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## Helping "Concerned Volunteers Working out of Their Kitchens": Funding Citizen Participation in Administrative Decision Making

Marcia Valiante

W. A. Bogart

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## Helping "Concerned Volunteers Working out of Their Kitchens": Funding Citizen Participation in Administrative Decision Making

### Abstract

Broad citizen participation in decision making by administrative bodies is important in achieving fairness, improving the quality of decisions, and realizing accountability and legitimacy. Yet such broad participation often hinges on adequate financial capacity. In this regard, the authors review a number of mechanisms used for funding citizen participation. These mechanisms are variations of essentially two models: public funding (direct and indirect) and direct funding by proponents. The article concludes with a plea for such mechanisms—even in a time of severe financial restraint—as one reflection of a vigorous participatory democracy.

### Keywords

Administrative agencies; Democracy—Citizen participation

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# HELPING “CONCERNED VOLUNTEERS WORKING OUT OF THEIR KITCHENS”: FUNDING CITIZEN PARTICIPATION IN ADMINISTRATIVE DECISION MAKING<sup>©</sup>

BY MARCIA VALIANTE\* AND W.A. BOGART\*\*

Broad citizen participation in decision making by administrative bodies is important in achieving fairness, improving the quality of decisions, and realizing accountability and legitimacy. Yet such broad participation often hinges on adequate financial capacity. In this regard, the authors review a number of mechanisms used for funding citizen participation. These mechanisms are variations of essentially two models: public funding (direct and indirect) and direct funding by proponents. The article concludes with a plea for such mechanisms—even in a time of severe financial restraint—as one reflection of a vigorous participatory democracy.

Citizens' groups are staffed by concerned volunteers working out of their kitchens. ... No government agency comes even close to a citizens' group in the assiduousness and efficiency with which they watch their turf.

—from a Greensville Against Serious Pollution (GASP) submission.<sup>1</sup>

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\* Assistant Professor of Law, Faculty of Law, University of Windsor.

\*\* Professor of Law, Faculty of Law, University of Windsor. Initial research for this article was conducted as part of a study of the *Intervenor Funding Project Act, 1988*, S.O. 1988, c. 71, funded by the Ministries of the Attorney General, Energy, and Environment: see W.A. Bogart & M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988* (Toronto: Ontario Ministry of the Attorney General, 1992). Subsequent research was assisted by Helga Wintal. The support of the Ontario government is gratefully acknowledged. The opinions expressed in this article are the sole responsibility of the authors.

<sup>1</sup> As quoted in W.A. Bogart & M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988* (Toronto: Ontario Ministry of the Attorney General, 1992) at 142.

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## I. INTRODUCTION

Dissatisfaction with and distrust of politicians and legislatures, of whatever stripe, is at a high. The fall of the Charlottetown Accord provides a recent, dramatic example.<sup>2</sup> Such grumblings throw into relief attempts to create alternative streams that will respond to issues on behalf of diverse interests. Courts and litigation have become, by some estimations, the bright promise. Here, it is claimed, rationality and principles of justice will prevail, offering a beacon against the lassitude and compromises—to say nothing of the connivance—of politicians.<sup>3</sup> In

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<sup>2</sup> The *Citizens' Forum* in 1990-91, as part of attempts at constitutional renewal, heard from over 400,000 Canadians regarding their views about Canada and its problems. It reported that the most common complaint of those participating was that they "have lost faith in both the political process and political leadership." See "Citizens' Forum on Canada's Future" *The [Toronto] Globe and Mail* (2 July 1991) A9, as cited in P. Russell, "Canadian Constraints on Judicialization From Without" (Paper presented at the International Political Science Association Research Committee on Comparative Judicial Studies, Forlì, Italy, June 1992) at 16 [unpublished].

<sup>3</sup> See, for example, the work of David Beatty: *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen's University Press, 1987); and *Talking Heads and The Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990).

Canada, of course, the *Charter of Rights and Freedoms*<sup>4</sup> has propelled courts forward as “rights” has become the new watchword. But the *Charter* has also stirred up long-standing reservations about such ambitions for judges. Skeptics busy themselves at many levels—theoretical, empirical, historical—aggregating evidence and arguments to demonstrate that courts may not meet such high expectations. Such doubters point to a long record of regressive judgments concerning the disadvantaged, and to the enervation of popular participation because of the elitism and mystification of law as warning signs against turning to the courts. They also focus upon the expense of lawyers and litigation as creating substantial barriers to the court system, even if otherwise attractive.<sup>5</sup> This last criticism is a matter to which we will return.

Yet, a different way of countering dissatisfaction with the lack of participation and influence upon policy making is not to turn away from legislatures and their emanations but to become more closely involved in their workings. Such efforts ally themselves with a participatory model of democracy, which hopes a vigilant and active citizenry will lead to the common good and remain attentive to a range of interests and rights.<sup>6</sup> One element of this strategy, the funding of diverse interests to not only participate in administrative decision making, but to do so effectively, is the subject of this paper.

Administrative decision making expanded enormously in North America in the decades following the Second World War. As the volume of regulatory agencies and their decisions grew, so did concern about the manner in which such decisions were being made. In the late 1960s, a number of assessments criticized agencies charged with regulating in the “public interest.” They were censured for failing to meet pressing public needs, such as environmental quality, and for

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<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>5</sup> This skepticism arises from a number of places on the political spectrum: see, for example, R. Knopf & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson, 1992); and M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989). For an excellent study of the impact of such litigation in the U.S. arguing that it may have actually hurt the disadvantaged, see G.N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

<sup>6</sup> C. Taylor, “Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada” in A. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1986) 183.

failing to serve the majority of the public.<sup>7</sup> Others criticized agencies for being biased in favour of the interests of the regulated industry and exercising their discretion at the expense of minorities, the poor, consumers, ratepayers, and other more diffuse interests.<sup>8</sup> Some of the reasons cited to explain these biases were the reliance of agencies on regulated industries for technical data and other information; the need to ensure industry cooperation in policy implementation; and the absence of other voices from administrative proceedings, largely because of the limited resources available to them.<sup>9</sup>

At the same time, the traditional concept of administrative agencies as mechanical implementers of legislative mandates which encompass an objectively rendered "public interest" has disintegrated.<sup>10</sup> Because the "public interest" has come to be seen as a "balance of many interests," the usual solution to the problem of bias was to throw open the agencies' doors and allow broad citizen participation.<sup>11</sup> Thus, as a *quid pro quo* for their validation, agencies attempt to listen to and consider all interests affected by their decisions.

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<sup>7</sup> See, for example, E. Gellhorn, "Public Participation in Administrative Proceedings" (1972) 81 Yale L.J. 359.

<sup>8</sup> See discussion in R.B. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harv. L. Rev. 1669; and R.C. Cramton, "The Why, Where and How of Broadened Public Participation in the Administrative Process" (1972) 60 Georgetown L.J. 525 at 525-30.

<sup>9</sup> See Stewart, *ibid.* at 1686. Cramton, *ibid.* at 529 states:

The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of hiring lawyers and expert witnesses to make a case for them. Noneconomic interests or those economic interests that are diffuse in character tend to be inadequately represented, although agency staffs often make valiant efforts in this direction [footnotes omitted].

<sup>10</sup> See Stewart, *supra* note 8 at 1683. Stewart traces a shift in the role of courts in judicial review that parallels this shift in concept. Judicial review shifted from a focus on ensuring that agencies stay within their legislative directives in order to prevent unauthorized intrusions on "private autonomy" to a focus on assuring fair representation for all affected interests in the exercise of delegated power. "Implicit in this development is the assumption that there is no ascertainable, transcendent 'public interest,' but only the distinct interests of various individuals and groups in society." *Ibid.* at 1712.

<sup>11</sup> See discussion in Gellhorn, *supra* note 7.

Enthusiasts of expanded citizen participation claim several advantages,<sup>12</sup> for example, fairness, the quality of decisions, and accountability and legitimacy.

#### A. *Fairness*

Regulatory decisions always affect some segment of the public. Sometimes individuals are financially affected, each to a small degree, as with telephone or utility rates. Sometimes individuals' health and well-being are affected, as with environmental or food and drug regulation. In principle, if people are affected by decisions, they have the right to be heard.<sup>13</sup>

#### B. *Quality of Decisions*

Where regulatory decisions affect the public and are required to be made in the "public interest," the quality of those decisions is improved when representatives of the affected interests participate. They can apprise an agency or tribunal of facts that might not otherwise come to its attention and they can assert different perspectives on and opinions about the consequences of a decision which challenge those of the regulated industry. In this way, the agency or tribunal gains a fuller understanding of the range of dimensions that comprise the "public interest" it is charged with serving. It is also argued that better decisions are the result.

#### C. *Accountability and Legitimacy*

When representatives of all affected interests participate in administrative proceedings, they gain an understanding of the balance

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<sup>12</sup> The rationale for increased citizen participation is considered by many authors. See, for example, Gellhorn, *supra* note 7 at 361; D. Fox, *Public Participation in the Administrative Process: A Study Paper Prepared for the Law Reform Commission* (Ottawa: Law Reform Commission, 1979) at 4-6; R. Anand & I.G. Scott, "Financing Public Participation in Environmental Decision Making" (1982) 60 Can. Bar Rev. 81 at 87-96; and R.B. Gibson, "The Value of Participation" in P.S. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Research Foundation and the Canadian Environmental Law Association, 1975).

