June 5, 2020 **BY EMAIL**

Roman Baber, MPP
Chair, Standing Committee on Justice Policy
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, Ontario M7A 1A2

Dear Mr. Baber:

RE: BILL 161 (*SMARTER AND STRONGER JUSTICE ACT, 2020*)

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide our comments on omnibus Bill 161 (*Smarter and Stronger Justice Act, 2020*).[1]

This submission focuses on several problematic Schedules in Bill 161 that are of greatest concern to CELA and our client communities:

- Schedule 4: proposed changes to the *Class Proceedings Act* (*CPA*);
- Schedule 11: proposed changes to the *Judicial Review Procedure Act* (*JRPA*); and
- Schedules 15 and 16: proposed changes to the *Legal Aid Services Act* (*LASA*).

For the reasons outlined below, CELA concludes that a number of these proposed changes are inconsistent with the public interest, and that they will likely impede – not enhance – access to environmental justice in Ontario.

Accordingly, CELA recommends that the proposed statutory revisions should not be enacted in their present form in the above-noted Schedules. In our view, these Schedules must be substantially amended in order to address the substantive deficiencies and procedural problems identified by CELA and other stakeholders.

PART I – CELA'S BACKGROUND, MANDATE AND EXPERTISE

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing laws to protect the environment and safeguard human health. Over the past 50 years, CELA lawyers have represented low-income persons and disadvantaged communities in the courts and before tribunals on a wide variety of environmental and public health issues.

[1] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-161.

Given our extensive history and ongoing involvement in environmental litigation on behalf of our clients, CELA has acquired valuable insight and considerable experience in various matters that are now being addressed in Bill 161.

For example, in relation to the *CPA* revisions proposed in Schedule 4, CELA has long advocated the establishment of effective class action mechanisms to address widespread pollution events that result in loss, injury or damage to large numbers of Ontarians. Accordingly, CELA served as an appointed member of the Attorney General's Advisory Committee on Class Action Reform, which drafted a model bill that served as the basis for the *CPA*. In addition, CELA has continued to monitor, and has occasionally been involved in, environmental class actions in Ontario,[2] and CELA participated in the recent review of the *CPA* conducted by the Law Commission of Ontario.

Similarly, in relation to the *JRPA* changes in Schedule 11 of Bill 161, CELA has commenced or responded to numerous applications for judicial review in Ontario's Divisional Court, including various precedent-setting cases. On behalf of our clients, CELA lawyers have also brought or responded to applications for judicial review under the *Federal Courts Act*.

Finally, in relation to Schedules 15 and 16 of Bill 161, CELA is a specialty legal clinic that is funded by Legal Aid Ontario pursuant to the current *LASA*. CELA has been operated as a legal aid clinic since 1978, and CELA staff continue to represent clients in countless cases in all regions of Ontario in order to protect human health, ensure safe housing, and address sources of air, water and land pollution that disproportionately affect low-income persons and disadvantaged communities, including Indigenous communities.

In light of the above-noted experience, CELA has carefully considered Bill 161 from the public interest perspective of our client communities, and through the lens of facilitating access to environmental justice. We have also reviewed the legislative debates on Bill 161 as it went through First and Second Reading in the Ontario Legislature.

PART II – CELA'S ANALYSIS OF SCHEDULES 4, 11, 15 AND 16 OF BILL 161

(a) Schedule 4: CPA Amendments

Enacted in 1992, the *CPA*[3] establishes a common procedure for bringing class actions in Ontario. The overall objectives of the *CPA* regime are to facilitate access to justice, ensure judicial economy, and promote behavior modification among defendants.

To date, over 900 class actions have been commenced in Ontario in many diverse areas of law, including product liability, consumer/privacy rights, competition law, securities/investors' rights, and employment law. Although mass environmental torts appear well-suited for class actions,

[2] For example, CELA intervened as a friend of the court before the Ontario Court of Appeal, which certified *Smith v. Inco* as an environmental class action: see *Pearson v. Inco Ltd.* (2005), 20 CELR (3d) 258 (ONCA).
[3] See https://www.ontario.ca/laws/statute/92c06.

relatively few pollution claims have been certified under the *CPA*, and, to CELA's knowledge, only one environmental class action (*Smith v. Inco*[4]) has gone to trial on common issues.

Many observers anticipated that over time, the *CPA* would become well-used by representative plaintiffs bringing claims based on contaminant discharges into air, land or water that result in widespread property damage, economic loss or personal injury within affected communities.

For example, the passage of the *CPA* followed the release of a 1990 report from the Attorney General's Advisory Committee on Class Action Reform. Among other things, this Report observed that:

> It is an unavoidable fact that modern industrialized societies such as Ontario will suffer mass injuries. North Americans have already witnessed incidents of widespread harm from defective products… So, too, have they seen mass environmental injury such as the incident at Three Mile Island or the recent PCB fire in Quebec… A class action, in which many similarly injured persons join together, can provide an effective and efficient means of litigating such mass claims.[5]

In a class action involving widespread environmental harm, similar observations were made by the Quebec Court of Appeal:

