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**PROPOSAL TO AMEND THE CANADIAN ENVIRONMENTAL ASSESSMENT ACT
TO PROVIDE FOR THE AWARDING OF INTERVENOR/PARTICIPANT
FUNDING & COSTS**

I. Background

When the Canadian Environmental Assessment Act was first introduced as Bill C-78 in June 1990, one major deficiency was the lack of any provisions for the granting of intervenor funding before review panels or for the mediation process. There was also no authority in the Act for review panels or mediators to grant interim or final costs. While the Minister, at the time, announced that a funding program would be put in place, it was to be outside the ambit of legislation. On November 15, 1991, then Minister Jean Charest announced an \$8.5 million Green Plan initiative to assist public participation in the review of projects subject to environmental assessment by a panel. A guide entitled "Participant Funding Program" has been published and is currently available from Environment Canada. A Funding Administration Committee, independent of both the panel and the proponent, is established to review the applications. The Committee is usually chaired by a FEARO employee. The guide sets out criteria outlining who is eligible to apply, what types of activities will be funded, eligible expenditures and other matters that must be addressed in the application. It should be noted that the original \$8.5 million was reduced in recent budget cuts to \$6.8 million over the six year period ending 1996-97. To date (since 1991) a total of \$2.28 million has been committed or spent.¹ These funds are only available for panel reviews.

The lack of provisions for intervenor funding in Bill C-78 met with substantial criticism from environmental organizations and others. Many submitters noted that while the preamble to Bill C-78 states the commitment of the government to "promoting public participation in the environmental assessment of projects"; public participation becomes meaningless unless adequately funded.

In the final version of Bill C-13, section 58 sets out a series of Minister's powers to facilitate environmental assessments. Section 58(1) provides that the Minister may "establish a participant funding program to facilitate the participation of the public in mediations and assessments by review panels." All this section does is clarify in the context of the legislation the ability of the Minister to establish a participant funding program. As noted above, this is already in place in relation to panel reviews under the EARP Guidelines Order. This section, in my opinion, does not provide the authority for the government to require any funds to be paid by the private sector or provincial proponents. This can be contrasted to the Ontario

¹ Correspondence to CELA from Jean Valin, Director General, Communications, Environment Canada (November 26, 1993).

Intervenor Funding Project Act which allows a hearing panel to determine who the funding proponent will be. It is usually the applicant and can be either a private or public sector proponent. The need for a legislative basis for intervenor funding is long overdue.

The Liberal Party's "Red Book" entitled Creating Opportunity: The Liberal Plan for Canada, clearly states that "A Liberal government will amend the Canadian Environmental Assessment Act to legally recognize intervenor funding as an integral component of the assessment process."² The following sets out briefly the rationale for intervenor funding and sets out some proposals for amending the CEAA to allow for the awarding of intervenor funds and costs.

II. Rationale

The notion of providing financial assistance to those interests otherwise unable to participate in environmental proceedings before administrative tribunals first received attention in the Berger Inquiry held in the mid 1970s. Mr. Justice Thomas Berger established five criteria for the awarding of funding which have been influential nationally in determining funding criteria before other inquiries and administrative tribunals.³ The rationale for intervenor funding has been said to include the need to improve the public's access to the justice system; providing view points and information not otherwise available to the tribunal leading to more efficient and better decision-making; enhancing public acceptance of decisions taken through greater public participation; and fostering of agency accountability. In the context of environmental proceedings, one of the key factors that distinguishes the process is the heavy reliance upon expert evidence in a host of technical disciplines. This increases the costs of intervention and provides a further rationale for funding of intervenors in environmental decision-making.⁴

In June 1988, the Ontario Government introduced the Intervenor Funding Project Act, 1988. Until that time, intervenor funding had been provided on an ad hoc basis. In introducing the Bill, the Attorney General noted that "we have recognized the need to try a more established

² Liberal Party of Canada. Creating Opportunity: The Liberal Plan for Canada (Liberal Party: Ottawa, 1993) at 69.

³ These criteria included: (1) there must 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 to adequately represent that interest and will require funds to do so; and (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. Northern Frontier, Northern Homeland- The Report of the MacKenzie Valley Pipeline Inquiry: Volume One (Ottawa: Minister of Supply and Services Canada, 1977).

⁴ Joseph F. Castrilli, "Intervenor Funding: Intervenor Funding Project Act, 1988", Insight, Tab VIII (Toronto: Insight, March 6, 1992).

mechanism, and one which charges back the costs of funding to proponents before the Boards."⁵ This rationale applies equally to the need to finally establish a statutory basis for intervenor funding in the CEAA.

III. Proposals for Reform

It is recommended that the CEAA be amended to permit the Canadian Environmental Assessment Agency to award intervenor funding for both mediation or review panels where the following criteria are met:

- (a) the intervenor represents a clearly ascertainable public interest that should be represented at the hearing or mediation;
- (b) separate and adequate representation of the interest would assist the review panel/mediator and contribute substantially to the hearing;
- (c) the intervenor does not have sufficient financial resources to enable it to represent the interest adequately;
- (d) the intervenor has made reasonable efforts to raise funding from other sources;
- (e) the intervenor has attempted to join together with other parties with similar interests;
- (f) the intervenor has a clear proposal for the use of any funds that might be awarded;
- (g) such representation would assist the review panel/ mediator and contribute substantially to the proceeding.

The legislation should provide for regulatory authority to establish procedures for intervenor funding and the expenditures that should be eligible for funding. These should include legal fees and eligible disbursements including disbursements for consultants, expert witnesses, typing, printing, copying, transcripts and other expenditures that may be named in the regulations.

The legislation should provide that an intervenor who has received an award of funding may apply to the review panel/mediator at any time up to the end of the hearing for supplementary funding.

The CEAA should also be amended to permit review panels to award interim and final costs to whom and by whom the panels so order and to provide that in awarding costs, the review panel is not limited to the considerations that govern awards of costs in any court.

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⁵ Ontario Ministry of the Attorney General. News Release. "Attorney General Introduces Bill to fund Public Interest Intervenors" (Toronto: June 29, 1988) at 2.