

FINANCING PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING

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I. Introduction: Assumptions and Objectives.

It is evident from a survey of the vast literature on public participation in environmental decision-making that the mechanism for payment of litigation costs represents the central design feature in the creation of an effective remedy for public participants. Traditional arrangements for the financing of legal fees and necessary disbursements have wide-ranging ramifications in both procedural and substantive areas of Canadian law. This is, of course, true of all litigation; but nowhere are these ramifications more severely felt than in interventions by public interest groups. In the following pages we will argue that the routine application of traditional cost rules leads to results that are not only severe, but inappropriate, in that these rules effectively prevent the initiation of public interest interventions before the various tribunals that are entrusted with environmental decision-making. Recognition of this powerful cost disincentive has resulted in the implementation of many innovative compensation schemes, particularly in the United States and before several administrative boards and commissions of inquiry in Canada. These and other alternative schemes will be considered, and proposals for reform will be made.

We propose at the outset to state certain of the assumptions upon which the following discussion will be based. Beginning at the widest level of generality: by environmental decision-making, we mean both the initial examination and approval procedure known as environmental impact assessment (whether carried on by a statutory administrative board or an *ad hoc* commission of inquiry), and the *ex post facto* determination of environmental questions, whether by a proceeding for injunctive or declaratory relief or by an action for monetary compensation. Examples will be used that span several of the possible permutations of process and forum.

Providing an inclusive definition of the terms "public interest" and "public participant" presents greater difficulties. We will follow the majority of writers on this subject, beginning with Professor Gellhorn in his seminal 1972 article,¹ in relying on an intuitive

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¹ Gellhorn, *Public Participation in Administrative Proceedings* (1972), 81 *Yale L.J.* 359, at p. 360.

understanding of the public interest as essentially comprising those views which are not otherwise adequately represented by parties with a significant personal or economic stake in the outcome of the proceeding. The "public interest", therefore, does not necessarily involve any "pro-industry" or "anti-development" orientation; it simply encompasses "points of view which do not enjoy the sponsorship of an industry or other well-organized constituency".² More importantly, this meaning of the term "public interest" must be distinguished from its significance as a decisional standard that is presumably at the forefront of all decision-making by courts, boards, and commissions. This distinction plays a central role in justifying the need for increased public interest intervention for such tribunals, and we will return to it at that point. The meaning of "public participants" follows from the above discussion, and various options regarding the form of public participation (for example, by a publicly-appointed official or body rather than by private individuals or groups) will be presented toward the conclusion of this article.

Present arrangements for the financing of legal fees and necessary disbursements have far reaching effects on public participation in environmental issues, and are largely based on the traditional goals of discouraging litigation and providing only a partial indemnity in the event of success. Although in one sense an appendage to substantive environmental remedies, cost rules acquire an independent vitality and importance from their singular ability to dictate the extent to which actions will be initiated at all. This point will be demonstrated in greater detail below; for present purposes, it is sufficient to rely on our intuitive understanding of the economic effects of costs of participation. Professors Dewees, Prichard, and Trebilcock note that "if litigation were truly costless for any plaintiff, he would, in theory, bring a suit in respect of a ten cent claim, with only a 10% probability of success".³ At the other extreme, it is possible to formulate rules which render the financing of litigation impractical for large segments of the population.

Opponents of liberalized funding provisions in the environmental contest rely on the traditional functions of cost rules and the correlation between these rules and the volume of litigation. Costs of participation are held to reduce the number of "inter-meddlers" and assure responsible participation. It thus follows that prior to any useful discussion of revised cost rules, a judgment must be made as to

² Lazarus and Onek, *The Regulators and the People* (1971), 57 Va. L. Rev. 1069, at p. 1077.

³ Dewees, Prichard & Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Actions*, Working Paper Series, Number 7918, Institute for Policy Analysis, University of Toronto (1979), p. 10.

the desirability of promoting "public interest" environmental litigation in Canada.

1. *Objectives of Cost Provisions in the Environmental Area.*

Two major objections are regularly raised against the promotion of "public interest" litigation in general; each applies with special force in the area of environmental interventions.

A. *Over-loading of the Courts and other Tribunals.*

Opponents of expanded environmental litigation, like critics of the class actions and other public interest law suits generally,⁴ argue that in view of their complex and time-consuming nature, the inevitable result of these proceedings would be to place additional burdens on already strained judicial and administrative resources. After examining several proposals to liberalize the "American rule" governing legal expenses incurred in federal litigation, a prominent Washington, D.C. attorney recently concluded:⁵

Litigation, even for noble purposes by public spirited groups, is not an end the federal government should encourage as an expensive crutch to the federal decision-making process.

There are several responses to this argument. Firstly, the assumption that judicial and administrative officials would be unable to withstand a modest increase in their work load has been questioned by a senior member of the United States Federal judiciary:

... based on my personal experience, and the observations of federal judges in a number of districts, I cannot conclude that the work load of federal trial judges has reached a level which can fairly be termed unreasonable or that cannot be dealt with by moderate expansion in personnel. For better or worse, we still have time to prepare and listen to speeches and we still have time to write opinions which are gradually crowding us out of our libraries.⁶

One solution would obviously be to increase the judicial and administrative complement. The judicial burden created by increased accessibility for intervenors cannot be treated in isolation; it must be

⁴ See, for example, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review* (1971), 71 Col. L. Rev. 1, at p. 10; Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream* (1974), 23 Buffalo L. Rev. 601, at p. 635; U.S. Solicitor General, quoted in Blechman, *Class Actions—A Reappraisal in Light of Hawaii v. Standard Oil* (1972), 38 J. of Air L. and Com. 369, at p. 400.

⁵ Mogel, *Award of Attorneys' Fees in Administrative Proceedings—Is it in the Public Interest?* (1978), 49 Miss L.J. 271, at p. 284.

⁶ Weinstein, *Some Reflections on the "Abusiveness" of Class Actions* (1973), 58 F.R.D. 299, at p. 301.

juxtaposed against the more important consideration of the desirability of interventions. If expanded public participation does indeed provide an accessible remedy to the otherwise silent intervenor, it is hardly a countervailing argument to state that this remedy poses an additional burden upon the process of decision-making.

It is precisely for the purpose of adjudicating claims and of providing appropriate remedies that courts have been created; if their work loads become excessive, the solution lies in the allocation to them of more resources not in the excision of their remedial functions.⁷

More importantly, the "overloading" objection assumes a judgment regarding the importance and legitimacy of actions presently occupying the courts which may not be valid. "Since we pass more laws every year and litigation grows every year, is there to be a sort of first-come, first-served rule on which laws may be policed by the courts and which may not?"⁸ Quite the contrary: important pieces of legislation are passed without computation of the numbers of potential litigants who will be afforded legal redress for the first time.⁹

At least two additional proposals present themselves as alternatives to the denial of procedural innovation in this area. One approach to the problem of judicial work load would be to "relieve the court of burdens that do not require their special expertise".¹⁰ Several areas of substantive law have frequently been suggested for removal from the purview of the courts, including routine divorce work,¹¹ bankruptcy matters,¹² "victimless" crimes such as drunkenness, prostitution, and gambling¹³ and motor vehicle negligence claims.¹⁴

A second method to alleviate the work load of decision-makers, particularly at the judicial level, is to make use of techniques for

⁷ Meyer, *The Social Utility of Class Actions* (1975), 42 *Brooklyn L. Rev.* 189, at p. 196.

⁸ G. Kessler, General Counsel for Consumer Federation of America in Committee on the Judiciary, Hearings on the Consumer Protection Act of 1970 (S. 3201), (U.S. Senate, 91st Cong., 2nd Sess., 1970), at p. 281.

⁹ A brief examination of the Family Law Reform Act, S.O., 1978, c. 2 and its legislative history is sufficient to demonstrate this point.

¹⁰ Rifkind, *Are We Asking Too Much of our Courts?* (1976), 70 *F.R.D.* 96, at p. 100.

¹¹ Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized* (1971), 69 *Mich. L. Rev.* 797, at p. 815.

¹² Chief Justice W.E. Burger, *The State of the Judiciary*, 1970 (1970), 56 *A.B.A.J.* 929, at p. 933.

¹³ Rifkind, *op. cit.*, footnote 10, at p. 105.

¹⁴ *Ibid.*, at pp. 105-106; Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (Ministry of the Attorney General, Toronto, (1973), p. 107.

streamlining legal procedures that have been proposed by the Chief Justice of Ontario and others in recent years.¹⁵

We have got to find ways to streamline the administration without diluting the quality of justice. Has not the time come for a critical examination of our legal proceedings to determine whether all the adjournments, the interlocutory proceedings, the successive rights of appeal, and the documentation required for them, are really necessary for the proper determination of the rights of litigants?

Addressing himself to the same problem, the Chief Justice of the United States suggested that the widened scope of judicial responsibility, if it is to be taken into account in considering procedural and substantive law reform, should be measured for all proposed statutes through the use of a "court impact statement".¹⁶

In recent years Congress has required every executive agency to prepare an "environmental impact statement" whenever a new highway, a new bridge or other federally funded projects are planned. I suggested, with all deference, that every piece of legislation creating new cases be accompanied by a "court impact statement", prepared by a reporting committee and submitted to the judicial committees of the Congress with an estimate of how many more judges and supporting personnel will be needed to handle the new cases.

This is not to suggest that Congress reject legislation simply because it would increase litigation in the federal courts, but only to suggest that Congress consider the needs of the courts along with the need for new legislation. What we sadly lack at the present time is the ability to plan rationally for the future with regard to the burdens of the courts. It is essential that we do this if our courts are to function as they should.

It will be seen that the "overloading" objection cannot be given great weight in the case of administrative tribunals that are specifically entrusted with environmental matters. For them, of course, there can be no question of countervailing priorities in other areas of substantive law; furthermore, several governing statutes in this area specifically recognize the desirability of wide public participation in the activities of these tribunals.¹⁷

Finally, there appears to be no empirical data to support the contention that with increased public intervention, environmental actions will occupy a disproportionate amount of court and tribunal time. In this connection, a remark by E. E. Saunders, Q.C., Counsel for Bell Canada, is noteworthy:¹⁸

In our hearings usually two provincial governments appear, there are two individuals who always appear, there are municipalities and associations of

¹⁵ Chief Justice W.G.C. Howland, Speech on the Occasion of the Swearing-in Ceremony in the Legislative Chamber; November 30, 1977 (1977), 11 L.S.U.C. Gazette 232, at p. 235.

¹⁶ Chief Justice W.E. Burger, *The State of the Judiciary*, 1972 (1972), 58 A.B.A.J. 1049, at p. 1051.

¹⁷ See, for example, the Environmental Assessment Act. S.O., 1975, c. 69, s. 12(4).

¹⁸ H.N. Janisch, ed., *Telecommunications Regulation at the Crossroads* (1976).

municipalities who sometimes appear. We have had consumers' groups of every stripe and point of view and in some cases, one case I can think of, a group whose sole expenditure was a bus ticket, appeared and had a distinct and tangible effect on the outcome of one of our rate cases. In a case in 1974, there were 113 different persons, groups, companies, or governments officially listed as intervenors in a Bell Canada hearing, and I doubt very much if the fact that there were 113 lengthened the proceedings by more than a couple of days, than if there had been three or four.

B. *Encouragement of Unmeritorious Litigation.*

The fear of frivolous litigation lies at the heart of opposition to incentives for public interest intervenors.¹⁹ Critics argue that the costs of participation serve a legitimate purpose in discouraging litigation, and that removal of this deterrent would serve to "tip the balance in favour of proceeding" to assert a position of doubtful validity.