> The class action recourse seems to me a particularly useful remedy in appropriate cases of environmental damage. Air or water pollution rarely affects just one individual or one piece of property. They often cause harm over a large geographic area. The issues involved may be similar in each claim but they may be complex and expensive to litigate, while the amount involved in each case may be relatively modest. The class action, in these cases, seems an obvious means for dealing with claims for compensation for harm done when compared to numerous individual lawsuits, each raising many of the same issues of fact and law.[6]

Ontario's Court of Appeal has further opined that there appears to be a natural fit between environmental claims and class actions for the purposes of modifying corporate behaviour:

> Thus, modification of behaviour does not only look at the particular defendant but looks more broadly at similar defendants, such as the other operators of refineries who are able to avoid the full costs and consequences of their polluting activities because the impact is diverse and often has minimal impact on any one individual. This is why environmental claims are well-suited to class proceedings. To repeat what McLachlin C.J.C. said in

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[4] The representative plaintiff was successful at trial, but the judgment was overturned on appeal: see 2011 ONCA 628; leave to appeal to SCC refused April 26, 2012.

[5] Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, 1990) at 16.

[6] *Comite d'environnement de La Baie Inc. v. Societe d'electrolyse et de chimie Alcan Ltee,* (1990), 6 CELR (NS) 150 at 162.

> *Western Canadian Shopping Centres Inc.*, *supra* at para. 26: "Environmental pollution may have consequences for citizens all over the country."[7]

However, despite this favourable judicial commentary, environmental class actions have been relatively infrequent under the *CPA* to date.

Against this backdrop, Schedule 4 of Bill 161 proposes a number of significant changes to the *CPA*, including the following:

- adding a new requirement to register proceedings commenced under the *CPA* in accordance with the regulations (proposed section 2(1.1));
- enabling the court to take into account multi-jurisdictional class proceedings proposed or commenced in Ontario or elsewhere in Canada (new proposed subsections 2(4), 5(6) to (8) and 5.1);
- prescribing additional factors to considered by the court when assessing whether a proposed class action is a "preferable procedure" for the purposes of the *CPA*'s certification test (new proposed section 5(1.1));
- establishing new requirements (and lawyers' cost liability) for carriage motions in situations where there are existing or proposed proceedings under the *CPA* involving the same or similar subject matter and some or all of the same class members (new subsection 13.1);
- specifying new notice requirements under the *CPA* (new sections 17 to 20, and 22);
- requiring the person or entity administering the distribution of an award under the *CPA* to file a report respecting the distribution with the court (new section 26);
- imposing new requirements in relation to settlements (new section 27.1), *cy-près* distributions (new section 27.2), and subrogated claims (new section 27.3);
- clarifying the suspension of limitation periods (new section 28), the discontinuance or abandonment of class proceedings (new section 29), and the dismissal of proceedings for delay (new section 29.1);
- changing the appeal route or monetary threshold for a number of appeals of decisions under the *CPA*, as well as to restrict the ability of an appellant to materially amend materials on an appeal (section 30);
- establishing new provisions and criteria for the court's approval of agreements respecting fees and disbursements between a solicitor and a representative party (section 32); and
- providing new rules for court approval of third-party funding agreements (section 33.1)

CELA supports the creation of a centralized and publicly accessible registry of class actions under the *CPA*, and we appreciate the need for certain procedural improvements under the *CPA* in order to clarify or streamline key steps in class action litigation. However, CELA is concerned that some proposed *CPA* amendments are "defendant-friendly" provisions that will undoubtedly make it

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[7] *Pearson v. Inco Ltd.* (2005), 20 CELR (3d) 258 (ONCA), para 88. See also Heather McCleod-Kilmurray, "*Hollick* and Environmental Class Actions: Putting the Substance into Class Action Procedure," (2002-2003) 34 *Ottawa L. Rev*. 363 at 283.

more difficult, costly and uncertain for representative plaintiffs to commence and maintain class actions in Ontario.

In particular, CELA is strongly opposed to the proposal in new section 5(1.1) to create a restrictive definition of what constitutes a "preferable procedure for the resolution of common issues":

> 5.(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
>
> (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
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> (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members (emphasis added).

In our view, the current "preferable procedure" and "common issues" criteria in subsections 5(1)(c) and (d) of the *CPA* have unfortunately become significant barriers to the certification of environmental class actions. However, proposed section 5(1.1) will aggravate this situation by making it even harder for environmental class actions to be certified under the *CPA*.

For example, in *Smith v. Inco* case, certification was originally denied by the motions judge, who held, *inter alia*, that certain issues (e.g. negligent misrepresentation by regulators) could not proceed on a common basis, and that the proposed class action was not the preferable procedure due to the prevalence of individualized issues and the existence of provincial environmental legislation that could address concerns over behavior modification.[8] However, certification was eventually allowed in this case by the Ontario Court of Appeal,[9] but only after the representative plaintiff dropped health-based claims and focused solely on property value depreciation.

Similarly, in *Hollick v. Toronto*,[10] the representative plaintiff proposed a class action on behalf of 30,000 residents in relation to odour, noise and other nuisance impacts caused by a large municipal landfill. However, the Supreme Court of Canada denied certification on the basis that the class action was not the "preferable procedure" for addressing common issues, particularly since a no-fault small claims fund already existed to provide compensation for off-site effects upon site neighbours.

