



## BRIEFING NOTE

### Key Elements of a Participant Funding Program for BC's *Environmental Assessment Act*

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#### Summary

Public participation is fundamental to the environmental assessment process – and to public access to procedural and substantive justice. It is imperative that public participation is made meaningful by the provision of participant funding assistance to inform dialogue, discussion and contribution to the environmental assessment. Adequate funding of participants will lead to better environmental assessments, and better government decisions. We advocate that BC provide for such a participant funding program through regulation, as is done in Manitoba.<sup>1</sup>

The Government of British Columbia has undertaken a revitalization of its environmental assessment regime to enhance public confidence, transparency and meaningful public participation, among other important objectives. Based on a review of scholarship and an analysis of existing participant funding programs, the British Columbia environmental assessment participant funding program should have the following characteristics:

1. The Participant Funding Program should be created through regulation.
2. Funding for BC's participant funding program should be sourced from both the provincial government and proponents.
3. Individuals, community groups and incorporated not-for-profit organizations with (1) an interest in the project or its impacts, or (2) information or knowledge which will contribute to the assessment, should be eligible for participant funding.
4. Participant funding should be available for all types of assessments; it should not be limited to major projects or panel reviews.

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<sup>1</sup> Significantly, Manitoba's *The Environment Act*, C.C.C.S.C. c E125 at s. 41(1)(bb)(v) enabled adoption of a participant funding program in regulation. Subsequently, the *Participant Assistance Regulation*, Reg. 125/91 established the Participant Assistance Program, which is administered in line with the *Guidelines for the Participant Assistance Program*.

Key Elements of a Participant Funding Program for BC's *Environmental Assessment Act*

5. Participant funding should be available for costs incurred throughout an environmental assessment, from the early engagement phase through to monitoring and management of compliance and enforcement.
6. The Environmental Assessment Office should provide sufficient participant funding to ensure that groups can participate in the environmental assessment of a large and complex proposed project at the same competency level as proponent and government.
7. The Environmental Assessment Office should establish an independent Participant Funding Program Committee to (1) develop the criteria for awards of funding – in line with the program's objectives, (2) review all applications and make decisions in light of the criteria, and (3) administer the program generally.
8. Funds should be made available early in the planning process.

## Key Elements of a Participant Funding Program for British Columbia's new *Environmental Assessment Act*

### *Context*

The Premier of British Columbia has directed the Minister of Environment and Climate Change Strategy to revitalize the province's environmental assessment (EA) process "to ensure the legal rights of First Nations are respected, and the public's expectation of a strong transparent process is met."<sup>2</sup> The new *Environmental Assessment Act*, which received Royal Assent in November 2018, will come into force by regulation of the Lieutenant Governor in Council.<sup>3</sup> In preparation, EA regulations are being developed to support the new statute.

The Government of British Columbia's EA revitalization is intended to result in changes that:

- a) enhance public confidence, transparency and meaningful participation;
- b) advance reconciliation with First Nations; and
- c) protect the environment while offering clear pathways to sustainable project approvals.<sup>4</sup>

This report outlines the importance of a robust public participation funding program to a new assessment regime, and recommends key characteristics of the proposed public participation funding program. The report

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<sup>2</sup> Mandate Letter, John Horgan – Premier, "Received by" Honourable George Heyman – Minister of Environment and Climate Change Strategy (2017 July 18) (Victoria, British Columbia), online: <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/heyman-mandate.pdf>.

<sup>3</sup> *Final Report of the Environmental Assessment Advisory Committee* (May 2, 2018) online: [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/revitalization\\_eaac\\_report.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/revitalization_eaac_report.pdf); Bill C 51 – 2018: *Environmental Assessment Act*, online: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/third-reading/gov51-3> [*Environmental Assessment Act*, 2018].

<sup>4</sup> British Columbia, *Environmental Assessment Revitalization Intentions Paper* at p. 11, online: [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea\\_revitalization\\_intentions\\_paper.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_intentions_paper.pdf) [*Intentions Paper*].

will draw from recommendations of the BC Environmental Assessment Advisory Committee, academic scholarship and lessons from participant funding programs in place in other jurisdictions throughout Canada.

### *Existing Environmental Assessment Participant Funding Programs*

Federal authorities and the province of Manitoba operate participant funding programs to offer funding for members of the public to participate in environmental assessments.<sup>5</sup> Similarly, regulatory bodies in Alberta and British Columbia operate participant assistance programs to offer funding to those who participate in energy, natural resource and utilities proceedings.

The move to formalize participant funding programs for environmental assessment regimes originated with the importance of intervenor funding in the hearing process of the Berger inquiry on the Mackenzie Valley Gas Pipeline Project,<sup>6</sup> which was cited by federal institutions in their support for adoption of formal procedures for intervenor funding at the federal level.<sup>7</sup>

In 1988, Environment Canada commissioned a report on the Federal Environmental Assessment and Review Process, which said that the federal government had a responsibility to ensure funds are available to public participants and to establish procedures for disbursement.<sup>8</sup> In 1990, a six-year program for funding federal participation in panel reviews was launched with Green Plan funding totaling \$8.5 million.<sup>9</sup> In 1992, the

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<sup>5</sup> A. John Sinclair & Alan P. Diduck, "Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions," in Hanna, K.S. (ed.) *Environmental Impact Assessment: Practice and Participation* (Toronto: Oxford University Press, 2016); A. John Sinclair & Alan P. Diduck, "Reconceptualising Public Participation in Environmental Assessment as EA Civics" (2017) *Environmental Impact Assessment Review* 62 174-182 at p. 177.

