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April 1, 1996 BY FAX

The Hon. Brenda Elliott
Minister of Environment and Energ
135 St. Clair Avenue West
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Dear Minister:

RE: INTERVENOR FUNDING PROJECT ACT

This is to acknowledge receipt of your letter dated March 28, 1996 with respect to intervenor funding.

In our view, your government's recent refusal to renew or extend the Intervenor Funding Project Act (IFPA) is clearly contrary to the public interest. The loss of upfront intervenor funding will significantly impair access to environmental justice, and it will undermine the integrity and soundness of the environmental decision-making process.

This view is not merely CELA's opinion -- it is a view that is widely shared by many Ontarians, and it is a view that has been confirmed in every major study of intervenor funding, including the independent review commissioned by the Ontario government in 1992. This independent review, which is undoubtedly the most comprehensive review of the IFPA to date, concluded that intervenor funding was valuable and cost-effective, and recommended the enactment of permanent intervenor funding legislation.

We disagree with the reasons advanced by your government for terminating intervenor funding. In particular, your government's position on the IFPA appears to be premised on four mistaken propositions:

1. The original legislative "intent" was to completely terminate intervenor funding as of April 1, 1996;

2. The government's "internal review" was sufficient to reach an informed decision on the future of the IFPA;

3. Eliminating intervenor funding will make hearings more "efficient", and will "reduce non-essential administrative processes"; and

4. Cost awards at the end of environmental hearings will compensate for the loss of upfront intervenor funding.

1. The Original Legislative Intent was NOT to Terminate Intervenor Funding

Your March 28th letter suggests that the decision to terminate the IFPA was consistent with the "original intent" to "sunset" intervenor funding on April 1, 1996. In fact, the original legislative intent was to establish intervenor funding on a "pilot project" basis prior to enacting permanent intervenor funding legislation. The purpose of this two-stage approach was to gather practical first-hand experience with statute-based intervenor funding in order to finetune the statutory model before entrenching it within permanent legislation.

This legislative intent is clearly evident in the Hansard debates involving the passage of the IFPA and its subsequent renewal in 1992. The intent is also evident in 1992 government announcements in which commitments were made to enact permanent legislation prior to the expiry of the IFPA in 1996.

The record is abundantly clear that permanent legislation was to be in place prior to April 1, 1996. It is therefore incorrect to suggest that terminating the IFPA without having alternative legislation in place is somehow consistent with the original legislative intent.

2. The Government's "Internal Review" was NOT Sufficient to Reach an Informed Decision on the IFPA

Your March 28th letter indicates that an "internal review" of the IFPA was conducted jointly by your Ministry and the Ministry of the Attorney General. Your letter also suggests that during this review, "the views of a range of stakeholders" was taken into consideration during the decision not to extend the IFPA.

We do not agree with the suggestion that meaningful public consultation was carried out in relation to intervenor funding. In fact, to our knowledge, there were no formal or public comment opportunities provided to interested stakeholders, and indeed, there was no public notice that this internal review was even underway.

Because the views of various stakeholders were not being solicited, CELA wrote to you in October 1995 to, among other things, express our concerns about the lack of consultation. When we received no satisfactory response to this correspondence, CELA filed an Application for Review under the Environmental Bill of Rights (EBR) to request a public review of the need for intervenor funding

legislation. Approximately two weeks ago, this Application for Review was denied by your Ministry on the grounds that the "internal review" was completed, and that the results of the review would be released prior to April 1, 1996. Accordingly, there was not any meaningful public input into the decision-making process regarding the future of intervenor funding.

The lack of public consultation during the "internal review" is unfortunate, particularly since there is widespread public support for the continuation of intervenor funding, even from representatives of proponents who pay intervenor funding. This public support for intervenor funding was evidenced in recent surveys conducted by the Environmental Assessment Board and the Energy Board, in which an overwhelming majority of respondents (83%) supported the continuation of intervenor funding.

The government's secretive decision to terminate the IFPA is contrary to Part II of the EBR and the MOEE's Statement of Environmental Values (SEV), both of which entrench commitments to meaningful public participation in environmental decision-making. In particular, the EBR requires public notice and comment before environmentally significant decisions are made by the government. Here, your Ministry appears to have made a final policy decision not to extend or renew the IFPA without posting advance notice on the EBR Registry and without providing meaningful public comment opportunities. In our view, this is another example of your Ministry's non-compliance with the EBR and its SEV, and we intend to pursue this matter with the Environmental Commissioner under separate cover.

