



Canadian Environmental Law Association  
L'Association canadienne du droit de l'environnement

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SUBMISSIONS TO LEGAL AID COMMITTEE OF THE  
CANADIAN BAR ASSOCIATION - ONTARIO REGARDING  
GROUP LEGAL AID CERTIFICATES

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The Canadian Environmental Law Association is a non-profit public interest organization established in 1970 to advocate the cause of environmental protection and conservation in judicial, administrative and legislative forums. Since 1977, the Association has been funded by the Ontario Legal Aid Plan to provide assistance to individuals and groups in the environmental law area. The objectives of our Association can be briefly summarized as follows:

- (i) to provide effective legal assistance to those unable to afford representation;
- (ii) to advance law and policy in all environmental areas, and particularly in the areas of toxic and hazardous substances and pesticides;
- (iii) to improve opportunities for public participation in the environmental regulatory process.

An analysis of the allocation of CELA's resources would reveal an approximately equal split between law reform and community education activities on the one hand and litigation in judicial and administrative forums on the other. Generally described as public interest advocacy, in both areas of endeavour CELA most commonly represents citizens groups. While a number of CELA's litigation clients are individuals, even in this traditional legal domain, the largest majority of our clients are citizens groups.

Over the years, the demand for our services has steadily risen and we are frequently in the position of having to decline applications for assistance by those unable to otherwise retain

legal counsel. On these occasions, we have advised unsuccessful applicants of their opportunity to apply for a group legal aid certificate. As the availability of group certificates may be the only recourse for those seeking to exercise the rights accorded to them under law, the matter is one of some considerable interest to our Association. Our familiarity with the somewhat unique dynamics of representing group clients also allows us a perspective on this issue that may provide some insight into the significance of the issues involved. We are grateful then to have this opportunity to address the members of your committee and hope that our submissions will assist you in the task of making recommendations concerning this area of providing subsidized legal services.

#### Acting for Groups

Commenting on the low priority that group representation was accorded under the Legal Aid statute, the Osler Task Force on Legal Aid noted the significant development of opportunities to represent groups in both court proceedings and before administrative tribunals. In the ten years that have now intervened since Mr. Justice Osler's consideration of this issue, group legal representation has continued to grow and expand. To illustrate the varied character of that representation in the environmental law area, consider a sampling of CELA's recent activities:

- CELA has represented two Ontario public interest groups (Operation Clean Niagara and Pollution Probe) by intervening in civil proceedings in New York State concerning a large hazardous waste landfill site in Hyde Park, New York. CELA was granted amicus curiae standing with respect to litigation initiated by the U.S. government against Hooker Chemical Limited.

- CELA represented a group of Eastern Ontario residents (Hydro Consumers Association), who had organized in response to a \$1.4 billion transmission system expansion project announced by Ontario Hydro that was the subject of planning, expropriation and environmental assessment proceedings before a Joint Hearing Board.
- On behalf of a group of concerned citizens, CELA successfully prosecuted Cyanamide Canada for the release of toxic substances into the Welland River.
- CELA has represented a group of inner-city Toronto residents concerned about excessive lead emissions from a secondary lead smelter located in their neighbourhood.
- CELA has represented several families joined as plaintiffs in litigation against the Provincial Ministry of the Environment and a waste disposal site operator for damages arising in consequence of the contamination of local groundwater supplies by toxic substances leaching from a waste disposal site. A substantial settlement was negotiated on our clients' behalf.
- CELA has recently represented two community groups who participated actively as parties before a Royal Commission convened to inquire into the licensing of mobile PCB disposal technology.

Apart from advocacy work in administrative and judicial proceedings, CELA is also actively involved with various law reform activities. Recently, CELA's endeavours have included extensive submissions and lobbying efforts on matters as diverse as the Spills Bill, nuclear waste disposal and the Health Protection and Promotion Act.

Two forces appear to be responsible for the steady growth in the area of group representation. The first is the ever-expanding domain of public law itself. To an increasing degree, decisions that have traditionally been the exclusive prerogative of private executive and administrative processes are now being made in a variety of public forums. At the same time, a clearly discernible trend in administrative law jurisprudence has clothed many hitherto informal decision-making functions with the cloak and trappings of quasi-judicial proceedings.

This is particularly true in the area of environmental law, where the last fifteen years have seen a very significant enlargement of the scope and opportunity for public participation in the licensing and regulatory process. A number of legislative initiatives including the Environmental Protection Act and Environmental Assessment Act have established public decision-making processes to engender participation of broad communities whose rights may be affected in consequence of the decisions being made. With the coming into being of The Consolidated Hearings Act in 1981, planning, environmental and expropriation hearings can now be consolidated in one monolithic proceeding. In the same period, a number of Royal Commissions have further enlarged the scope of public law activity in the environmental area. A partial list here would include the Royal Commissions on electrical power planning, the northern environment and mobile PCB disposal.

A similar trend can also be observed at the federal level where public hearings are regularly convened before various tribunals including the National Energy Board and Environmental Assessment Review panels. In addition, a growing number of federal regulations pertaining to pesticides and environmental contaminants are the subject of public consultation processes and are published in the Canadian Gazette for comment.