Once again, these criticisms do not appear to have empirical support. Similar criticisms have been directed in the United States at the existing class action mechanism on the basis that it permits "legalized blackmail" of defendants by allowing unscrupulous class plaintiffs or attorneys to extort large settlements from them in frivolous actions. Two coercive pressures are identified as being associated with class actions: (1) the cost of conducting large, unmanageable proceedings; and (2) the large aggregate recoveries that class actions render possible. In the environmental context, only the first of these possible areas of abuse is likely to be relevant. It has been described in the following terms:

Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement, is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence, have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.²⁰

Yet, even with the formidable incentives to litigate that are available to the class plaintiff, available empirical data support the intuitive assertion of counsel for the Consumer Federation of America:

No lawyer would ever claim that a class action was an easy suit to bring. No lawyer with an ounce of intelligence is going to go through the time and labour of a class action which he thinks is frivolous . . . it simply will not be economical to bring the suits. A lawyer has only his time and knowledge to sell—he will not waste either on frivolous suits which stand no chance of success.²¹

¹⁹ Herman and Hoffman, *Financing Public Interest Litigation in State Court: A Proposal for Legislative Action* (1978), 64 Cornell L. Rev. 173, at p. 196; see also the federal and California committee testimony cited therein.

²⁰ Handler, *op. cit.*, footnote 4, at p. 9.

²¹ G. Kessler, *op. cit.*, footnote 8, p. 287.

In one study, for example, "interviews with the defendant attorneys disclosed that no more than a handful would label their opponents' cases as frivolous". The authors of the study concluded that "if frivolous cases are brought, the high proportion of dismissals and summary judgments indicates that the class action is not a very effective tool for forcing settlement".²² Subsequently, in a cogent defence of the American class action procedure, which is at least equally applicable in the area of environmental interventions, a prominent writer refuted the claim that the proliferating complexity and volume of class litigation resulted from the assertion of unmeritorious claims. Rather, he showed the phenomenon to have its origins in three recent developments: (1) the expansion of substantive rights by the courts; (2) the redirection of legal resources (caused, for example, by the institution of no-fault insurance and similar innovations); and (3) the increase in "public interest" litigation.²³

There is, of course, a second answer to fears of unmeritorious litigation: the insertion of procedural safeguards to prevent it, and to do so in a more rational way than the simple burden of litigation costs for the public interest intervenor.

In the American class action context, this objective has been reached by interposing a "certification" stage that encompasses, *inter alia*, a preliminary test on the merits. In environmental actions before the courts or administrative tribunals, similar goals can be achieved by providing penalties for interventions brought in bad faith or without *prima facie* merit, and by preliminary and on-going judicial or administrative assessments of the value and merit of the positions being asserted by the intervenors. These innovations will be considered in greater detail when we discuss present and proposed funding procedures before environmental decision-making tribunals.

2. Arguments in Favour of Widened Public Participation.

These two major objections can be answered in still another way: by examining the special social significance of increasing public participation in environmental determinations.

A. Access to Justice.

The objection that encouraging public participation would have the effect of stirring up unmeritorious litigation is only one aspect of a wider attack on "public interest" advocacy that is commonly mounted by critics who argue that conflict resolution is the sole

²² Committee on Commerce, U.S. Senate, Class Action Study (1974), pp. 9-10.

²³ Miller, Myth, Reality and the Class Action Problem (1979), 92 Harv. L. Rev. 664.

legitimate purpose of civil actions.²⁴ Another aspect of this approach is the assumption that when claims are not enforced through litigation, it is because they are unimportant to the affected individuals. Yet the obvious fact that failure to litigate may result from factors other than mere indifference was pointed out over forty years ago in an eloquent passage that remains persuasive today:

We must . . . discard . . . the assumption of medieval society, that a law suit is an evil in itself. It is hard to see how even the legal profession or our court machinery can justify its existence, if we go on the assumption that it is always better to suffer a wrong than to redress it by litigation. A law suit is an evil if it is baseless, or so uncertain that no man of common sense would wish to maintain it. If it is well founded, if a wrong has been done or an obligation unfulfilled, . . . a law suit ought to be considered proper and commendable. . . .

. . . Kent believed it was a "principle common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce". But if we ask ourselves . . . why they are not disposed to enforce their rights, surely it must be obvious that the sword cuts both ways, and that against the group of men who harass their neighbours with improper and unnecessary suits, . . . we may set the meet and economically feeble persons who without support are afraid or incapable of calling in the law to secure their rights.²⁵

It is clear that the failure to advance a particular cause in a given piece of litigation often results from barriers to legal redress that have nothing to do with the merit of the cause or the relative importance of the harm that is perceived by the "victim". Economic barriers to participation in decision-making are well documented in all forms of litigation, and apply most severely to those who suffer in addition from social, psychological and cultural impediments to the redressing of their grievances.²⁶

Additional barriers present themselves in the case of public interest groups. Professor Michael Trebilcock, in a 1975 critique of the modern regulatory system and its effects on consumer interests, has identified three such barriers that have analogous effects on environmental groups. Firstly, the environmental concerns of the average citizen are spread across a great range of projects, issues and locations. On the other hand, a business interest that is concerned with

²⁴ In contrast with those who support both the "conflict resolution" and "behaviour modification" models. See Scott, *Two Models of the Civil Process* (1975), 27 *Stanford L. Rev.* 937, at pp. 937-938 and p. 950; Committee on Class Actions of the Section of Corporation, Banking and Business Law, *Report: Recommendation Regarding Consumer Class Actions for Monetary Relief* (1974), 29 *Bus. L.* 957, at p. 963.

²⁵ Radim, *Maintenance by Champerty* (1935), 24 *Cal. L. Rev.* 48, at pp. 72 and 77-78.

²⁶ See, for example, B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey* (American Bar Foundation, 1977), pp. 238-246 and 204-208; Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972), p. 106; Task Force on Legal Aid (Report, Part 1, 1974), pp. 103-104.

the particular project, issue or location has "a sufficiently concentrated stake in any prospective regulation of it to make [its] views known very forcefully to government".²⁷ The plight of the environmentally-conscious citizen parallels that of the barber's customer in the following example put by Professor Milton Friedman:²⁸

Each of us is a producer and also a consumer. However, we are much more specialized and devote a much larger fraction of our attention to our activity as a producer than as a consumer. We consume literally thousands, if not millions of items. The result is that people in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are [sic] willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering.

"Consumers of the environment" are further disadvantaged in comparison to their counterpart consumers of goods and services. For it cannot be said in the environmental context that while "the direct economic effect of a regulatory decision on one consumer is so small that his participation costs far outweigh any possible benefits, . . . the monetary aggregate of the interests are all individual consumers will equal the monetary interest of the regulated industry in an issue".²⁹

Secondly, unlike highly concentrated producer interests, environmental interests are not generally homogeneous. Most environmentalists are also both consumers and producers of goods and services, and in these roles will often see things differently. The problems of fragmentation of interest that are described in the following passage by Professor Trebilcock are therefore multiplied in the case of public interest groups in the environmental area:³⁰

If we come from an oil-producing province, we see things differently from consumers from an oil-importing province. If we work on an automobile production line, we may see questions of public transit, pollution and safety standards, and lower tariffs on imported cars differently from other consumers. As environmentalists, we may favour underground wires, but as consumers, we may not be prepared to pay the cost. A higher-income consumer may be prepared to pay \$500.00 for a safe, cleaner car, but a lower-income consumer may not be able to afford the "luxury" of more safety and less pollution.

The third barrier is commonly known as the "free rider" phenomenon. Olson, for example, argues that unless the membership in a public interest group is small, or unless some special incentive is

²⁷ Trebilcock, *Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?* (1975), 13 *Osg. H. L. J.* 619, at p. 620.

²⁸ *Capitalism and Freedom* (1962), p. 143.

²⁹ *Regulated Industries Program, Consumers' Association of Canada, Costs Awards in Regulatory Proceedings/A Manual for Public Participants* (1979), p. 45.

³⁰ *Op. cit.*, footnote 27, at p. 623 (footnote omitted).

provided to encourage individuals to act in the common interests of the group, rational and self-interested individuals will not act to achieve their common or group interests.³¹ Olson cites the nation state as an extreme example of a large group that cannot survive on voluntary contributions but must resort to coercive taxes.³² Furthermore, "Olson suggests that, in the absence of coercion, the explanation for membership in existing large pressure group organizations lies not primarily in the collective goods these organizations provide to their members, but rather in the non-collective goods they provide to members".³³

In the result, public interest groups never achieve the strength that their number of potential beneficiaries would indicate, since many of the possible contributors of money, time and expertise either require or are permitted to take a "free ride" at the expense of existing members.³⁴

It is by overcoming these "barriers to litigation" that the encouragement of public participation achieves the significant benefit of obtaining confidence in our system of civil justice.³⁵ A significant "process" value is attached by the community to enhanced public involvement in collective decision-making.³⁶

On an individual level, we are concerned with the sheer unfairness confronting the citizen who finds himself unable to take advantage of a legal system which his taxes go to support and which his society has said is a fundamental part of his birthright From the perspective of society as a whole, we seek to avoid creating incentives for the use of force and lending tacit support to the citizen's alienation, sense of powerlessness and feeling that those in authority are not credible or trustworthy. These feelings presently are all pervasive in our society [W]e cannot afford to let our legal system contribute to these existing problems.³⁷

³¹ The Logic of Collective Action (1971), pp. 12-14, cited in Trebilcock, *op. cit.*, *ibid.*, at p. 225.

³² Trebilcock, *op. cit.*, *ibid.*, at p. 625.

³³ This thesis is reflected, for example, in the fact that the Consumers' Association of Canada, which offers its members both collective and individual benefits, has about thirty times the membership of the Canadian Civil Liberties Association, which offers only collective goods.

³⁴ Trebilcock, *op. cit.*, footnote 27, at p. 624.

³⁵ Haines, Book Review: Canadian Negligence Law, by A.M. Linden (1973), 51 Can. Bar Rev. 709. In economic terms, the "soft variable" represented by "a greater sense of public participation in collective decision-making . . . may well enter a community's social welfare function in a quite significant way." Trebilcock, Waverman and Prichard, Markets for Regulation: Implications for Performance Standards and Institutional Design, in Ontario Economic Council, Government Regulation: Issues and Alternatives (1978), p. 56.

³⁶ *Op. cit.*, *ibid.*, p. 56.

³⁷ Jones and Boyer, Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies (1972), 40 Geo. Wash. L. Rev. 357, at pp. 362-363. For the results of an American Bar Foundation survey of these attitudes, see B. Curran, *op. cit.*, footnote 26, pp. 252-253. See also Haines, J., *op. cit.*, footnote 35, at p. 709: "A

B. Private Enforcement of Public Rights.

A common response to the argument for increased citizen involvement in environmental decision-making is the assertion that intervenors have no useful purpose to serve, given that the public agencies such as administrative tribunals and courts have been entrusted with the dual roles of regulators of industry and representatives of the public interest. Yet, enforcement of public policies can be achieved by private individuals by supplementing the work of the various tribunals or by "energizing the agencies".³⁸ In the last quarter century there has been substantial modification to the basic premise that disinterested experts would be able to order certain areas of life by means of comprehensive and rational planning. As long ago as 1954, Professor Jaffe concluded that the natural consequence of comprehensive planning was that the decisions of agencies would reflect the views of the public interest that were asserted by the regulated parties.³⁹

Professor Gellhorn has identified three principal factors which combine to produce what has become known as agency "capture" by regulated interests. Firstly, the limited resources that are allocated to administrative agencies, considered in relation to the sheer mass of activity that is required to monitor and test proposals and applications, necessitates close co-operation between the regulator and the regulated industry. Administrative boards thus become dependent upon industry as providers of information. A second cause of industry orientation is the dependence of regulatory agencies on the regulated interests for political support. Independent tribunals cannot rely upon the government to protect them from legislative attack and must therefore develop their own constituencies that are capable of generating support in the legislatures. In this regard, a natural ally can often be found in the regulated interests.⁴⁰

Most importantly, two other characteristics of the administrative process have combined to form a third source of agency deference to industry positions.

belief that somewhere in our system there is someone who will put things right and that he is accessible at a price the citizens can afford makes for confidence and satisfaction, whereas a sense of injustice makes people want to tear things down."