3. Eliminating Intervenor Funding will NOT Make Hearings more "Efficient", and will NOT Reduce "Non-Essential" Processes

Your March 28th letter suggests that the elimination of intervenor funding will make hearings more "efficient". If, by "efficient", you mean short, one-sided hearings dominated by proponents and private commercial interests, then the loss of the IFPA will undoubtedly lead to that result. If, on the other hand, "efficient" means focused and timely hearings resulting in environmentally sound decisions, then the loss of the IFPA will not lead to greater efficiency.

In fact, the IFPA experience clearly demonstrates that intervenor funding contributes to hearing efficiency. Parties aided by upfront intervenor funding are able to scope or settle issues in dispute at the pre-hearing stage, which has significantly shortened public hearings and sometimes even eliminated the need for extensive hearings. In addition, intervenor funding has enabled parties to develop comprehensive conditions of approval that have been accepted by proponents and imposed by the Boards without extensive evidence and argument. Finally, intervenor funding has

enabled parties to persuade proponents to down-size, re-design or abandon unsound undertakings before considerable time, money, and effort is expended by the parties and the Boards.

Your March 28th letter also indicates that the loss of the IFPA will reduce "non-essential administrative processes." In fact, the IFPA was an essential legal process, and the intervenor funding program was run very efficiently by the Boards. Funding awards were adjudicated by single panel members on the basis of written materials, not full-blown adversarial hearings. This efficient process resulted in increased certainty and predictability, and it often prompted proponents to settle intervenor awards with eligible parties. In short, intervenor funding was not an extraneous or administrative "add-on" to the hearing process; instead, it was an integral, efficient, and necessary part of the public hearing process.

4. Costs Awards are NOT an Adequate Substitute for Intervenor Funding

Your March 28th letter attempts to rationalize the loss of the IFPA in two ways: first, that cost awards will still be available from the Boards; and second, that the Ministry will still "encourage" proponents to provide participant funding "on a voluntary basis". In our opinion, cost awards or voluntary participant funding are inadequate substitutes for upfront intervenor funding. Moreover, your reference to voluntary participant funding is unrealistic, given that we are aware of no proponents (particularly in the private sector) who have voluntarily provided adequate upfront funding to permit intervenors to fully participate in the pre-hearing and hearing stages.

Your letter states that hearing participants before the Environmental Assessment Board will be eligible for cost awards "as was done prior to the Act". In fact, prior to the IFPA, the Board did not have the authority to award costs. As a result of amendments contained in the IFPA, the Board was given the power to award costs; however, it is clear that cost awards must be viewed as a supplement to, not a substitute for, intervenor funding.

Without intervenor funding, few individuals or groups will be able or willing to incur significant financial debt (i.e. to retain counsel or consultants) on the "gamble" that they may be reimbursed at the end of the hearing through cost awards. Because of the discretionary nature of cost awards, the loss of intervenor funding means that residents may be footing the entire cost of intervention, at least during the critical pre-hearing and early hearing stages, where the issues in dispute are being identified, scoped, and preferably settled. On a more practical level, residents cannot afford to "cash-flow" or underwrite interventions in complex or technical hearings. Cost awards are an important mechanism, but they cannot be viewed as an adequate substitute for

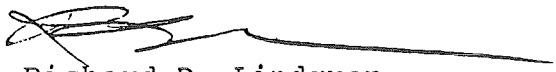
intervenor funding.

Your March 28th letter also ominously refers to "other mechanisms" that will be part of "our waste approvals reform initiative". To our knowledge, there have been no meaningful public notice and comment opportunities on what this "initiative" entails; however, without intervenor funding, any public hearings under this new regime will likely be one-sided charades dominated by waste disposal proponents. CELA therefore requests that you make public the particulars of your "waste approvals reform initiative".

The concluding sentence of your March 28th letter predicts that that the loss of the IFPA will have "minimal impact on public accessibility". As a frequent participant in countless environmental hearings since the 1970's, CELA can assure you that the loss of the IFPA will have a maximum impact on public accessibility. The loss of the IFPA will impair access to justice, and will undoubtedly lead to poorer, unsound environmental decision-making. Accordingly, CELA requests the immediate restoration of statutory intervenor funding.