<sup>13</sup> For a discussion of whether the right to participate in decisions affecting one's life or health is guaranteed by section 7 of the *Charter*, see M. Jackman, "Rights and Participation: The Use of the *Charter* to Supervise the Regulatory Process" (1991) 4 C.J.A.L.P. 23.

that is ultimately struck between competing interests in decision making. This process makes the result more transparent, the decision maker more accountable to the public, and helps legitimize the decision for those who participate.

Recognition of the importance and necessity of improved access has moved governments to open administrative proceedings to more participants. However, acceptance of a bare right to participate is often not enough to ensure that the goals of access are met. Participation must also be effective. Often, in administrative proceedings, members of the public challenge the proposal of a public sector agency, or a large private sector business that has substantial financial and human resources to professionally present a case.<sup>14</sup> Individuals and members of public interest groups generally have fewer resources to contribute. While public interest groups represent the interests of consumers, fundraising results, for example, do not reflect the numbers who benefit from the group's work because *all* consumers will benefit even if they do not contribute directly. This is known as the "free rider effect." In addition, the costs of participating in an administrative proceeding are much greater than the individual benefit of a successful intervention.

Accordingly, for participation to be effective in a proceeding where there is such an imbalance of resources, an attempt to redress that imbalance is required. In this depiction, financial assistance, provided directly or indirectly to intervenors, and provided by the government, the tribunal, or the proponent, is vital for redressing the imbalance.<sup>15</sup> However, responsible use of the funds and relevant and constructive participation in the proceedings are also critical. This article reviews a number of such mechanisms.

That such initiatives have weaknesses is a matter that will become all too clear. Nevertheless, whatever their imperfections, they stand in marked contrast to the way similar barriers to courts have been addressed. Legal aid for judicial proceedings has been an important modification but its focus is on individuals, particularly the very needy,

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<sup>14</sup> As one commentator claims:

[t]here is a generally perceived imbalance of resources, information, expertise and familiarity with applications as between the applicant in a proceeding and the other components of the public interest.

R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, vol. 1 (Toronto: Carswell, 1988) at 26-2.

<sup>15</sup> Other ways of increasing public input include direct government consultation with interest groups or the creation of a public or consumer advocate to represent diverse interests in administrative proceedings. Macaulay, *ibid.* at 26-4.



and especially those facing criminal charges. Apart from these critical but limited alterations, the overall structure of litigation is that losers pay winners. As an abstraction, such a rule is attractive in discouraging frivolous claims and defences and comports with theories of formal equality. As a reality, it can have a prohibitive impact on individuals and groups seeking to raise important issues of public policy, particularly when their adversaries—frequently governments or big corporations—are far better able to absorb or pass on the costs of such litigation.<sup>16</sup>

It is true that there have been limited attempts to redress such an imbalance. Good examples are Quebec's<sup>17</sup> and Ontario's<sup>18</sup> class action mechanisms and their costs devices. Nevertheless, possibly the most important innovation, certainly in terms of *Charter* litigation, was the Court Challenges Program. Under this federal programme, a maximum of \$35,000 at each court level was provided to assist individuals and non-profit groups in bringing or intervening in test cases that raised important issues relating to the language and equality rights under the *Charter*.<sup>19</sup> The purpose of the programme was to allow groups intended to benefit from the *Charter* to test the meaning of protections and relevant provisions, "so as to clarify and advance the rights of all members of the disadvantaged group."<sup>20</sup> However, funding for that programme was eliminated by the federal government in its February 1992 budget. Such a termination can be seen, not as a second thought about the wonders of litigation, but as a signal to the disadvantaged that lack of access is not a deficiency of this process, but an unfortunate side effect for some interests that will be, from now on, their problem. Such indifference to real court barriers needs to be kept in mind as initiatives to provide access to administrative proceedings and their limitations are surveyed.

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<sup>16</sup> See, for example, G.D. Watson *et al.*, *Civil Litigation: Cases and Materials*, 4th ed. (Toronto: Emond Montgomery, 1991) at c. 4.

<sup>17</sup> *Class Action*, R.S.Q. c. R-2.1; part of Art. 710 C.C.P.

<sup>18</sup> See Bill 28, *An Act respecting Class Proceedings*, 2d Sess., 35th Leg., Ontario, 1992 (assented to 25 June 1992, S.O. 1992, c. 6); and Bill 29, *An Act to amend the Law Society Act to Provide for Funding to Parties to Class Proceedings*, 2d sess., 35th Leg., Ontario, 1992 (assented to 25 June 1992, S.O. 1992, c. 7). Both came into force on 1 January 1993.

<sup>19</sup> Court Challenges Program, *Information Sheet: Funding for Equality Cases* (Ottawa: Court Challenges Program, 2 November 1990). Ottawa also funds a programme for test cases involving important Aboriginal legal issues. See Indian and Northern Affairs Canada, *Indian Test Case Funding: Terms and Conditions, Contribution Program* (Ottawa: INAC, 1990).

<sup>20</sup> Court Challenges Program, *ibid.* at 3.

## II. REVIEW OF FUNDING MECHANISMS

### A. *Introduction*

There is a wide assortment of mechanisms that have been and are being used to provide funding to citizens and public interest participants in administrative proceedings. For discussion purposes, these mechanisms are grouped into a number of "models." There are two main characteristics differentiating these models. First, a distinction is made between the sources of funding: "public" or "proponent." "Public" means that the source is general government or other public sector funds. By contrast, "proponent" funding refers to a specific source which may be either governmental (such as a municipality, provincial ministry, or Crown corporation) or non-governmental. A "proponent" is an actor subject to a regulatory process, and as part of its application for authorization in that process, it becomes the source for funding. The underlying rationale for requiring proponent funding is that, because the proponent benefits, financially and otherwise from such authorization, it should underwrite the expenses of those who, by their participation, will assist the regulating authority to come to a better decision "in the public interest." An obvious limit to this model is that there must be an identifiable proponent in the process who can be ordered, and who is financially able, to provide such funds.

The second characteristic used to differentiate these models is the distinction between intervenor funding and costs awards. Though the distinction is not airtight (for example, intervenor funding awards and interim costs can become very close in theory and in practice), the focus of the former is on an award at the beginning of the proceedings centred on financial need. The latter is usually awarded at the end, and hinges both on whether the participant has made an effective contribution to the proceedings and whether the participant is financially needy. It will be seen that the criterion of need is a factor that looms large in our analysis of any preferred model.

Using these characteristics, the following models are discussed and analyzed in terms of their potential to make access more effective:

1. Public Funding of Intervenors
  - a) *Direct Funding*
    - i) *Ad hoc* Intervenor Funding
    - ii) Regularized Intervenor Funding

- b) *Indirect Funding*
  - i) Legal Aid
  - ii) Public Advocate
- 2. Direct Funding of Intervenors by Proponents
  - a) *Costs, Compensation, and Fee Shifting*
  - b) *Intervenor Funding*

The following discussion is rather detailed in some places. We have leaned toward the inclusion of such particulars because of the relative inaccessibility of some of the models. The irony of the difficulty in discovering the existence of these programmes designed to facilitate access, let alone assessing their impact, is by no means lost on us.

Finally, while at a theoretical and policy level our sympathies are clearly in favour of funding mechanisms, we make a general plea for a systematic study of them so that their actual workings (including, obviously, their weaknesses) can be gauged. It is not enough to say that funding *should* result in effective participation without later measuring that effectiveness in some way. These measures have not been undertaken with respect to most mechanisms. An important exception to this lack of systematic review is the evaluation of the Ontario *Intervenor Funding Project Act, 1988*,<sup>21</sup> which we undertook in 1992, and the highlights of which we discuss below in Section 2 (b).

## 1. Public Funding of Intervenors

### a) *Direct Funding*

Sharing funds with public interest intervenors in administrative proceedings began in Canada with the awarding of "costs" by boards regulating gas and electricity rates. The first board to award costs to citizen intervenors was the Alberta Public Utilities Board, commencing in 1960. (Because costs are payable by the regulated industry and passed along to customers through rates, they are addressed under the second model, proponent funding). A different route has been followed with the provision of funds by governments and other public bodies. Starting with the Berger Commission in 1974, most of this funding has occurred through programmes established for one-time inquiries where the criteria and funds vary from case to case. Direct funding by government

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<sup>21</sup> S.O. 1988, c. 71 (now R.S.O. 1990, c. I.13) [hereinafter *IFPA*].

is also the model that has been used (but largely abandoned) in the United States, although this was done through a regularized process. In both situations, the funding has not been accompanied by the power to award costs at the end of a proceeding payable by the proponent.

i) *Ad Hoc* Intervenor Funding

The Berger Commission was the first and most influential funding experiment in Canada. More formally known as the Mackenzie Valley Pipeline Inquiry, the Commission was established in 1974 to review the social, cultural, and environmental impacts in northern Canada of the proposals to build pipelines to bring natural gas to southern Canada. Berger determined that funding would be necessary to ensure that the many diverse interests affected by the proposals would be represented at the hearings. Berger creatively interpreted the provisions of his terms of reference to authorize funding for public interest intervenors, and was able to secure funds from the federal government for this purpose. Approximately \$1.7 million, out of the total cost for the inquiry of \$4.8 million, was awarded to Aboriginal organizations, an environmental group, northern municipalities, and northern businesses.