<sup>6</sup> Sarah Lynn & Peter Wathern, "Intervenor Funding in the Environmental Assessment Process in Canada," (1991) 5 *Project Appraisal* 3 169-173 at p. 169 [*Intervenor Funding in the Environmental Assessment Process in Canada*] citing D. J. Gamble 1987, "The Berger Inquiry: An Impact Assessment Process," (1978) 199 *Science* 946-952, W. R. D. Sewel, "How Canada Responded: The Berger Inquiry" in T. O'Riordan & W. R. D. Sewell (eds.) *Project Appraisal and Policy Review* (Chichester: Wiley, 1981) at p. 77-94 and Access Research Associates, *Beaufort Sea Environmental Assessment & Review Process Intervenor Funding Program Comparative Study Final Report* (Ottawa: Access Research Associates Inc., 1985). In its final report, the Environmental Assessment Panel reported that the funds made available to participants "...materially assisted the review, and [participant funding] enhanced the quality and substance of the interventions of Northern residents whose interests would have been most directly affected if the project were to go ahead." Report of the Environmental Assessment Panel, "Beaufort Sea Hydrocarbon Production and Transportation Proposal" (July 1984), online: [http://publications.gc.ca/collections/collection\\_2017/acee-ceaa/En105-30-1984-eng.pdf](http://publications.gc.ca/collections/collection_2017/acee-ceaa/En105-30-1984-eng.pdf) [*Beaufort Sea Hydrocarbon Production Proposal: Final Report of the EA Panel*].

<sup>7</sup> Lynn & Wathern, *Intervenor Funding in the Environmental Assessment Process in Canada*, *supra* note 6 at p. 171 citing *Beaufort Sea Hydrocarbon Production Proposal: Final Report of the EA Panel*, *supra* note 6, Nordcity Group Ltd. & Boreal Ecology Ltd, *Beaufort Sea Intervenor Funding Program Evaluation Final Report* (Ottawa: Nordcity Group Ltd., 1985), W. J. Couch, J. F. Herity and R. E. Munn, "EIA in Canada" in PADC EIA & Planning Unit (eds), *Environmental Impact Assessment* (The Hague: Nartinus Nijhoff, 1983). Note, at the ENGO level, the Canadian Environmental Law Association and Canadian Environmental Law Research Foundation were some of the first to formally call for funding of citizen participation in environmental hearings in Canada in the late 1970s.

<sup>8</sup> Federal Environmental Assessment and Review Office, *Public Review: Neither Judicial, nor Political, but an Essential Forum for the Future of the Environment* (Ministry of Supply and Services, Ottawa 1998) [*Public Review: Neither Judicial, nor Political, but an Essential Forum for the Future of the Environment*].

<sup>9</sup> Iler Campbell, "Intervenor Funding and Access to Environmental Justice: Time for the Ontario Political Parties to revisit this issue?" (August 2011) at p.5, online: [http://www.academia.edu/15578303/Intervenor\\_Funding\\_and\\_Access\\_to\\_Environmental\\_Justice\\_Time\\_for\\_the\\_Ontario\\_Political\\_Parties\\_to\\_revisit\\_this\\_issue\\_August\\_2011\\_](http://www.academia.edu/15578303/Intervenor_Funding_and_Access_to_Environmental_Justice_Time_for_the_Ontario_Political_Parties_to_revisit_this_issue_August_2011_) [*Intervenor Funding and Access to Environmental Justice*].

Key Elements of a Participant Funding Program for BC's *Environmental Assessment Act*

*Canadian Environmental Assessment Act* was enacted and a 1994 amendment enabled the establishment of a participant funding program “to facilitate the participation of the public in comprehensive studies, mediations and assessments by review panels...”<sup>10</sup> *Canadian Environmental Assessment Act, 2012 (CEAA 2012)* requires the Canadian Environmental Assessment Agency, National Energy Board and Canadian Nuclear Safety Commission to establish participant funding programs.<sup>11</sup> Note that if federal Bill C-69<sup>12</sup> passes into law, the *Impact Assessment Act* would require the new Impact Assessment Agency to establish a participant funding program to facilitate the participation of the public in impact assessments and allow the public to participate in a meaningful manner.<sup>13</sup>

From 1988 to 1996, Ontario had an *Intervenor Funding Project Act*, which permitted panels of the Environmental Assessment Board, the Ontario Energy Board and Joint Boards under the *Consolidated Hearings Act* to provide funding to public interest intervenors for such things as legal fees and expert witnesses.<sup>14</sup> 1996 amendments to Ontario's *Environmental Assessment Act* entrenched certain public participation requirements,<sup>15</sup> however the formal regime for providing public participation funding was not renewed. Some suggest that access to environmental justice has been seriously affected in the province due to this change.<sup>16</sup>

In BC, the *Utilities Commission Act* was amended in 1993 to allow the Utilities Commission to make orders related to costs associated with proceedings before the Utilities Commission.<sup>17</sup> The Commission makes such decisions according to participant funding guidelines, which it has adopted and amended through a series of orders over time.<sup>18</sup> Several regulatory bodies in Alberta with jurisdiction regarding natural resources and energy are enabled to provide for the costs of public participants in their various proceedings.<sup>19</sup>

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<sup>10</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 at s. 58(1.1).