Accordingly, CELA concludes that Schedule 4 of Bill 161 should not place further constraints on the availability of class actions in the environmental context. To the contrary, CELA submits that

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[8] *Pearson v. Inco Ltd.*, [2002] O.J. No. 2764 (Ont SCJ), paras 108-113 and 115-138.
[9] *Supra*, footnote 4.
[10] 2001 SCC 68.

the statutory certification test itself should be modified in order to enhance – not frustrate – access to environmental justice.

In the two above-noted environmental class actions, the current "common issues" and "preferable procedure" criteria were the main stumbling blocks to certification. However, this problem will not be fixed by superimposing even greater restrictions in the form of proposed section 5(1.1) in Schedule 4. In light of these and other cases[11] under the *CPA*, CELA submits that there are two possible options for reform that should be considered by the Ontario Legislature:

- delete, or alternatively, modify the statutory language used within subsections 5(1)(c) and (d) to ensure that they are applied by the courts in a less restrictive manner in all types of class actions; or
- leave these subsections intact, but insert a new provision that explains how they should be applied in environmental claims, or alternatively, that exempts or "carves out" environmental claims, in whole or in part, from the application of the "common issues."

In making this submission, CELA is mindful of the fact that Quebec's certification test does not contain a "preferable procedure" requirement, and sets out a broader approach to "common issues." In particular, article 575 of the Quebec Code of Civil Procedure (CCP) has been framed as follows:

> The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
> (2) the facts alleged appear to justify the conclusions sought;
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.[12]

In our view, section 5 of the *CPA* should be amended to more closely resemble the Quebec test in order to better facilitate access to justice.[13]

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[11] See, for example, *Grace v. Fort Erie (Town)* (2003), 42 MPLR. (3d) 180 (Ont SCJ) (certification denied for class of residents claiming health-based and property-related damages in relation to the supply and potability of drinking water from defendant municipality); *Defazio v. Ontario,* [2007] O.J. No.902 (Ont SCJ) (certification denied for class of persons claiming health-based damages arising from presence of asbestos in a subway station); and *Dumoulin v. Ontario,* [2005] O.J. No.3961; supplementary reasons [2006] O.J. No. 1233 (Ont SCJ) (certification denied for class of persons claiming health-based damages arising from presence of toxic mould in the defendant's courthouse).

[12] Art 575 CCP.

[13] See, for example, *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 SCR 3; *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600; and *Asselin c. Desjardins Cabinet de services financiers inc*, 2017 QCCA 1673.

Unfortunately, the proposed changes in proposed section 5(1.1) of Schedule 4 go too far in the opposite direction, and they will inevitably make certification harder – if not impossible – to obtain in environmental class actions or other claims involving mass torts.

This serious concern has also been expressed by the Law Commission of Ontario, which strongly criticized Bill 161's proposal to make the certification test more stringent:

> Unfortunately, Bill 161 also includes amendments to the *Class Proceedings Act* certification provisions that are likely to significantly reduce access to justice and worsen class action delays, inefficiencies and costs.
>
> Bill 161 adopts mandatory *and* conjunctive "superiority" and "predominance" tests at certification. **These provisions fundamentally restructure class action law and policy in Ontario by shifting the *CPA*'s longstanding certification test strongly in favour of defendants** (original emphasis).[14]

CELA concurs with the five reasons offered by the Law Commission of Ontario in support of its position against Bill 161's proposed reform of the *CPA* certification test:

> **First, Bill 161 will effectively restrict class actions and access to justice in a broad range of important cases, including consumer matters, product and medical liability claims, and any potential class actions where there may be a combination of common and individual issues…**
>
> **Second, Bill 161's "superiority" and "predominance" provisions are demonstrably inconsistent with certification rules across Canada and will likely increase costs, delays, and legal uncertainty for plaintiffs, defendants and justice systems across the country…**
>
> **Third, Bill 161 creates an improbable and unwelcome situation in which Ontarians potentially have fewer legal rights and less access to justice than other Canadians…**
>
> **Fourth, Bill 161 adopts restrictive American legislative provisions and priorities that are inconsistent with decades of Canadian law…**
>
> **Finally, Bill 161 and the new *Crown Liability and Proceedings Act* create significant barriers for Ontarians wishing to initiate class actions against their provincial government, government agencies, corporations and other institutions** (original emphasis).[15]

[14] Letter dated January 22, 2020 from the Law Commission of Ontario to Attorney General Doug Downey, page 2. Online, https://www.lco-cdo.org/wp-content/uploads/2020/01/LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf.
[15] *Ibid*, pages 2-3.

Similar concerns have been raised by numerous other legal observers in Ontario. For example, one law firm has noted the traditional rejection of the "predominance" test in Ontario:

> Although a predominance requirement has long been an element of the U.S. class actions process, it has never formed a part of the Canadian regime. In *Bendall v McGhan Medical Corp*—the first case to be certified on a contested basis in Canada—Justice Montgomery specifically recognized that the predominance issue is not a factor to be considered under the Ontario certification test.[16]

Similarly, a recent legal blog noted that "few of the changes recommended by the Law Commission found their way into the proposed legislation, which instead advances a slate of reforms propounded by defence interests."[17] This view is shared by another law firm that has concluded that the proposed changes in Bill 161 are likely to favour defendants over representative plaintiffs:

> However, some of the proposed amendments, such as changes to the certification test, were specifically considered and rejected by the LCO…
>
> Many of the amendments will be beneficial to defendants and potential defendants. Other amendments, although not directly applicable to defendants, have the effect of restricting the options available to plaintiff counsel…[18]

