

## Introduction

The Canadian Environmental Law Association (CELA) is pleased to have this opportunity to provide information to the Legal Aid Review. In addition, we have endorsed two other submissions to the Review from the clinic system: The Role of Community Legal Clinics in Ensuring Access to Justice in Ontario, and the submission prepared by the Provincial Association Steering Committee on behalf of Ontario Community Legal Clinics.

CELA, founded in 1970, is funded as a community legal clinic within the clinic system of the Ontario Legal Aid Plan. As a specialty environmental law clinic, CELA represents poor individuals and non-profit, low-income citizens organizations; provides public legal education regarding environmental law; and promotes law reform for the protection of human health and the environment, and for increased access to justice for Ontario citizens.

In this submission, we will respond to questions posed by the Review in its Public Consultation Paper of January 1997, and provide information specific to the role played by CELA and community clinics in the Ontario Legal Aid system.

### 1. Client Needs

Much environmental law casework is concerned, not only with environmental protection, but with protection of human health.

#### Environmental Impacts on the Poor

Studies have shown that low income individuals and communities experience disproportionately high impacts from environmental problems.<sup>1</sup>

Poor people are often exposed to multiple sources of toxic pollution, since;

- low income communities are more likely to have poor air quality;
- poor people are more likely to work in polluting industries and to be exposed to higher levels of industrial pollutants;
- they often reside in inner city neighbourhoods of mixed industrial and residential housing and with poorer housing stock. Urban poor children are more likely to be exposed to lead paint, car emissions, and local industrial emissions;
- rural poor people are more likely to reside near power stations and landfill sites;
- poor water quality is also often a problem in poor neighbourhoods, which are more likely to be serviced by lead pipes, and to lack sophisticated water treatment facilities;

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<sup>1</sup>Shrybman, Steven, Poverty and Pollution, CELA, 1987.

- poor communities in rural Ontario, including aboriginal communities, have experienced serious water contamination problems, including from mercury and radioactive mining wastes;
- poor individuals suffer the greatest impacts from resource mismanagement, such as job loss after depletion of forests and fish, exposure of migrant workers to pesticide use in agriculture, and the financial cost of high-priced energy resources;
- "We lose 1,800 Ontarians [a year] prematurely due to poor quality air in the province."<sup>2</sup>
- "Air pollutants cause irritation, damage lung tissue, interfere with respiratory function, cause serious nervous system disease and cancer. The medical literature contains hundreds of articles and studies detailing the health effects of air pollutants and establishing causal relationships to a variety of health disorders from allergic reactions to lung cancer. While few of these studies examine the socio-economic demography of these adverse health effects, the epidemiological work that has been done in this area confirms the hypothesis that low-income, greater exposure, and adverse effects go hand in hand."<sup>3</sup>

Further, poor people have fewer financial resources to avoid pollution (even including water or air purifiers), less current preventive information, and relatively less access to health care, including preventive educational clinics.

### **CELA Casework**

These correlations of environmental problems with poverty and with human health problems provide the recurrent and fundamental themes in CELA's casework, which is carried out by lawyers and community legal workers working together. Clients representative of our work include:

- low income single mothers whose homes had been built on an abandoned waste site, causing problems of toxicity, unsafe and unhealthy homes;
- a blind senior living on a small rural property, whose well has been de-watered by a local quarrying operation, which is out of compliance with its operating licence;
- rural families whose water has been polluted by leaching toxic landfill sites;

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<sup>2</sup>The Honourable Norman Sterling, Ontario Minister of Environment and Energy, quoted in the Globe and Mail, October 16, 1996.

<sup>3</sup>Shrybman, *ibid.*, p 5-6.

- low income farmers whose marginal agricultural operations have been virtually destroyed by pollution of their water supplies;
- poor citizens groups fighting to prevent water or air pollution of entire communities by negotiating emission controls on local polluters or by requiring in-depth environmental assessment of proposed risky projects (landfills, toxic destruction facilities);
- poor citizens groups organizing for cleanups of contaminants that have polluted entire residential neighbourhoods;
- aboriginal communities devastated socially and economically by pollution and/or resource mismanagement and depletion;
- a private prosecution for a poor family of a pesticide company which drenched their pre-school son in pesticide, causing health effects;
- representation at the Ontario Labour Relations Board of a person laid off following his "whistle-blowing" regarding illegal dumping by his employer;
- test case and intervention: including appearing at the Supreme Court of Canada to argue in support of the constitutionality of the Canadian Environmental Protection Act, the basic federal statute; and representing citizens in the environmental assessment hearing held to assess safety and risk of a new technology for the destruction of PCBs, prior to installation of the equipment in a poor community.