The Commission established the following criteria for funding eligibility: that applicants have a clearly ascertainable interest that should be represented; that separate and adequate representation of that interest would make a necessary and substantial contribution; that applicants have an established record of concern for and a demonstrated commitment to the interest; that applicants do not have sufficient resources to adequately represent the interest; and that applicants have a clear proposal for the use of funds and be sufficiently well organized to account for them.<sup>22</sup> These criteria have served as the basis for virtually all subsequent funding programmes.

Most commentators on the funding aspect of the Inquiry, including Berger himself, claim it had a significant impact on the outcome of the Inquiry:

The usefulness of the funding that was provided has been amply demonstrated. All concerned showed an awareness of the magnitude of the task. The funds supplied to the intervenors, although substantial, should be considered in the light of the estimated cost

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<sup>22</sup> *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, vol. 2 (Ottawa: Minister of Supply and Services, 1977) (Commissioner: T.R. Berger) at 225-26.

of the project itself, and of the funds expended by the pipeline companies in assembling their own evidence.<sup>23</sup>

Criticisms of the funding programme focused on the inadequacy of the amount of funding, particularly for the funded environmental group which nearly went bankrupt, and on the view that funding did not bring major new interests into the debate.<sup>24</sup>

Following the Berger Commission, several Canadian governments adopted that model on an *ad hoc* basis for numerous commissions and inquiries as a way of increasing public interest group participation. Examples include the federal Lysyk Inquiry (Alaska Highway Pipeline); the seven-year Ontario Royal Commission on the Northern Environment; the five-year Porter Commission on Electric Power Planning (Ontario); the 1977 Thompson Inquiry into West Coast Oil Ports; the Ontario PCB Inquiry; several panels established under the federal Environmental Assessment and Review Process; the Saskatchewan Cluff Lake Inquiry; and environmental and energy hearings in Ontario prior to passage of the *IFPA*.

One example of how this model has been applied in a regulatory setting is the federal Alachlor Review Board.<sup>25</sup> In 1985, the federal Minister of Agriculture cancelled the registration of the pesticide alachlor under the *Pest Control Products Act*.<sup>26</sup> Monsanto, a manufacturer of alachlor, required a review of this decision and a Review Board was formed. Since this case was very important regarding certain aspects of pesticide regulation, the Minister of Agriculture ordered the review board to provide money to intervenors in need of funds to participate.

The criteria for eligibility were determined by the Review Board and were based on the Berger criteria. Members of the Pest Management Advisory Board acted as an Intervenor Funding Committee in order to attain a degree of independence from the Board and the Minister. The original ceiling on available funds was \$75,000 but \$127,500 was eventually provided. These funds were used for legal and expert witness fees, travel, and administrative overhead. According to

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<sup>23</sup> *Ibid.* at 226.

<sup>24</sup> See discussion in R.J.D. Page, *Northern Development: The Canadian Dilemma* (Toronto: McClelland and Stewart, 1986); and François Bregha, "A Ten Year Muddle: The Northern Pipeline and Canadian Energy Policy" (1979-80) 59:695 *Canadian Forum* 16-21.

<sup>25</sup> See discussion in H. Versteeg, "Intervenor Funding: The Alachlor Review Board Experience" (1990) 3 *C.J.A.L.P.* 91.

<sup>26</sup> R.S.C. 1985, c. P-9.

one member of the funding committee, there was "absolutely no doubt that intervenor funding was critical" to effective participation by the public interest intervenors.<sup>27</sup> Some criticisms of this particular process were that there were no guidelines for applicants and that a 50 per cent holdback was imposed which created problems for intervenors. Court action was initiated at several points in the review but no funds were available for the intervenors for that purpose.

A major criticism of the *ad hoc* process is that it is *ad hoc*. This means there is no certainty for intervenors as to whether there will be funding; the criteria may change for each hearing; the amounts may be limited and, therefore, not sufficient for effective participation; the timing of funding may not always be appropriate; and even when similar criteria are used, there have been inconsistent funding decisions.<sup>28</sup> On the other hand, unlike a costs model, *ad hoc* funding on the Berger model is provided at the front end of a hearing, providing some certainty to participating groups. In addition, the model is tied to the criterion of "need." Only those groups who would not otherwise be able to participate are funded. This requirement provides a clear link to the goal of making access more effective.

## ii) Regularized Intervenor Funding

The longest standing regularized government funding programmes for intervenors were those that operated in U.S. federal regulatory agencies primarily in the 1970s. However, one Canadian agency, the Federal Environmental Assessment Review Office (FEARO), has recently switched from *ad hoc* funding to a regularized process. Meanwhile, in Saskatchewan, the Environmental Assessment Review Commission has called for the revival of "stakeholder funding." Saskatchewan had Canada's first statutory intervenor funding provisions (in *The Environmental Assessment Act*) but these were removed from

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<sup>27</sup> Versteeg, *supra* note 25 at 97.

<sup>28</sup> See discussion with respect to the Orders in Council providing intervenor funding prior to passage of IFPA in H. Campbell, *Intervenor Funding and the Intervenor Funding Project Act in Ontario: A Report Prepared by the Canadian Environmental Defence Fund for the Ministry of the Environment* (Toronto: Canadian CEDF, 1991) at 22-23.

that *Act* in 1988.<sup>29</sup> The Commission's proposal for a new regularized funding process has yet to be acted on.<sup>30</sup>

The FEARO administers the federal environmental assessment programme. Until recently, funding for intervenors in public reviews had been supplied on an *ad hoc* basis by departments involved in the review.<sup>31</sup> However, as part of the development of the new *Canadian Environmental Assessment Act*,<sup>32</sup> a more regularized process has been instituted. The programme is not referred to in the *Act*, but it is an administrative programme administered by FEARO. The programme, initiated in 1991, has been allocated \$8.5 million for distribution to intervenors over a six-year period.

Funds will be made available to cover the costs of preparation for, and participation in, the environmental assessment process. The funds will not be limited to the hearing stage of the process but will also be available for "phase I" activities, which include participation in the development of the guidelines document that forms the basis of the environmental impact statement. Funding will be available to those who meet certain criteria. To be eligible, an intervenor must have a "demonstrated interest in the potential environmental effects of the proposal under review and the social effects directly related to those environmental effects," a need for financial assistance, and must have made an attempt to coordinate with others "sharing like interests."<sup>33</sup> Priority will go to those whose "way of life or means of making a living will be directly affected by the project."<sup>34</sup>

Eligible costs will be those that are relevant to the panel's terms of reference and do not duplicate existing services or studies, including professional fees, research costs, travel expenses, purchase of documents, information collection and dissemination, office expenses, etc.<sup>35</sup> FEARO actively discourages legal representation at panel reviews,

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<sup>29</sup> S.S. 1979-80, c. E-10.1, s.6, as am. by *The Governmental Organization Consequential Amendment Act, 1988*, S.S. 1988-89, c. 42, s. 37(3).

<sup>30</sup> See *Environmental Challenges: The Report of the Saskatchewan Environmental Assessment Review Commission* (Regina: Saskatchewan Environment and Public Safety, 1991) at 49-52 [hereinafter *Environmental Challenges*]; and telephone interview with M.A. Bowden, Chair of the Commission (6 February 1992).

<sup>31</sup> Telephone interview with Ghislaine Kerry, FEARO (6 February 1992).

<sup>32</sup> S.C. 1992, c. 37 (not yet in force).

<sup>33</sup> Federal Environmental Assessment Review Office, *Participant Funding Program* (Ottawa: FEARO, 1991) at 1.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* at 3.

so it will be interesting to see to what extent legal fees will be applied for and funded.<sup>36</sup> The funding application will be made to an independent funding administration committee that will make recommendations to the executive chair of FEARO, who will make the final decision. There is no appeal and costs awards cannot be made at the end of the review process.

A regularized process of public funding overcomes some of the disadvantages of the *ad hoc* processes. Most importantly, potential intervenors can plan their intervention with a clearer expectation of assistance. This predictability will increase as the fixed criteria are interpreted, resulting in, it is hoped, consistent application. The FEARO mechanism is particularly useful for public interest intervenors because of its emphasis on need, and its application to the pre-hearing stages of the process where well-informed participation is often essential, but is not usually funded. It will remain to be seen, however, whether the amounts awarded will be sufficient to allow for effective participation.

#### b) *Indirect Public Funding*

Governments provide assistance to intervenors in order to aid indirect participation through a number of mechanisms. Two that will be discussed below are legal aid and a public advocate. In addition, some avenues for providing partial assistance are worth mentioning. One has been the provision of funds by Canadian federal departments to some public interest groups which allow them to either carry on their daily activities, or to take part in proceedings of special interest. For example, the Department of Consumer and Corporate Affairs provides sustaining funding to the Public Interest Advocacy Centre and the Consumers' Association of Canada, and has also provided funds to the Consumers' Association and the National Anti-Poverty Organization to intervene in the Canadian Radio-Television and Telecommunications Commission (CRTC) proceedings.<sup>37</sup> The Department of Indian Affairs and Northern Development provided funds to the Inuit Tapirisat of Canada to participate in a National Energy Board hearing; and

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<sup>36</sup> The panel review is required to be informal and non-judicial, but structured. See Environmental Assessment and Review Process Guidelines Order SOR/84-467, s. 27(1).