<sup>11</sup> *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 at ss. 57&58(1); Rowland J. Harrison, Lars Olthafer, Katie Slipp, “Federal and Alberta Energy Project Regulation Reform – At What Cost Efficiency,” 51 *Alta. L. Rev.* 249 at p. 259.

<sup>12</sup> Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2018 at Part 1 – Impact Assessment Act [Bill C-69 – Impact Assessment Act].

<sup>13</sup> Bill C-69 – Impact Assessment Act, *supra* note 12 at cl. 75.

<sup>14</sup> Campbell, *Intervenor Funding and Access to Environmental Justice*, *supra* note 9 at p. 2 citing *Intervenor Funding Project Act*, R.S.O. 1990, c. 13 and *Consolidated Hearings Act*, R.S.O. 1990, c. C.29. For an explanation of the intervenor funding available for Ontario's environmental assessment process from 1988 to 1996, see Michael I. Jeffery, Q.C. “Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People back into the Picture,” (2002) 19 *Arizona Journal of International and Comparative Law* 2 643-677 at p. 661-675.

<sup>15</sup> Campbell, *Intervenor Funding and Access to Environmental Justice*, *supra* note 9 at p. 4 citing *Environmental Assessment Act*, R.S.O. 1990, c. E.18 amended by 1996, c. 27, s. 2.

<sup>16</sup> Campbell, *Intervenor Funding and Access to Environmental Justice*, *supra* note 9.

<sup>17</sup> *Utilities Commission Act*, R.S.B.C. 1996, c. 473 at s. 118 [*Utilities Commission Act*].

<sup>18</sup> Between 1993 and 2007, the Commission issued and amended its participant funding guidelines pursuant to section 118 of the *Utilities Commission Act* by Orders G-117-93, G-103-96, G-97-98, G-23-01, G-15-04 and G-72-07. *Utilities Commission Act*, *supra* note 17; British Columbia Utilities Commission Order Number G-143-16, “Participant Assistance/Cost Award Guidelines” at Appendix A, online: <https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/179994/index.do> [Participant Assistance/Cost Award Guidelines].

<sup>19</sup> *Alberta Utilities Commission Act* enables the Commission to make rules respecting the payment of costs to a local intervenor for participation in any hearing or other proceeding of the Commission. *Alberta Utilities Commission Act*, c. A-37.2 at s. 22(2). Recovery of costs in facilities proceedings are governed by Rule 009: *Rules on Local Intervener Costs*.

### ***Robust Public Participation Funding is Crucial for Strong Environmental Assessment***

Public participation is a foundational component of the environmental assessment process which generates knowledge and provides transparency and public involvement in decision making

The Government of British Columbia should be congratulated for recognising the importance of public participation in environmental assessments under the new *Environmental Assessment Act*.

In addition to increased opportunities for public participation in EAs under the new Act, a legislative purpose of the Environmental Assessment Office is to facilitate meaningful public participation throughout assessments.<sup>20</sup> As such, it is imperative that the opportunities for public participation are rendered meaningful by making available participant assistance to inform dialogue and discussion.<sup>21</sup>

The adoption of a participant funding program is consistent with scholars' recommendation that ample, stable and apolitical participant funding must be provided to help people and organizations process and analyse complex EA documentation with adequate expert and legal assistance -- so they may offer more informed input.<sup>22</sup> The following are some of the many benefits of participant funding in environmental assessment recognised by scholars:

- a) improved decision making;

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Alberta Utilities Commission, Rule 009: *Rules on Local Intervener Costs*, online:

<http://www.auc.ab.ca/Shared%20Documents/rules/Rule009.pdf>. Recovery of costs in rates proceedings is governed by Rule 022: *Rules on Costs in Utility Rate Proceedings*. Alberta Utilities Commission, Rule 022: *Rules on Costs in Utility Rate Proceedings*, online: <http://www.auc.ab.ca/Shared%20Documents/rules/Rule022.pdf>. Further, Directive 031: REDA Energy Cost Claims is intended to direct participants who wish to apply to the Alberta Energy Regulator (AER) for an advance of funds or an award of costs in relation to their participation in a proceeding. In addition, The *Natural Resources Conservation Board Act* makes provision for the individuals or groups of individuals who, in the opinion of the Natural Resources Conservation Board (NRCB), are or may be "directly affected" by a reviewable project to apply for intervener funding to assist their participation in the review process. *Natural Resources Conservation Board Act*, c N-3 at s. 11. The NRCB's *Intervenor Funding Process Guide* provides applicants and potential interveners with a summary of the process and procedures used in awarding intervener funding; the purpose of funding, who qualifies, how to submit a request for funding, how that request will be handled and the costs that are likely to be judged acceptable for reimbursement. Natural Resources Conservation Board, *Intervenor Funding Process Guide*, online:

<http://www.assembly.ab.ca/lao/library/egovdocs/2007/alnrc/173397.pdf>.

<sup>20</sup> Gavin Smith, "How Does British Columbia's Proposed New Environmental Assessment Act Measure Up?" online: <https://www.wcel.org/sites/default/files/publications/2018-11-bcea-howbill51measuresup.pdf> citing *Environmental Assessment Act, 2018*, *supra* note 3 at s. 2(2)(b)(i)(B).

<sup>21</sup> John Sinclair, *Achieving Meaningful Collaboration, Participation and Learning*, Presentation given in Vancouver, Canada (2017).