#### **Legal representation beyond need for representation before courts**

Many of CELA's casework services are provided outside the courts. Examples of our clients' needs include:

- legal advice and consequent strategic advice regarding governmental and community processes for dealing with environmental problems;
- assistance in obtaining the technical and scientific advice necessary to assess many environmental problems;
- advice, guidance, and/or representation in negotiations with industry and the Ministry regarding pollution controls in particular situations;
- assistance in community mobilization to address community-wide environmental problems, including public legal education;
- assistance and advice regarding utilizing non-judicial strategies for remedies, such as

those available in the Environmental Bill of Rights;

- legal advice regarding proposed governmental or industrial projects.

### **Groups with different needs**

CELA's client community is province-wide, and the location of clients whom we have represented extends from the Eastern to the Western borders of Northern Ontario, and throughout Southern Ontario. Their problems often affect family groupings, adults and children, or even whole communities (an urban neighbourhood, an entire rural community.) Rural clients are often relatively isolated, and lack any other resource for assistance. Our clients include aboriginal communities, poor mothers, elderly people, and individuals suffering health effects (disabilities) from environmental causes.

### **Social, economic or justice system factors**

Poverty, isolation, lack of information, the high cost of litigation, and increasingly, shrinkage of government ministries, all contribute to the need for legal services. Most environmental problems are caused by poor economic planning, which results in environmental damage in the short or long term.

A significant blow to poor people experiencing environmental problems, with an immediate impact on their rights and CELA's work, was the decision of the Ontario government to eliminate Intervenor Funding as of April 1996. The Intervenor Funding Project Act, introduced in 1989, required proponents in some environmental hearings to provide funds to intervenors for legal and technical experts in order to provide the tribunal with independent assessment of the proponents' evidence. The demise of this funding means clients cannot rely on it to pay private sector lawyers or to muster the necessary evidence in these hearings. It has increased representation requests to CELA. The re-institution of the Act, or a new analogous one would expand poor people's access to environmental justice.

With weakening of Ontario pollution standards, significant staff reductions, and reduced oversight, testing, inspection and enforcement by the Ministry of Environment and Energy and Ministry of Natural Resources, more environmental problems affecting poor people are going unresolved. CELA is already receiving an increase in requests for a range of services and we anticipate further increases.

### **Predicting needs**

CELA monitors needs by listening to the client community, both individuals and groups, maintaining coalition relationships with them, and having community members on our Board of Directors. CELA is also a member of provincial and national environmental networks; maintains an extensive library that is accessible to the public; and maintains personal and professional relationships with the environmental community. From these sources, we are

usually able to foresee trends and likely impacts on our client community and plan for them.

In its 26 years of existence, CELA has produced 312 law reform briefs, some of them book-length. Many of these law reform initiatives have been directed to the development of environmental planning or innovative legal processes that would expand environmental protections and therefore reduce legal service needs.

Like other community legal clinics, CELA frequently plans non-casework means to maximize the utility of our expertise: citizens' guides to new laws or legal processes; widespread legal education; summary advice or on-going legal advice to assist citizens to represent themselves; working with other organizations for maximum educational and law reform success. Our knowledgeable, experienced community legal workers do significant amounts of this work.

These strategies have been and continue to be necessary for existing within a fixed budget.

## 2. Goals of a Legal Aid System

Clinics have expressed the principle that:

Legal aid resources should be dedicated to furthering access to justice for persons who are poor or are denied access because of their disadvantage.<sup>4</sup>

The Honourable Roy McMurtry, Chief Justice of Ontario, speaking on November 14, 1996, quoted from a previous speech he had given 20 years before, saying:

Legal Aid, and, in particular, community law, is perhaps the single most important mechanism we have to make the equal rights dream a reality. Seaton Pollock, who has had a long and intense involvement in legal aid in England, has stated that:

It is the corporate responsibility of a community to see that none of its members is excluded from the rule of law. ...

