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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON GOVERNMENT AGENCIES REGARDING THE ONTARIO MUNICIPAL BOARD

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INTRODUCTION

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

Over the years, CELA counsel have provided information and summary legal advice to numerous members of the public regarding the practices and procedures of the Ontario Municipal Board (OMB). CELA counsel have also represented individuals and citizens' groups before the OMB on a variety of matters involving environmental issues. Frequently, these cases involve zoning by-law appeals, official plan amendment referrals, and subdivision approvals under the Planning Act, 1983. Because CELA always represents public interest intervenors rather than proponents or municipalities, we believe that we have acquired a unique perspective on the services and performance of the OMB, particularly in the land use planning context.

Because of its diverse legislative authority, the OMB plays an important role in shaping the character of Ontario's urban and rural environment. It is noteworthy that there are very limited appeal rights with respect to OMB decisions, and hence the Board

often functions as the final arbiter of disputes involving matters of considerable public interest.

The virtual finality of OMB decisions makes it imperative that all relevant evidence, information and opinions are presented fully and effectively before the Board. However, there has been increasing concern among CELA counsel that certain OMB practices and procedures are undermining public participatory rights and public confidence in the OMB hearing process, especially where environmental issues are involved.

In particular, CELA's concerns focus primarily on the following matters:

- the lack of intervenor funding in OMB cases;
- the inadequacy of current OMB cost criteria;
- the need for education and training of OMB members, particularly in relation to environmental issues;
- the need to improve OMB case management;
- the unclear relationship between the OMB and the environmental assessment process;
- the need for the OMB to impose monitoring requirements and other conditions of approval;
- the general inability of the existing land use planning process (which includes the OMB) to adequately address the direct, indirect, and cumulative environmental impacts of development.

In light of these concerns, CELA was pleased by the Standing Committee's invitation to make submissions on the operation and performance of the OMB. Accordingly, this submission provides a

brief discussion of the above-noted concerns, and includes a number of recommendations for reform. **It should be noted that the fundamental premise of this submission is that all citizens who are interested in or affected by OMB decisions should be given a meaningful opportunity to participate in OMB proceedings, particularly where those proceedings involve issues related to environmental protection and/or resource management.**

1. THE OMB AND INTERVENOR FUNDING

At the present time, the Intervenor Funding Project Act applies to the Ontario Energy Board, the Environmental Assessment Board, and the Joint Board, but does not apply to the OMB. In a 1988 submission to the Attorney General, CELA argued that the intervenor funding legislation should apply to the OMB (see Appendix A). It is noteworthy that the Hon. Ruth Grier, Minister of the Environment, also supported the extension of the intervenor funding legislation to the OMB (Hansard, December 14, 1988, p.6793 ff.). In 1991, CELA's view remains unchanged, and we submit that the OMB must be brought within the ambit of intervenor funding legislation for a number of reasons.

For example, it is generally recognized that intervenor funding allows public interest groups to participate more effectively in administrative proceedings, such as those held by the OMB. Public interest interventions before the OMB are important and should be encouraged because:

- intervenors can present evidence, information, and opinions that otherwise may not be presented to the Board;
- intervenors can provide an effective means to test the evidence of proponents and municipalities; and
- interventions can enhance the accountability of the Board and the credibility of its decisions.

Currently, however, the ability of public interest groups to participate in OMB proceedings is frequently hampered by limited financial resources. The strength of a public interest group's case depends on the group's ability to retain qualified experts to review the applicant's evidence and to appear as witnesses on the group's behalf at the hearing. A lack of funds generally means that public interest groups cannot afford to hire qualified experts, nor retain their services for the entire course of a lengthy hearing. In many cases, this lack of resources may also serve to preclude the group from retaining counsel in cases where legal representation may be desirable or even necessary.