The second major impetus that has supported growth of group representation is the very nature of the matters at issue. Thus, in the area of environmental law it is most common to find the interests of communities pitted against those of large public and private corporations. The dispute is not one involving 'private' interests. In a traditional sense then, there is no *lis inter partes* but rather a common or broad public interest affecting citizens groups or broader communities. On occasion, the community affected may be a citizens group living in the vicinity of a hazardous waste disposal site or in the path of a proposed transmission line or highway project. On other occasions, the community will be much more broadly defined to include all those with an interest in more stringent regulation of lead emissions from gasoline or a more equitable structure for hydro rates. While the impacts associated with these issues may be tangible and personal, they are more appropriately viewed as affecting groups or classes of interest.

In addition, the complexity of the matters in dispute virtually dictate collective action if a community is to have any hope of effectively countering the often unlimited resources of large corporations. This is particularly so when the subject of the dispute involves highly technical and complex issues. Proceedings in the environmental law area, are often protracted and involve extensive expert evidence. It would be the very rare occasion for legal fees in a proceeding before the Environmental Assessment Board to not exceed \$50,000 with consulting fees being of a similar order. These costs are clearly beyond the resources of all but the wealthiest of individuals. Indeed, even a pooling of community resources will often fall far short of the mark. Without subsidies to defray these enormous costs, legal rights and participatory opportunities become purely theoretical.

## Is Legal Aid to Groups a Secondary Priority?

It is very apparent that group representation has traditionally and continues to be given low priority under The Legal Aid Act. Indeed, ten years after the Osler Task Force recommended various amendments to the Act intended to firmly establish the Plan's jurisdiction to grant group certificates, those amendments have yet to be made. Although the Task Force clearly endorsed the principle of funding class actions and group proceedings in appropriate cases, it also expressed the view that "such undertakings rank in priority behind the obligations of the Plan to meet the needs of citizens to assert and protect more traditional rights". It is not at all clear what prompted Task Force to arrive at this conclusion and unfortunately its report does not offer an explanation for adopting this order of priorities. When one considers those factors that might support such a proposition however, some doubt does arise as to the validity of this conventional view. In this regard, we have considered four possible basis for prioritizing the allocation of scarce resources. These are: notions of access, the severity of potential consequences, the extent of the community affected and the need of the applicant for subsidized legal services.

The equality rights provisions in s. 15 of the Charter has now elevated the concept of equality before, protection and equal benefit of the law, from an ideal to a constitutional principle. There can be little debate that without access to legal services this constitutional right remains a nominal one incapable of being enforced. If the operational precept is to be equality, then there would appear to be little rationale for creating differential and unequal access to legal services based upon notions relating to the nature of the legal right involved or the singularity or number of those seeking to exercise that right.

Neither is this differentiation supportable on the ground that the matters for which a group might make application are

necessarily of a consequence less severe than those met by more traditional areas of legal aid service. A decision by an environmental assessment board to approve an Ontario Hydro undertaking may lead to the expropriation of property. For a group of low-income rural residents with few resources other than farms from which they derive a self-sufficient lifestyle, the impacts of such expropriation is certain to be profound. A decision to license a hazardous waste disposal site will have significant impacts upon the character of community life and may have very direct impacts upon public health. An inner-city, low-income community concerned about elevated lead levels in the blood of neighbourhood children and the potentially disastrous consequences for the healthy development of these children, will vigorously debate the contention that access to judicial and administrative remedies is of secondary importance. It is easy to imagine a similar response from the members of a Native northern community affected by elevated methyl mercury levels in the waters upon which they rely and that spawns the fish that comprise an essential part of the community's diet. Yet in each example, effective advocacy requires that those affected pool resources and operate collectively.

A third factor that might arguably justify a judgment as to the allocation of scarce legal aid resources, is the extent of the impacts associated with a legal matter. By definition however, group representation engenders consequences for a broader client constituency and cannot, for that reason, be regarded as being less deserving of those resources.

Finally, can differentiation be justified on the ground that groups are less in need of legal aid than are individuals? In our view, the answer is no. To begin with, there is the obvious point that a group of impoverished individuals may have no more resources collectively than they have individually. Another factor that must enter the equation here would account for the very substantial fees and disbursements that are often necessary



in this domain and that have been commented on earlier. Even the collective resources of clients of modest means will not meet the cost in the many tens of thousands of dollars. Finally, there is ample evidence to support the contention that many environmental problems have a disproportionately greater impact upon low-income people who are less able to avoid, counter or withstand adverse impacts of contaminated water, rate increases or air pollution.

While we are not as familiar with other areas of group representation, the same comments might well be made with respect to legal representation of tenants, injured workers and others.

We have not offered the foregoing analysis to argue that a group applying for legal aid with respect to the polluting activity of a neighbourhood lead smelter is more deserving of a certificate than is an individual seeking counsel for criminal or family law proceedings. Rather, we do so to challenge the assumption that somehow a group applicant is less deserving of that aid.