<sup>37</sup> J. Keeping, "Intervenors' Costs" (1990) 3 C.J.A.L.P. 81 at 84.



Environment Canada provides limited sustaining funds to environmental groups.<sup>38</sup>

Some boards make technical assistance available to intervenors as another way of providing partial assistance. At the Ontario Environmental Assessment Board, for example, the board can hire experts to assist it.<sup>39</sup> The board has retained experts to address issues in a hearing and to assist intervenors both on its own initiative and when intervenors could not afford to hire an expert.<sup>40</sup>

#### i) Legal Aid

In Ontario, persons without sufficient financial resources can hire a lawyer who will be paid by the provincial Legal Aid Plan. If the lawyer is in private practice, an application must be made to the Plan and, if the person is eligible, a certificate will be issued. In addition, community and specialty clinics have lawyers and community legal workers on staff to provide legal services to those who qualify. Specialty clinics relevant to a discussion of public interest participation include the Canadian Environmental Law Association, the Toronto Workers' Health and Safety Clinic, the Advocacy Resource Centre for the Handicapped, and the Advocacy Centre for the Elderly.

In Ontario and other provinces, legal aid certificates have been used by groups in proceedings which address public interest issues. For example, in a Joint Board hearing addressing the site selection for the new Halton Region landfill, Ontario Legal Aid funded half of the legal fees for one citizens' group. The other group of citizens participating was represented by a legal aid clinic, the Canadian Environmental Law Association. Certificates have also been issued to groups participating in the Environmental Assessment Board, Environmental Appeal Board, and Ontario Municipal Board hearings.<sup>41</sup> These certificates have been important in allowing groups which fall outside the application of the

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<sup>38</sup> Both cited by I.A. Blue, "Costs and Intervenor Funding—The National Energy Board" in N. Bankes & J.O. Saunders, eds., *Public Disposition of Natural Resources: Essays from the First Banff Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1984) 235 at 239.

<sup>39</sup> *Environmental Assessment Act*, R.S.O. 1990, c. E.18, s. 18(10).

<sup>40</sup> See R.B. Eisen, "Expert Opinion Evidence at Environmental Board Hearings" (1989) 3 C.E.L.R. (N.S.) 63.

<sup>41</sup> Ontario Legal Aid Plan, *Report Regarding Environmental Cases to the Legal Aid Committee by the Group Applications and Test Cases Subcommittee*, (Toronto: Ontario Legal Aid Plan, September 1991).

*IFPA* to participate in hearings or to supplement such funding. However, despite the important role legal aid can and has played in increasing access, the Ontario Legal Aid Plan subcommittee which considers group applications recently recommended that group certificates no longer be issued in environmental cases, largely due to the disproportionately high cost of such cases compared to others coming before the subcommittee.<sup>42</sup> The subcommittee recommended that a more appropriate funding mechanism for environmental cases would be to expand the *IFPA* to include cases before the Environmental Appeal Board.<sup>43</sup> However, this would leave a gap in court actions involving environmental issues for which legal aid may still be the only funding mechanism available.

Legal aid has the advantage of allowing clients to choose and instruct their own lawyers. Eligibility is tied to financial need, so there is a link to the goal of access. However, as the Ontario decision on funding environmental cases demonstrates, there are many interests competing for scarce public funds. Where there are complex administrative proceedings which require sustained participation over many weeks or months, it is unrealistic to look to legal aid to fund that participation.

## ii) Public Advocate

A different model for providing assistance to public intervenors is the establishment of an office of a public (or consumer) advocate. The public advocate would carry out research and investigations, disseminate information, and intervene in administrative proceedings as the representative of the general public interest or a special segment of it (such as consumers or mental health patients, *etc.*). This model has had more of a history in the United States than in Canada. While public advocacy has been experienced at the U.S. state level, no consumer advocacy office has been established federally, despite many prolonged attempts.

New Jersey, with twenty years of experience, provides a useful example. The Department of the Public Advocate was established there in 1974 as a vehicle for advancing the concerns and interests of classes of

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<sup>42</sup> In contrast to Ontario, in Manitoba, legal aid to groups is expressly available only where the objective of the applicant group relates "to an issue of public interest including ... any consumer or environmental issue." See *The Legal Aid Services Society of Manitoba Act*, R.S.M. 1987, c. L.105, s. 4(2)(b).

<sup>43</sup> Ontario Legal Aid Plan, *supra* note 41 at footnote 58.

citizens who were traditionally unrepresented or underrepresented in administrative decision making.<sup>44</sup> The Department consists of a number of specialized divisions, including the divisions of Public Interest Advocacy, Mental Health Advocacy, Rate Counsel, Advocacy for the Developmentally Disabled, and Citizen Complaints.<sup>45</sup> Staff from each division act as public representatives. They initiate investigations or proceedings, intervene in a wide range of administrative proceedings, and attempt to resolve issues without resorting to litigation. The Department boasts an impressive résumé of accomplishments in advancing the interests of the public in such areas as affordable housing, tenant rights, environmental protection, utility rates, patients' rights, and health care.<sup>46</sup>

Another example of a public advocate at the state level is the Wisconsin Public Intervenor, who operates as part of the Department of Justice.<sup>47</sup> The Public Intervenor is given the right to intervene in certain proceedings in order to protect public rights in water and other natural resources, and may initiate investigations or other proceedings.<sup>48</sup>

Wisconsin and other states also have an advocacy mechanism known as "citizen utility boards" to "represent and protect the interests of the residential utility consumers." The boards are created by statute but members and funds are drawn from the citizens of the state.<sup>49</sup> The board educates consumers on energy conservation, transmits information about energy issues to its members, and intervenes in utility proceedings.

This model is not well-developed in Canada. Two examples of its use are at the Ontario Energy Board (OEB) and the Manitoba Legal Aid Services Society's Public Interest Law Centre.

The OEB maintains a large technical staff which plays an important role in advancing the "public interest" through board

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<sup>44</sup> New Jersey, Department of the Public Advocate, *Evolution of the Department of the Public Advocate* (Trenton, N.J.: N.J. Dept. of the Public Advocate, 15 July 1990) at 2.

<sup>45</sup> New Jersey, Department of the Public Advocate and Office of the Public Defender, *1990 Annual Report* (Trenton, N.J.: N.J. Dept. of the Public Advocate, 1990).

<sup>46</sup> New Jersey, Department of the Public Advocate, *Department of the Public Advocate Accomplishments Checklist* (Trenton, N.J.: N.J. Dept. of the Public Advocate, 1991).

<sup>47</sup> See *Department of Justice Act*, Wis. Stat. Ann. § 165.07 (West Supp. 1988).

<sup>48</sup> *Ibid.* The Public Intervenor is automatically given notice of all proceedings under the state's environmental and natural resources statutes.

<sup>49</sup> See Wis. Stat. Ann. ch. 199 (West Supp. 1988); Ill. Ann. Stat. ch. 111 2/3, para. 901; Or. Rev. Stat. §§ 774.010-774.990 (1989). Generally, there is a statutory limit on the amount of funds that any one person can contribute to the Board.

hearings. The OEB staff acts as a separate intervenor. Technical staff members and special counsel review applications, sometimes hire outside experts, present evidence, and cross-examine other parties in their role as watchdogs. These staff members are distinct from those who advise the Board in their deliberations. Members of the public with an interest in a hearing are able to consult with the OEB technical staff, special counsel, and outside experts. A continuing issue is the appropriate role of Board staff with respect to intervenors funded under the *IFPA* who are also raising "public interest" positions.<sup>50</sup>

The Manitoba Public Interest Law Centre operates essentially as a specialized clinic representing groups who seek to raise "public interest" issues or bring a test case. In addition, the Centre undertakes law reform activities. Clients must qualify for legal aid and cases must raise an issue of public interest primarily affecting lower income Manitobans. Groups will often be required to contribute toward the costs, but individuals usually cannot. Although the Centre does not generally undertake environmental cases, it does intervene in public utility rate cases before the Manitoba Public Utilities Board, which has ruled that the Centre can recover costs in proceedings before it.<sup>51</sup>

Although the public advocacy model has been effective in some states,<sup>52</sup> one of the major criticisms with this model, especially as it has operated in the U.S., is that the advocate's office determines and advances *its* view of the public interest and does not represent particular groups, which may have conflicting views on what the "public interest" is. Thus, for potential intervenors, "their" case may be taken out of their hands.

## 2. Direct Funding of Intervenors by Proponents

### a) *Costs, Compensation, and Fee Shifting*

The most common experience for proponents funding intervenors in Canadian tribunals is the imposition of costs awards.

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<sup>50</sup> See discussion in Bogart & Valiante, *supra* note 1 at 267-69.

<sup>51</sup> Telephone interview with Arne Peltz, Director, Public Interest Law Centre (10 February 1992); and The Legal Aid Services Society of Manitoba, *Report of the Public Interest Law Centre, 1990-91* (Manitoba: Public Interest Law Centre, 1991).

<sup>52</sup> K. Engelhart & M. Trebilcock, *Participation in the Regulatory Process: The Issue of Funding* (Ottawa: Economic Council of Canada, 1981) at 134 [Regulation Reference, Working Paper No. 17].