Public interest groups' general lack of resources is to be contrasted with the financial situation of corporate applicants and municipalities that often appear before the Board with a platoon of lawyers, expert witnesses, and other consultants. In our experience, these parties have generally been able to retain all the professional assistance that may be required in a given case, particularly since their hearing costs may be passed on to customers or ratepayers or may be claimed as a tax-deductible business expense. Public interest intervenors, on the other hand,

do not represent interests as economically self-serving as those of the applicant or of other interested parties. For example, public interest groups do not realize immediate economic benefits that may be used to off-set their costs, even where the groups may be successful in their opposition to a particular application before the OMB. Moreover, tax write-offs are not generally available to public interest intervenors.

Accordingly, CELA submits that the intervenors' lack of resources undermines public participatory rights, and adversely affects the hearing process in that the OMB may be deprived of important evidence and opinions when making its decision on a particular application. In this sense, intervenor funding is necessary to address this imbalance of resources and to obtain "a level playing field" among the parties, thereby ensuring that the proceeding does not become a one-sided affair dominated by applicants and municipalities. This is particularly true where matters before the OMB involve consideration of environmental issues, which can often make hearings complex, technical, and lengthy.

In addition, it should also be noted that public interest intervenors who appear before the OMB are usually unable to recover their case-related expenses at the end of the hearing as a result of the Board's current cost practices, as described in Part 2 of this submission. This has undoubtedly inhibited the quality and quantity of public interest interventions before the OMB since

intervenors generally have no reasonable prospect of being reimbursed for the resources they have committed to the hearing process. However, even if the OMB's cost practices were to be substantially amended, there would still be a need for intervenor funding since intervenors often require funds prior to the hearing in order to retain counsel, hire experts, and pay other disbursements. Thus, CELA strongly recommends that the intervenor funding legislation must be extended to the OMB to ensure full, fair, and effective public participation in the decision-making process.

At the same time, however, CELA does not believe that it is necessary to have intervenor funding available in every possible proceeding before the OMB. The OMB exercises jurisdiction under a considerable number of statutes, and many public hearings held by the OMB are quite short, involve few parties, and focus upon relatively minor, non-technical or essentially private disputes. On the other hand, some OMB hearings, particularly those under the Planning Act, 1983 or the Aggregate Resources Act [formerly the Pits and Quarries Act], can last for many weeks or months, involve multiple parties, and focus upon complicated technical matters of considerable public interest. It is in the latter category of cases that intervenor funding is necessary, and the OMB (or Cabinet) must therefore give consideration to identifying the classes or types of OMB cases where intervenor funding will be available.

While it is beyond the scope of this brief to provide the particulars of an appropriate classification system, CELA suggests that a "threshold test" could be established to identify OMB cases where intervenor funding should normally be available. Potential criteria could include: the expected length of the case; the nature of the case; the monetary value of the subject-matter of the application; the nature of the public interest involved; the nature and number of issues to be addressed; or any other relevant consideration. Flexibility should be built into the screening mechanism to allow the OMB (or a hearing funding panel) to ensure that intervenor funding is available in appropriate cases without causing undue hardship to the parties involved.

It must be pointed out that the existing Intervenor Funding Project Act, 1988 already contains a number of safeguards which would ensure that intervenor funding would be restricted to the more serious OMB cases if the Board was brought under the ambit of the Act. For example, s.7(1) provides that a funding panel may refuse to award intervenor funding where the issues to be raised do not affect the public interest. Similarly, s.8(3) provides that the panel may refuse to make an award, or may reduce the size of an award, where the award will result in significant financial hardship to the proponent. It should also be noted that a potential OMB intervenor must satisfy the statutory criteria under s.7(2) before becoming eligible for intervenor funding. These provisions, together with an adequate OMB screening mechanism ,

should undoubtedly serve to restrict intervenor funding to appropriate OMB cases.

In CELA's view, intervenor funding in OMB cases must be payable by those parties who stand to gain financially from the Board's decision. This normally will include the applicant whose undertaking is the subject-matter of the OMB hearing, but may also include other parties, such as municipalities, who may also be financial beneficiaries of the Board's decision. CELA strongly supports the "proponent pays" principle, and we submit that it is entirely appropriate to apply this principle in the context of OMB proceedings.