#### Availability of Group Certificates

Nearly ten years ago, the Osler Task Force made several recommendations on the subject of group certificates. We append those recommendations to these comments and are fully in agreement with them. Accordingly, we would invite the Attorney General to adopt them and the Legal Aid Committee to expeditiously pursue the task of implementation. In addition to endorsing the provision of legal aid certificates for class actions and other group proceedings, the Task Force also identified the need to amend The Legal Aid Act and Regulation by:

- (a) Amending the definition of "person" found in s. 1, so as to make it clear that "person" includes groups and that groups who have been incorporated are not by that fact alone disqualified from receiving the benefits of the Act;

- (b) Removing the restrictive provisions of Regulation 39;
- (c) Setting up an application scheme in which discretion is vested in the Area Committee with provision that an appeal therefrom be available and authority for interim certificates.

Unfortunately, to this date, none of these changes or procedures have been put in place. Rather, action appears to have been limited to the nomination of a sub-committee of the Legal Aid Committee for the purposes of developing procedures and criteria for responding to group applicants. In the process, the Sub-Committee has received several applications for group certificates and has granted a very small number of those applications. The activities of this Committee have been somewhat sporadic, and there has been at least one hiatus lasting over a year.

Having recently contacted the Sub-Committee's secretary, we understand that a report from the Sub-Committee to Convocation was prepared and given approximately two years ago. That report has not, however, been made public and neither has the Committee published or promulgated any other report of its activities that we are aware of. It is likely that the largest majority of citizen, ratepayer and other groups in this province are completely unaware of the Committee's existence or of the potential availability of a group legal aid certificate. There are no guidelines or procedures that we can provide prospective applicants whom we refer to the Committee. Progress has not been encouraging.

While certificates have been provided in isolated circumstances, the procedures that have been adopted for making application have often been cumbersome and arduous. On one occasion with which we are familiar, a certificate was provided to a community group in

Eastern Ontario concerned with an Ontario Hydro's transmission system expansion project involving planning, expropriation and environmental assessment proceedings. On that occasion, it took almost 2½ months to process the application and the group's solicitor had to travel from Perth to Toronto on two occasions for the purposes of meeting with the Committee.

Of the various legal aid matters that have grown to crisis proportion during the last several years, the issue of group certificates appears to have fallen by the wayside. In part, this may be attributable to a general bias in favour of discounting the significance of group representation and in part to the malaise that has characterized Government's response towards legal aid issues in general. One contributing factor must however be considered to be the seeming reluctance of the Law Society to give this matter the attention that in our view it clearly deserves. We would encourage the Legal Aid Committee then to expeditiously develop procedures and guidelines to facilitate group applications to be followed by a public information campaign designed to make the option one that citizens groups are aware of. Increased awareness is absolutely essential to access and would provide the support necessary to give the issue the profile that it deserves.

### Conclusion

In sum therefore, we strongly urge that the provision of group certificates be given a much higher priority on the agenda of legal aid law reform than it has traditionally enjoyed and make the following specific recommendations:

1. That the recommendations of the Osler Task Force be implemented forthwith and that the Act and Regulations be appropriately amended to remove any impediment to the granting of certificates to groups who qualify for subsidized legal assistance.

2. That the Sub-Committee of the Legal Aid Committee move expeditiously to develop appropriate guidelines and procedures for the granting of group certificates with a view to amending The Legal Aid Act to include a part specifically setting out such procedures and criteria. That in preparing its recommendations, the Committee solicit input from interested parties and circulate a draft proposal for comment. In developing its position on group representation, the Committee should have due regard to the participatory rights of the constituency that it is seeking to serve.
  
3. That in the allocation of legal aid resources, the provision of group certificates be granted equal status with the more traditional matters for which legal aid has historically been provided.

## GROUP CERTIFICATES

70. Class actions and group proceedings should be funded in appropriate cases.

71. Applications by groups for aid should be made to the Area Committee with an appeal by the group or the Area Director to the Appeal Committee of Legal Aid Ontario.

72. Subject to the availability of funds:

(a) groups may be assisted not only to litigate but also to make representations to legislative and regulatory bodies;

(b) groups may be assisted to obtain advice in the organization of their own affairs;

(c) groups may be assisted to invoke private criminal or quasi-criminal prosecutions.

73. In group proceedings, if the group is unsuccessful, the burden should rest with the successful party who requests costs to satisfy the Court or tribunal that no public issue of substance was involved or that the proceedings were frivolous or vexatious.

74. The Director of Legal Aid should determine the criteria for granting assistance to groups and guidelines for the assistance of Area Committees but the following factors should be considered:

(a) the representative nature of the applicant;

- (b) the purpose for which legal assistance is sought;
- (c) whether the relief sought represents a benefit to the group or to the public as a whole;
- (d) whether the granting of a certificate will redress an economic imbalance;
- (e) the availability of alternative sources of funding;
- (f) the past record of the group and its ability to adequately represent its interests;
- (g) the extent to which the individual members of the group would be eligible for Legal Aid;
- (h) counsel's opinion as to the merits of the group's contemplated action;
- (i) whether some other group or individual will likely represent the applicants' interest;
- (j) the importance of the issue;
- (k) the cost to the Plan.