³⁹ Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation* (1954), 67 Harv. L. Rev. 1105.

³⁸ Or in fact substituting for these public agencies: for example, Mashaw, *Private Enforcement of Public Regulatory Provisions: The Citizen Suit* (1975), 4 C.A.R. 29; Polinsky, *Private versus Public Enforcement of Fines* (mimeograph 1978), cited in Dewees, *Prichard & Trebilcock*, *op. cit.*, footnote 3, p. 4.

⁴⁰ Note, *Federal Agency Assistance to Impecunious Intervenors* (1975), 88 Harv. L. Rev. 1815, at p. 1816. See also Professor Trebilcock's comments regarding the "myth . . . that most major forms of regulation are forced on unwilling producers by hostile non-producer groups", *op. cit.*, footnote 27, at pp. 627-628.

First, the legislative mandates of the agencies are for the most part so open-ended that it is rarely clear what the public interest is in any given context. Second, the regulated parties generally possess the high degree of involvement, the economic strength, and the organizational cohesion required to present their views to the agencies consistently and coherently. Consequently, the agencies, left without a clear concept of where their duty lies, tend to adopt the only viewpoint presented to them in a persuasive and coherent fashion.⁴¹

It should be noted that the above-discussion of agency "capture" by regulated interests does not presuppose any allegation of real or apparent bias on the part of the relevant public officials. While certain tribunals, such as the Environmental Assessment Board in Ontario,⁴² have been criticized on the basis of an apparent lack of independence from the government, these concerns will not be fully met by facilitating public participation. The problem of the "empty environmentalists' chair" is simply that "governmental agencies rarely respond to interests that are not represented in their proceedings".⁴³ The mere setting up by governments of regulatory agencies is insufficient to protect the public interest.

In those cases where protest has been organized within the neighbourhood, there is no funding to enable the residents to oppose the experts, the high-priced engineers, and the real estate dealers. The government, in effect, has all the power on its side. It sets up a public hearing format and says, now look, here you are, a fair deal, a public hearing. We are going to hear from both sides and deliver our verdict on the merits. That is exactly what Roman Emperors used to say to Christians when they invited them into the lion's den. One lion, one Christian, and may the best lion win.⁴⁴

In the United States, this view was given judicial approval for the first time in 1966, when Judge Burger wrote a strong opinion exploding the theory that administrative agencies could always effectively represent the public interest without the aid and participation of legitimate representatives fulfilling the role of private attorneys general.⁴⁵

At the very least, even if the interests of the regulated industry and the adjudicator do not fully coincide, it is clear that the "public interest" which is the theoretical mandate of the decision-maker is not unitary. It has diverse and indeed countervailing components, and so

⁴¹ Note, *ibid.*, at p. 1816. See also Jaffe, *The Illusion of the Ideal Administration* (1973), 86 Harv. L. Rev. 1183, at pp. 1184 and 1190-1191.

⁴² D.P. Emond, *Environmental Assessment Law in Canada* (1978), pp. 137-138.

⁴³ Crampton, *The Why, Where & How of Broadened Public Participation in the Administrative Process* (1972), 60 Georgetown L.J. 525, at p. 529, quoted in Trebilcock, *op. cit.*, footnote 27, at p. 628.

⁴⁴ Mayor Rod Sykes of Calgary, in *Canadian Council on Urban & Regional Research* (1973), 5 Urban Research Bulletin, no. 3, at p. 3, quoted in Trebilcock, *op. cit.*, *ibid.*, at p. 628. See also the comments of former Ministers of Consumer and Corporate Affairs, the Hon. John Turner and the Hon. Robert Andras, also quoted therein.

⁴⁵ *Office of the Communication of the United Church of Christ v. F.C.C.* (1966), 359 F. (2d) 994, at p. 100 (D.C. Cir.).

the environmental tribunal or court cannot be expected to become its guardian with unqualified success. Public intervention "softens the artificial two-sidedness which is often a by-product of the adversarial adjudicative process".⁴⁶

C. *Improvement of The Administrative and Judicial Processes.*

Four distinct benefits accrue to the investigative and adjudicative processes as a result of increased public participation.

Firstly, public participation provides decision-makers with a greater range of ideas and information on which to base their decisions.⁴⁷ This input has important implications for what is essentially a decentralized, pluralistic system of adjudication by courts and tribunals; that is, one that, by delegation, performs the legislative function of balancing the concerns of competing interest groups.⁴⁸

Environmental issues are rarely election issues, and the parliamentary system provides virtually no control over the important decisions of non-elected officers. Participation not only gives legislators and other decision-makers a better sense of societal sentiment, and thus provides some check on legislative decision-making; it also gives the public direct access to an ever-expanding and ever-important regulatory bureaucracy.⁴⁹

This substantive contribution to environmental decision-making has two aspects. Firstly, public participants bring important factual information and legal submissions to the attention of the adjudicator. For example, an intervenor's revelation that a developer planned to build a community for 30,000 people, within two miles of the proposed site of a nuclear power plant, prompted the United States Atomic Energy Commission to withdraw its initial approval of the site.⁵⁰ Similarly, in a recent case before the Canadian Radio and Television Commission, the Commission commented in its written decision:⁵¹

. . . in bringing to the attention of the Commission a tariff which was contrary to s. 321 of the Railway Act and in making its case, Challenge made a substantial

⁴⁶ Gellhorn, *op. cit.*, footnote 1, at p. 381.

⁴⁷ Note, *op. cit.*, footnote 40, at p. 1816; Johnson, A New Fidelity to the Regulatory Ideal (1971), 59 *georgetown L.J.* 869, at pp. 876-77.

⁴⁸ Trebilcock et al., *op. cit.*, footnote 35, p. 53.

⁴⁹ Emond, Participation and the Environment: A Strategy for Democratizing Canada's Environmental Protection Laws (1975), 13 *Osg. H.L.J.* 783, at p. 785.

⁵⁰ Steeg, Federal Agency Compensation of Intervenors (1976), 5 *Env. Aff.* 697, at p. 700.

⁵¹ *Challenge Communications v. Bell Canada*, CRTC Telecom Decision 77-16, at p. 39. For similar and more wide-ranging conclusions, see the remarks of David Pittle, Commissioner of the U.S. Consumer Products Safety Commission, quoted in Steeg, *op. cit.*, *ibid.*, at p. 700, and Decision No. 30202 of the Alberta Public Utilities Board, March 29th, 1971, at pp. 7-8.

contribution to the effect of discharge of the statutory responsibilities of the Commission. . . .

The second element of substantive contribution is the presentation of a viewpoint or perspective that is not otherwise available to the decision-maker. Intervenors are often able to put forward a legal or factual argument which places a unique emphasis or interpretation upon existing issues or causes the tribunal to examine a new issue. Examples abound of environmental groups posing problems of aesthetic values that would not otherwise enter into the calculus of decision-making. In other cases, public interest groups have been successful in reflecting "an intimate and first-hand familiarity" with the problems at hand that commission staff themselves were not able to acquire.⁵²

The second major benefit is that public participation can enhance public acceptance of judicial and administrative decisions:

. . . not only must pollution be controlled within limits acceptable to the community at large, *but agency proceedings must be sufficiently open to ensure that this is clearly seen by the public*. In other words, it is essential to the tribunals' success that public confidence and support for its enforcement process be maintained; for this can only be done by readily allowing members of the public to participate in that process.⁵³

Public acceptability, in turn, can be expected to ease the implementation and enforcement of judicial and administrative decisions that rely upon public co-operation.⁵⁴

Third, problems of agency dependence on industry for political support may be alleviated by the broad participation of other parties. Such participation may promote the actual autonomy of the agency, both by giving it a broader perspective from which to view its own role, and by providing alternative potential bases of political support.⁵⁵

Fourth, the presentation of alternative view points at the board or lower court level is said to induce these decision-makers to be more thorough in their analyses and to articulate more clearly and precisely the reasons for their decisions.⁵⁶ These improvements may in turn contribute to the building of a record on which a reviewing or appellate court might reverse the initial decision.⁵⁷

⁵² See Steeg, *op. cit.*, *ibid.*, at pp. 700-701.

⁵³ Lucas, *Legal Techniques for Pollution Control: The Role of the Public* (1971), 6 U.B.C.L. Rev. 167, at p. 186, quoted in Emond, *op. cit.*, footnote 49, at p. 785.

⁵⁴ Gellhorn, *op. cit.*, footnote 1, at p. 361. Emond, *op. cit.*, *ibid.*, at pp. 785-786.

⁵⁵ Note, *op. cit.*, footnote 40, at p. 1816.

⁵⁶ Steeg, *op. cit.*, footnote 50, at p. 699, and sources cited therein.

⁵⁷ Comment, *Public Participation in Federal Administrative Proceedings* (1972), 120 U. Pa. L. Rev. 702, at p. 710, cited in Note, *op. cit.*, footnote 40, at p. 1817. Of equal importance, of course, is the common situation in which the need for effective

D. *Empirical Evidence of Necessity and Effectiveness.*

Recent examples of the effectiveness of participation by public interest groups fall into three major categories. Firstly, there are the cases in which a substantial degree of success was achieved by virtue of public interventions. In the Maple garbage dump case,⁵⁸ for example, the collaboration of a private citizens' group with the Canadian Environmental Law Association resulted in extensive participation through several months of hearings before the Environmental Assessment Board and the Environmental Appeal Board. The intervenors were eventually successful in obtaining an approval for the operation of the garbage dump which was conditional upon compliance with several exacting conditions.⁵⁹

A second area of success in which examples can readily be cited is that of public interventions pointing out inadequacies in existing legislative and regulatory guidelines and resulting in more rigorous procedures in future applications. This pattern emerged from the first regulatory initiative by the Advocacy Programme of the Consumers' Association of Canada in late 1973 following an application by Ontario Hydro to the National Energy Board for a license to import coal from the United States which would produce energy in Canada, and then export the energy to the United States. A joint intervention by Pollution Probe and the Consumers' Association of Canada was designed to show that the substantial economic benefits of this proposal were counter-balanced by its serious social costs. Their evidence was rejected as too speculative, and Ontario Hydro's license was granted by the National Energy Board, confirmed by the Federal Cabinet, and upheld by the Federal Court of Canada. Nevertheless, in subsequent cases both Ontario Hydro and the National Energy Board requested the assistance of social cost analysts, and environmental impact assessment has been carried out much more rigorously by the Board since that time.⁶⁰

Professor Trebilcock pointed out a third benefit that resulted from intervention by these public interest groups in the Ontario Hydro

public participation at the administrative agency level is heightened by the virtual or complete unavailability of judicial review: see, for example, *Re Nanticoke Ratepayers' Association and the Environmental Assessment Board* (1978), 7 W.L.R. 8 (Div. Ct.).

⁵⁸ This was an application by Superior Sand, Gravel and Supplies Ltd. (owner) and Crawford Allied Industries Ltd. (operator) for approval of a 245 acre landfill site in Vaughan Township in Ontario. Conditional approval was eventually granted by the Environmental Appeal Board (Toronto Globe and Mail, Thursday, April 3rd, 1980, at p. 101).