In addition, the Director of the Class Action Clinic at the University of Windsor has concluded that:

> The new superiority and predominance tests are conservative American principles that make many types of mass wrong impossible to litigate as class actions. There is a reason that mass torts – like defective medical devices or pharmaceutical cases – are not litigated as class actions in the US. Successful cases in Canada that could not have been pursued as class actions if the predominance test existed, because they involved one or only a few common issues and many individual issues, include:
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> - Indian Residential Schools
>
> - Walkerton
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> - The tainted blood supply litigation

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[16] C. Woodin *et al*., "Bill 161 Predominance Test to Alter the Landscape on Class Proceedings in Ontario" (December 23, 2019). Online, https://www.bennettjones.com/Blogs-Section/Bill-161-Predominance-Test-to-Alter-the-Landscape-on-Class-Proceedings-in-Ontario.

[17] D. Peebles et al., "Ontario's Attorney General Proposes Significant Changes to the Class Proceeding Act (December 10, 2019). Online, https://www.mccarthy.ca/en/insights/blogs/canadian-class-actions-monitor/ontarios-attorney-general-proposes-significant-changes-class-proceedings-act.

[18] W. Worden et al., "Game Changer? Ontario Introduces Significant Amendments to the *Class Proceedings Act* (December 12, 2019). Online, https://www.torys.com/insights/publications/2019/12/game-changer-ontario-introduces-significant-amendments-to-the-class-proceedings-act.

> - Insurer's unilateral amendments to health insurance plans
>
> - Unpaid wages and overtime
>
> This is a major step back for Ontarians. The CPA was drafted specifically to avoid the restrictive analysis used by American courts. Where the US court frames class actions as the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only", the Supreme Court of Canada has repeatedly stated that the CPA "should be construed generously to give full effect to its benefits". The proposed changes to the certification test are inconsistent with the long-standing Canadian approach to mass harm redress (emphasis added).[19]

CELA agrees with and strongly commends these critical comments on the regressive nature of the proposed amendments to the certification test in the *CPA*.

We conclude that this proposal is unacceptable and unjustified from the public interest perspective. In short, importing and utilizing the American considerations of "superiority" and "predominance" will undermine the overall objectives of the *CPA*. Moreover, these new restrictions are clearly inconsistent with the multi-stakeholder consensus that was reached by the Attorney General's Advisory Committee on Class Action Reform when the *CPA*'s certification test was first developed.

RECOMMENDATION 1: Proposed section 5(1.1) in Schedule 4 of Bill 161 must be deleted, and the provincial government should undertake consultations with interested stakeholders on how to amend the certification test so that it more closely resembles Quebec's authorization stage for class actions.

(b) Schedule 11: JRPA Amendments

The *JRPA*[20] was enacted in 1971 to create a comprehensive regime[21] that enables Ontarians to seek judicial review of administrative actions by public officials who exercise statutory powers of decision. If a judicial review application is successful, the court may grant various forms of relief, including injunctions, declarations, and orders in the nature of *certiorari* (quashing or setting aside the impugned decision), *mandamus* (compelling the performance of a public duty), and prohibition (preventing or stopping public officials from taking action). Thus, the *JRPA* is an important mechanism for ensuring governmental accountability and compliance with the rule of law.

Schedule 11 of Bill 161 proposes three changes to the *JRPA*:

- clarifying that the court has discretion to refuse to grant relief (new subsection 2(5));

[19] J. Kalajdzic, "One Step Forward, Two Steps Back: Commentary on Proposed Changes to Ontario's Class Proceedings Act" (December 10, 2019). Online, https://classactionclinic.com/2019/12/10/one-step-forward-two-steps-back-commentary-on-proposed-changes-to-ontarios-class-proceedings-act/.
[20] See https://www.ontario.ca/laws/statute/90j01.
[21] See also Rule 68 of the *Rules of Civil Procedure*.

- specifying information requirements for judicial review applications (new subsection 9(1)); and
- establishing a new 30 day deadline for the commencement of judicial review applications (new subsections 5(1) to (4)).

CELA has no objection to the first two proposed changes, which largely consolidate existing requirements under the *JRPA*. However, we remain concerned about the proposed 30 day deadline for commencing judicial review applications under the *JRPA*.

Over the five past decades, the *JRPA* has successfully operated without an explicit deadline. Instead, Ontario courts have used the equitable doctrine of *laches* (unreasonable delay) to screen out and dismiss judicial review applications that have not been brought in a timely manner. In our experience, the doctrine of *laches* has worked reasonably well in the judicial review context, and CELA recommends that *laches* – not an arbitrary fixed deadline – should continue to be utilized under the *JRPA*.

On this point, CELA has considered the judicial review regimes in other provincial, territorial and federal statutes, and we note that like Ontario, several jurisdictions[22] currently have no express deadline for the commencement of judicial review applications. In other jurisdictions that have prescribed statutory deadlines, several laws[23] have established deadlines that range between three and six months from the date of the administrative decision for judicial review is being sought.