2. THE OMB AND COSTS

Under s.96 of the OMB Act, the Board has a wide discretion to award costs in OMB proceedings:

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

In the exercise of its statutory discretion, the Board has traditionally declined to award costs to or against parties, including public interest groups, where the dispute was bona fide

and where the parties have acted reasonably. Thus, the Board has generally been reluctant to award costs except where an unnecessary delay or adjournment has occurred, or where an objection has been held to be frivolous or without merit. Nevertheless, there have been notable exceptions to this general policy, and the Board has occasionally awarded costs against ratepayers and other appellants on rather questionable grounds. In fact, concern about the Board's cost practices prompted CELA to participate in a Cabinet-ordered review of these practices in 1987-88 (see Appendix B), and resulted in the production of the OMB's current cost guidelines.

In CELA's view, however, the Board's cost guidelines do little to promote and enhance public participation in OMB proceedings. It is clear that if intervenor funding remains unavailable in OMB cases, then cost awards become the sine qua non of effective public participation in the Board's hearing process. Accordingly, the OMB must join other administrative tribunals (such as the Joint Board, the Ontario Energy Board, and the Canadian Radio-Television Telecommunications Commission) in the development of liberal cost practices which serve to facilitate public interest interventions by regularly awarding costs to intervenors in appropriate cases.

In particular, CELA submits that the OMB should routinely award costs to a public interest intervenor where:

- the intervenor has represented individuals or groups with an ascertainable non-pecuniary interest in the subject-matter of the hearing; and

- the intervenor has participated responsibly in the hearing, and has contributed to a better understanding of the issues by the Board.

Due to the inherent differences between judicial and administrative proceedings, the common law rule that "costs follow the event" should not apply to the OMB since the Board does not decide a lis; instead, the Board is called upon to determine matters of public interest that often transcend the interests of the immediate parties. Thus, the OMB should award costs to public intervenors regardless of their success or failure before the Board, provided that the intervenors meet the above-noted criteria. In particular, there should be a presumption that public interest intervenors at OMB proceedings are prima facie entitled to costs, and the burden of proof should be on the applicant to demonstrate why intervenor costs should not be awarded in a specific case. Where the intervention is found to be frivolous or vexatious, then the OMB may deny costs to public interest intervenors; however, the Board should refrain from awarding costs against intervenors except in the most egregious of circumstances (i.e. where the "intervenor" is the applicant's business competitor and whose objections are without merit).

In CELA's submission, costs should be available in all OMB proceedings, and cost awards should cover all expenses that have been reasonably incurred and properly documented. This would normally include counsel fees; expert witnesses' fees; consultants' fees; travel and accommodation expenses; honoraria (on a per diem

or pro rata basis) for individuals appearing on their own or on behalf of a group; and photocopying, telephone, postage and other reasonable disbursements. The OMB should also retain the discretion to award costs for items not caught by these broad categories.

It is further submitted that the applicant should normally pay any costs awarded to intervenors by the OMB, although municipalities in support of the application should be called upon to pay a proportionate share of costs in appropriate circumstances. The "proponent pays" principle is usually applied by administrative tribunals presently awarding costs, largely because applicants generally have superior financial resources and they stand to benefit from board decisions. With respect to the applicant's hearing costs, CELA submits that an applicant should bear its own costs since they can be passed on to consumers or ratepayers, and are regarded as part of the normal cost of doing business. In those rare situations where costs are awarded against an intervenor, the applicant's costs should be subject to the same level of scrutiny as intervenor costs, and an applicant's costs which are unreasonable or unnecessary should be disallowed.

As noted in Part 1 of this brief, public interest intervenor often require funds prior to and during OMB hearings in order to retain the services of counsel and consultants. If intervenor funding is unavailable, intervenors may find it difficult to retain counsel

and consultants, or to pay disbursements incurred over the course of the hearing, particularly if there is little hope of recovering costs at the end of the hearing. Accordingly, CELA submits that the OMB should have the discretion to award interim costs or costs in advance to public interest intervenors. Unfortunately, the Ontario Divisional Court has held that tribunals cannot award costs in advance unless specifically authorized by statute to do so. Thus, CELA recommends that s.96 of the OMB Act be amended so as to empower the Board to award costs in advance to intervenors. In order to receive these interim costs, intervenors should submit detailed budgets to the Board for approval, and there should be a full accounting for expenditures at the end of the hearing.