<sup>22</sup> Sinclair & Diduck, *Reconceptualising Public Participation in Environmental Assessment as EA Civics*, *supra* note 5 at p. 177 citing Canadian Environmental Network, *A Federal Environmental Assessment Process: The Core Elements* (Ottawa: Environmental Planning and Assessment Caucus, 1988); S. Lynn & P. Wathern, "Intervener Funding in the Environmental Assessment Process in Canada" (1991) 6 *Project Appraisal* 3 169-173; D. McRobert & P. Boutis, "Proposal for a new Ontario Participant and Intervenor Funding Act filed with Environmental Commissioner of Ontario" (2012) 22 *Environews* (Ontario Bar Association Environmental Law Section) 1 1-4; West Coast Environmental Law, Ecojustice, Environmental Law Centre – University of Victoria & Pacific Centre for Environmental Law and Litigation, "A Blueprint for Revitalizing Environmental Assessment in British Columbia," online: <https://www.wcel.org/sites/default/files/publications/2018-04-blueprintforrevitalizingeainbc-final-v2.pdf> citing Johanne Gélinas, Doug Horswill, Rod Northey and Renée Pelletier, "Building Common Ground: A New Vision for Impact Assessment in Canada - The Final Report of the Expert Panel for the Review of Environmental Assessment Processes" (2017) at p. 31, 40.

- b) increased process transparency;
- c) access to justice by financially challenged affected parties;
- d) enhanced public information (e.g. local citizens often bring critical new information and perspectives unavailable to government and industry);
- e) public acceptance of conclusions and decisions; and
- f) enhanced accountability of the decision-makers themselves.<sup>23</sup>

Participant funding improves decision-making associated with environmental assessments because funded individuals:

- a) identify and clarify the problems, interests, and alternatives that administrative officials must consider – and offer information and points of view that might otherwise have been unavailable;
- b) aid decision makers in analysing the input before them;
- c) facilitate expeditious, accurate, and equitable agency treatment of questions at issue; and
- d) contribute to more defensible conclusions.<sup>24</sup>

Participant funding programs are particularly important because they contribute to access to justice by financially challenged parties affected by the proposed project. Public participation funding is necessary to redress financial imbalance among parties and support full and effective public participation.<sup>25</sup> Because citizen participants, such as public interest groups or individuals, have comparatively few resources for participating in administrative decision-making, public participation funding is central to the citizen's right to participate.<sup>26</sup> Special attention must be given in EA law reform to enhance the capacity and funding necessary to "enable representation of important interests and considerations not otherwise effectively included (for example, disadvantaged populations, future generations, broader socio-ecological relations)."<sup>27</sup>

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<sup>23</sup> Alastair R. Lucas, "Canadian Participatory Rights in Energy Resource Development: The Bridges to Empowerment," 24 J. Land Resources & Envtl. L. 195 (2004) at p. 199 [*Canadian Participatory Rights in Energy Resource Development*] citing S. J. McWilliams, "Ontario's Intervenor Funding Project Act: The Experience of the Ontario Energy Board," 5 Can. J. Admin. L. & Prac. 203 (1992) [*Ontario's Intervenor Funding Project Act*]; Raj Anand & Ian Scott, "Financing Public Participation in Environmental Decision Making," 80 Can. Bar. Rev. 81 (1982) [*Financing Public Participation in Environmental Decision Making*]; J. Keeping, "Intervenor's Costs," 3 Can. J. Admin. L. & Prac. 81 (1989) [*Intervenor's Costs*]; Michael I. Jeffery, "Environmental Approvals in Canada," CH. 4 (1989) [*Environmental Approvals in Canada*].

<sup>24</sup> Carl Tobias, "Reviving Participant Compensation," 2 Conn. L. Rev. 505 (1990) at p. 511 [*Reviving Participant Compensation*].

<sup>25</sup> Lucas, *Canadian Participatory Rights in Energy Resource Development*, *supra* note 23 at p. 199 citing McWilliams, *Ontario's Intervenor Funding Project Act*, *supra* note 23; Anand & Scott, *Financing Public Participation in Environmental Decision Making*, *supra* note 23; Keeping, *Intervenor's Costs*, *supra* note 23; Jeffery, *Environmental Approvals in Canada*, *supra* note 23.

<sup>26</sup> Tobias, *Reviving Participant Compensation*, *supra* note 24 citing *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966) at p. 505.

<sup>27</sup> R. B. Gibson, M. Doelle, J. A. Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," 29 Journal of Environmental Law and Practice 251-276; Sinclair & Diduck, *Reconceptualising Public Participation in Environmental Assessment as EA Civics*, *supra* note 5 at p. 174.



## Characteristics of the Participant Funding Program

### *A. Regulation Addressing Participant Funding Program*

#### **Recommendation 1: The Participant Funding Program should be created through regulation.**

Establishing a participant funding program in law, through regulation, is a core element of levelling the playing field in environmental assessment, both to support the persistence of the program across successive governments, as well as to establish enforceable standards that ensure sufficient amounts of participant funding are consistently provided, according to a process that promotes public faith in the impartiality of funding decisions.

Canadian common law suggests that participant funding programs require explicit statutory authority.<sup>28</sup> It is clear that the new *Environmental Assessment Act* provides the Lieutenant Governor in Council authority to establish a participant funding program in regulation. The *Environmental Assessment Act* provides that the Lieutenant Governor in Council has regulatory power to establish “fees and charges to be paid in respect of any matter in relation to which a service is provided or a duty is performed under this Act, and prescribing by whom the fees and charges are to be paid.”<sup>29</sup>

Since public participation is a fundamental required component of the environmental assessment process which provides immense benefit to the process and outcome of the assessment, providing for public participation should properly be considered a service or duty performed under the *Environmental Assessment Act* which warrants the payment of fees and charges.