In summary, the proposed addition of a 30 day deadline limit in the *JRPA* strikes CELA as a solution in search of a problem. In our view, *laches* is the preferable approach for ensuring that judicial review applications are brought with due dispatch, while at the same time providing judges with flexibility to weigh timeliness considerations on a case-by-case basis. However, in the event that the Ontario government remains insistent that a deadline should be inserted into the *JRPA*, then CELA recommends that this deadline should be three months (or 90 days) from the date of the impugned decision.

RECOMMENDATION 2: Schedule 11 of Bill 161 should be amended by deleting the timing restrictions that are proposed in new subsections 5(1) to (4) in relation to judicial review applications. In the alternative, these subsections should be amended to prescribe a deadline of three months from the date that the administrative decision was made.

(c) Schedules 15 and 16: LASA Amendments

The current *LASA*[24] was enacted in 1998 to replace the *Legal Aid Act*,[25] which had been administered by the Law Society of Ontario. In essence, the *LASA* provides a comprehensive statutory framework for the planning, funding and delivery of legal aid services in Ontario through community-based legal clinics, specialty legal clinics (such as CELA), student legal aid societies, and legal aid certificates that enable eligible persons to retain members of the private bar.

[22] See, for example, British Columbia, Saskatchewan, Manitoba and Yukon.
[23] See, for example, New Brunswick (three months), Alberta (six months), and Nova Scotia (six months).
[24] See https://www.ontario.ca/laws/statute/98l26.
[25] See https://www.ontario.ca/laws/statute/90l09?search=Legal+Aid+Act.

The legislative purpose of the *LASA* is to "to promote access to justice throughout Ontario for low-income individuals."[26] To help achieve this purpose, the *LASA* enables community and specialty clinics to engage in "clinic law", which is defined as follows:

> "clinic law" means the areas of law which particularly affect low-income individuals or disadvantaged communities, including legal matters related to,
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> (a) housing and shelter, income maintenance, social assistance and other similar government programs, and
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> (b) human rights, health, employment and education.[27]

In this regard, CELA's legal services are provided to low-income persons and disadvantaged communities in the practice areas of housing and shelter, human rights, and health law. This interpretation was confirmed by former Environment Minister Norm Sterling when the *LASA* was going through the legislative process:

> [T]he definition of clinic law in the Bill is inclusive and not exhaustive. Further, the terms "disadvantaged communities", "human rights" and "health", all of which can have significant environmental dimensions, are included in the definition.[28]

The *LASA* also establishes Legal Aid Ontario (LAO) as an independent and accountable entity that oversees the implementation of a "cost-effective and efficient" legal aid system across the province.[29] Among other things, the statute imposes a mandatory duty upon LAO to provide legal aid services in "clinic law" and other prescribed areas of law.[30] LAO is further directed to provide such services through various appropriate means, including "the funding of clinics."[31]

Schedule 15 of Bill 161 proposes a number of interim changes to the current *LASA*, including:

- changing the composition of LAO board of directors (new section 5 and repeal of section 6);
- eliminating the process under which clinics may request reconsideration of funding decisions, and terminating any existing reconsiderations (repeal of section 36 and new section 72.4);
- outlining circumstances in which LAO is required to provide specific legal aid services (new section 39.1); and
- enabling LAO to enter into discussions with clinics and with deans of law schools respecting new agreements for the provision of legal aid services, and establishing new

[26] *LASA*, section 1.
[27] *LASA*, section 2.
[28] Letter dated December 15, 1998 from the Hon. Norm Sterling to Paul Muldoon, CELA Executive Director.
[29] *LASA*, Parts II and V.
[30] *LASA*, section 13.
[31] *LASA*, section 14(1)(c) and sections 33 to 39.

provisions regarding the cancellation or termination of existing agreements (new sections 72.3 to 72.5).

Schedule 16 proposes to repeal and replace the 1998 *LASA* with a new statute (*LASA 2019*) that includes the following features:

- setting out new purposes and definitions under the legislation; (sections 1 and 2);
- describing the legal aid services that may be provided and the manner in which they may be provided, including by the authorization of persons and entities who would provide the legal aid services as service providers, subject to regulations (sections 3 to 5);
- establishing the eligibility requirements for receiving legal aid services, which are to be provided without cost to an individual with certain exceptions (sections 7 to 9);
- identifying circumstances in which specific legal aid services shall be provided (section 15);
- continuing LAO as a Corporation, setting out its objects and powers, providing for its board of directors, and addressing other corporate matters (sections 16 to 26);
- describing the various powers and duties of the Corporation in relation to fiscal and administrative matters, including annual budgets, provincial funding, and public consultation (sections 27 to 33);
- providing direction on the exercise and performance of powers, duties and functions under the Act and the provision of legal aid services, including provisions addressing personal immunity for Corporation employees and others, deeming certain communications to be privileged, and setting offences for specified contraventions of the Act (sections 34 to 45);
- outlining the rule-making authority of the Corporation's board of directors, and permitting the board to make rules in relation to a broad range of matters (section 46); and
- providing broad authority to the Cabinet and the Minister to make regulations under the (section 47).

For the reasons discussed below, CELA does not support Schedules 15 and 16 as currently drafted in Bill 161. If enacted in their present form, Schedules 15 and 16 will significantly hinder – not help – CELA's clients in obtaining access to justice in Ontario. In our view, the Schedules alter or remove too many key safeguards that exist in the *LASA*, and therefore represent an unjustifiable rollback of the current regime governing Ontario's highly regarded legal aid system.

