



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

February 28, 2007

By Fax (416) 326-7351

Kevin Whitaker, Agency Cluster Facilitator
Agency Cluster Project
M1-52 Macdonald Block
900 Bay Street
Toronto, ON M7A 1N3

**Re: "Interim Report of the Agency Cluster Facilitator
for the Municipal, Environment and Land Planning Tribunals"
January 31, 2007**

Dear Mr. Whitaker:

The purpose of these comments from the Canadian Environmental Law Association (CELA) is to provide feedback on your interim report, "Interim Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals" (the Interim Report).

PART I - BACKGROUND:

CELA is a non-profit organization founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizen's groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. CELA also undertakes public education, community organization, and law reform activities.

CELA lawyers and articling students regularly represent clients in hearings before the ERT and the OMB. In addition to representation at hearings, CELA provides on-going summary advice to numerous individuals and citizens' groups who represent themselves before those tribunals. CELA also provides information on the tribunals' practices and procedures. CELA is pleased to provide comments on the Interim Report, as part of its ongoing participation in reform efforts and measures designed to improve access to justice for Ontarians.

On December 11, 2006, Ramani Nadarajah, Acting Executive Director of CELA, as well as Marlene Cashin and Hugh Benevides, counsel for CELA, met with you and Senior Project Consultant for the Agency Cluster Project, Michael Uhlmann. Before the meeting, we were provided with a News Release and Backgrounder, which provided some basic information

regarding the Agency Cluster Pilot Project. During the meeting, we offered our preliminary comments on some possible ways to improve service delivery for five tribunals in the municipal, environment and land planning sector. Those tribunals are: the Assessment Review Board (ARB), the Board of Negotiation (BON), the Conservation Review Board (CRB), the Environmental Review Tribunal (ERT), and the Ontario Municipal Board (OMB).

PART II – GENERAL COMMENTS

The Interim Report has identified a number of key issues for which improved policies and procedures should be considered. As a general principle, CELA believes that it is important that any reform to the administrative justice system in Ontario, as well as the development and implementation of such reform, be undertaken with the continued participation of all stakeholders in an open and consultative fashion. We were pleased to see that the Interim Report was placed on the Environmental Bill of Rights Registry for a 30-day comment period.

CELA will not be commenting on each of the proposals for change, but will confine its comments to areas of concern, and specifically the suggestions for change at the ERT.

PART III – SPECIFIC COMMENTS

1. Dilution of Expertise

CELA's most significant concern regarding the Agency Cluster Pilot Project is that the proposals for change may in some cases result in a dilution of expertise at the ERT, which is a specialized Tribunal. As the Interim Report notes, the ERT "wears three hats", as ERT, the Niagara Escarpment Hearing Office, and The Office of Consolidated Hearings. A wide variety of environmental disputes, under 10 different statutory schemes, are brought before the ERT for resolution each year. Many of these matters involve highly technical and scientific issues. The composition of the ERT, and the statutory regime under which operates, suggest that it is a Tribunal that has, and must maintain, a high level of specialized knowledge and expertise on the part of its adjudicators, who may also mediate disputes.

2. Early Mediation and Commonly Shared Mediation Services

The following statements from the Interim Report, that:

...tribunals could benefit from an increased use of mediation and appropriate dispute resolution techniques. Mediation, and particularly early mediation, should be considered routinely in a broader range of disputes. Consideration should be given to the use of a commonly shared mediation services unit to provide mediation services to all Tribunals...¹

is of concern, since it does not appear to recognize the public interest component that must be considered by the ERT.

¹ Interim Report at 16.

Early dispute resolution is usually not problematic in cases where the issues involve a lis between parties and there is a not a public interest component. However, when multiple parties are involved, and particularly when some of them represent a broader public interest mandate, early mediation may not be suitable or indeed, possible.

We also draw you attention in this regard to Rule 172 of the Rules and Practice Directions of the Environmental Review Tribunal (“the Rules”). The rule is entitled “Termination of Proceedings by Settlement Agreement” and provides:

172. The Parties shall inform the Tribunal of their intention to terminate the proceeding because of a settlement agreement that alters the decision that is under appeal. The Tribunal shall review the agreement to ensure it is in accord with the Tribunal’s Practice Direction on Consideration of Agreements and to ensure that the agreement is not adverse to the public interest. If the Tribunal issues a decision approving the withdrawal and dismissing the proceedings, it may append the agreement to the decision.

Consequently, it is essential that mediation takes into account the broader public interest dimension which is frequently at stake in ERT hearings. The proposal of assignment of mediators early in the case management process is inappropriate in cases before the ERT. The rules of the Tribunal itself, do not allow for mediation until after a Pre-Conference or Preliminary Hearing has been held.²

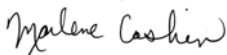
We are also concerned about the proposal that Tribunals should consider the use of a commonly shared mediation unit whose primary skill set is mediation. We believe given the complexity of the issues the ERT addresses, there is a need for mediators to have specialized, substantive knowledge of the issues the ERT addresses.

PART IV - CONCLUSION

Thank you for the opportunity to provide comments on the Interim Report. CELA generally endorses the broad suggestions contained in the Interim Report but strongly recommends that all changes and implementation details continue to be developed with stakeholders in an open and consultative fashion. We look forward to the opportunity of further consultation and to the Final Report to the Minister of Government Services in summer 2007.

Sincerely,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Marlene Cashin
Counsel



Ramani Nadarajah
Counsel and Acting Executive Director

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² Rules and Practice Directions of the Environmental Review Tribunal, September 18, 2006