⁵⁹ *Ibid.*; see also the press release accompanying a resolution to the Legislative Assembly of Ontario by Ms. Marion Bryden, M.P.P. on June 1st, 1978, setting out the history of the Maple landfill hearings up to that point.

⁶⁰ For a more detailed account of this and other initiatives by the Advocacy Programme of the C.A.C., see Trebilcock, *op. cit.*, footnote 27, at pp. 631-636.

application: the considerable media publicity that had accompanied the case was one factor in a heightened public consciousness about the social impact of large-scale industrial projects,

... a consciousness needed for example to prompt decisions like that of the Federal Government to set up the Berger Commission to assess the impact of the Mackenzie Valley Pipeline on the Northern environment and native peoples.⁶¹

II. *Present State of the Canadian Law of Costs.*

It is evident from the foregoing discussion that far-reaching benefits can be obtained by widening access to public participation. Against this background we will juxtapose Canadian costs rules at the court, board and commission levels and evaluate their effects in terms of this goal.

1. *Courts.*

In the common law provinces of Canada, the subject of costs is nominally covered by the judiciary statutes; in Ontario, for example, the relevant provision gives courts "full power to determine by whom and to what extent the costs shall be paid".⁶² Despite this rather broad wording, the general rule is that costs should follow the event and a successful party should not be deprived of costs unless he or his counsel have been guilty of some misconduct.⁶³

There are exceptions to the rule that a successful party is entitled to his costs. Costs may not be awarded to a successful party even when there has been no misconduct if the question at issue is a new one,⁶⁴ where a new statute is being interpreted⁶⁵ or if the action is a test case.⁶⁶ The exercise of judicial discretion in these cases has served to make clear that the totality of circumstances in each lawsuit must be weighed and that exceptional facts may be reflected in an exceptional cost award.

⁶¹ *Ibid.*, at p. 632. A detailed discussion of the necessity and effectiveness of public participation in the American setting is contained in Lenny, *The Case for Funding Citizen Participation in the Administrative Process* (1976), 28 Admin. L. Rev. 483 at pp. 494-503. In addition to the areas covered in this paper, Lenny gives examples of (1) potential successes of public participation in agency proceedings that went unrealized due to a lack of proper funding; (2) successes of citizens' applications for judicial review of agency actions; and (3) potential successes of such applications that went unrealized due to a lack of proper funding.

⁶² R.S.O., 1970, c. 228, s. 82(1).

⁶³ *Field v. Richard* (1913), 24 O.W.R. 606, at p. 607; *aff'd* at p. 987; *Ritter v. Godfrey*, [1920] 2 K.B. 47, at p. 60.

⁶⁴ *Anderson v. Busse and Federation Insurance Company of Canada*, [1946] 2 O.R. 454; *Gracie v. King*, [1943] O.W.N. 356.

⁶⁵ *Re: McMaster*, [1947] 2 W.W.R. 1032, *aff'd* [1948] 1 W.W.R. 648.

⁶⁶ *Re: Bothwell Estate*, [1950] 1 W.W.R. 1041; *York Condominium Corp. No. 148 v. Singular Investments Limited* (1977), 16 O.R. (2d) 31.

A second branch of the traditional common law cost rule is the proposition that recoverable costs in litigation should only provide a partial indemnity to the successful party for amounts actually expended by him.⁶⁷ This constitutes a compromise between the so-called American rule, which normally permits no recovery of costs, and a full indemnity rule, which would provide the winner with the full sum expended on his behalf for legal fees and necessary disbursements.

The costs payable by the loser to the winner are known as party and party costs. The costs payable by a party to his own solicitor, regardless of the outcome of the litigation, are commonly referred to as solicitor and client costs. It is on the former scale that costs are normally awarded, and they are calculated according to tariffs which are contained in the rules of court.⁶⁸ While there is no mathematical formula which relates party and party costs to costs as between solicitor and client, generally speaking the latter is one-third to one-half higher than the former. Recent decisions, however, have tended to narrow the gap by increasing the quantum of recoverable party and party costs.⁶⁹ Costs under the common law rule belong to the party and not his solicitor.⁷⁰

Under the civil law of Quebec, the general rule is once again that costs are to be awarded to the successful party.⁷¹ A Quebec court may deny costs to the successful party but it must give its reasons for so doing. In Quebec the costs are awarded by the court to the lawyer and not to the client; they are the lawyer's property and may be collected only by him.⁷² This principle is reflected in the type of circumstances that may result in a denial of costs by a Quebec court. For example, costs may be refused if the court concludes that the successful party's lawyer was of no assistance to it in rendering its decision and the court's reasons for decision are not found in his pleadings.⁷³

By relating the cost award to success on the merits, Canadian courts have generally adhered to the "damages theory of costs". It dictates that costs are awarded to the successful party as part of the damages suffered as the result of being forced to pursue or defend an

⁶⁷ *Ryan v. McGregor*, [1926] 1 D.L.R. 476 (Ont. C.A.); *Wright v. Elliott* (1911), 21 Man. R. 337, at p. 339.

⁶⁸ See, for example, R.R.O., 1970, c. 545, Rule 683 and Tariffs A, B & C.

⁶⁹ See, for example, *Falcone v. Diceman et al.* (1974), 4 O.R. (2d) 116; *Gioberti v. Gioberti*, [1972] 2 O.R. 263.

⁷⁰ *Meriden Britannia Co. v. Braden* (1896), 17 P.R. 77.

⁷¹ Code of Civil Procedure, Art. 477.

⁷² *Ibid.*, Art. 479.

⁷³ *Belanger v. Corporation de la Ville de St. Pamphile*, [1968] C.S.P. 178; *Visante v. Longato*, [1973] C.S.P. 606.

action. According to this theory, a successful plaintiff has been put to a legitimate and necessary expense in order to pursue its claim, and so he should be made whole by recovering not only the amount of the claim but the additional expenses as well. The requirement that the unsuccessful defendant pay these expenses arises directly from the findings of fault made by the courts on the substantive issues.

The damages theory thus readily explains the result that costs act as a deterrent. Because the outcome of litigation is fraught with uncertainties, parties must carefully weigh the prospects of success with the costs of failure before deciding either to proceed with a claim or to offer a defence. The reality that a party must pay his own solicitor notwithstanding the outcome of the case, together with the fear that additional costs will have to be paid to the adversary in the event of failure, are together intended to insure that only meritorious claims are pursued and that marginal defences are abandoned. This result is intended to produce direct benefits both for the parties contemplating litigation and also for the public at large insofar as costs will tend to screen out weak causes to protect our already overburdened courts from unjustified litigation. It is, of course, presumed that the individual who is pursuing or protecting his private economic interest will be properly influenced and guided by the economic impact of legal costs and that only claims that are justifiable on economic grounds will be litigated.

This deterrent theory lies at the heart of two additional provisions which form part of the common law of costs. Security for costs can be ordered by a court in circumstances where a party may be judgment-proof or where a "group" or "cause" is setting up a "man of straw" in order to shield itself from costs liability. Rule 373 (1) of the Ontario Rules of Practice provides:

Security for costs may be ordered

(f) where the action is brought by a nominal plaintiff;

(h) where an action is brought on behalf of a class and the plaintiff is not possessed of sufficient property to answer the costs of action and it appears that the plaintiff has put forward or instigated to sue by others.⁷⁴

The scope of this rule is, however, unclear. A plaintiff will not be considered "nominal" within the meaning of sub-rule (f), if he has an actual interest in the litigation,⁷⁵ and most representatives can readily satisfy this criterion. Furthermore, it may be difficult under sub-rule (h) to establish that the plaintiff has been "put forward or instigated to sue by others". The Ontario Court of Appeal recently held that an order for security of costs will only be made under this sub-rule if there is direct evidence of instigation and if it can be shown that the

⁷⁴ R.R.O., 1970, c. 545.

⁷⁵ *McAlister v. O'Meara* (1896), 17 P.R. 176; *Ella v. Spring*, [1941] O.W.N. 407.

plaintiff does not stand to benefit personally to some degree by his actions in the event of success.⁷⁶

The second restriction is the undertaking for damages. In a civil action, as a pre-condition to the granting of a temporary injunction, the court may require the plaintiff to give an undertaking to be responsible to the defendant for any financial loss that is sustained as a result of stopping the work alleged to be harmful in the period prior to trial. The effect of this provision can be devastating: "where the defendant is a business which must cease production, distribution or sales, no person or group of modest means could give such an undertaking or carry it out."⁷⁷

The rationale for the rule of costs as a filter rests on the premise that the threat of liability for costs operates even-handedly as between the parties. This presumption of equality underlies a number of fundamental principles on which the entire adversary system is based. Parties, however, are rarely evenly matched, at least in economic terms, and accordingly will be affected unevenly by the fears that are inherent in cost awards. Furthermore, a cost rule based on success or failure ("innocence" or "fault") neglects the fact that a party who succeeds in a close case may not have established that his adversary acted unreasonably in refusing to settle. While a cost rule based on fault may discourage some frivolous and unnecessary litigation, it will also undoubtedly discourage meritorious claims, particularly those of considerable public interest and importance.⁷⁸

Recent recognition of this potential for unfairness has resulted in a gradual evolution in judicial use of the exceptions to the traditional cost rule. In a recent motion for judicial review of a ruling of the Environmental Assessment Board, Mr. Justice Goodman of the Ontario Supreme Court refused to award costs against the applicant ratepayers' association, since it had acted "responsibly" and "in good faith" and he was "satisfied that the matter [was] one of public importance".⁷⁹ A similar result was reached by Mr. Justice Weatherston of the same court in the well-known *Elora Gorge* case.⁸⁰

I have expressed the view that if it had not been for the concern of citizens in the area, no consideration would have been given to the environmental factors. In the

⁷⁶ *Ostrander v. Niagara Helicopter Ltd* (1975), 4 O.R. (2d) 388.

⁷⁷ Swaigen, Costs, Undertakings and Public Cases (1978), Brief to the Civil Procedure Revision Committee prepared on behalf of the Canadian Environmental Law Research Foundation.

⁷⁸ Watson, Borins and Williams, *Canadian Civil Procedure* (2nd ed., 1977), pp. 2-5.

⁷⁹ *Re Nanticoke Ratepayers' Association and Environmental Assessment Board* (1978), 19 O.R. (2d) 7, at pp. 17-18, 83 D.L.R. (3d) 722, at pp. 732-733, 7 C.E.L.N. 8.

⁸⁰ *Re Rosenberg and The Grand River Conservation Authority* (1976), 9 O.R. (2d) 771, 5 C.E.L.N. 156, at p. 162.

result, it would not have made any difference but councils must learn that they should take all relevant matters into consideration and these were most important considerations which initially were completely ignored. I think that the plaintiffs have done a public service here in bringing this application. . . . I make no order as to costs.

In a recent Ontario County Court case, the judge was explicit in recognizing the relative inability of a public interest group to finance protracted litigation against a large landlord:

There is little doubt in my mind that individual members of lower income groups need protection against more powerful forces in our society. . . .

The existence of this organization [Parkdale Community Legal Services] and the claim for costs in this application against one of its staff lawyers throws into focus a serious problem. On the one hand we have a group trying to fulfil a social need. On the other hand, there are the dangers inherent in an organization undertaking and sponsoring litigation without the need of having any regard to the legal costs incurred.

His Honour Judge Cornish limited the costs payable by the applicant tenant to her landlord to \$200.00 for proceedings which consumed eight court days.⁸¹

Undoubtedly the greatest impetus for reform in Ontario cost practice has resulted from the 1974 *Report of the Task Force on Legal Aid*. Mr. Justice Osler states, in language that is particularly applicable to environmental litigation:⁸²

[W]e are emboldened to suggest at this point that it is no longer self evident that costs should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation but the threat of having costs awarded against a losing party operates unequally as a deterrent. The threat of costs undoubtedly works heavily against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore propose an amendment to The Legal Aid Act casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious.