Furthermore, British Columbia's *Interpretation Act* says that if an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as enabling them, for the purpose of carrying out the enactment according to its intent, to “make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it”.<sup>30</sup> Regulations addressing public participation funding are clearly consistent with and ancillary to the *Environmental Assessment Act*, and for the reasons set out herein they ought to be considered necessary and advisable. As such, the

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<sup>28</sup> Lucas, *Canadian Participatory Rights in Energy Resource Development*, *supra* note 23 at p. 199 ; *Re: Ontario (Energy Board) (1985)*, 51 O.R. (2d) 333 (Div. Ct) at p. 337; *Ontario Workers' Compensation Appeals Tribunal Decision No. 288/901*, 1992 CarswellOnt 4981, [1992] O.W.C.A.T.D. no. 624; Of particular importance is the case *National Energy Board Act (Can.) (Re)*, where the Federal Court of Appeal said that the National Energy Board could not grant costs in connection with a public hearing, which it characterized as “intervenor funding,” because the *National Energy Board Act* did not refer explicitly to a power to grant costs characterized as intervenor funding and its authority “with respect to...other matters” could not be interpreted to include costs characterized as intervenor funding under the *ejusdem generis* rule. As such, the National Energy Board could not set up a Participant Funding Program until 2010, when the *National Energy Board Act* was amended to include an enabling provision. *National Energy Board Act (Can.) (Re)*, [1986] 3 FC 275, 1986 CanLII 4033 (FCA) at para 19-20; *National Energy Board Act*, R.S.C. 1970, c. N-6.

<sup>29</sup> *Environmental Assessment Act*, 2018, *supra* note 3 at s. 77(2)(b).

<sup>30</sup> *Interpretation Act*, RSBC 1996, c 238 s. 41(1)(a):

- (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to
  - (a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,

Lieutenant Governor in Council is properly enabled to make regulations addressing a participant funding program.

This recommendation is consistent with the only other provincial environmental assessment participant funding program: Manitoba's Participant Assistance Program. Manitoba's *Environment Act* enables adoption of a participant funding program in regulation.<sup>31</sup> Manitoba's Participant Assistance Program is set out in *Participant Assistance Regulation*, Reg. 125/91.

## *B. Funding Sources*

**Recommendation 2: Funding for BC's participant funding program should be sourced from both the provincial government and proponents.**

Academic literature, as well as the recommendations of BC's EA Advisory Committee, indicate that both government agencies and proponents should financially support the role of EA participants.<sup>32</sup> The British Columbia legislature also recognized this in providing for a Participant Assistance/Cost Award program under the *Utilities Commission Act*. That Act enables the BC Utilities Commission to order a participant in a proceeding to pay another participant's costs, or allows the Commission to pay all or part of a participant's costs itself where the Commission considers this to be in the public interest.<sup>33</sup> While we do not advocate a funding model identical to the BC Utilities Commission, the approach reflects the value of enabling participant funding to be made available from both government and proponent sources. We recommend that the participant funding program be sourced from the Province while also including legal tools to source funds from proponents.

## *C. Eligible Parties*

**Recommendation 3: Individuals, community groups and incorporated not-for-profit organizations with (1) an interest in the project or its impacts, or (2) information or knowledge which will contribute to the assessment, should be eligible for participant funding.**

Participant funding programs throughout Canada provide funding to individuals, community groups, incorporated not-for-profit organizations and Indigenous groups.<sup>34</sup> These programs generally reflect the

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<sup>31</sup> *Manitoba Environment Act*, C.C.S.M. c. E125 at s.13.2.

<sup>32</sup> Sinclair & Diduck, *Reconceptualising Public Participation in Environmental Assessment as EA Civics*, *supra* note 5 at p. 177-178; *Final Report of the Environmental Assessment Advisory Committee*, *supra* note 5 at p. 20.

<sup>33</sup> *Utilities Commission Act*, *supra* note 17 at s. 118(1)&(2).

<sup>34</sup> Canadian Environmental Assessment Agency, "Participant Funding Program: National Program Guidelines," at p. 4, online: <https://www.canada.ca/content/dam/ceaa-acee/documents/policy-guidance/participant-funding-program-national-program-guidelines/participant-funding-program-national-program-guidelines.pdf> [CEAA Participant Funding Program: National Program Guidelines]; National Energy Board, "Participant Funding Guide" (13 July 2017), online: <https://www.neb-one.gc.ca/prtcptn/hrng/pfp/prgrmgd-eng.html#s1> [NEB Participant Funding Guide]; Canadian Nuclear Safety Commission, "Participant Funding Program Guide," at p. 7, online: <http://nuclearsafety.gc.ca/eng/pdfs/participant-funding-program/CNSC-Participant-Funding-Guide-eng.pdf> [Canadian Nuclear Safety Commission Participant Funding Program Guide]; Crown-Indigenous Relations and Northern Affairs Canada, "Northern Participant Funding Program," online: <https://www.rcaanc-cirnac.gc.ca/eng/1545150205116/1547478360408> [Northern Participant Funding Program]; Manitoba Clean Environment Commission, "Guidelines for the Participant Assistance Program," at p. 1, online: [http://www.cecmanitoba.ca/resource/file/Participation%20Application%20Package\(2\).pdf](http://www.cecmanitoba.ca/resource/file/Participation%20Application%20Package(2).pdf) [Manitoba Guidelines for the



importance of providing such funding to enable individuals and groups to participate where they have an interest in the impacts and outcomes at stake, and in order to share their knowledge and expertise. We recommend a flexible and broad overarching approach to eligibility for participant funding in order to ensure that these objectives can be met. No participant in an EA should be prohibited from applying for participant funding by either regulation or policy. Below we offer more specific proposals about the process and guidance for decision-making on funding applications in particular assessments.