While much has been accomplished as a society, we still have a long way to go.<sup>5</sup>

Chief Justice McMurtry also provided his perspective of the range of services that Legal Aid now provides through the clinics; casework, legal education and preventive services, and law reform:

There are some, who, for example, will continue to argue that anything beyond the case-by-case representation of individuals is inappropriate.

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<sup>4</sup>THE ROLE OF COMMUNITY LEGAL CLINICS IN ENSURING ACCESS TO JUSTICE IN ONTARIO; The position of Ontario's Community Legal Clinics, February 3, 1996, p.5.

<sup>5</sup>McMurtry, Roy, "On the occasion of a conference to mark THE 25TH ANNIVERSARY OF COMMUNITY LEGAL CLINICS IN ONTARIO" Toronto, November 14, 1996.

To them I would suggest that they look at the services provided by law firms to institutional clients. There you will see a major emphasis on influencing the shape and interpretation of the law, on developing preventive strategies, and on finding allies and alliances for the client's goals. Do the poor require or deserve anything less?

There are some who assert that the clinics must be curbed in their challenges to laws enacted by the legislature.

It has been my experience that no minister of the Crown or senior administrator, however experienced or well advised, can predict how the bare bones of a law will be applied, particularly to the most disadvantaged.

It is only when laws are tested, whether in the courts of Justice or the court of public opinion, in the light of real experience, that those making the laws can see the true impact on the neediest who are affected in unique ways by our legal system. And it is only through the development of facts and arguments in open and independent courts that the public can be satisfied that our fundamental constitutional tenets are being respected.

Testing laws and procedures for their impact on the most disadvantaged is not a challenge to the civil authority, but a bulwark of the rule of law.

Finally, there are those who say that the bar at large can be relied upon to develop these cases.

The fact is however that courts need the expertise that can be found only in clinic lawyers, and that is why their advocacy is requested as Friends of the Court when difficult points are in issue.

The clinics also have a unique ability to assess the priorities of their communities in developing strategies for the long haul.<sup>6</sup>

CELA submits that the objectives of the Legal Aid system should include those explicitly and implicitly enumerated in these statements: to provide poor people with legal rights and access to the law equal to that of higher-income Ontarians; and to provide resources for the improvement of laws and the legal system through strategies of law reform, legal education, test cases, prevention, and community-based services.

### 3. Coverage

With regard to environmental problems affecting poor people, CELA is the sole resource

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<sup>6</sup>McMurtry, Roy, *Ibid.* pp. 10 -12.

provided in the entire province, since Legal Aid certificates have been unavailable for such cases since the early 1990s.

We were concerned to read the statement of Mr. Robert Holden, Director of Legal Aid, that suggests that during last year, only 2% of the budget for Certificates was available for civil legal aid other than family and immigration law.<sup>7</sup> We are cognizant of the urgent need for legal services that exists in many areas of civil law, including family and immigration.

However, pollution and/or mismanagement of natural resources can have devastating effects on individuals, families and even on entire communities. It is therefore CELA's view that environmental law is one of the areas of civil law which merit continued (or even expanded) resources from OLAP.

In the current climate of contracting budgets, the ability of the community clinics to provide services in many areas of civil law for which certificates are unavailable, is an important contribution to poor communities and the legal system.

It also underscores a strength of the clinic system, diversity, which in CELA's view, is an appropriate principle to apply in considering what varying needs the Legal Aid system as a whole will respond to. We are aware that in current discussions of the future of Legal Aid, some scenarios have entailed drastic reductions in the range of services and clientele to be served, particularly regarding civil law. The clinic system currently provides services that ensure that a diversity of clients are served in diverse areas of law not well covered by the Certificate program, for a cost of about 16% of the overall OLAP cost. This is a significant and unduplicated contribution to what Chief Justice McMurtry called the "equal rights dream."

#### 4. Delivery models

It is CELA's view that a mixed model of legal aid delivery will continue to provide the best range of necessary services to people in Ontario, and that it would be a mistake to look for a simplified "one size fits all" approach.