In particular, CELA wishes to draw the Standing Committee's attention to a large number of fundamental flaws and substantive problems in Schedules 15 and 16.

1. Like other clinics, CELA currently has, and complies with, a memorandum of understanding with LAO in relation to the legal aid services performed by clinic staff. However, Schedule 15 provides for the automatic termination of such agreements six months after Bill 161 comes into force, and merely states that LAO "may attempt" to enter into discussions with clinics to develop new agreements within this short timeframe.[32] This leaves open the possibility that LAO may elect <u>not</u> to enter into discussions with one or more clinics, which would effectively de-fund such clinics in a matter of months. CELA

[32] Bill 161, Schedule 15, section 72.3.

submits that there is no public interest rationale for this discretionary and time-limited provision, particularly since negotiating agreements under the new *LASA 2019* model will likely take considerable time and effort by all parties. While CELA has no objection to requiring LAO to enter into discussions forthwith with all current clinics, Schedule 15 should not prescribe an arbitrary deadline for the completion of these discussions.[33] In addition, existing agreements should remain in effect (or should be deemed to be extended) until they are replaced with new agreements developed and executed under the *LASA 2019*.

2. CELA is highly concerned about Schedule 16's deliberate omission of "access to justice" as the primary purpose of the *LASA 2019*.[34] As noted above, this concept is entrenched as the overarching purpose of the current *LASA*, which also references other key phrases – such as "low-income Ontarians" and "disadvantaged communities" – that are conspicuously absent from section 1 of the *LASA 2019*. As a matter of law, purpose sections provide important interpretative aids when construing the meaning or legal effect of statutory provisions, and they supply much-needed direction to decision-makers and administrators in the day-to-day implementation of legislative requirements. Accordingly, CELA submits that the purpose of the *LASA 2019* must be substantially re-written in order to better reflect the societal objective of ensuring access to justice through the sustainable delivery of effective, efficient and high quality legal aid services to low-income persons and disadvantaged communities across Ontario.

3. CELA notes that the definitions section of *LASA 2019* no longer contains a definition of "clinic law." Instead, section 4 of the *LASA 2019* lists nine "areas of law" that are eligible for LAO funding, including the areas in which CELA provides legal aid services (e.g. poverty law (housing and shelter), human rights law, and health law). However, unlike the current *LASA* (which makes it mandatory for LAO to provide legal aid services), section 4 is permissive in nature, and simply states that LAO "may" (not "shall") provide services in the listed areas of law. In our view, this is an unwarranted rollback of existing legal aid obligations in the *LASA*. CELA further submits that conferring open-ended discretion upon LAO to <u>not</u> provide legal aid services in one or more areas potentially negates the well-known socio-economic benefits (and efficiencies in the administration of justice) that result from properly funded legal aid services. For this reason, section 4 should be amended to include clear prescriptive language that places a mandatory duty on LAO to provide legal aid services in all of the areas of law prescribed by the *LASA 2019*.

4. At the same time, CELA is alarmed that the *LASA 2019* fails to entrench community and specialty clinics as the central mechanism for delivering certain legal aid services across the province. As discussed above, the current *LASA* makes it mandatory for LAO to provide legal aid services in "clinic law," and empowers LAO to fund clinics to provide such services. Moreover, the *LASA* expressly provides that LAO "<u>shall</u> provide legal aid services in the area of clinic law having regard to the fact that clinics are <u>the foundation</u> for the provision of legal aid services in that area" (emphasis added)[35] Unfortunately, the *LASA*

[33] In the alternative, if Schedule 15 is going to set a deadline, then CELA submits that the timeline should be 12 to 24 months after Bill 161 comes into effect.
[34] Bill 161, Schedule 16, section 1.
[35] *LASA*, section 14(3).

2019 makes it optional (not mandatory) for LAO to fund clinics,[36] and does not identify clinics as "the foundation" for delivering services in poverty law or related areas of law. At best, the *LASA 2019* merely directs LAO to "have regard" for the "foundational role" played by clinics.[37] In our view, simply recognizing clinics' "foundational role" is far less significant or determinative for LAO priority-setting or decision-making, as opposed to legally establishing clinics as "the foundation" for delivering certain services. Accordingly, CELA submits that section 5 should be amended to clearly specify that clinics are the fundamental centerpiece of the legal aid system for the purposes of delivering services in poverty law and related areas of law.

5. Furthermore, CELA is concerned that the "poverty law" definition set out in section 4 of the *LASA 2019* represents an unreasonable narrowing of the "clinic law" definition in the current *LASA*. As noted above, the *LASA* broadly defines "clinic law" as the areas of law which particularly affect low-income individuals or disadvantaged communities, including (but not necessarily limited to) legal matters in various areas of law. In contrast, section 4 of the *LASA 2019*:

   - omits any reference to low-income individuals and disadvantaged communities;
   - restricts "poverty law" to just housing and shelter, income maintenance or social assistance; and
   - implies that other related areas – such as human rights law or health law – are somehow separate from poverty law (which appears to be the only area in which clinics have a so-called "foundational role" under the *LASA 2019*).