We understand that a separate funding regime will be established for “participating Indigenous nations,” as defined by the *Environmental Assessment Act*, in recognition of their jurisdiction and rights. The *Environmental Assessment Act* at s. 48 empowers the chief executive assessment officer to establish a tariff of costs to be paid by proponents to participating Indigenous nations to defray costs of participating in an assessment or subsequent inspections. This division of funding streams should not preclude Indigenous individuals, community groups and/or organizations that do not constitute “participating Indigenous nations” from applying for the participant funding program.

#### *D. Types of Assessments for Which Participant Funding is Available*

**Recommendation 4:** Participant funding should be available for all types of assessments; it should not be limited to major projects or panel reviews.

Participant funding should be available for all environmental assessment processes under the new *Environmental Assessment Act*. This includes project assessments, class assessments, strategic assessments and regional assessments – conducted by the Environmental Assessment Office or other assessment bodies. This is consistent with existing participant funding programs, which provide funding to those participating in a wide variety of assessment processes.<sup>35</sup>

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*Participant Assistance Program*]; Alberta Utilities Commission, “Funding for Participants,” online: <http://www.auc.ab.ca/Pages/funding-for-participants.aspx> [AUC *Funding for Participants*]; Alberta Energy Regulator, Directive 031: REDA Energy Cost Claims, online: <https://www.aer.ca/documents/directives/Directive031.pdf> at p. 12 [AER *REDA Energy Cost Claims*]; Alberta Energy Regulator *Rules of Practice, Alberta Regulation 99/2013* at section 58(1)(c), online: [http://www.qp.alberta.ca/documents/Regs/2013\\_099.pdf](http://www.qp.alberta.ca/documents/Regs/2013_099.pdf); Natural Resources Conservation Board, “Intervener Funding: Under the Natural Resources Conservation Board Act,” online: [https://nrcb.ca/Portals/1/Documents/Forms-guides/Intervener\\_Funding\\_fact\\_sheet.pdf](https://nrcb.ca/Portals/1/Documents/Forms-guides/Intervener_Funding_fact_sheet.pdf) [NRCB *Intervener Funding*]; NRCB, *Intervener Funding Process Guide*, *supra* note 19 at p. 4; *Participant Assistance/Cost Award Guidelines*, *supra* note 18 at s. 3.1.

<sup>35</sup> CEEA *Participant Funding Program: National Program Guidelines*, *supra* note 34 at p. 4; NEB *Participant Funding Guide*, *supra* note 34; Canadian Nuclear Safety Commission *Participant Funding Program Guide*, *supra* note 34 at p. 3; Northern *Participant Funding Program*, *supra* note 34; Manitoba *Guidelines for the Participant Assistance Program*, *supra* note 34 at p. 1-2; AUC *Funding for Participants*, *supra* note 34; Alberta Utilities Commission, “Review Process for Facility Projects,” online: <http://www.auc.ab.ca/Pages/review-process-steps.aspx>; Alberta Utilities Commission, “Review Process for Rate Applications,” online: <http://www.auc.ab.ca/Pages/rates-review-process.aspx>; AER *REDA Energy Cost Claims*, *supra* note 34 at p. 3; NRCB *Intervener Funding*, *supra* note 34 at p. 1; *Participant Assistance/Cost Award Guidelines*, *supra* note 18 at p. 3.

## *E. Costs Eligible*

Recommendation 5: Participant funding should be available for costs incurred throughout an environmental assessment, from the early engagement phase through to monitoring and management of compliance and enforcement.

Funding must be available for costs incurred from participating in the environmental assessment process from the early engagement phase<sup>36</sup> through monitoring and management of compliance and enforcement.<sup>37</sup>

Adequate participant funding is the *sine qua non* of meaningful public participation during the early engagement and planning phase of an environmental assessment.<sup>38</sup> Public groups may need independent technical advice on the characteristics of the project to identify key issues and ensure that the scoping process identifies all relevant issues.<sup>39</sup>

The following is a comprehensive list of the expenses eligible for funding associated with participant funding programs throughout Canada:

### 1. Professional Services:

- a) expert advice or assistance on environmental, technical or social issues relevant to the environmental assessment
  - i. can include costs associated with technical reviews of information, research, data collection, preparation of submissions and presentations
- b) legal advice or assistance directly related to the recipients' participation
  - i. can include costs associated with retention of experts and preparation of witnesses
- c) translation services
- d) Honoraria for Indigenous Elders, Knowledge Keepers and consultants

### 2. Reporting Costs:

- e) staff salaries of persons employed for the purpose of coordination, research and the preparation of materials, including secretarial services
- f) bookkeeping, accounting, reporting on deliverables specific to the project
- g) activities associated with preparing submissions for hearings, including Oral Traditional Evidence

### 3. Administrative Costs:

- h) office supplies
- i) photocopying, postage and stationary

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<sup>36</sup> *Final Report of the Environmental Assessment Advisory Committee*, *supra* note 3 at p. 20.