High quality of legal service must be a given. This implies that as the funder, the Legal Aid Plan is justified in having quality assurance mechanisms for evaluation. Models exist in various public sector jurisdictions in which funders legitimately monitor the quality of services provided. To our knowledge, the certificate program of Legal Aid has no such program, although lawyers are of course subject to the professional standards monitored and enforced by the Law Society. The community clinic program is currently commencing such a program.

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<sup>7</sup>Mr. Holden was quoted in the Globe and Mail of January 10, 1997, stating that from April 1996 to January 1997, 67% of certificates issued were for criminal cases; 23% were for family cases; and 8% were for refugee and immigration cases.

High quality also implies and requires a sufficient level of funding to ensure that any delivery model is not underfunded relative to the level of service it is expected to deliver.

Other criteria for assessment of models could include:

- efficiency: including the use of varying strategies to maximize the benefit of funds (use of non-lawyers; legal education; advice in self-representation where appropriate; strategies to avoid litigation)
- responsiveness to needs identified by poor communities.

Amongst the various models, the advantages of the community clinic model have been described by Chief Justice McMurtry, and in the two papers CELA has endorsed. (The Role of Community Legal Clinics in Ensuring Access to Justice in Ontario, and the submission of the Provincial Clinic Association Steering Committee)

## **5. Financial Eligibility**

CELA has observed that numerous poor working people affected by environmental problems may sustain serious losses in their lives (ie.homes, health, farms), but do not qualify financially for legal aid. These people cannot in fact afford to retain private sector lawyers and litigate, even if prospects are good, because they simply cannot pay legal fees and the high costs of the technical studies and expert evidence necessary in environmental litigation. They are therefore without legal remedy, given current eligibility requirements.

These difficulties also affect many of our clients, since our legal services are free, but the clients must fund raise in some way for the other costs of litigation. These costs are frequently a barrier to pursuing the preferred legal strategy. With the demise of intervenor funding, this problem now also occurs regarding administrative tribunal processes.

## **6. Impact of constraints**

As noted above, the demise of intervenor funding has increased demand for CELA's services. Reinstitution of it, since it is payable by proponents, not by government, would be a cost-effective means to increase access to justice and legal services to poor people. Similarly, inclusion of environmental law amongst civil cases eligible for Legal Aid certificates would provide further options.

## **7,8,9. Financing of Legal Aid; Legal Aid as part of the Larger Justice System; Operational Management**

With regard to the role of the community clinic system within the larger justice system, we refer you again to the words of Chief Justice McMurtry.



CELA plays an educational and advocacy role in many parts of the legal system, since our lawyers are specialists, and public interest practitioners. We therefore contribute widely to government consultative committees on legislation and legal processes; to advisory committees of environmental tribunals; and to legal education at all levels (public lay education; law schools; legal professional conferences; other agencies and academic institutions).

Regarding financial and operational management, we refer again to the various strategies used by clinics to maximize the value to the public of the Legal Aid funds received.

## **10. Governance**

With regard to governance, a primary issue for the clinic system is the existence of community boards of directors.

The advantages of the governance of legal clinics by community boards of directors have been described in the submissions of the Provincial Clinic Association Steering Committee submission<sup>8</sup> and by Chief Justice McMurtry.

These values also apply to CELA. For a specialty law clinic like CELA, there is a particular value in having community members involved in priority-setting and governance. They are knowledgeable about environmental trends and impacts, about legal, scientific and technical issues CELA must take into account, and about needs and priorities of environmental groups and low income communities. Some CELA Board members have very long association with the organization, and are very experienced in assessing environmental trends and contributing to strategies of response. They demonstrate a commitment and support for our work that is invaluable to staff and to our clients.

The Legal Aid Plan and justice system are well served by the involvement of such individuals in the administration of legal aid services at no cost to the Plan.

In our view, the community boards offer an example that may be useful to the Legal Aid Review in its consideration of the role of communities in the governance of the Legal Aid system.

## **Conclusion**

In a role that has developed over 26 years, CELA provides a range of public services ranging from casework representation of the poor to advice and consultation with high-level governmental and judicial decision-makers. It is recognized as a unique source of environmental public education and community leadership, provincially and nationally. The

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<sup>8</sup>pp.4-5.

forward-looking mandate and funding base provided to community legal clinics has facilitated this development.

We look forward to making further contributions to the Legal Aid Review as it continues its planning for the future of legal aid in Ontario.