and bring forward environmentally risky undertakings with unfunded opposition. As a practical matter, CELA doubts that most proponents of undertakings that actually require a hearing would be able to successfully plead poverty in order to reduce or negate a funding award. At a minimum, where a proponent is attempting to rely upon this provision, the funding panel must require full financial disclosure in the form of an affidavit and subject to cross-examination.

11. As noted above, intervenors should generally enjoy a degree of autonomy in funding the preparation and presentation of their cases. However, in situations where intervenor funding has clearly been abused or misappropriated, then the intervenor should be liable to pay back some or all of the misused funds. This determination should be made by the funding panel.

12. In general, intervenors should not be required to pay back the difference between funding awards and cost awards, except in clear cases of abuse or impropriety. As noted above, it is CELA's view that sufficient safeguards already exist within the IFPA, and we are unconvinced that this "pay-back" proposal has any merit or utility, particularly since, to our knowledge, abuse of intervenor funding has been virtually non-existent. Moreover, there has been greater misuse and wastage of funds (particularly public funds) by proponents in various hearings, and we would respectfully suggest that the focus on alleged intervenor misconduct is misplaced and unsupported by the evidence.

13. Given the length and complexity of hearings caught by the IFPA, supplementary funding is both desirable and necessary.

14. (a) Where appropriate, CELA has no objection to certain pre-hearing activities being carried out by the hearing panel -- such as identification of parties and participants, or establishing procedural guidelines for the conduct of the hearing -- prior to or during the intervenor funding process. However, the hearing panel must recognize that in many cases (particularly where no participant funding has been

available), only a preliminary list of issues in dispute can be identified until further IFPA-funded work has been completed. It is conceivable and probable that once the consultants' work has been continued or completed, issues may get added, deleted or refined over time.

(b) The wording of this question is somewhat unclear. If the question is whether the funding panel should be able to refer certain issues for rulings by the hearing panel, then CELA's answer is in the negative. CELA foresees significant evidentiary problems in allowing the funding panel to, in effect, "state a case" by requesting an adjudication of certain issues by the hearing panel. Moreover, depending on the nature of the issue in dispute, it may be premature for the hearing panel to rule on the matter. In any event, questions of jurisdiction, relevance, or procedure are best left to the parties to pursue through motions and proper supporting materials.

15. To ensure impartiality, CELA submits that supplementary funding applications should be considered by funding panels.

16. In general, intervenors should be required to contribute a reasonable portion of their own funds toward their intervention, in accordance with their financial means, fund-raising efforts, and capacity to pay. In-kind contributions ought to count towards the intervenor's contribution requirements.

17. The IFPA must provide for an opportunity to appeal a funding award as of right. The appeal cannot be to the Minister (either the Minister of Environment or the Attorney General) nor the Cabinet since they are frequently parties in these hearings. While CELA is concerned about the time, risk, and expense of using the courts as an appellate forum, there appears to be no other workable and independent alternative. The appeal could go to a single judge of the Ontario Court (General Division), and proceedings below should generally be stayed unless the court orders otherwise.

18. Where appropriate, CELA has no objection to a "paper" hearing, and notes that recent amendments to the SPPA appear to allow the boards to hold written hearings in lieu of oral hearings. However, where an intervenor or proponent insists on an oral hearing, such a hearing should be held. However, we do not support turning oral hearings into full-blown adversarial trials with examination and cross-examination of witnesses under oath.

19. CELA has been involved in numerous intervenor funding applications prior to and after the passage of the IFPA.

20. CELA strongly supports the IFPA, and submits that it must be amended and placed on a permanent legislative basis. While other funding models may be possible, there is consensus support for the current model and a growing familiarity and comfort level with the IFPA. While certain amendments are required -- particularly with respect to participant funding and interim costs -- the IFPA is fundamentally sound and must be continued.

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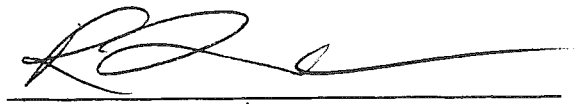

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