We look forward to your reply.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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October 24, 1995 **BY FAX**

The Honourable Brenda Elliott
Minister of Environment & Energy
135 St. Clair Avenue
Toronto, Ontario
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Dear Minister:

RE: INTERVENOR FUNDING PROJECT ACT

We are writing to express our strong concern regarding the imminent demise of the Intervenor Funding Project Act (IFPA). As you know, CELA has long advocated intervenor funding in Ontario, and we strongly support the IFPA because it facilitates meaningful public participation in environmental decision-making.

We have carefully reviewed your government's recent Throne speech, and we have examined the legislative agenda for the fall session. However, we have been unable to find any references to the compelling need to extend the IFPA before it expires on April 1, 1996. In fact, to the contrary, there have been recent media reports suggesting that intervenor funding has been targeted for elimination (Globe & Mail, September 26, 1995). Accordingly, we can only conclude that your government, without the benefit of public consultation, has decided to simply allow the IFPA to lapse.

We note that the demise of the IFPA was not mentioned in the Common Sense Revolution document, nor was it a policy objective espoused during the recent election campaign. Indeed, the apparent decision to kill the IFPA appears contrary to the support for the IFPA previously expressed by the Honourable Mr. Harris (see attached letter dated December 13, 1991).

We wish to draw to your attention the value, function, and structure of the intervenor funding program in this province. Most knowledgeable observers agree that intervenor funding serves the public interest by:

- permitting intervenors to effectively exercise their statutory right to participate in public hearings before the Ontario Energy Board, Environmental Assessment Board, and Joint Board;

- facilitating the presentation of evidence, opinions, and perspectives that otherwise may not be presented to the Boards by proponents or private commercial interests;

- increasing access to justice by helping level the playing field between proponents and

intervenors;

- ensuring better and more efficient decisions by the Boards; and

- enhancing the public credibility and accountability of the decision-making process.

Support for the continuation of the IFPA does not come only from intervenors who may be prospective recipients of intervenor funding. In fact, representatives of proponents who pay intervenor funding -- such as local municipalities, public utilities, and private sector companies -- have also indicated strong support for the continuation of intervenor funding.

This broad-based support was readily apparent in a recent poll by the Energy Board and Environmental Assessment Board in which an overwhelming majority of respondents (83%) favoured continuation of intervenor funding. It is our understanding that the results of this poll have been provided to you by the multi-stakeholder Advisory Committee of the Environmental Assessment Board.

Despite the widespread support for intervenor funding, we have heard suggestions from government officials that the IFPA is being cut for fiscal reasons. If so, it is important to recall that intervenor funding is proponent-driven: in other words, it is the proponent, not the government at large, that provides intervenor funding. Most proponents now regard intervenor funding as simply a legitimate cost of seeking statutory approvals -- a cost that can ultimately be passed on to the intended users or consumers of the approved undertaking. In short, intervenor funding is not a line item in the Ontario government's budget.

This fact leads us to conclude that the IFPA is being eliminated for reasons other than deficit reduction. If, for example, the rationale for eliminating the IFPA is to "speed up" approvals, then the decision is clearly contrary to the public interest. Indeed, it is in no one's interest to permit environmentally significant undertakings to whistle through the approvals process with little or no public input due to the unavailability of intervenor funding. Such an approach will undoubtedly leave a legacy of leaking landfills and other undesirable situations that may result in irreparable damage or cost millions of dollars to remediate, typically at public expense. We are well aware that your Ministry does not have the resources to monitor and remediate these problems on a case-by-case basis.

There have also been suggestions that the Boards' cost powers make intervenor funding redundant. In our view, costs awards, either interim or final, are inadequate substitutes for upfront intervenor funding. Relying only upon cost powers will have a deleterious impact on the ability of public interest groups to participate in public hearings. Simply put, most individuals and groups (and their legal or professional representatives) are unable to "cash-flow" or subsidize public interest interventions, particularly in technical or complex hearings. Cost awards are an important mechanism, but they must be viewed as a supplement, not a substitute, for intervenor funding.