We will consider these and other proposals for reform of existing cost rules at a later stage in this chapter.

2. Administrative Agencies.

It is clear from the foregoing discussion that in spite of the substantial cost obstacles to public participation in court proceedings the few small steps that have been taken in the direction of reform have gone no further than the *ad hoc* removal of costs liability on a discretionary basis. Greater innovation has been evident at the level of

⁸¹ *Re Pajelle Investments Ltd and Booth* (No. 2) (1975), 7 O.R. (2d) 229, at pp. 239-241, 5 C.E.L.N. 163.

⁸² p. 99.

administrative tribunals, where decision-making has departed from the traditional adjudicative mode and tribunals have thus been able to look beyond the "damages" theory of compensation as between individual parties.

The first step in the evolution of a distinct costs regime at the administrative level was the recognition that in the absence of specific statutory compulsions, administrative boards are not bound by the common law or civil law cost principles. In a 1930 case, the Manitoba Court of Appeal was asked to quash the refusal of the Municipal and Public Utility Board to invoke a provision in its governing statute⁸³ which permitted it to "order by whom and to whom any costs are to be paid" and stipulated that "the costs of and incidental to any proceeding . . . are in the discretion of the [Board], and may be fixed in any case at a sum certain, or may be taxed". The Manitoba Court of Appeal held:⁸⁴

Proceedings before the Public Utility Board belong to a different category and are necessarily dealt with from a point of view that has no place in litigation between the parties. The status and risks of suitors in an action are fixed by practice and authority. No rule has been laid down by the Board that persons appearing by counsel before the Board shall, subject to the Board's discretion, have costs in the event of their failure. Whether such a rule should be adopted or not is a matter wholly for the Board. In the meantime the matter is left by sec. 55 in the Board's absolute discretion, untrammelled by the principles that necessarily control the discretion of the Court or a Judge. See *Local Government Board v. Arlidge*, [1950] A.C. 120, 84 C.J.K.B. 72.

Similar reason was adopted by the Canadian Radio-Television and Telecommunications Commission in a recent rate decision:⁸⁵

[I]t is not necessary to adhere to a strict judicial notice of costs when dealing with costs under The Railway Act . . . the term "costs" in sub-section 2(1) of The Railway Act and section 73 of The [National Transportation Act] goes beyond the notion of compensation to successful litigants so as to include fees and expenses incurred in the performance of studies necessary by the Commission for the determination of the matters before it.

The next stage in the formulation of independent cost rules was the recognition that certain functional characteristics of administrative tribunals rendered the application of traditional "two-way, partial indemnity" principles inappropriate. A succinct summary of these considerations is found in a recent manual prepared by the Regulated Industries Programme of The Consumers' Association of Canada:⁸⁶

⁸³ Municipal and Public Utility Board Act, S.M., 1926, c. 33, s. 55.

⁸⁴ *In Re Municipal and Public Utility Board*, [1930] 1 W.W.R. 615, at p. 618.

⁸⁵ Telecom Decision C.R.T.C. 79-5 March 8th, 1979, at pp. 5-6.

⁸⁶ *Op. cit.*, footnote 29, p. 17. It should be noted that the third consideration in particular is often applicable to court decisions as well.

[1] The question of winning or losing parties is secondary where a Board has a mandate to make a decision in the public interest. The Board is not required to adopt or approve the position of any participant even though some participants may take adversarial positions

[2] Certain boards cannot sanction out-of-court settlements by parties. This is especially true where the Board must, by statute, express its own determination on the matter.

[3] Boards are often required to apply unspecific policy criteria such as the "public interest" or "public convenience and necessity". Determining hard facts therefore must often give way to balancing the opinions of expert witnesses. Moreover, reasonable people may differ substantially on what facts are relevant to a regulatory board decision.

The predictable third step in the evolution of attitudes toward administrative cost awards was a close examination of the statutory framework in which the tribunals must operate. Statutes were found to contain a wide range of procedural provisions, but specific references to cost issues were relatively rare. Public interest groups were often forced to argue for an award of costs under the "residuary power" of the tribunal that is exemplified by section 18 (12) of the Environmental Assessment Act of Ontario:⁸⁷

The Board may determine its own practice and procedure in relation to hearings and may, subject to Section 28 of *The Statutory Powers Procedure Act*, 1971 and the approval of the Lieutenant Governor in Council, make rules governing such practice and procedure and the exercise of its powers in relation thereto and prescribe such forms as are considered advisable.

Other statutes, including several which have been on the books for decades, contain more explicit statutory authorization in the area of cost awards. In most cases, however, widespread use of this administrative cost of power has been a relatively recent occurrence. For example, the Ontario Municipal Board's usual practice has been to award no costs, leaving each party to pay its own legal expenses. The Board stated its policy on this question in a recent case:⁸⁸

This Board, however, is of the firm opinion that the hearing of this matter, regardless of any delays which may have been occasioned, is the right of the citizens of the Province of Ontario under the Planning Act, R.S.O. 1970, chapter 349, and unless the objection or objections be deemed to be frivolous or without merit, no order as to costs should issue. The objections to the proposal were stated with certainty, clarity and with a great deal of merit, and certainly were anything but frivolous. There will therefore be no order as to costs.

Recent recognition of the problems of financing meritorious public participation have resulted in affirmative awards of costs in favour of intervenors rather than a mere denial of costs to proponents. In a 1977 decision the Ontario Energy Board based such an affirma-

⁸⁷ S.O., 1975, c. 69.

⁸⁸ *Re Central Wellington Planning Area Official Plan Amendment* (1978), 8 O.M.B.R. 263, at p. 284.

tive award upon essentially the same reasoning as that which motivated the Ontario Municipal Board in the passage quoted above.⁸⁹

In the opinion of the Board, the views of Ontario Hydro's customers and the public in general must be considered. To this end it is important to encourage active, informed and useful participation so that a wide range of views can be examined in detail. Without such interventions the burden upon the Board in a hearing could be overwhelming.

The Board considers that intervenor participation in phase 1 of this hearing has been helpful, and it will therefore award costs to those intervenors who have actively participated and have put forward intelligent, well-informed and effective interventions.

A further refinement by environmental and other tribunals has occurred through the use of rule-making powers to promulgate guidelines, policies and schedules on the subject of costs. In so doing tribunals have been forced to reconcile the desire to afford some certainty to potential intervenors with the judicial provision against "fettering one's discretion".⁹⁰ In a 1977 Position Paper, the Alberta Public Utilities Board concluded:⁹¹

[T]he Board must recognize conditions as they currently exist. While it may prefer to see municipal interventions paid for by municipal taxpayers; while it may prefer to see "public interest" groups funded by the public; and while it may question the effectiveness of particular intervention; it cannot attempt to impose upon its Members guidelines which would override their unfettered judicial discretion. The position of the Board is that costs will continue to be awarded to intervenors appearing before it but that such costs will be scrutinized as to the reasonableness and the time spent and the fees and expenses charged, and as to the benefits derived by all customers of the applicant.

More specific guidelines have been issued by agencies which have specific mandates to formulate rules of procedure. Authorized by a recent amendment to its governing statute,⁹² the Energy Resources Conservation Board of Alberta promulgated a Local Intervenor's Costs Regulation in December of 1978. It stipulates in considerable detail the application procedures, granting criteria and taxation

⁸⁹ *Reference Re Principles of Power Costing and Rate Making for Use by Ontario Hydro* (1977), 6 C.E.L.N. 171.

⁹⁰ See De Smith, *Judicial Review of Administrative Action* (2nd ed., 1968), p. 294: "A tribunal entrusted with a discretion must not by the adoption of a general rule of policy disable itself from exercising its discretion in individual cases. Thus, a tribunal which has power to award costs fails to exercise its discretion judicially if it fixes specific amounts to be applied indiscriminately to all cases before it; but its statutory discretion may be wide enough to justify the adoption of a rule not to award any costs save in exceptional circumstances, as distinct from a rule never to award any costs at all." (footnotes omitted).

⁹¹ Position Paper on Interventions and Costs, Public Utilities Board, Alberta, February 24th, 1977, at p. 14.

⁹² Energy Resources Amendment Act, 1978 (Bill 57), s. 30.1.

proceedings that will precede a cost award under the Energy Resources Conservation Act.⁹³

Recent attention in the area of intervenors' costs has focused on the possibility of direct funding by the tribunals. Once again, strategies have varied according to the nature of the relevant statutory language. Where a board is given a broad residual authority to do what it considers necessary to carry into effect the intent of the legislature, it can be argued that it should ensure that there is a balanced representation of views at its public hearings by funding groups which could not otherwise participate in an effective manner.⁹⁴ On the other hand, where a tribunal has a discretion to award costs "against whom" it chooses, it is arguable that it can award costs against itself to achieve the same result. This possibility was recently recognized by the Canadian Transport Commission, although the Commission ultimately held that it could not adopt this course without a specific appropriation of funds by the federal government.⁹⁵ A similar conclusion was reached by the Canadian Radio and Television Commission notwithstanding its expressed preference for direct funding over cost awards and notwithstanding more specific statutory permission than in the case of the Canadian Transport Commission.⁹⁶

Finally, the Alberta Energy Resources Conservation Board has been given explicit legislative sanction to award costs to "local intervenors" from its own funds.⁹⁷

3. *Commissions of Inquiry.*

It is undoubtedly in the area of public inquiries that the most far-reaching steps have been taken to insure that public interest groups are effectively represented. The forerunner in this field was clearly the Mackenzie Valley Pipeline Inquiry headed by Mr. Justice Thomas Berger, and its funding procedures have since been emulated by numerous *ad hoc* inquiries and several administrative tribunals.

The commitment to making financial assistance widely available to all interested parties in the Mackenzie Valley and the Western Arctic was apparently Mr. Justice Berger's own; he personally argued

⁹³ The regulation is reproduced in Appendix III of the C.A.C. Manual, *op. cit.*, footnote 29. For similar provisions, see Canadian Radio-Television and Telecommunications Commission, Telecommunications Rules of Procedure Telecom decision C.R.T.C. 1978-4, s. 52.

⁹⁴ C.A.C. Manual, *op. cit.*, footnote 29, p. 20.

⁹⁵ *In the matter of an application by the Consumers' Association of Canada for costs*, files 49893-2 and 457-4 (Dec. 28th, 1978).

⁹⁶ C.R.T.C. Procedures and Practices in Telecommunications Regulation (Telecom decision C.R.T.C. 1978-4), *supra*, footnote 93.