<sup>37</sup> *Ibid.*

<sup>38</sup> Richard D. Lindgren – CELA Counsel, "Submissions by the Canadian Environmental Law Association to the Government of Canada Regarding Consultation Paper on Information Requirement and Time Management Regulations," at p. 4, online: [https://s3.ca-central-1.amazonaws.com/ehq-production-canada/file\\_answers/files/6bd3d7f98f429a6ae594f17cc2597def08dee32e/010/438/438/original/CELA\\_Submissions\\_re\\_IA\\_A\\_info\\_timing\\_%28June\\_1\\_2018%29.pdf?1527883330&utm\\_campaign=website&utm\\_source=ehq&utm\\_medium=email](https://s3.ca-central-1.amazonaws.com/ehq-production-canada/file_answers/files/6bd3d7f98f429a6ae594f17cc2597def08dee32e/010/438/438/original/CELA_Submissions_re_IA_A_info_timing_%28June_1_2018%29.pdf?1527883330&utm_campaign=website&utm_source=ehq&utm_medium=email); *Final Report of the Environmental Assessment Advisory Committee*, *supra* note 3 at p. 20.

<sup>39</sup> Lynn & Wathern, *Intervenor Funding in the Environmental Assessment Process in Canada*, *supra* note 6 at p. 170.

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- j) telephone charges
- k) rental of office space and meeting rooms
- l) local collection and distribution of information
- m) the purchase of relevant information material such as maps, documents and reports for the purpose of information, presentation and analysis
- n) media advertising and promotion
- o) ceremonial items/offerings

## 4. Travel Expenses:

- p) travel kilometers or flights
- q) accommodation
- r) meals and other incidentals.<sup>40</sup>

Funding to enable participants to hire qualified experts is particularly important to achieving a balanced final decision in an environmental assessment. One of the biggest problems with environmental assessments has been that the evidence considered in the assessment is produced by the proponent and its consultants, leading to public skepticism about its reliability.<sup>41</sup> To ensure well-informed, trusted environmental assessments, proponent evidence must be peer-reviewed and objective analysis should be provided by other experts as appropriate. BC's participant funding program must support the role of EA participants in this process by enabling participants to hire experts, in a manner identified through early engagement and process planning.

*F. Amount of Funding Available*

**Recommendation 6:** The Environmental Assessment Office should provide sufficient participant funding to ensure that groups can participate in the environmental assessment of a large and complex proposed project at the same competency level as proponent and government.

Government should consider Participant Funding Programs that have provided adequate levels of support to assist in the environmental assessment of projects located in British Columbia.<sup>42</sup> For example, the National

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<sup>40</sup> CEAA Participant Funding Program: National Program Guidelines, *supra* note 34 at p. 5; NEB Participant Funding Guide, *supra* note 34; Canadian Nuclear Safety Commission Participant Funding Program Guide, *supra* note 34 at p. 3; Northern Participant Funding Program, *supra* note 34; Manitoba Guidelines for the Participant Assistance Program, *supra* note 34 at p. 2; AUC Funding for Participants, *supra* note 34; [AER REDA Energy Cost Claims, supra note 34 at p. 8](#); NRCB Intervener Funding, *supra* note 34; NRCB, Intervener Funding Process Guide, *supra* note 19 at p. 13; Participant Assistance/Cost Award Guidelines, *supra* note 18.

<sup>41</sup> The Environmental Assessment Advisory Committee recognised this issue in its final report:

Information begins with the early identification of proponent intentions, assessment of potential negative and positive benefits across the five pillars and upon whom they may fall. It continues with the detailed investigations of baseline conditions, changes expected as a result of project activity, the means of accentuating positive impacts and mitigating negative ones and the analyses and interpretations that are made to reject a project, modify it, approve it, set conditions, and monitor it if it proceeds. In all these stages participant acceptance of the veracity of the information matters and is sensitive to who provides it, who pays for it and who verifies its accuracy and relevance.

*Final Report of the Environmental Assessment Advisory Committee, supra* note 3 at p. 9.

<sup>42</sup> CEAA Participant Funding Program: National Program Guidelines, *supra* note 34 at p. 3; NEB Participant Funding Guide, *supra* note 34; Participant Assistance/Cost Award Guidelines, *supra* note 18.

Energy Board's reconsideration of the Trans Mountain Expansion Project provided for eligible groups to receive up to \$80,000, and individuals up to \$12,000.<sup>43</sup> In addition, the Canadian Environmental Assessment Agency allocated a total of \$192,100 to 10 organizations to assist in their participation in the assessment of proposed changes to Woodfibre LNG Project; individual allocations ranged from \$15,000 to \$57,000.<sup>44</sup> Participant Assistance/Cost Awards from the British Columbia Utilities Commission (BCUC) are also informative. In a recent decision, the BCUC awarded a group \$132, 238.05 to support their participation in the BCUC's review of Fortis BC Inc.'s 2017 Cost of Service Analysis and Rate Design Application.<sup>45</sup>

Funding should be scaled to the complexity and size of the proposed project.<sup>46</sup> In order for the public to meaningfully participate in an EA hearing at the same level as the proponent, there should be funds available for them to have access to the same type of information and expertise when preparing their submissions.<sup>47</sup>

Funding should be adequate to ensure that:

- a) EA participants are able to fully contribute their local/special knowledge and expertise to the EA;
- b) EA participants have access to the necessary information and expertise to meaningfully participate in the EA;
- c) EA participants have the opportunity to be as well-informed about the project and its potential impacts as the proponent;
- d) EA participants are empowered to identify gaps or shortcomings regarding the assessment information base that could be strengthened to improve the assessment; and
- e) funding is sufficient for the size and scale of the project, in proportion to potential impacts, complexity, and financial resources likely to be spent by the proponent on the assessment.