   CELA submits that this restrictive approach appears to reduce or eliminate the current ability of clinics to represent clients in disputes involving human rights or health law. If so, this constitutes an unacceptable rollback that needs to be remedied via amendments to Schedule 16. In particular, CELA submits that the poverty law definition in the *LASA 2019* needs to retain the current focus on low-income persons and disadvantaged communities. In addition, the poverty law definition should be significantly broadened to ensure that clinics and their community-based boards are not precluded from undertaking casework or systemic legal advocacy in areas other than housing/shelter, income maintenance and social assistance.

6. The *LASA* currently defines "clinic" as "an independent community organization structured as a corporation without share capital that provides legal aid services to the community it serves on a basis other than fee for service."[38] A substantially similar definition of "community legal clinic" is offered in the *LASA 2019*, except that the important qualifier "on a basis other than fee for service" has been wholly deleted.[39] The "no fee for service" model has been the cornerstone of the robust clinic system that has evolved in Ontario, and has helped to ensure the availability of legal aid services to eligible clients who otherwise cannot afford legal representation. In these circumstances, it is unclear to CELA why the

[36] Bill 161, Schedule 16, sections 4 and 5(2).
[37] Bill 161, Schedule 16, section 5(5).
[38] *LASA*, section 2.
[39] Bill 161, Schedule 16, section 5(1).

"no fee for service" clinic model has been abruptly dropped in the *LASA 2019*. Accordingly, CELA submits that this key concept should be reinstated in the new definition of "community legal clinic."

7. Under the current *LASA*, clinic boards are obliged to determine the legal needs of the communities they serve, and to ensure that their clinics provide legal aid services to meet these identified needs.[40] This obligation makes considerable sense because boards are generally drawn from, and are representative of, the communities served by clinics, and are therefore closely attuned to the issues, interests and priorities of the clinics' constituencies. In accordance with this requirement, CELA's board undertakes needs assessments, community consultation efforts and strategic planning initiatives to ensure that our legal aid services remain responsive to the evolving challenges faced by low-income individuals and disadvantaged communities in Ontario. Nevertheless, the *LASA 2019* now proposes that LAO – not clinics – should be solely responsible for determining the "legal needs of individuals and communities in Ontario for legal aid services."[41] In addition, the *LASA 2019* inexplicably omits all of the duties and functions of clinic board members that are currently specified in the *LASA*.[42] Even if LAO solicits, or has regard for, input from clinics regarding community needs, CELA submits that this proposed top-down model is unrealistic and unworkable. In our experience, determinations of community legal needs (and how to address them) are best made by persons closest to the front lines: clinic boards, clinic staff and representatives of the clients and communities served by the clinic. For this reason, CELA submits that *LASA 2019* should be amended to ensure that clinic boards remain responsible for assessing and addressing community needs in all relevant areas of law (not just narrowly defined "poverty law"). Similarly, the *LASA 2019* should outline the other duties and tasks to be performed by clinic boards of directors.

8. At present, community and specialty clinics submit annual funding applications for review and approval by LAO. As a safety valve, the *LASA* enables clinics to seek reconsideration of LAO's funding decisions.[43] Over the past year, a number of clinics filed successful reconsideration requests after LAO made significant funding cuts in these clinics' budgets for 2019-20 and 2020-21. However, without elaboration or explanation, the *LASA 2019* proposes to wholly eliminate the clinics' statutory right to ask for reconsideration of funding decisions. In light of recent events, there can be no presumption that an LAO funding decision is always correct or entitled to deference. CELA therefore submits that the *LASA 2019* must be amended to include an appeal mechanism or reconsideration process that enables clinics to challenge LAO funding decisions that may adversely affect the clinics' delivery of legal aid services.

9. The *LASA 2019* proposes that if a legal aid client receives a monetary award in judicial or administrative proceedings, then the cost of the legal aid services provided to the client is a charge on the sum recovered and shall be deducted and paid to LAO.[44] CELA does not

[40] *LASA*, section 39(3).
[41] Bill 161, Schedule 16, section 6(a).
[42] *LASA*, section 39.
[43] *LASA*, section 36.
[44] Bill 161, Schedule 16, section 13.

support this "claw back" mechanism, which also exists in the current *LASA*.[45] Given that low-income individuals eligible for legal aid are, by definition, persons of modest means, CELA submits that it is unconscionable to force successful clients to pay back LAO out-of-pocket. In some lengthy cases that take months or years to resolve, this proposal may leave clients with far less money to which they were legally entitled if they must reimburse LAO for the time spent by clinic lawyers. On this point, CELA notes that the *LASA 2019* continues the current provisions that allow legal aid clients to be awarded court costs, which, in turn, vest in, and are payable, to LAO.[46] CELA has no objection to this long-standing cost arrangement, and, in fact, we have undertaken successful litigation that resulted in favourable cost awards which have been duly forwarded to LAO. However, the proposal to claw-back money directly from legal aid clients is inequitable and unacceptable. Accordingly, this proposal should be deleted from the *LASA 2019*.