⁹⁷ Energy Resources Amendment Act, 1978, *supra*, footnote 92, 30.1.

for it with the Minister of Indian and Northern Affairs. The rationale for public funding was fourfold:

- (1) To insure that the evidence was as complete as possible, and included all relevant research. It was found that this could be achieved only through an adversarial examination of the arguments for and against the proposal which identified hitherto unsuspected gaps in the information;
- (2) To insure that the evidence should be as balanced as possible. Without funding, the balance of advantage would clearly be with the oil industry;
- (3) It was felt that hearsay and sociological studies of attitudes and aspirations were no substitute for direct expression by the principals; and
- (4) To use the inquiry's time to best advantage. Funded objections presented by counsel were more informed and effective and less time-consuming.⁹⁸

The Berger inquiry established five criteria for the granting of funding:

- (1) There had to be a clearly ascertainable interest that ought to be represented at the inquiry.
- (2) It should be clear that separate and adequate representation of that interest will make a necessary and substantial contribution to the inquiry.
- (3) Those seeking funds should have an established record of concern for and should have demonstrated their own commitment to the interests they seek to represent.
- (4) It should be shown that those seeking funds do not have sufficient financial resources to enable them adequately to represent the interests and will require funds to do so.
- (5) Those seeking funds should have a clear proposal as to the use they intend to make of the funds and should be sufficiently well organized to account for the funds.⁹⁹

Among its many distinctive features was the Commission's attempt to consolidate interest groups and avoid duplication of effort. Four umbrella organizations were recognized for funding purposes:

1. The Northern Assessment Group, which was a consortium of environmental organizations including The Canadian Arctic Resources Committee, The Canadian Nature Federation, The Federation of Ontario Naturalists, Pollution Probe and The Canadian Environmental Law Association;

2. Natives North of Sixty;

3. The Northwest Territories Association of Municipalities; and

4. The Northwest Territories Chamber of Commerce.¹⁰⁰

The Alaska Highway Pipeline Inquiry, which followed closely on the heels of the Mackenzie Valley Inquiry, pursued a similar

⁹⁸ R. Longworth, *Financial Aid for Intervenor at Public Inquiries: The Canadian Experience and its Relevance to England and Wales* (Monograph, July 1979), p. II 2.

⁹⁹ *Budget of the Inquiry, Funding of Intervenor*, Ian G. Waddell, Special Counsel (Yellowknife, March 31st, 1976), p. 2.

¹⁰⁰ *Ibid.* For figures as to sums allocated to these groups see "Contributions to Intervenor", an appendix to Mr. Waddell's memorandum.

course with respect to funding. In his final report, Chairman Lysyk made two recommendations that are noteworthy in this context. Firstly, he recommended that funding for participation in the ongoing regulatory process that was to be carried on by the Northern Pipelines Agency should be provided on a community-by-community basis. "Separate funding tacitly acknowledges the differences in interests and attitudes that exist among the communities of the Yukon with respect to the Pipeline".¹⁰¹ Second, while recommending that the authority to decide on the eligibility of interest groups to receive funding must reside with the Agency, he recognized that "this responsibility, wherever it is placed, may lead to conflict and disagreement". We will return to these comments at a later stage in this article.

The Thompson Inquiry Into West Coast Oil Ports was appointed in March of 1977 and completed its work eleven months later. Its experience was instructive in two aspects of the funding process. Firstly, after receiving applications for funding from some thirty-six groups, Professor Thompson determined that additional criteria were necessary in order to divide the funds that were made available to him by the Federal Department of the Environment.¹⁰²

I have decided to follow two basic principles. The first principle must be that the funding should contribute so far as possible to a fair and effective conduct of the formal hearings. To this end, they should be concentrated on providing a sustained appearance with expert advice and witnesses by the main interest groups affected by the inquiry. This implies that groups be encouraged to form coalitions, as stated in the guidelines.

The second basic principle is that these main interest groups should be encouraged to demonstrate support for their positions before the inquiry by appealing for additional funds from their members and from the public at large. The issues of concern to environmentalists, fishermen and native people are enormously significant to all British Columbians, and therefore an appeal for donations should receive substantial response.

In this inquiry, problems were experienced with respect to umbrella funding. This inquiry, unlike the Berger and Lysyk Inquiries, was accessible to many groups, "all of whom felt best able to make their own case and quite unprepared to surrender this right to a hastily assembled coalition".¹⁰³

The Royal Commission on the North Environment, initially under the chairmanship of Mr. Justice Patrick Hartt and subsequently of Mr. E. Fahlgren, initiated the concept of an independent Funding Advisory Committee as a buffer between the Inquiry's staff and the

¹⁰¹ Lysyk, *Alaska Highway Pipeline Inquiry* (1977), p. 141.

¹⁰² Thompson, *Supplementary Report on Participation Funding, Kitimat Oil Port Inquiry*, June 22nd, 1977, p. 2.

¹⁰³ Longworth, *op. cit.*, footnote 98, p. II 11.

various public interest groups. One of five places on the Committee was reserved for a senior Inquiry staff member, the remainder being filled through nominations by representative interests.¹⁰⁴ This framework has been thought to work well and to have been accepted as independent and representative. One commentator, however, has concluded that the complexity of its structure and activity has effectively overshadowed the substantive work of the Commission; "the funding of participation seems to have become an end in itself at R.C.N.E.".¹⁰⁵ The funding guidelines were similar to those of the Northern resource inquiries.

Further refinement of the independent review concept was undertaken by the Cluff Lake Board of Inquiry under the chairmanship of Mr. Justice E. D. Bayda. On March 3rd, 1977, just days after the appointment of the Inquiry, a three-member review panel was created by Saskatchewan Environment Minister Neil E. Byers.¹⁰⁶ The Administration of this scheme was shared between the sponsoring government department and the independent panel; the Inquiry itself was simply the recipient of the results. In this final report, the Board gave wholehearted approval to the concept of a financial assistance programme and, contrary to the experience of the Thompson Inquiry, concluded that the grouping of interests under a "lead" group worked well.¹⁰⁷ The Inquiry's funding criteria were expressly stated to be "adapted from the Berger Inquiry".¹⁰⁸

III. Available Alternatives and Proposals for Change.

The experience of recent Canadian Commissions of Inquiry is particularly instructive in terms of the contrast which they provide with the ongoing work of courts and administrative tribunals. It is ironic, although perhaps not surprising in view of the present climate of fiscal restraint, that it is only in these *ad hoc* situations that full recognition has been given to the desirability of participation and the benefits that accrue from it which were considered earlier in this chapter. Clearly, there are functional and structural differences between the different forums, some of which have been pointed out in the earlier discussion; nevertheless, it is clear that only in the area of

¹⁰⁴ Funding Programme, November 15, 1978 — March 31, 1979, Royal Commission on the Northern Environment.

¹⁰⁵ Longworth, *op. cit.*, footnote 98, p. II 17.

¹⁰⁶ Media release, Environment Saskatchewan, Review Panel for Cluff Lake Inquiry Financial Assistance Programme, p. 1.

¹⁰⁷ Longworth, *op. cit.*, footnote 98, p. II 19.

¹⁰⁸ Financial Assistance Programme for Saskatchewan Public Interest Groups Participating in the Cluff Lake Board of Inquiry, Feb. 4th, 1977, p. 2. Similar criteria have been adopted by the on-again off-again British Columbia Royal Commission Inquiry Into Uranium Mining. See its Public Notice: Participant Funding, March, 1979.

commissions of inquiry, and to a lesser extent in that of administrative tribunals, can it be said that significant progress has been made in the direction of increased public participation. When we come to examine the possibilities for reform in these areas, we will investigate the extent to which it is appropriate to import the experiences of these commissions. Before beginning that investigation, we will briefly consider the American experience in the area of public participation in courts and administrative tribunals.

1. *The United States Position.*

In the United States, the general rule in both courtroom and administrative litigation is that each party bears his own costs notwithstanding the outcome of the proceedings. American tribunals generally lack the power to order a losing party to pay the attorney's fees and disbursements of the winner.¹⁰⁹ Accordingly, the Anglo-Canadian fault principle as to costs is not followed in the United States.

The rationale for the American rule is that it removes the disincentive that a party might otherwise have as a result of his fear of cost liability in the event of failure. However, this same rule also ensures that if successful, he cannot recover all or part of his own attorney's fees from his opponent.

In actions for monetary relief, the American party and party rule must be considered in conjunction with the availability of contingent fee arrangements as between attorneys and their clients. Under these arrangements, a solicitor may stipulate with his plaintiff client in advance that if the action is successful, he will receive a share of the recovery or a multiple of his normal fee, and if it is unsuccessful, he will receive no compensation by way of fees and disbursements. Agreements of this sort are common in the United States, but are prohibited by the legislation in most Canadian provinces.¹¹⁰ For present purposes, however, such agreements are largely inapplicable, since the incentive which they present to potential plaintiff lawyers lies principally in cases with potentially large monetary recoveries. Litigation for the protection of environment seldom falls into this category.

It will be clear that the American no-way, contingent fee rule can impose a significant disincentive to litigation where the claim is not fee-generating in nature. Partly as a response to this difficulty,

¹⁰⁹ Ehrenzweig, *Shall Counsel Fees be Allowed* (1951), 26 Cal. St. Bar J. 107; C. Wright & A. Miller, *Federal Practice and Procedure* (1972), Vol. 10, ss 2665-2679.

¹¹⁰ *Acquiring Interest in Litigation; the Role of the Contingent Fee* (1965), 54 Kentucky L.J. 152. The Ontario prohibition is contained in s. 30 of the Solicitors' Act, R.S.O., 1970, c. 441.

American courts have traditionally exercised equitable jurisdiction in awarding attorney's fees in three instances. Firstly, an award may be made where it can be shown that a "losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons'".¹¹¹ Second, an award may be made where a litigant has protected a right or interest shared with a class of beneficiaries; in other words, he has created a "common fund" or "common benefit".¹¹²

Prior to 1975, the United States federal courts fashioned a third category for enlarging the "common benefit" exception to provide for the recovery of attorney's fees where a "statutory common fund" had been created; that is, where it could be shown that the plaintiff had conferred a benefit upon the public at large by acting as a "private attorney general to protect 'important statutory rights of all citizens'".¹¹³ Some statutes clearly were intended to be enforced by private actions; thus it seemed only equitable to provide attorney's fees to one who was, by necessity, assuming the law enforcement responsibilities of the government.¹¹⁴ The need for an economic incentive in these circumstances was made explicit in an early District Court opinion:¹¹⁵

Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to guard the guardians.

However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many public interest cases only injunctive relief is sought, and the average attorney or litigant must hesitate . . . with no prospect of financial compensation for the efforts and expenses rendered. The expenses in litigation in such a case poses a formidable, if not insurmountable, obstacle.

Severe curtailment of the contributions made toward sound agency and court decisions through citizen lawsuits resulted from the United States Supreme Court's 1975 decision in *Alyeska Pipelines Service Co. v. Wilderness Society*.¹¹⁶ That case held that the successful environmental plaintiffs in litigation surrounding the construction of the Alaska Oil Pipeline were not entitled to an award of attorney's fees against the oil company consortium. The court held that the

¹¹¹ *F.D. Rich Co. v. Industrial Lumber Co.* (1974), 417 U.S. 115, at p. 129; *Vaughan v. Atkinson* (1962), 369 U.S. 527 at pp. 530-531.

¹¹² *Mills v. Electric Auto-Lite Co.* (1970), 396 U.S. 375, at pp. 391-397 (stockholder's suit benefitted company and other stockholders); *Trustees v. Greenough* (1882), 105 U.S. 527, at pp. 532-537.

¹¹³ *Wilderness Society v. Morton* (1974), 495 F. (2d) 1026, at p. 1032 (D.C. Cir., en banc).

¹¹⁴ Dougherty. After *Alyeska*: Will Public Interest Litigation Survive? (1976), 16 Santa Clara L. Rev. 267; at p. 295.

¹¹⁵ *La Raza Unida v. Volpe* (1972), 57 F.R.D. 94, at pp. 100-101 (N.D. Cal.).

¹¹⁶ (1975), 95 S. Ct. 1612, 421 U.S. 240.

formulation of exceptions to the traditional American no-cost rule was a matter for the Congress and not the courts. The *Alyeska* decision has clearly had a restraining effect on judicial encouragement of public interest litigation through cost awards.¹¹⁷

Two other consequences of the *Alyeska* decision can readily be identified. Firstly, Congress responded to the Supreme Court's challenge by enacting the Civil Rights Attorney's Fees Awards Act of 1976,¹¹⁸ which permits the use of the "private attorney general" theory where the plaintiff is the prevailing party.¹¹⁹ Second, the impact of *Alyeska* extended beyond court actions to agency proceedings as well.