Further, as noted above, common law cost rules should not apply to OMB proceedings, and CELA recommends that s.96 should be amended to ensure that the Board is not restricted by the "costs follow the event" rule. On this point, CELA suggests that this amendment could be modelled on ss.17-20 of the Intervenor Funding Pilot Act, 1988, which provide that "in awarding costs, the Board is not limited to the considerations that govern awards of costs in any Court".

3. TRAINING AND PROFESSIONAL DEVELOPMENT

It is well-established in law that the OMB cannot refuse to hear "environmental" evidence (as opposed to traditional "planning" evidence) in the exercise of its jurisdiction under the Planning

Act, 1983. It is also clear that in deciding matters under the Aggregate Resources Act or the Ontario Water Resources Act, the OMB is called upon to adjudicate complex environmental issues. Accordingly, it is important to ensure that Board members have a solid understanding of the environmental issues that are likely to arise in OMB proceedings.

However, it appears as if sensitivity to environmental issues varies from Board member to Board member. While CELA counsel have appeared before OMB members who have a significant appreciation of environmental issues, many other public interest groups have expressed concern over the lack of knowledge or interest in environmental matters displayed by certain OMB members. More often than not, this concern arises where the groups have been unrepresented by counsel, and have attempted to address environmental concerns through expert and/or lay evidence. Some unrepresented groups and individuals have reported inappropriate behaviour on the part of OMB members, and where this has occurred, CELA submits that the matter should be fully investigated by the OMB Chairman and appropriate disciplinary steps should be undertaken.

At a minimum, CELA recommends that the OMB develop a comprehensive environmental training program for its members. It is suggested that this program should provide members with an understanding of discrete environmental topics (i.e. hydrology, hydrogeology,

habitat protection, cumulative environmental effects, etc.) as well as broader environmental policy issues (i.e. principles of sustainable development, environmental impact analysis, or energy and transportation issues, etc.). While some OMB members undoubtedly possess this level of understanding, CELA submits that a training and professional development program will help ensure that there is a uniform understanding and consistent treatment of environmental issues by all OMB members.

In the alternative, CELA submits that the OMB should consider establishing a "panel" or "team" of OMB members and Vice-Chairmen with environmental expertise or experience. Once established, members of the panel could be assigned cases involving numerous or complex issues relating to environmental protection and/or resource management. The establishment of such a panel would parallel similar developments within Ontario's judicial system, and would enhance the Board's credibility with public interest groups which attempt to address environmental issues in OMB proceedings.

4. OMB CASE MANAGEMENT

It is CELA's understanding that there is an approximate 12 to 13 month backlog of cases pending before the OMB. It is also CELA's understanding that while the Board's workload has increased in recent years, the allocation of funding and other resources by the provincial government has not kept pace with the increase in applications and public hearings.

In CELA's view, the public is not well served when, for example, it takes approximately one year to obtain a hearing date after an appeal is filed under the Planning Act, 1983. This is particularly true in the environmental context where developers continue to excavate, grade, or fill environmentally significant areas prior to the hearing of the appeal, as has happened in several recent cases. To address this specific problem, CELA submits that the OMB must be given the explicit power to prohibit these activities prior to the hearing of the appeal, and to order restoration of the environment where an appeal is successful, but where the land has already been degraded by the developer.

To address the more general backlog issue, CELA submits that consideration should be given to appointing more full-time and part-time members to the OMB. It goes without saying that the provincial government must ensure that all OMB members have adequate resources and staffing so that members' time is spent efficiently and productively. Not only would this reduce the backlog, but it should also serve to reduce the amount of time from the end of the hearing to the release of the written decision, and the time from the written decision to the issuance of the Board's order.