Some Canadian tribunals in their enabling statutes are given the power to award "costs." Most of the cost provisions are identical from board to board and between jurisdictions:

(1) The costs of and incidental to any proceeding before the Board are 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 are to be taxed.<sup>53</sup>

These provisions are similar to those in court proceedings from which the statutory language was drawn.<sup>54</sup>

For many years, most boards with a power over costs did not exercise it in favour of intervenors.<sup>55</sup> The Alberta Public Utilities Board was the first to do so in 1960. Since then, other boards have begun to award intervenors' costs, including the CRTC, the Alberta Energy Resources Conservation Board, the OEB, and the Manitoba Public Utilities Board. However, in two cases, boards have backed away from awarding costs because of the increasing expense placed on utility customers. These boards are the Alberta Public Utilities Board and the British Columbia Utilities Commission.<sup>56</sup>

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<sup>53</sup> Examples of boards with the power to award costs: Ontario Energy Board; Ontario Municipal Board; Ontario Joint Boards under the *Consolidated Hearings Act*; CRTC; Public Utilities Boards in Alberta, Manitoba, Newfoundland, Quebec, and Nova Scotia; Alberta Energy Resources Conservation Board. Others are mentioned in Blue, *supra* note 38 at 235-48; and in A.J. Roman, *Effective Advocacy Before Administrative Tribunals* (Toronto: Carswell, 1989) at 325.

<sup>54</sup> The Ontario Divisional Court makes this point in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save The Valley Committee, Inc.* (1985), 51 O.R. (2d) 23 at 30 [hereinafter *Hamilton-Wentworth*].

<sup>55</sup> Some boards have never exercised their costs power for any purpose (the Canadian Transport Commission, for example, discussed below). Others use their power as a punitive measure, awarding costs against parties whose case is frivolous or vexatious (the Ontario Municipal Board, for example).

<sup>56</sup> Since 1975, the Alberta Public Utilities Board (PUB) has shown less willingness to award costs, largely because costs have been "escalating dramatically" in recent years. Because these costs are passed on to utility customers, the Board "sees itself as having an obligation to the public to ensure that these costs are fair and reasonable." When the PUB changed its guidelines to limit the types of costs that could be compensated, that decision was challenged by intervenors, but upheld (*Re Green, Michaels & Associates Ltd. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.) [hereinafter *Re Green*]). In 1989, the Board reviewed its costs practices and adopted a schedule of fees and disbursements that cap the amounts that will be awarded by the Board. See Alberta Public Utilities Board, *Procedural Review Report* (Edmonton: Alberta PUB, 30 June 1989) at 20-31, App. 2.

In British Columbia, the Utilities Commission awarded intervenors' costs until its enabling statute, the *Utilities Commission Act*, S.B.C. 1980, c. 60, s. 133, was amended in 1984 by the *Miscellaneous Statutes Amendment Act (No. 1)*, 1984, S.B.C. 1984, c. 25, s. 67, to prohibit the practice. This amendment was the result of cost-cutting measures by the B.C. government following

Each board has its own guidelines for awarding costs but all of them use the criterion of "contribution," that is, whether the intervenor assisted the board in understanding the issues and reaching its decision.<sup>57</sup> The OEB recently revised its cost policies so that intervenors can now expect to be awarded 100 per cent of their reasonably incurred costs, "unless the intervention is seen to have not been pertinent or responsible."<sup>58</sup> This focus on contribution means that costs are used as a method of regulating the quality of interventions. The threat of no costs, or an award of costs against a party, screens out frivolous interventions. It also keeps intervenors closely focused on those issues that a tribunal considers to be relevant.

Only the Manitoba Public Utilities Board and the CRTC consider financial need to be an important criterion for awarding costs at the end of a hearing.<sup>59</sup> Thus, in most circumstances, well-funded intervenors with a commercial interest in the outcome of a hearing are eligible for costs. The absence of need as a criterion reinforces the traditional view that costs should not be used to encourage participation in order to make the right of access more effective.<sup>60</sup>

Courts have generally been unwilling to interfere with a tribunal's discretion in awarding costs.<sup>61</sup> However, where a board fetters

one hearing in which \$357,000 had been awarded to intervenors, most going to environmental and Aboriginal groups. See discussion of this case in R.W. Shorthouse, "The Demise of Public Funding" (1985) 43 *The Advocate* 601; and *Alkali Lake Indian Band v. Westcoast Transmission Co.*, [1984] 4 W.W.R. 263 (B.C.C.A.) [hereinafter *Alkali Lake*].

<sup>57</sup> See, for example, *Re Green*, *ibid.* at 653-54:

The Board is prepared to pass on to the public those costs of intervention which it has found to be of some value to the public interest. There is no error in law in this: rather, it is generally recognized as proper. ... It is not in the public interest to have intervention merely for the sake of intervention: there should be some perceptible value to it, and the Board has left open for consideration in any given case whether the services of the consultant were in some way or to some extent of value, and not merely misconceived or frivolous.

See also *Consumers' Association of Canada (Alberta) and Edmonton v. Public Utilities Board* (1985), 58 A.R. 72 at 77.

<sup>58</sup> Memorandum of Ontario Energy Board to All Intervenors in Recent Proceedings (24 February 1992) at 2. The Board states that cost awards will be reduced "when intervention is judged to have been notably deficient." For example, where intervention has not been relevant, where it has been duplicative concerning evidence, where cross-examination has been excessive, or where there has been misconduct.

<sup>59</sup> According to Keeping, *supra* note 37 at 89, the OEB expressly rejected the requirement of financial need, but she maintains it is a factor that will be taken into account.

<sup>60</sup> The only exception to this is with respect to interim costs, discussed below.

<sup>61</sup> See *Re Municipal and Public Utility Board*, [1930] 1 W.W.R. 615 (Man. C.A.); *Bell Canada v. Consumers' Association of Canada* (1986), 17 Admin. L.R. 205 (S.C.C.) [hereinafter *Bell Canada*]; *Re Green*, *supra* note 56; and *Newfoundland and Labrador Hydro v. Newfoundland and Labrador*

its discretion by denying costs on the basis of a letter from a Minister,<sup>62</sup> or wrongly interprets the meaning of "costs" to include interim costs,<sup>63</sup> the courts have intervened.

The more restrictive reading of these provisions has been that costs have the same meaning as court costs: they follow the event and are an indemnity for actual costs expended. They are not to be used to encourage participation generally.<sup>64</sup> Despite its widespread acceptance, this view is based on the questionable notion that courts and tribunals, and the parties appearing before them, are engaged in comparable tasks. Some courts and most commentators have pointed out the distinct differences in the roles of courts and tribunals:

There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.<sup>65</sup>

The Economic Council of Canada recommended that costs be used as one mechanism for funding public interest groups. It specifically recommended that "all statutory regulatory agencies formulate rules for awarding costs to public interest group interveners and, where legislation does not allow such awards, that appropriate amendments be made."<sup>66</sup>

The availability of costs at the end of a hearing provides an incentive for public interest intervenors to participate. But because of uncertainty regarding whether an award will be made and delay in recovering the award, it clearly falls short of the incentive associated with funding up front. There are a few Canadian boards with the power to make advance orders for costs which, in theory, could provide an

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*Federation of Municipalities* (1979), 24 Nfld. & P.E.I.R. 317 (Nfld. C.A.).

<sup>62</sup> See *Alkali Lake*, *supra* note 56. In the *Alkali Lake* case, the Court overturned a ruling of the B.C. Utilities Commission which refused costs to the intervening Band. This ruling was based on a letter from the Minister of Energy stating that cost awards should be discontinued in accordance with the government's policies of "economy and restraint." The Court held that the Commission had fettered its discretion and that there was no clear reason to refuse costs. The Court ordered that the Band's costs be paid. However, the Legislature amended the *Utilities Commission Act*, *supra* note 56 to remove the costs power just prior to the release of the Court's decision.

<sup>63</sup> The cases involving an advance of costs are *Hamilton-Wentworth*, *supra* note 54; *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333 (Div. Ct.); and *Manitoba Society of Seniors Inc. v. Greater Winnipeg Gas Co.* (1982), 18 Man. R. (2d) 440 (C.A.).

<sup>64</sup> See especially *Hamilton-Wentworth*, *supra* note 54.

<sup>65</sup> *Re Green*, *supra* note 56 at 655-56. See also, Macaulay, *supra* note 14 at c. 27; and L. Fox, Annotation (1986), 17 Admin. L.R. 206 (in *Bell Canada*, *supra* note 61).

<sup>66</sup> Economic Council of Canada, *Reforming Regulation* (Ottawa: Minister of Supply and Services Canada, 1981) at 135.

incentive. The Alberta Energy Resources Conservation Board (ERCB) and the CRTC are two examples.