The issue of compensation of impecunious intervenors before administrative tribunals proceed along a somewhat different course, in part due to obvious functional differences between courts and tribunals. In the so-called *Greene County* litigation,¹²⁰ the Second Circuit twice ruled that the Federal Power Commission lacked statutory authority to award attorney's fees. And in *Turner v. F.C.C.*, the D.C. Circuit ruled in *obiter*.¹²¹

The reasoning of the Supreme Court in *Alyeska* . . . is fully applicable to litigation before the F.C.C. Congress has no more extended a roving commission to the F.C.C. than it has to the judiciary to allow counsel fees as costs or otherwise whenever the [Commission] might deem them warranted.

The rejection of the "private attorney general" rationale in *Green County* and *Turner* effectively foreclosed the practice of involuntary fee-shifting between applicants and intervenors before administrative tribunals. The remaining two judicial theories of cost awards have little relevance to the administrative situation.¹²² Two other theories have been advanced at the administrative level. Firstly, it has been argued that since the typical applicant "in an administra-

¹¹⁷ Mogel, *op. cit.*, footnote 5, at p. 275; "United States Supreme Court Stops Trend Towards Awards of Attorneys' Fees in Pipeline Case (1976), 4 C.E.L.N. 174, at p. 175; Dougherty, *op. cit.*, footnote 114, at p. 295.

¹¹⁸ (1976), 42 U.S.C.A. par. 1988.

¹¹⁹ The same result has been reached for both plaintiffs and defendants through judicial construction of existing statutes. See *Newman v. Piggie Park Enterprises Inc.* (1968), 390 U.S. 400, 88 S. Ct. 964; *Christianbur Garment Co. v. E.E.O.C.* (1978), 98 S. Ct. 694.

¹²⁰ *Greene County Planning Board v. F.P.C.* (1976), 559 F. (2d) 1227 (2nd Cir.), cert. denied (1978), 98 S. Ct. 1280; *Greene County Planning Board v. F.P.C.* (1975), 528 F. (2d) 38 (2nd Cir.); *Greene County Planning Board v. F.P.C.* (1973), 490 F. (2d) 256 (2nd Cir.); *Greene County Planning Board v. F.P.C.* (1972), 445 F. (2d) 412 (2nd Cir.) cert. denied (1972), 409 U.S. 849.

¹²¹ (1975), 514 F. (2d) 1354.

¹²² Few administrative proceedings result in the creation or protection of an equitable fund; and seldom will any party be likely to have unreasonably imposed unnecessary litigation upon another.

tive proceeding is seeking a governmental privilege, it should be required to support as a cost of doing business the participation of indigent critics that the agency feels are necessary to bear". Second, a "deep pocket" approach can be used where the fee payor is in a position to spread the costs among the class of persons benefitted by the intervenor's action.

Attention has instead been shifted to agency or governmental funding as a response to the *Alveska* challenge. There are approximately seventy federal statutes that provide for the award of attorney's fees; furthermore, there has been a recent trend for agencies to exercise their inherent statutory authority to reimburse impecunious participants in proceedings before them.¹²³ Section 202 of the Federal Trade Commission Improvement Act of 1975 is typical of the explicit statutory provisions in its mandate to provide compensation to eligible persons for reasonable attorney's fees, expert witnesses' fees and other costs of participation. Compensation may be provided to any person:¹²⁴

- (a) who has, or represents an interest
 - (i) which would not otherwise be adequately represented in such proceeding; and
 - (ii) representation of which is necessary for a fair determination of the rule making proceeding as a whole, and
- (b) is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations conducting cross-examination, and making rebuttal submissions in such proceedings.

In recent years Senator Edward M. Kennedy has twice introduced legislation that would amend the Administrative Procedure Act¹²⁵ to permit awards of reasonable attorney's fees and other costs participation in all federal agency rule making, rate making, licensing and other adjudicatory proceedings "involving issues which relate directly to health, safety, civil rights, the environment and the economic well-being of consumers in the marketplace".¹²⁶ In addition, the Bill provided for the awarding of attorney's fees and other enumerated expenses in federal judicial proceedings reviewing administrative agencies' orders.¹²⁷ It provided that the court could grant the award if the initiation and prosecution of such actions served an important public interest and if the court afforded the litigant a

¹²³ Hughes, *Inducement of Public Participation in Administrative Proceedings Through the Award of Attorneys' Fees* (1978), 30 Baylor L. Rev. 785, at p. 787.

¹²⁴ Publ. L. No. 93-637, 88 Stat. 2183, s. 202. For a recent progress report on this legislation see C.A.C. Manual, *op. cit.*, footnote 29, at pp. 21-24.

¹²⁵ (1976), 5 U.S.C. par. 500-576.

¹²⁶ S. 270, 95th Cong., 2nd Sess., s. 2(a); see also S.2715, 94th Cong., 1st Sess.

¹²⁷ *Ibid.*, s. 3(a).

substantial measure of the relief sought. Neither of these Bills became law.¹²⁸

2. *Proposals for Canada.*

In this section we will describe and evaluate several alternative cost systems in terms of their ability to alleviate the severe economic barriers to litigation that face environmental public interest groups.

A. *Office of the Environmental Advocate.*

One method of ensuring that a great range of interests is represented before environmental agencies would be to establish public advocacy offices either within each agency or as autonomous bodies. These offices would consider the various interests and viewpoints that would not otherwise be represented and would select certain ones to advocate before the agency.

The first alternative, intra-agency advocacy, could itself operate in either of two ways. Under one approach the advocacy office would have no clients of its own; rather, it would be charged with identifying interests that ought to be considered with constructing arguments on their behalf. This model, however, does not differ materially from the activity that is presently carried on by internal agency staff. "If agency staffs are presently incapable of formulating alternatives for the agency, there is little reason to believe that intra-agency advocacy offices would be able to discharge this responsibility any more effectively."¹²⁹

Intra-agency advocacy could also operate on the model of a legal aid office within each agency. Lawyers within the advocacy office would respond to the concerns of individual clients in much the same way as duty counsel conduct themselves in criminal courts.

A second possibility would be to establish an independent environmental advocacy agency which would autonomously select interests for representation in various tribunal proceedings and then serve as an advocate of those interests. Like the first model of intra-agency advocate, this office of public counsel would not have individual "clients", and would therefore be free to develop consistent policies on environmental issues.

Each of these proposals has ample precedents in American practice. Several states and the District of Columbia have single

¹²⁸ See also H.R. 3361, the counterpart of S. 270, and H.R. 12088, which would permit plaintiffs who prevailed in suits against the United States to recover their counsel fees, while prevailing defendants sued by the United States could recover their fees only if they could show that the government's action was brought without foundation.

¹²⁹ Note, *op. cit.*, footnote 40, at p. 1820.

purpose public counsel offices, all of them operating in utilities regulation. Other states have multi-purpose public advocates who represent the public interest in a broad range of matters before a number of administrative bodies.¹³⁰

Nevertheless, there are significant difficulties with the public advocacy concept. Firstly, there is the problem of locating the office of public counsel in the administrative hierarchy so as to maintain its financial and structural independence from the courts and tribunals before which it must appear.¹³¹ Theoretically an in-house counsel can develop a good working relationship with the decision-maker which would minimize the friction that often results from the mutual mistrust of tribunal and public interest intervenor. Yet in some circumstances it may be difficult to insulate the appointed counsel from agency pressure, since the agency would be the source of his salary and promotion. This concern was alleviated by the New Jersey Department of the Public Advocate, which gains great strength from the fact that the Public Advocate is also a member of the Governor's Cabinet. This position maximizes the opportunity for publicity and allows the Department to establish its own identity as a unique agency within the state bureaucracy.¹³²

A greater concern lies in the prospects of the environmental advocate fulfilling its role of representing a wide range of public interests. Unless it is to embody a large number of lawyers asserting different and often contradictory positions, any agency of this type must engage in the selection of one public interest viewpoint over another. The appearance that this creates can be particularly unseemly for the intra-agency advocate, since it raises anew the spectre of agency refusal to represent unorthodox points of view or groups that are small in numbers.¹³³

Perhaps the most significant objection, and one which applies equally to courtroom and board advocacy by environmental groups, is that any delegation of advocacy function to a state agency necessarily involves the loss of the right of intervenors to speak for themselves. This element of access to justice was shown earlier in this chapter to lie at the core of the need for liberalized cost provisions. Thus, an office of public counsel, while it would extend to some degree the number of interests effectively represented before courts and adminis-

¹³⁰ Schraub, *The Office of Public Counsel: Institutionalizing Public Interest Representation in State Government* (1976), 64 *Georgetown L.J.* 895, at p. 897.

¹³¹ Note, *op. cit.*, footnote 40, at p. 1820.

¹³² Schraub, *op. cit.*, footnote 130, at p. 900-901.

¹³³ Lazarus and Onek, *op. cit.*, footnote 2, at p. 1103.

trative agencies, cannot provide a comprehensive solution to the problem.¹³⁴

*B. Shifting of the Cost Burden from
Private Citizens and Intervenors.*

Brief consideration will be given here to four models which attempt to remove the cost impediments facing environmental groups: cost immunity; a one-way cost rule; public funding; and income tax deductibility.

Proposals for cost immunity, while they find respectable precedent in traditional American practice, have little utility in the environmental context. At the environmental tribunal level, significant barriers to participation exist in spite of the prevalent no-way cost rule. In courtroom litigation, a system in which each party pays his own legal costs and disbursements is "an empty choice for the public interest litigant".¹³⁵ Except in actions for substantial monetary relief, the sole effect of the American rule is to reduce the total potential cost liability while fixing the certain cost liability at a high and often unaffordable level.

Canadian support for a one-way cost rule in public interest litigation traces its origins to the persuasive argument of Mr. Justice Osler which was quoted earlier in this article.¹³⁶ In his submission, an onus should be cast upon a successful opponent in "any such proceedings" to show that no public issue of importance was involved or that the proceedings were brought in a frivolous or vexious manner. This procedure would involve an *ex post facto* exercise of discretion by the decision-maker and would maintain an element of unpredictability for the public interest group throughout the litigation. Nevertheless, it can be seen from the earlier discussion that this model has found favour in a variety of administrative contexts and has been adopted infrequently in Canadian court cases.

We advance for consideration an alternative fee-shifting proposal which would involve an exercise of administrative or judicial discretion to institute a one-way cost rule at an early stage in the proceedings. Some time after initiating or intervening in proceedings, the public participants would have to apply for "certification" as a cost-exempt group in much the same way as plaintiff class representa-

¹³⁴ It is nevertheless noteworthy that the Ontario New Democratic Party has proposed the creation of a public advocate's office "to help the public take on corporations at rate hearings" and "to defend citizens in environmental hearings." Toronto Globe and Mail, March 21st, 1980.

¹³⁵ Castrilli & Swaigen, *The American or the Canadian Costs Rule? An Empty Choice for the Public Interest Litigant* (1975), 3 C.E.L.N. 175.

¹³⁶ See text accompanying footnote 82.

tives do under Rule 23 of The American Federal Rules of Civil Procedure. We would adopt as certification criteria the standards contained in the Federal Trade Commission Improvement Act quoted earlier; that is (1) the likelihood of adequate representation by the applicants; (2) the necessity of its participation for a fair determination of the questions before the tribunal; and (3) a showing of impecuniousness. Application would be made in a summary fashion and the material before the tribunal would go no further than affidavits and transcript of cross-examinations of their deponents. Further safeguards against the bringing of unmeritorious claims in this way could be afforded by a requirement that the solicitor for the public interest group personally certify his belief as to fulfillment of the prerequisites. A subsequent finding of non-fulfillment of these requirements could then result in an order of costs against the solicitor personally.