10. Finally, CELA has several concerns about various LAO governance issues that arise under the *LASA 2019*. First, the new law materially changes the process for appointing LAO's board of directors in a manner that gives the provincial government far greater say in the composition of the board,[47] although LAO is otherwise supposed to be "independent" of the Government of Ontario.[48] Second, the *LASA 2019* omits the current statutory criteria that are used to ensure that selected LAO board members have the requisite knowledge, skills and experience to direct the provision of legal aid services to low-income persons and disadvantaged communities.[49] Third, the proposed legislation removes the current requirements for LAO to establish a clinic committee, an audit committee and an advisory committee.[50] Fourth, while the stated objects of LAO have remained largely intact,[51] the key requirement to ensure "high quality" legal aid services to "low-income individuals" has been deleted.[52] For these reasons, CELA submits that the *LASA 2019* proposals regarding LAO governance should be revisited and revised.

Many of the above-noted concerns have also been raised by the Association of Community Legal Clinics of Ontario (ACLCO). CELA has had an opportunity to review the detailed Bill 161 analysis prepared by the ACLCO, and we fully endorse the findings, conclusions and recommended reforms contained in the ACLCO analysis.

CELA further notes that the failure of the *LASA 2019* to specifically include access to justice as a fundamental purpose of the legislation has attracted strong criticism from other legal commentators. For example, representatives of LAO lawyers and legal professionals at three clinics have characterized this omission as highly inappropriate:

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[45] *LASA*, section 47.
[46] Bill 161, Schedule 16, section 12. See also *LASA*, section 46.
[47] Bill 161, Schedule 16, section 5(2).
[48] Bill 161, Schedule 16, section 16(4).
[49] *LASA*, section 5(4).
[50] *LASA*, sections 7 to 8.
[51] Bill 161, Schedule 16, section 17(1).
[52] *LASA*, section 4(a).

> The so-called *Smarter and Stronger Justice Act* is an attack on legal representation for the poorest Ontarians. Beyond removing "access to justice" and "low income individuals" from the purpose of the *Legal Aid Services Act*, the legislation would radically alter Legal Aid Ontario's mandate.[53]

In addition, the Toronto Lawyers Association (TLA) has commented on the refusal to include "access to justice" as the purpose of the new legislation:

> Gone entirely from this purpose-stating section is any reference to "access to justice" or "low-income individuals". Instead, the focus seems to have turned to guarding the public purse. The TLA is left with the strong impression that the government's concern is not with providing the barest of essential legal services to disadvantaged Ontarians, but rather with limiting its expenditures from Treasury. If this impression is correct, then, as explained above, the objective is misplaced, as funding legal aid provides substantial savings and improves the delivery of justice, as well as providing access to marginalized persons.[54]

Similarly, 30 law professors across Ontario have recently prepared a joint letter that calls for the deletion of Bills 15 and 16 from Bill 161:

> The Bill, if passed, will have profoundly negative impacts on the clients and communities served by Ontario's community legal clinics and community-driven boards… Bill 161 seriously weakens the ability of community legal clinics to engage in meaningful, sufficiently funded legal work to address the everyday violations of legal rights of low-income individuals and disadvantaged communities…
>
> In summary, LASA 2019 will limit the capacity of legal clinics and their boards to properly assess and address community legal needs, and the government's approach will deepen and extend poverty and marginalization in the province.[55]

CELA agrees with the above-noted views, and we highly commend them to the Standing Committee.

RECOMMENDATION 3: Schedules 15 and 16 in Bill 161 must substantially amended before they are enacted and proclaimed into force, especially in relation to: the purpose of the *LASA 2019*; the duty to identify and address the legal aid service needs of low-income individuals and disadvantaged communities; the funding, function and operation of community and specialty clinics; the definition of "poverty law" and related areas of law; and LAO governance.

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[53] Society of United Professionals, "New Legal Aid Legislation Removes Access to Justice Literally" (December 9, 2019). Online, https://www.thesociety.ca/new_legal_aid_legislation_removes_access_to_justice_literally.
[54] Letter dated February 25, 2020 from TLA to Attorney General Doug Downey, page 3. Online, https://tlaonline.ca/uploaded/web/pdf/Advocacy%20documents/TLA_Submissions_re_Smarter_and_Stronger_Justice_Act.pdf.
[55] See https://www.scribd.com/document/450921762/Ontario-Bill-161-Brief.

PART III – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that Schedules 4, 11, 15 and 16 in Bill 161 do not enhance access to justice in Ontario. To the contrary, these Schedules contain various provisions that, individually and collectively, will make it increasingly difficult (if not impossible) for our clients to safeguard their legal rights in a timely, effective and equitable manner.

Accordingly, CELA makes the following recommendations to the Standing Committee as it reviews Bill 161:

RECOMMENDATION 1: Proposed section 5(1.1) in Schedule 4 of Bill 161 must be deleted, and the provincial government should undertake consultations with interested stakeholders on how to amend the certification test so that it more closely resembles Quebec's authorization stage for class actions.

RECOMMENDATION 2: Schedule 11 of Bill 161 should be amended by deleting the timing restrictions that are proposed in new subsections 5(1) to (4) in relation to judicial review applications. In the alternative, these subsections should be amended to prescribe a deadline of three months from the date that the administrative decision was made.

RECOMMENDATION 3: Schedules 15 and 16 in Bill 161 must substantially amended before they are enacted and proclaimed into force, especially in relation to: the purpose of the *LASA 2019*; the duty to identify and address the legal aid service needs of low-income individuals and disadvantaged communities; the funding, function and operation of community and specialty clinics; the definition of "poverty law" and related areas of law; and LAO governance.

Please contact the undersigned if you have any questions or require any additional information about these submissions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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