The Alberta ERCB is a tribunal with broad authority to supervise the energy industry in Alberta, including the ability to approve new developments. Since 1978, the ERCB has reimbursed "local intervenors" for their Board interventions.<sup>67</sup> Local intervenors (defined as those with an interest in land which may be affected by a decision)<sup>68</sup> are usually awarded costs at the end of the hearing, payable by the proponent. However, the *Energy Resources Conservation Act* provides that the Board may "make an advance of costs to a local intervener and it may direct any terms and conditions for the payment or repayment of the advance by any party to the proceeding that the Board considers appropriate."<sup>69</sup> Criteria that the Board considers when making an advance of costs are: whether the person applying comes within the definition of a local intervenor; whether the advance is "necessary prior to the holding of the hearing"; and whether the intervenor has "established a need at that time for financial assistance in the preparation and presentation" of the intervention.<sup>70</sup>

An advance of costs is paid by the Board to the intervenor but, because it remains contingent until the final costs award, the costs are usually ultimately paid by the proponent. The costs of such an award are those that are reasonable and directly and necessarily related to the hearing. The Board decides what costs are reasonable and necessary in light of the circumstances of each case. It also stresses the need to be "economical" in the sense of needing to avoid duplication.<sup>71</sup> There are no express limits on what disbursements are eligible for repayment. The ERCB costs awards appear relatively modest. The amounts have ranged from \$100 for an unrepresented individual to \$50,000 for a group represented by counsel.<sup>72</sup>

The ERCB has amended its costs regulations and guidelines twice in the past, but there has been no comprehensive audit of the programme. The programme is now under review with the expectation

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<sup>67</sup> Alberta, Energy Resources Conservation Board, *Guidelines Respecting Application for Local Interveners' Costs Awards* (Calgary: ERCB, 1988) at 1 [hereinafter *Guidelines*].

<sup>68</sup> *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11, s. 31(1).

<sup>69</sup> *Ibid.* at s. 31(6), as am. by S.A. 1981, c. 47, s. 2.

<sup>70</sup> Alta. Reg. 517/82, s. 12(2).

<sup>71</sup> *Guidelines*, *supra* note 67 at appendix A.

<sup>72</sup> *Ibid.* at 5. \$50,000 is considered an "exceptional" amount by ERCB standards.



of some further "fine tuning" rather than major changes.<sup>73</sup> It is possible that the Alberta Legislature will change the eligibility criteria for receiving costs to parallel those of the newly created Natural Resources Conservation Board.<sup>74</sup> There an intervenor need only show a "potential direct effect" rather than an interest in the land affected.<sup>75</sup> This would greatly broaden the number of eligible intervenors to include those who wish to represent a larger public interest.

The costs programme of the ERCB has been criticized primarily because of its very restrictive reading of the definition of "local intervenor." The present definition was adopted in 1981 to broaden the number of groups that would be eligible for funds, but the narrow view the Board has adopted

not only contradicts the clear legislative intent to broaden the grounds of qualification for intervenor costs, but also subverts the very purpose and intent of the public-hearing process. It is forcing on the concerned public an unnecessary connection to a proprietary interest to front a more genuine environmental concern regarding the disposition of resources.<sup>76</sup>

Because of the strict limits on eligibility, funding at the ERCB does not operate to help a broad range of public interest intervenors gain access to the decision-making process.

The CRTC is the only Canadian federal tribunal which awards costs to intervenors in its proceedings. Its authority is found in s. 76 of the *National Telecommunications Powers and Procedures Act*,<sup>77</sup> which contains the standard Canadian costs clause. The Canadian Transport

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<sup>73</sup> Letter from J.K. Moloney, Legal Department, ERCB to W.A. Bogart and Marcia Valiante (17 December 1991).

<sup>74</sup> Moloney, *ibid.*; *Natural Resources Conservation Board Act*, S.A. 1990, c. N-5.5, s. 10. Under this new *Act*, funding is available for intervenors who "are or may be directly affected by a reviewable project" (s. 10(1)).

<sup>75</sup> The Board's view of who will be directly affected includes those who live or work near the project; those who regularly use the air, water, land, or wildlife affected by the project; and those with direct financial effects. See Natural Resources Conservation Board, *Guidelines Respecting Claims for Eligible Intervenors Costs Awards* (Calgary: NRCB, 31 July 1991) at 2-3. In the Board's first award of costs, four environmental groups seeking funds were denied costs "largely because they couldn't prove strong membership in the Canmore region" and thus were not *directly* affected. M. Lamb, "Resort Study Money Limited" *Calgary Herald* (25 March 1992) B2.

<sup>76</sup> L.F. Duncan, "Equal Pay For Work of Equal Value: A Public Interest Perspective on Intervener Costs" in Banks & Saunders, eds., *supra* note 38, 249 at 252.

<sup>77</sup> R.S.C. 1985, c. N-20 (now known as the *National Transportation Act*).

Commission (CTC) also derives authority from the predecessor to this statute but has consistently refused to award costs to intervenors.<sup>78</sup>

The CRTC applies the Telecommunications Rules of Procedure when awarding costs. These regulations detail the procedure and eligibility criteria for an award. To receive costs, an intervenor must have:

- (a) ... 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) ... participated in a responsible way; and (c) ... contributed to a better understanding of the issues by the Commission.<sup>79</sup>

According to one review of the CRTC, the Commission's primary focus in determining eligibility, in practice, is on the contribution the intervenor makes, not on the degree to which the intervenor is representative of an interest.<sup>80</sup> However, the CRTC also requires that an intervenor lack sufficient funds to enable it to participate. Thus, although need is not an express criterion in s. 44 of the Rules, since 1978 the Commission has consistently "exercised its [costs] discretion in favour of public interest groups that would otherwise lack sufficient funds to intervene, in order to meet the objective of obtaining informed participation in public hearings."<sup>81</sup> The CRTC will, therefore, not award costs to commercial enterprises.

The CRTC has established a regime of interim costs awards for "intervenors who lack sufficient funds to participate in a commission proceeding."<sup>82</sup> The jurisdiction to make interim costs awards comes from s. 76 combined with s. 60(2) which authorizes the making of interim orders.<sup>83</sup> The Commission considered its jurisdiction to award interim costs to be in doubt following the Federal Court of Appeal decision in *Bell Canada v. Canadian Radio-Television Telecommunications*

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<sup>78</sup> *Ibid.* The CTC has refused to award costs since 1911. This policy was reviewed in a hearing held in 1975 but the recommendation was for the CTC not to depart from its past practice. This is reviewed in T.G. Kane, *Consumers and the Regulators: Intervention in the Federal Regulatory Process* (Montreal: Institute for Research on Public Policy, 1980) at 106-07; Engelhart & Trebilcock, *supra* note 52; and M.J. Trebilcock, "Regulators and the Consumer Interest: The Canadian Transport Commission's Costs Decision" (1977-78) 2 Can. Bus. L.J. 101.

<sup>79</sup> SOR/79-554, s. 44(1).

<sup>80</sup> Engelhart & Trebilcock, *supra* note 52 at 85.

<sup>81</sup> *Re Maritime Tel & Tel Ltd., Novix et al.; Re Application to Review and Vary Telecom Costs Order CRTC 91-3*, Telecom Letter Decision 91-6 (26 July 1991) at 4.

<sup>82</sup> Letter from K. Spicer, Chair, CRTC to W.A. Bogart and Marcia Valiante (6 February 1992).

<sup>83</sup> *National Transportation Act*, *supra* note 77.

*Commission*.<sup>84</sup> The case dealt with the CRTC's powers to make interim orders generally. Based on that decision, the CRTC refused to award interim costs in a 1987 case and no further applications for interim costs were made until 1991. In 1991, the Commission resumed making interim costs awards.<sup>85</sup>

The Regulations allow the awarding of interim costs to intervenors who meet the three criteria above and who "can satisfy the Commission that [they] do not have sufficient financial resources available to participate effectively in the proceeding" without an interim award.<sup>86</sup> As an interim award, these costs are accounted for in the final costs award and are therefore potentially repayable. Any intervenor awarded interim costs is required to apply for costs at the end of the proceeding and must file documentation that the undertakings were fulfilled, explaining any difference between the interim award and the request for final costs.<sup>87</sup> Costs, whether final or interim, are paid by the regulated company that is the subject of the hearing. The only limit on eligible costs is that they should not "exceed those necessarily and reasonably incurred by the intervenor in connection with its intervention."<sup>88</sup>

There has been no comprehensive review of the CRTC's costs programme, but several commentators have looked at its operations. According to Engelhart and Trebilcock, in a review a decade ago, the CRTC improved public access to rate hearings particularly through the use of its costs power. From their research, they concluded that the CRTC was generally viewed as even-handed in its treatment of

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<sup>84</sup> [1988] 1 F.C. 296.

<sup>85</sup> In 1991, the Commission received applications for interim costs from two groups—from the B.C. Old Age Pensioners Organization and other seniors' groups, and from the National Anti-Poverty Organization and Rural Dignity Canada—in a case involving Unitel Communications. Following argument, the Commission decided it did have jurisdiction to award interim costs. This decision is based on the Supreme Court of Canada's decision in *Bell Canada*, *supra* note 61, which reversed the decision of the Federal Court of Appeal. In addition, the Commission decided that the *Hamilton-Wentworth* case, *supra* note 54, creates a prohibition on tribunals using their costs powers to award intervenor funding and not a prohibition on interim costs awards. The difference is that intervenor funding is based primarily on financial need while interim costs are based primarily on merit. The Commission went on to award interim costs to the two groups. See *In Re: Unitel Communications Inc. & B.C. Rail Telecommunications/Lightel Inc.—Applications to Provide Public Long Distance Voice Telephone Services and Related Resale and Sharing Issues: Applications for Interim Costs*, Telecom Costs Order CRTC 91-4 (22 April 1991).