The OMB's scheduling of hearings and issuance of hearing notices could also be improved to facilitate public participation. In particular, all parties to an OMB proceeding should have meaningful

input into the scheduling of hearings, especially in light of the Board's understandable reluctance to grant adjournments once a fixed date has been set. As a rule, public interest intervenors want matters to be dealt with as expeditiously as possible, but they do not want to be presented with a hearing date when their counsel or consultants are unavailable. Moreover, there is a perception among many public interest groups that applicants and municipalities are more often accommodated by OMB staff in terms of their preferences for hearing dates. CELA therefore submits that a requirement that OMB staff contact all parties by telephone or in writing about proposed hearing dates should serve to alleviate this problem. CELA also submits that realistic periods of time should be set aside for OMB proceedings ab initio to avoid having matters adjourned in mid-case for several months or more.

With respect to hearing notices, CELA submits that in many Planning Act cases, the standard 30 day notice is inadequate. Given the current backlog, it is unclear why intervenors must wait for their appeals to languish for months on end, only to be given four weeks notice of the actual hearing date for the appeals. This short notice period sometimes creates difficulty for intervenors whose lawyers and expert witnesses may be otherwise committed before or during the date(s) set for the hearings. Thus, CELA submits that unless intervenors and other parties are given a more substantive say in the scheduling of hearings, then consideration should be given to increasing the notice period.

Similarly, CELA submits that consideration should be given by the Board to developing and adopting pre-hearing procedures which serve to identify or "scope" the issues in dispute among the parties, thereby streamlining the hearing process. Alternative dispute resolution (ADR) methods, such as pre-hearing mediation, conciliation or similar initiatives, should also be explored by the Board for possible application in appropriate circumstances.

5. THE OMB AND THE ENVIRONMENTAL ASSESSMENT PROCESS

Recently, there has been a great deal of public uncertainty about the relationship of the OMB to other statutory tribunals, particularly the Environmental Assessment Board. While the Consolidated Hearings Act, 1981 attempts to avoid a multiplicity of proceedings arising out of the same subject-matter, a number of concerns have arisen about the potential overlap between OMB proceedings and the environmental assessment process under the Environmental Assessment Act (EAA).

In particular, CELA has been involved in several recent cases where the OMB has decided to go ahead with Planning Act hearings even though the Minister of the Environment has been considering the designation of the subject-matter of the hearings as "undertakings" to which the EAA applies. However, where the OMB hearing is held and a decision is rendered by the OMB on the merits of the case, a number of intractable legal problems can arise if the Minister does, in fact, designate the undertaking and refers it to the

Environmental Assessment Board. Firstly, there will be a multiplicity of proceedings despite the intent of the Consolidated Hearings Act, 1981. Secondly, and more importantly, there is considerable potential for inconsistent or conflicting decisions among the two tribunals. This is particularly true where the OMB approves a site for an undertaking, but where the Environmental Assessment Board has yet to assess the alternatives to the site. For these reasons, CELA strongly recommends that where the subject-matter of an OMB hearing is being considered by the Minister of the Environment for designation under the EAA, then no OMB hearings should be scheduled or held pending the Minister's final decision on designation.

6. MONITORING AND CONDITIONS OF APPROVAL

OMB decisions may include certain terms or conditions that are to be fulfilled as part of the board's approval of a particular project or undertaking. Monitoring an applicant's or municipality's compliance with these terms or conditions is, in many respects, as important of the OMB decision itself. At the same time, it is also important to determine the effectiveness of the terms and conditions imposed by the OMB in order to ensure that these requirements are providing an adequate level of protection to the environment and other values. However, in OMB decisions, the issues of compliance monitoring and environmental effects monitoring are paid scant attention by the Board, or are delegated to other government agencies or municipal officials.

It is CELA's submission that the OMB must take a proactive role in ensuring that adequate compliance and effects monitoring is carried out by applicants and/or municipalities. In particular, CELA submits that where appropriate, the Board must require applicants to present a satisfactory monitoring program during OMB hearings where the public can have a meaningful input into the content of the proposed monitoring program. It is not sufficient for the Board to leave the particulars of the monitoring program to be developed after the hearing by applicants, or by relevant government agencies (which may be unable or unwilling to ensure that the monitoring program is comprehensive and effective). There is a clear public interest in compliance monitoring, and the nature and extent of monitoring must be discussed in a public forum, viz. OMB proceedings.

