Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

May 16, 2019 **BY EMAIL**

Sharifa Wyndham-Nguyen
Client Services and Permissions Branch
Ministry of the Environment, Conservation and Parks
135 St. Clair Avenue West, 1st Floor
Toronto, ON
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Dear Ms. Wyndham-Nguyen:

RE: PROPOSED CHANGES TO THE *ENVIRONMENTAL ASSESSMENT ACT*
ENVIRONMENTAL REGISTRY NO. 013-5102

These are the comments of the Canadian Environmental Law Association (CELA) on the Ontario government's proposed amendments to the *Environmental Assessment Act* (*EAA*) in relation to the following matters:

- Ministerial decisions to reconsider previously issued approvals under the *EAA*;
- amendments to Class Environmental Assessments (EAs) to exempt certain undertakings; and
- Ministerial decision-making on public requests for Part II orders under the *EAA*.

These comments are being forwarded to you in accordance with the above-noted Registry notice.

Part I of this submission provides CELA's general views on the questionable manner in which the proposed *EAA* amendments have been presented to the public for review and comment. Part II of this submission outlines CELA's specific comments and recommendations in relation to the *EAA* proposals, while Part III sets out CELA's overall conclusions about next steps.

PART I – CELA'S GENERAL COMMENTS ON THE REGISTRY POSTING

(a) Uncoordinated Consultation

At the outset, CELA notes that there is considerable overlap between the *EAA* amendments outlined in this Registry posting and some identical amendments described in a separate Registry posting for Ontario's recent Discussion Paper[1] on "modernizing" the *EAA*.

[1] The Discussion Paper is available through the Environmental Registry: see https://ero.ontario.ca/notice/013-5101.

CELA is unclear why the Ministry of the Environment, Conservation and Parks (MECP) has decided to post two different Registry notices with respect to the same set of *EAA* proposals.[2] In our view, these duplicative postings may create unnecessary confusion among stakeholders and members of the general public, and may unduly impair public input during the perfunctory 30 day comment period.[3] In any event, this brief sets out CELA's submissions on the above-noted *EAA* changes, and our submissions on the Discussion Paper will be provided to the MECP under separate cover.

More alarmingly, even though the Discussion Paper and Registry Notice 013-5102 describe the MECP's suggested *EAA* changes as "proposals," it appears that these suggestions have now moved well beyond the proposal stage and are already being implemented by the provincial government.

In particular, the generalized proposals outlined in the Registry posting are now set out in legislative form in Schedule 6 of Bill 108.[4] This statute was introduced in the Ontario Legislature earlier this month, despite the fact that the public comment period under the Registry notice is still running until May 25, 2019. Moreover, after the introduction of Bill 108, the Registry notice has not been updated or re-posted to let Ontarians know that the actual text for these proposed *EAA* amendments is now available for scrutiny.

In CELA's view, this chronology of uncoordinated consultation by the MECP is unacceptable, and it substantially undermines public participation rights under Part II of the *EBR*. By any objective standard, amending the *EAA* (which is Ontario's oldest and arguably most important environmental planning law) is an environmentally significant matter of profound public importance. Therefore, any governmental proposal to change the *EAA* requires an integrated and comprehensive approach to public notice/comment, rather than fragmented, time-limited chances to respond to separate online postings.

(b) EBR Non-Compliance

Section 35 of the *EBR* legally obliges the Environment Minister to "take every reasonable step to ensure that all comments" received from the public "are considered when decisions about the proposal are made by the ministry." In our opinion, this burden has not been satisfactorily discharged in this case since it appears that a decision has already been made to proceed with this proposal long before public comments have been considered – or even received – by the MECP.

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[2] For example, the Discussion Paper (Registry Notice 013-5101) discusses exemptions of low-risk projects from Class EAs (page 10), reforms to the decision-making process for Part II order requests (pages 12-13), and changes to the Minister's power to reconsider EA approvals (page 13). These same reforms are also proposed in Registry Notice 013-5102.

[3] In addition, CELA notes that there has been a third separate Registry posting in relation to the Ontario government's recent proposal to exempt certain dispositions of provincially owned property from *EAA* coverage: see https://ero.ontario.ca/notice/013-4845. This proposal triggered a 45 day comment period, and CELA's response to this posting is available at: https://www.cela.ca/publications/EA-exemptions-public-lands.

[4] Bill 108 (*More Homes, More Choice Act, 2019*) was introduced for First Reading on May 2, 2019: see https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-108. To date, Second Reading debate on Bill 108 occurred on May 8, 9, 13 and 14, 2019 with no discussion by government representatives about the rationale for, or content of, the *EAA* changes in Schedule 6.