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<sup>43</sup> National Energy Board, File OF-Fac-Oil-T260-2013-03 59 (26 September 2018) Trans Mountain Pipeline ULC (Trans Mountain) Application for the Trans Mountain Expansion Project (Project) – National Energy Board (Board) reconsideration of aspects of its Recommendation Report (Report) as directed by Order in Council (OIC) P.C. 2018-1177 MH-052-2018 – Application to Participate process; and comment process on the draft List of Issues, the draft Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canadian Environmental Assessment Act, 2012*, and the design of the hearing process [NEB, *Trans Mountain Expansion Project Reconsideration, Application to Participate Process*].

<sup>44</sup> Canadian Environmental Assessment Agency, "Public Notice: Woodfibre LNG Project – Additional Participant Funding Allocated," online: <https://ceaa-acee.gc.ca/050/evaluations/document/125081?culture=en-CA>.

<sup>45</sup> BCUC, "FortisBC Inc. 2017 Cost of Service Analysis and Rate Design Application – Participant Assistance/Cost Award Application – Final Order with Reasons," online: <https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/400478/index.do?q=Participant+Assistance+Cost+Award+Final+Order+%26+2019>.

<sup>46</sup> *Final Report of the Environmental Assessment Advisory Committee*, *supra* note 3 at p. 20.

<sup>47</sup> Lynn & Wathern, *Intervenor Funding in the Environmental Assessment Process in Canada*, *supra* note 6 at p. 171.

### *G. Decision-Making Process*

Recommendation 7: The Environmental Assessment Office should establish an independent Participant Funding Program Committee to (1) develop the criteria for awards of funding – in line with the program's objectives, (2) review all applications and make decisions in light of the criteria, and (3) administer the program generally.

Academic literature on EA affirms it is good practice that an independent funding committee be established to act as arbitrators through the development of criteria for allocating funding, and administration of participant funding programs.<sup>48</sup> In the federal context, a specific funding review committee provides a funding recommendation to the responsible authority and then the responsible authority makes the final determination.<sup>49</sup> The responsible authority or funding review committee reviews applications in line with its eligibility criteria and makes a determination on whether funding will be provided to the applicant, and communicates the decision to the applicant.

### *H. Timing*

Recommendation 8: Funds should be made available early in the planning process.

Timing is an important consideration in the distribution of participant funding. Existing participant funding programs allow for advance, interim or final payments.<sup>50</sup> Scholars affirm that resources must be made available early in the EA planning process if they are to be effective in encouraging and enabling public participation.<sup>51</sup> Participants need funds early in order to play a meaningful role in early engagement and process planning, which set the stage for how an assessment will unfold.

## Conclusion

The following are recommendations for British Columbia's participant funding program for the new *Environmental Assessment Act*:

1. The Participant Funding Program should be created through regulation.
2. Funding for BC's participant funding program should be sourced from both the provincial government and proponents.

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<sup>48</sup> Lynn & Wathern, *Intervenor Funding in the Environmental Assessment Process in Canada*, *supra* note 6 at p. 170&172 citing *Public Review: Neither Judicial, nor Political, but an Essential Forum for the Future of the Environment*, *supra* note 8; *Final Report of the Environmental Assessment Advisory Committee*, *supra* note 3 at p. 20.

<sup>49</sup> CEAA Participant Funding Program: National Program Guidelines, *supra* note 34 at p. 9; Canadian Nuclear Safety Commission Participant Funding Program Guide, *supra* note 34 at p. 13.

<sup>50</sup> CEAA Participant Funding Program: National Program Guidelines, *supra* note 34 at p. 8; NEB Participant Funding Guide, *supra* note 34; Canadian Nuclear Safety Commission Participant Funding Program Guide, *supra* note 34 at p. 18; Manitoba Guidelines for the Participant Assistance Program, *supra* note 34; AUC Funding for Participants, *supra* note 34; [AER REDA Energy Cost Claims](#), *supra* note 34 at p. 3-4; NRCB Intervenor Funding Process Guide, *supra* note 34 at p. 7; Participant Assistance/Cost Award Guidelines, *supra* note 18.

<sup>51</sup> Lynn & Wathern, *Intervenor Funding in the Environmental Assessment Process in Canada*, *supra* note 6 at p. 170.

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3. Individuals, community groups and incorporated not-for-profit organizations with (1) an interest in the project or its impacts, or (2) information or knowledge which will contribute to the assessment, should be eligible for participant funding.
4. Participant funding should be available for all types of assessments; it should not be limited to major projects or panel reviews.
5. Participant funding should be available for costs incurred throughout an environmental assessment, from the early engagement phase through to monitoring and management of compliance and enforcement.
6. The Environmental Assessment Office should provide sufficient participant funding to ensure that groups can participate in the environmental assessment of a large and complex proposed project at the same competency level as proponent and government.
7. The Environmental Assessment Office should establish an independent Participant Funding Program Committee to (1) develop the criteria for awards of funding – in line with the program's objectives, (2) review all applications and make decisions in light of the criteria, and (3) administer the program generally.
8. Funds should be made available early in the planning process.