This system would have two distinct advantages. Firstly, it would clearly provide greater certainty to environmental groups and to their opponents that meritorious proceedings, and no others, could be carried on in this way. Second, by moving the cost award decision ahead to an early stage in the proceedings, the focus of costs in this context would be diverted from eventual success "in the result" to its proper place as a measure of the merits of public participation.

It is this last factor that minimizes the strength of the argument that many commentators put forward to differentiate between the appropriateness of fee-shifting at judicial and quasi-legislative proceedings. According to this argument, quasi-legislative or rule making hearings are held for the benefit of the public as a whole, and there are no distinct winners or losers amongst the participants whereas adjudicative proceedings produce winners and losers whose economic fate should follow the result. A different conclusion follows if we view public participation as beneficial not necessarily because it results in victory, but rather because it affords the decision-making advantages that we refer to earlier in this chapter. Industry participation is aided by a tax deduction for legal expenses which is not generally available to citizen intervenors; furthermore, costs of industry participation can be passed on to a citizen constituency that may approximate that which is represented by the environmental groups. Finally, the certification mechanism described above does not require the creation of a massive bureaucracy in addition to that which administers the affairs of the court or tribunal.

The principal objection to the system outlined above is the possibility of abuse, conscious or otherwise, where a decision-maker is given effective control over the nature of the representations that will be made before them. If the reward structure of public representatives makes them tend to be responsible to the desires of the agency

involved, the entire purpose of expanded public participation will be defeated. The theory of financing outside participation is that the agency itself does not automatically represent the entire public interest effectively in all cases. Agency domination or undue influence over intervenors would destroy the foundation of any such programme. The public interest movement could be corrupt if the main interest of citizen groups were to become the obtaining of grants by meeting the expressed or implied desires of the agency.

It is therefore imperative that a separate review body be entrusted with the task of cost certification under the proposed scheme, even if this must be done at the cost of some additional bureaucracy.

A third possible means of funding public participation by environmental groups themselves lies in subsidization by the Crown or by the particular commission or agency. Once we recognize that the benefits that emerge from public participation, especially in environmental assessment and protection cases, are directed at the public at large rather than really the parties to the litigation, it takes only a short step to conclude that the public should also bear the cost of financing these public participants. The mechanics of funding would once again revolve around a certification application to an independent funding agency, and the eligibility standards and safeguards suggested earlier would be applied here as well. There is, of course, nothing novel in this approach; it closely parallels that of several "environmental assessment" public inquiries in Canada during the 1970's. Their experience could be gainfully employed to decide in each case whether to grant funding to individual advocacy groups or only to umbrella organizations, depending, for example, on the location of the inquiry, the issues involved and the nature and structure of the particular groups.

It is clear that any attempt to implement this type of proposal on a scale that would apply it to a large number of tribunals and a heavy schedule of hearings would entail considerable expenditure of time and money in the organization and maintenance of an administrative structure that was capable of managing a public fund and regulating access to it. Several steps would be required in the case of each piece of litigation. An application for public funding would have to be made and processed; a judgment would have to be reached to the initial desirability and likely merit of the actions; the financial resources of the parties and the progress of the proceedings would have to be monitored by the funding agency; control would have to be exerted to some extent over the way in which the claim was being prosecuted and over the expenses being incurred at each step by the parties receiving assistance. We therefore propose that a single agency for the funding of environmental advocacy be created, and that discussion be initiated

with a view to expanding its scope to cover other areas of citizen participation such as consumer interventions.

Consideration would have to be given to guidelines governing the quantum of funding that would be awarded in each case. One American proposal directed the Nuclear Safety and Licensing Commission to establish in advance "a maximum amount to be allocated to each hearing or agency proceeding" and to apportion that amount among the parties seeking reimbursement. If this figure proved to be out of line with the actual costs of intervention, the agency could adjust it accordingly.¹³⁷

The effect of such a spending ceiling would be to alert potential intervenors to the size of the fund they must share and hence to deter groups with frivolous or harassing motives from pressing for "one more piece of a seemingly infinite pie".

The second form of ceiling would limit the total subsidy paid to each group in any one year. This device would, of course, encourage each group to conduct its litigation efficiently; furthermore, it would encourage groups to select carefully those proceedings in which they wished to participate.

Further refinements of these proposals are, of course, possible, and some of them have the benefit of precedents at the public inquiry level. Compensation, for example, can be limited to examination-in-chief and cross-examination on certain issues only, if these issues represented the areas of interest and expertise of the intervenor group. Alternatively, certification of the public interest group could be granted only on certain issues, with leave being given to the applicant to participate in other phases of the hearing, but to receive compensation for that participation only in a retrospective fashion, depending upon the manner in which it conducted itself. Finally, some groups may be capable of partial funding of their participation on their own. In these cases, if the decision making process would benefit from full participation, the funding agency could properly provide such groups with partial subsidization.¹³⁸

Finally, there are those who "argue that tax policy may provide the best vehicle for redressing the under-representation of certain interests in the regulatory and political decision-making processes".¹³⁹

In his seminal 1972 article, Professor Gellhorn listed "encouraging *pro bono publico* work by the bar" as the first of five possible

¹³⁷ Note, *op. cit.*, footnote 40, at p. 1833.

¹³⁸ *Ibid.*, at pp. 1833-1834.

¹³⁹ Trebilcock *et al.*, *op. cit.*, footnote 35, p. 58.

approaches to providing representation of public interest groups,¹⁴⁰ and since then commentators have responded to the challenge by suggesting two alternative schemes. The first would allow professionals to take charitable deduction for the *pro bono* work they perform.¹⁴¹ On the present state of the law, it is doubtful that such a deduction could be taken. Section 110 (1) (a) of the federal Income Tax Act¹⁴² permits deductions for "gifts made by the taxpayer . . . to (i) registered charities". The American Internal Revenue Service interprets the equivalent section of its Code as restricting charitable deductions to donations of money, not services,¹⁴³ and if a contrary interpretation were accepted in Canada the effect would be to reduce taxable professional income below the level that would otherwise be reached if the lawyer received his fees and then donated them to the organization. (For in that situation, there would be an offsetting inclusion and deduction of the amount of those fees.) Another problem arises from the fact that not all clients with a public interest suit could qualify as charitable organizations; therefore an individual might be unable to participate unless he could find a qualified organization to pursue his action, and thus induce a firm looking for a charitable deduction to undertake litigation. Implementation of this proposal would therefore require an amendment to the definition of "registered charity" in section 110 (8) (c) to widen the common law meaning of "charitable organization" that is incorporated into that definition.

The second proposal involves an extension of the tax credit now available for political contributions under both levels of Canadian income tax legislation to contributions to other groups participating in public interest litigation.

For example, under both [federal and Ontario] Acts, 75% contributions to political parties up to \$100.00 constitute a tax credit. We would suggest . . . that a tax credit be extended to 75% of contributions, up to say \$20.00 per contributor (to insure broadly-based support), to interest groups, other than political parties, participating in the regulatory or political decision making processes. . . .

This approach has a number of attractions. First, the tax credit, while properly requiring some personal contribution from interest group members, offsets, at least crudely, the transaction cost and free rider problems that otherwise discourage interest group representation. Second, by forcing groups to compete to attract

¹⁴⁰ *Op. cit.*, footnote 1, at pp. 394-395.

¹⁴¹ Baird, *Charitable Deductions for Pro Bono Publico Professional Services: An Updated Carrot and Stick Approach* (1972), 50 *Tex. L. Rev.* 441.

¹⁴² R.S.C., 1952, c. 148, as am. by S.C., 1970-71-72, c. 63 and subsequent amendments.

¹⁴³ Dougherty, *op. cit.*, footnote 114, at p. 296. The Canadian Department of National Revenue takes a similar view, asserting in paragraph 1 of the Interpretation Bulletin 297 that the deduction permitted by section 110(1)(a) "generally does not include a gift of services".

and retain support (albeit subsidized), goals of constituency accountability are enhanced. Third, by avoiding direct institutional subsidization, both potentially treacherous political decisions and dangers of monolithic assumptions about the nature of interest are reduced. Fourth, by virtue of membership subsidization rather than institutional subsidization, representatives of interests will have an incentive to avoid extravagant, misdirected, or "nuisance" interventions and instead seek to maximize returns to their constituencies through cost-justified activities on their behalf. This will reduce the need for legislatures or agencies to formulate elaborate rules to constrain undisciplined interventions. Fifth, by extending to other representational interest groups present subsidization of contributions to political parties, we are belatedly acknowledging that much political decision-making is influenced not only by vote-support but also by various forms of non-vote support.¹⁴⁴

The use of income tax policy in this way has the additional advantage that the determination of eligibility by means of the "charitable organization" or "public interest group" criteria can be delegated to existing administrative structures. However, these officials are unlikely to possess the expertise in environmental or other public interest matters that would undoubtedly be developed by the independent funding agency that was proposed earlier. Nevertheless, these suggestions clearly merit further consideration, and the optimal funding structure would likely encompass a combination of these theories.

C. Streamlining of Environmental Litigation Processes.

Changes in institutional design were suggested earlier in this chapter as a means of reducing the workload of decision-makers and thus making room for more extensive interventions. Reform of this sort can also be used to reduce the substantial costs of litigation before courts, administrative tribunals and commissions of inquiry. Apart from lawyers' fees, Professor Gellhorn identified three aspects of the mechanics of litigation that constitute formidable barriers to public participation: multiple copy rules, high transcript charges, and expert assistance charges.¹⁴⁵

The requirement that parties file numerous copies of voluminous documents is aggravated by reliance, especially at the administrative agency level, on extensive written testimony. This reliance, of course, is itself a result of attempts to streamline administrative processes by obviating massive legal bills and transportation costs. Nevertheless, where even reasonable and necessary requirements for the filing of multiple copies constitute a hardship on the participants, tribunals should be generous in waiving these requirements. The same comment is applicable to court and tribunal charges for the preparation of transcripts for participants.

¹⁴⁴ Trebilcock *et al.*, *op. cit.*, footnote 35, at p. 58.

¹⁴⁵ *Op. cit.*, footnote 1, at pp 389-394.

The necessity for expert testimony presents different problems:

Obtaining the information and qualified assistance necessary to support substantive arguments is one of the most difficult and expensive aspects of public participation. File information is not identified or readily available. Qualified experts able to provide this information and to testify in a proceeding command large fees, which public groups are frequently unable to pay. Even when they can afford to pay, public groups find that experts are reluctant to testify against a commercial interest which might employ their services on a more frequent basis.¹⁴⁶

Experts who are employed by or are otherwise attached to agencies and commissions of inquiry must be made accessible to impecunious intervenors. Furthermore, file information in the hands of such tribunals can be made more accessible, both by technological improvement and by according rights of access to public participants.

Another area of possible institutional reform would be a reduction in formal adjudicative procedures in order to minimize time and legal costs.¹⁴⁷ This proposal, of course, would involve at least a partial reversion to the discredited premises of the "administrative ideal" through an emphasis on decision-making by disinterested experts. Furthermore, while it is difficult to make an assessment except on a tribunal-by-tribunal basis, it is difficult to foresee a willingness in this post-Proposition 13 era to provide tribunals with a budget large enough to obtain the necessary information itself.

It is hoped that close consideration will be given to the proposals suggested above and that implementation will result in an effective resolution of the problems of funding public participation in environmental decision making.

¹⁴⁶ *Ibid.*, at p. 393.

¹⁴⁷ Longworth, *op. cit.*, footnote 98, p. 11.