<sup>86</sup> SOR/79-554, s. 45(1)(d).

<sup>87</sup> *Ibid.* ss. 45(3), (4).

<sup>88</sup> *Ibid.* s. 44(6)(b).

applications because of its judicial approach and clear procedures.<sup>89</sup> Kane's view, also from the early 1980s, was that the CRTC, through the use of its costs power, had been successful in increasing public participation in its proceedings. However, he noted that the process of applying for costs could be very time consuming:

As positive as this development may be, the awarding of costs to intervenors is by no means a panacea for the financial difficulties confronting consumer groups. In this respect, for example, the time it has taken consumer groups to actually obtain money following an award of costs by the CRTC should be noted.<sup>90</sup>

The Commission recognizes that intervenors would

prefer a true intervenor funding regime, since such a scheme would eliminate the uncertainty that comes with merit-based awards. From the Commission's perspective, a costs award regime requires that the Commission balance its desire to encourage informed public participation with the legal requirement, gleaned from the jurisprudence ... that costs awards be based on the quality of interventions presented.<sup>91</sup>

However, to the extent that "merit," in this context was judged to be satisfied so long as there was a responsible expenditure of awards, there might be little difference, in fact, between "interim costs" and "intervenor funding."

A costs model can provide the funds needed for public interest intervenors to participate but because its primary focus is on "contribution" rather than "need," it also funds already well-financed interests. This obscures the importance of the goal of access. Although the CRTC programme uses need as a criterion, it is the exception. On the whole, where a "costs" model is utilized it generally reflects the attitude that the proponent has some obligation to fund the participation of all who have contributed to the regulatory process. This may place an undue burden on the proponent in terms of interests clearly capable of funding their own participation and who do so for their own financial interests (as competitors, *etc.*). At the same time, attention can be deflected from those seeking to represent broader, more diffuse interests and who are dependent on the underwriting of their expenses for effective participation because of a demonstrated lack of resources.

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<sup>89</sup> Engelhart & Trebilcock, *supra* note 52 at 84.

<sup>90</sup> Kane, *supra* note 78 at 111.

<sup>91</sup> Spicer, *supra* note 82.

b) *Intervenor Funding*

Intervenor funding is an award of funds prior to a proceeding intended to enable citizens and public interest groups, who would not otherwise be able to afford it, to participate. In this way it is distinguished from "costs" which are calculated at the conclusion of a proceeding and intended to reimburse participants who contributed to the outcome, usually regardless of need. The only example of a regularized intervenor funding programme where funding is provided by proponents is Ontario's *Intervenor Funding Project Act*.<sup>92</sup>

The *Act* came into force on 1 April 1989. It was expressly intended to enable wider and more effective participation by public interest intervenors in some administrative proceedings. It was not expected that the *Act* would equalize the resources of all participants in a hearing, but it would at least remedy a portion of the disparity. The 1988 *Act* is comprised of two parts. Part I established a three-year pilot project to provide "intervenor funding" in proceedings before the Environmental Assessment Board, the OEB, and Joint Boards considering matters under three environmental statutes. The project was extended in the spring of 1992 for another four years. These boards were chosen for the pilot project because they had experience with funding awards under a series of orders in council.<sup>93</sup> Part II of the *Act* amended provisions in these boards' statutes relating to the power to award costs at the end of a proceeding, and was not subject to a three-year time limit.

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<sup>92</sup> *IFPA*, *supra* note 21. The *Act* is discussed in Bogart & Valiante, *supra* note 1; Campbell, *supra* note 28; R. Horwood, *The Ontario Intervenor Funding Project Act, 1988: Its Review and Reform and A Model to Provide for Public Interest Participation in Regulatory Proceedings in Canada* (Ottawa: Public Interest Advocacy Centre, 1991); L. Huinink, *An Evaluation of the Funding Denials under the Intervenor Funding Project Act, 1988* (Ryerson, Toronto, 1991) [unpublished]; and S.J. McWilliams, "The Costs of Intervenor Funding and Their Control: The Experience of the Ontario Energy Board" (1991) 11 Windsor Y.B. Access Just. 217.

<sup>93</sup> The *IFPA* was precipitated by two 1985 Divisional Court judgments which prohibited a Joint Board and the OEB from using their "costs" power to award advance costs to public interest intervenors: see *Hamilton-Wentworth*, *supra* note 54; and *Re Ontario Energy Board*, *supra* note 63. The Court characterized the Joint Board's attempt to award costs in advance as a provision of "intervenor funding, something which the Board has no jurisdiction to do. 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," *Hamilton-Wentworth* at 43. Following these decisions, the new Liberal government in Ontario provided funds in selected hearings through orders in council. From 1985 until the *IFPA* was proclaimed in 1989, twelve orders in council made public funds available in hearings before the Environmental Assessment Board, Joint Boards, and the OEB.

The *Act* spells out a number of criteria that intervenors must fulfil to be eligible for funding. First, funding may only be awarded in relation to certain *issues*—those that both “affect a significant segment of the public” and “affect the public interest and not just private interests.”<sup>94</sup> Secondly, there are criteria that relate to the nature of the *intervenor* which the panel must consider:

- a) the intervenor represents a clearly ascertainable interest that should be represented at the hearing;
- b) separate and adequate representation of the interest would assist the board and contribute substantially to the hearing;
- c) the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;
- d) the intervenor has made reasonable efforts to raise funding from other sources;
- e) the intervenor has an established record of concern for and commitment to the interest;
- f) the intervenor has attempted to bring related interests of which it was aware into an umbrella group to represent the related interests at the hearing;
- g) the intervenor has a clear proposal for its use of any funds which might be awarded; and
- h) the intervenor has appropriate financial controls to ensure that the funds, if awarded, are spent for the purposes of the award.<sup>95</sup>

The *Act* does not provide for any priority or ranking of these criteria. Funding panels applying the criteria have, as a general rule, required that all of the criteria be met to establish eligibility. However, there have also been circumstances where failure to meet one criterion was not fatal to an application because it did not interfere with the purpose of the *Act*.<sup>96</sup> Nevertheless, it is clear that financial need looms very large in decisions to award such funds. The focus of the *IFPA*, in practice, is very much on ensuring access for those interests that would otherwise not have the financial resources to participate at all, or, their participation would be limited to a substantially diminished role.

There are certain restrictions on the amounts that can be funded. In particular, legal fees must be assessed at the legal aid rate in effect on the date of the award<sup>97</sup> (though any shortfall may be made up through a costs award at the end of the hearing); and disbursements are restricted to those “for consultants, expert witnesses, typing, printing, copying, and

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<sup>94</sup> *IFPA*, *supra* note 21 s. 7(1).

<sup>95</sup> *Ibid.* s. 7(2).

<sup>96</sup> Bogart & Valiante, *supra* note 1 at 64. The Ontario Court of Justice (General Division) approved of such an approach in the appeal of the *Native Council of Canada v. Environmental Assessment Board and Ontario Hydro* (19 October 1990), Ottawa, Desmarais J. [unreported] from the *Ontario Hydro Demand/Supply Plan* hearing.

<sup>97</sup> *IFPA*, *supra* note 21 s. 7(3).

transcripts necessary for the representation of the interest.” These eligible disbursements can be expanded by regulation, but to date, this has not been done.<sup>98</sup> The panel is required to set a ceiling on disbursements and to “deduct from the award funds that are reasonably available to the applicant from other sources.”<sup>99</sup>

The funding panel can impose conditions on an award and it is a condition of every award “that the funded intervenor allow the board under whose jurisdiction the award was made, or its agents, access to the books and records of the intervenor to insure that conditions set by the funding panel are being or have been met.”<sup>100</sup> If an intervenor does not “without reasonable cause” comply with the conditions of a funding award, the board may order a funded intervenor to “repay to the proponent the amount of the award, or such part thereof, as the board may order.”<sup>101</sup>

Funded intervenors are eligible to apply for “supplementary funding.” Application is not made to the funding panel but to the board hearing the case, and can be made “at any time up to the end of the hearing.”<sup>102</sup> The board may award supplementary “funding if it is of the opinion, having regard to all of the circumstances, that the original award was inadequate.”<sup>103</sup> In making a supplementary funding award, the board must also consider the criteria set out in s. 7.<sup>104</sup> To date, there have been few supplementary funding applications. In those cases, the boards have tried to determine whether an original award was “inadequate” by looking for circumstances which were unexpected at the time of, or that have changed since, the original funding award. The

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<sup>98</sup> *Ibid.* at ss. 7(3), (5). This limitation has proved problematic in some hearings. Travel costs for consultants and lawyers are included as part of “fees,” but for members of intervenor groups no travel costs can be reimbursed. This created difficulty for Native participants in the *Ontario Hydro Demand/Supply Plan* Environmental Assessment hearing, because they were geographically dispersed and were required to travel great distances to attend the hearing or meet with their lawyers and consultants. The Environmental Assessment Board has in some cases treated elders and in-house staff of environmental groups as “consultants” or “experts” so that their work and travel could be reimbursed. See *Ontario Hydro Supply and Demand Plan Intervenor Funding Program—Stage II* (14 December 1990), No. EA-90-01 (EAB) at 26-27. Bogart & Valiante, *supra* note 1 at 74.

<sup>99</sup> *IFPA, ibid.* ss. 7(3)(b), (c).