Finally, there have been suggestions that the intervenor funding process needs to be reformed. Undoubtedly, there are technical improvements -- such as revising eligibility criteria, eligible disbursements, and appeal mechanisms -- that could be considered with respect to the implementation of the current IFPA model. There have also been calls to extend the IFPA to include certain proceedings before the Ontario Municipal Board and Environmental Appeal

Board. However, the desirability of such reforms does not provide an acceptable rationale for eliminating the IFPA. Although intervenor funding may require some finetuning, the IFPA is fundamentally sound.

On this point, we note that in the 1992 government-sponsored review of the IFPA, Professors Bogart and Valiante comprehensively examined the IFPA experience and concluded that the legislation was important and worth retaining. In our opinion, the conclusions of Professors Bogart and Valiante remain valid and uncontradicted by any other government studies or reviews.

For the foregoing reasons, it is our opinion that there are three reasonable options that could be considered by the government in relation to intervenor funding: enacting permanent intervenor funding legislation; extending the IFPA for a fixed period of time by simply amending the sunset clause; or promulgating intervenor funding regulations. These options are described below:

1. Enacting permanent intervenor funding legislation.

This is the preferred option of most public interest environmental non-governmental organizations, including CELA. The IFPA was originally enacted (and extended) as a three year pilot project that was intended to gather valuable experience with statutory intervenor funding in order to develop appropriate permanent legislation. Now, with years of experience demonstrating the value of intervenor funding in Ontario, we are in a position to learn from the lessons of the pilot project and place intervenor funding on a permanent legislative basis.

The development of new legislation would provide opportunities to interested persons to suggest reforms or improvements in the intervenor funding process. Even with the best of intentions, however, new legislation is unlikely to be drafted, introduced, passed, and proclaimed before the April 1, 1996 expiry of the IFPA. Accordingly, if this preferred option is pursued, then an interim measure -- such as a time-limited extension of the IFPA -- will be required to ensure that there is no legislative gap regarding intervenor funding.

2. Extending the IFPA for a fixed period of time by simply amending the sunset clause.

If the government will not commit to the development of new permanent legislation, then CELA submits that the current IFPA should be extended in its present form for a fixed period of time, perhaps two or three years. A concise single-sentence amendment to the IFPA's sunset clause (sec.16) should be all that is required to implement the extension. In fact, we would suggest the following wording:

1. Subsection 16(1) of the Intervenor Funding Project Act is repealed and the following substituted therefor:

   "16. (1) This Act is repealed on the first day of April, 1999 or on such day after the first day of April, 1999 as is named by proclamation of the Lieutenant Governor."

Such an extension would provide more breathing space and an opportunity for the government to undertake an open and consultative approach to the future of intervenor funding. In the meantime, intervenor funding would continue to be available pending the ultimate decision on the future of intervenor funding. Such an approach would also be consistent with the Environmental Bill of Rights (EBR) and your Ministry's Statement of Environmental Values,

both of which contain guarantees of public participation in environmental decision-making.

3. Promulgating intervenor funding regulations.

In CELA's view, this option is the least desirable alternative. While regulations have the advantage of being more flexible than statutes, they can also be amended or deleted much more easily than statutes. Entrenching intervenor funding on a firm legislative basis is preferable to a regulatory basis. If, however, the government will not enact or extend intervenor funding legislation, then regulations may be an appropriate route, provided that the regulations are drafted with public input, and that the regulations contain the essential elements of intervenor funding as reflected in the IFPA. Regulations would not be the ideal solution, but they would certainly be preferable to a return to the old days of ad hoc or non-existent intervenor funding.

There may, however, be some practical difficulties in drafting and promulgating appropriate regulations prior to the April 1, 1996 deadline. For example, we assume that the Environmental Assessment Act, Environmental Protection Act, Consolidated Hearings Act, and the Energy Act will each require statutory amendments conferring the ability to make intervenor funding regulations. Similarly, the regulations themselves will be subject to Part II of the EBR, and will require at least a thirty day public comment period. Again, even with the best of intentions, it will be difficult (but not impossible) to put the regulations in place prior to the expiry of the IFPA. Accordingly, upon closer examination, the government may find it easier to simply amend and extend the sunset clause of the IFPA in order to provide sufficient time to craft appropriate regulations.

In conclusion, intervenor funding represents common sense for the public interest. We trust that your government will act to ensure the continuation of intervenor funding in Ontario. We would be pleased to meet with you or Ministry staff to discuss the various intervenor funding alternatives.

We look forward to your reply.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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The Hon. Charles Harnick, Attorney General
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