Aside from merely discussing monitoring, the OMB must also be prepared to impose comprehensive monitoring programs as conditions to their approvals under various statutes. Under Part III of the OMB Act, the Board has been granted general powers respecting its jurisdiction, but monitoring is not explicitly mentioned as a requirement that may be imposed by the Board. Similarly, with respect to by-law appeals under the Planning Act, 1983, the Board is empowered to dismiss or allow the appeal, or to amend the by-law in question, but again there is no explicit reference to the imposition of monitoring as a condition to the Board's approval. Finally, while the Board can revise or impose conditions related to

plans of subdivision and consents under ss.50 and 52 of the Planning Act, 1983, there is no explicit reference to monitoring.

To address this concern, CELA recommends that statutory amendments be enacted so as to expressly require the OMB to consider and impose monitoring programs and similar requirements in appropriate cases. We suggest that such amendments could be modelled on s.(14)(1)(b) of the Environmental Assessment Act, which sets out an illustrative list of terms and conditions that could be imposed in order to protect the environment and to ensure the wise management of natural resources. CELA believes that entrenching a similar list in the OMB Act or in OMB-administered statutes would send a clear message to OMB members, applicants, municipalities, and the public as to the range of terms and conditions, including monitoring, that may be imposed to address environmental concerns.

7. THE LAND USE PLANNING PROCESS

The issue of OMB reform cannot be divorced from the larger issue of reforming the existing land use planning and approvals process in order to ensure the adequate identification, analysis, and mitigation of the adverse environmental impacts associated with development. Recently, a number of public interest groups have advocated the reform of the land use planning process to ensure that environmental considerations are properly taken into account by planning authorities. The Environmental Assessment Advisory Committee has made similar recommendations in a number of reports

(i.e. Report No. 38 on the Ganaraska Watershed), as have the reports of the Royal Commission on the Future of the Toronto Waterfront (the "Crombie Commission"). CELA also notes that the Ministry of Municipal Affairs has recently initiated a public consultation process on the need to "green" the planning process.

In general, public concern about the planning and approvals process has focused on the following matters:

- the lack of co-ordinated, ecosystem-based planning, and the need to integrate such planning into the local, regional and provincial planning processes;
- the lack of comprehensive and clearly articulated environmental protection and resource management policies at the local, regional and provincial levels;
- the inability or unwillingness of municipalities to evaluate the environmental significance of natural areas, or to adequately assess the direct, indirect, and cumulative impacts of development on such areas; and
- the understaffing, underfunding and unco-ordination of government ministeries and agencies that are expected to review and comment upon development proposals.

While it is beyond the scope of this brief to identify the specific statutory and non-regulatory reforms that are necessary to address the above-noted concerns, CELA submits that the provincial government must immediately act on these concerns. In doing so, the government must consider how the OMB hearing process could be reformed or restructured in order to achieve the objective of maximizing environmental protection and ensuring wise management of Ontario's natural resources. If the various recommendations outlined in this brief are implemented, it is CELA's submission that we will be closer to achieving this objective than if the

current planning and approvals process remains unchanged.

CONCLUSIONS

CELA welcomes this opportunity to express our views to the Standing Committee with respect to the operation and performance of the OMB. In our view, enhancing public participation in OMB proceedings is an objective of fundamental importance, particularly in cases involving issues related to environmental protection and/or resource management. We submit that this objective can be achieved, inter alia, through OMB intervenor funding; liberal OMB cost practices; environmental training for OMB members; improved OMB case management; imposition of comprehensive conditions of approval by the OMB; and reform of the existing land use planning and approvals process. Upon the implementation of such changes, CELA believes that the OMB can more effectively discharge its statutory duties and powers relating to the protection of the environmental and the wise management of Ontario's natural resources.

All of which is respectfully submitted.

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