<sup>100</sup> *Ibid.* ss. 7(4) and 9(1).

<sup>101</sup> *Ibid.* s. 9(2).

<sup>102</sup> *Ibid.* s. 12(1).

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.* s. 12(2). Section 12(2) provides that ss. 7 to 11 apply “with necessary modifications” to supplementary funding.

availability of supplementary funding does not provide a licence to spend beyond one's originally approved budget; it is granted only when new issues arise, when new witnesses must be called, or when the presentation of evidence by another party lasts longer than expected.<sup>105</sup> Supplementary funding should not be used as a way to appeal a funding panel decision.<sup>106</sup>

In the first three years of the pilot project, \$25 million was awarded as intervenor funding to seventy-one applicants in twenty-two hearings. Twenty-three million dollars of that total was awarded in the *Ontario Hydro Demand/Supply Plan Environmental Assessment* hearing alone. Because of its complexity, this hearing raises issues which transcend questions relating simply to intervenor funding.<sup>107</sup> For funding applicants in other hearings, the amounts awarded ranged from \$600 to \$300,000, with an average award of approximately \$50,000, and a median award of \$21,000 at the EAB and \$30,000 at the OEB.<sup>108</sup> From the information available, these awards seemed reasonable given the circumstances, and in some instances, seemed low given the nature of the particular hearing. Proponents are no longer required to disclose their hearing and project expenditures, so that proportionality does not now, but certainly could, guide the level of funding awarded.

Submissions from intervenors, boards, and proponents received as part of the review of the pilot project expressed overwhelming support for intervenor funding. However, there were a number of reservations about the operation of the *IFPA* itself. For example, on one hand, there is the need to ensure that intervenors are adequately funded, but on the

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<sup>105</sup> See, for example, *Ontario Hydro Supply and Demand Plan Intervenor Funding Program—Stage II*, *supra* note 98; *Centra Gas Ontario—Rates* (20 September 1991), No. EBRO 474 (OEB); and *Ontario Waste Management Corporation, Supplementary Funding Decision* (19 April 1991), No. CH-91-01 (Joint Board).

<sup>106</sup> In two cases, supplementary funding applications were made shortly after decisions denying a desired level of funding. In one, the Board held that there had been no change in circumstances and denied supplementary funding; in the other, the Board held that the applicants were entitled to apply for supplementary funding as the circumstances had changed sufficiently. See letter from J. Santos, Assistant Board Secretary, Environmental Assessment Board to P. Pickfield, counsel for Greensville Against Serious Pollution [*Re Steeley Quarry Products Inc.* (26 April 1990), No. EP-89-04 (EAB)]; and *Town of Innisfil Landfill, Ruling on Motion for Supplementary Funding Hearing* (23 December 1991), No. CH-91-01 (Joint Board).

<sup>107</sup> In January 1993, after nearly two years of Ontario Hydro's presentation of evidence and a significant modification of the undertaking, the proposal was withdrawn from the Board without a resolution. See discussion in C. Findlay, "Ontario Hydro 'Pulls the Plug' on Demand Supply Plan Hearing" (1993) 1 D.E.L.E.A. 153.

<sup>108</sup> Bogart & Valiante, *supra* note 1 at 95-96.



other, there is the need to ensure that funds are responsibly expended.<sup>109</sup> Severe criticisms of intervenor funding, which question its very legitimacy, are that it removes the incentive which comes with spending one's own money and focusing one's participation on only the most important issues; it primarily benefits lawyers and professional consultants; it may create a disincentive for proponents, particularly private sector ones, to proceed with worthwhile projects; and it adds substantial time to a hearing. These criticisms, however, were not supported by the vast majority of interests and were not borne out by the available evidence.<sup>110</sup>

### III. CONCLUSION: THE FUTURE OF FUNDING

Predicting the future of funding is very difficult because there are contradictory trends emerging. On one hand, the legitimate need for funding to ensure that access is made effective is widely accepted by governments, tribunals, and public interest groups. A growing experience demonstrates the utility of many different funding mechanisms in accomplishing this goal. On the other hand, however, the current financial constraints on governments and proponents have provoked the imposition of stricter limits on some programmes, and a failure to expand others.

In Canada, the success of the Ontario intervenor funding experiment will improve the climate for funding. Our recent review of the pilot project concluded that the *IFPA* model had met its goals of increasing the level and quality of interventions in the applicable proceedings. The *Act* was then extended for a further four years.<sup>111</sup> Intervenor funding may be extended to planning appeals at the Ontario Municipal Board.<sup>112</sup> Other provinces are moving toward their own funding programmes. The Ontario *IFPA* model has been recommended for adoption in Quebec,<sup>113</sup> while a variation has been recommended for

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* at 135 and following.

<sup>111</sup> Ontario, Ministry of the Attorney General, News Release, "Extension of *Intervenor Funding Project Act* Announced" (25 March 1992). The government is expected to "develop proposals for permanent legislation" following consultation on the review report.

<sup>112</sup> See Ontario, Commission on Planning and Development Reform in Ontario, *New Planning for Ontario: Final Report Summary and Recommendations* (Toronto: Commission on Planning and Development Reform, June 1993) at 39-40.

<sup>113</sup> Telephone interview with Roderick A. Macdonald (February 1992).

adoption in Saskatchewan.<sup>114</sup> British Columbia is including intervenor funding in its new environmental assessment legislation and Nova Scotia is conducting an evaluation of different mechanisms. Yet, the *IFPA*, as currently structured, does have important limits on its transferability to other administrative schemes. Foremost among these is the need for a "proponent" who can underwrite the participation of intervenors in financial need.

The new federal funding programme for environmental assessment public reviews is another important advance. It is government rather than proponent funded, but maintains a focus on need and, therefore, on effectiveness and access. This programme also recognizes the need for funding in the stages prior to a hearing, while the other funding mechanisms do not. In addition, the new Alberta Natural Resources Conservation Board has an expanded costs power, which includes the power to award costs in advance of a hearing.<sup>115</sup> All of these new initiatives illustrate that the need for intervenor funding is widely accepted in Canada.

Balanced against these advances, however, are a number of retrenchments. Financial pressures are behind the decisions to cancel the Court Challenges Program; to cancel Ontario Legal Aid funding for environmental cases; to take the power to award costs away from the B.C. Utilities Commission; to limit the costs awarded by the Alberta Public Utilities Board; and to dismantle the U.S. federal agency compensation programme. Such pressures will also have a powerful influence on the Ontario government's decision to make the *IFPA* permanent, and whether to expand it to other tribunals and other proceedings.

In looking at these counterweights, it is clear that the future of funding will require finding a reasonable balance between the rights, interests, and responsibilities of public interest intervenors, proponents, and governments. Demands for "responsible funding" or efficient administration could very likely translate into increased limits on intervenors, which may in turn undermine the goals of effective access. To counter this, the Ontario *IFPA* should be looked to as a useful model for balancing the interests and responsibilities of different

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<sup>114</sup> *Environmental Challenges*, *supra* note 30 at 49-52.

<sup>115</sup> *Natural Resources Conservation Board Act*, *supra* note 74; and Alta. Reg. 278/91. The *Act* allows for costs to be paid to any "eligible intervenor," that is, one directly affected by a proposal, expanding beyond the limited power of the Energy Resources Conservation Board.

participants.<sup>116</sup> It is important that funding be expanded to ensure access to administrative proceedings for those who are otherwise unable to participate effectively, and provided through programmes that are fair to all parties and protected from arbitrary cancellation.

The focus of these programmes should be on the central criterion of need. To adopt a “neutral” costs model as the primary machinery for securing access will not ensure that access is made more effective. Unlike courts, most tribunals are not engaged in crowning winners and penalizing losers, but in balancing competing interests and arriving at a workable outcome consistent with a balanced interpretation of the “public interest.” This is not to say that contribution should not be a criterion for awarding funds—it is a useful mechanism for controlling a hearing and ensuring accountability, and should be part of the funding calculus. Yet, while this is an important principle to recognize, it should not be the primary determinant of where these limited funds go; for this is not neutral terrain where all participants are equally able to participate, nor are these flush times when the use of funds is not closely scrutinized. It is essential that the goal of access not be lost in the process.

Of course, it is important not to romanticize devices for citizen participation in administrative decision making. Not all money awarded is effectively spent, and vigilance against waste has to be an important ingredient of such programmes. Nor can participation in the process *per se* justify a bad administrative decision, no matter how it is decided in a particular context. Yet, at a fundamental level, such initiatives can underscore central aspects of a participatory model of democracy so that “the sense of citizen dignity is based on having a voice in deciding the common laws by which members live ... that we as a whole, or community, decide about ourselves as a whole community.”<sup>117</sup>

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<sup>116</sup> For example, the *IFPA* eligibility criteria require *inter alia* that intervenors raise “public” rather than private issues and that they be in need of funds in order to qualify for funding. In addition, there are safeguards to ensure accountability for funds and responsible participation. Intervenors are generally expected to make a financial contribution, and the limits on “eligible disbursements” mean that full funding is only possible through a cost award at the end of a hearing, with costs, of course, limited to those who make a contribution to the hearing. Safeguards for the proponent include the opportunity to challenge being named a funding proponent.

<sup>117</sup> Taylor, *supra* note 6 at 211.