Similarly, CELA submits that the current "consultation" is inconsistent with the commitment to public participation in the MECP's Statement of Environmental Values (SEV) under the *EBR*:

> The Ministry… believes that public consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.[5]

In light of the MECP's apparent failure to comply with the *EBR* and its own SEV, CELA draws no comfort from the Registry notice's assurance that the MECP will be consulting "at a later date" on regulations that "result" from the statutory changes, or that the MECP is "planning" to host webinars for "indigenous communities and organizations, as well as stakeholder groups."

In our view, this type of engagement is being scheduled far too late in the decision-making process regarding the proposed *EAA* changes, which have already been introduced in Bill 108. Rather than undertake belated consultation on implementation details, it would have been far more preferable for the MECP to meaningfully pre-consult with stakeholders, Indigenous communities and members of the public well before Schedule 6 of Bill 108 was drafted and tabled in the Ontario Legislature. It strikes CELA as highly ironic that the MECP's objectionable consultation in this case has occurred in the context of an EA statute that is intended to establish an open, accessible and participatory process.

In any event, given the unfortunate confluence of Registry Notice 013-5102, the EA Discussion Paper, and Schedule 6 of Bill 108, the following submissions by CELA will, of necessity, discuss all three documents.

(c) CELA's Background and Experience in EA Matters

CELA's comments on the most significant *EAA* amendments outlined in the Registry notice and proposed in Schedule 6 of Bill 108 are set out below. These comments are based on CELA's decades-long experience under the *EAA*, including:

- representing clients in individual EA processes for undertakings caught by Part II of the *EAA*;
- representing clients in Class EA processes, including making requests for Part II orders (also known as "elevation" or "bump-up" requests);
- representing clients in judicial review applications, statutory appeals and administrative hearings in relation to the *EAA*;
- filing law reform submissions on the *EAA* and regulations, including new or proposed regulatory exemptions for specific sectors, undertakings or proponents;
- participating in provincial advisory committees considering matters under the *EAA*; and

[5] See https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change.

- conducting public education/outreach, and providing summary advice, to countless individuals, non-governmental organizations, Indigenous communities, and other persons interested in matters arising under the *EAA*.

Accordingly, CELA has carefully considered the proposed *EAA* changes from the public interest perspective of our client communities, and through the lens of ensuring access to environmental justice.

PART II – CELA COMMENTS ON SCHEDULE 6 OF BILL 108

(a) Overview of Proposed EAA Changes

If enacted, Schedule 6 of Bill 108 proposes to:

- clarify the scope of the Minister's existing power under subsection 11.4 to reconsider approvals that have been previously issued under the current *EAA* and its predecessor;

- add new provisions regarding the approval and amendment of Class EAs in order to exempt certain undertakings (or groups of undertakings) from Class EA requirements; and

- establish new constraints on the public's ability to request the Environment Minister to elevate (or "bump up") specific undertakings from a Class EA planning process to an individual EA under Part II of the *EAA*.

As explained below, CELA generally supports the suggested changes to subsection 11.4 of the *EAA*. However, CELA concludes that Schedule 6's proposed amendments in relation to Class EAs and Part II order requests are problematic for various reasons, and they should therefore not be enacted by the Ontario Legislature.

In addition, CELA submits that rather than pursuing these piecemeal amendments to the *EAA*, the provincial government should be developing and consulting on the wider suite of procedural and substantive reforms that are long overdue in Ontario in order to make the current EA program more robust, participatory, transparent and accountable.

Unfortunately, none of these broader EA reforms are addressed in Schedule 6 of Bill 108, nor have they been discussed (or even mentioned) in the Registry notice or the Discussion Paper.

(b) Reconsideration of Previous EA Approvals

Section 11.4 of the *EAA* currently enables the Environment Minister to reconsider approvals issued under the Act to grant permission to proponents to proceed with their undertakings. This reconsideration power may be exercised where there is "a change in circumstances" or "new information" regarding the approved EA application.

This reconsideration provision applies to EA approvals previously issued by either the Minister or the Environmental Review Tribunal (ERT) when an EA application has been referred by the Minister to the ERT for a public hearing and decision. The reconsideration of the EA approval may be carried out by the Minister, who is also empowered to request the ERT to determine whether it is appropriate to reconsider the approval, or to actually carry out the reconsideration of a previous approval.

Subsection 11.4 was added to the *EAA* in 1996. However, to CELA's knowledge, the Ministerial reconsideration power has rarely (if ever) been exercised to formally re-examine previous EA approvals, or to amend or revoke such approvals. Nevertheless, CELA supports the continuation of subsection 11.4 since it serves as an important safeguard in cases where it may become necessary to review older approvals, or to adjust the terms and conditions attached to such approvals, in accordance with the public interest purpose of the *EAA*.[6]

Schedule 6 of Bill 108 leaves the existing provisions of subsection 11.4 largely intact, but proposes to add new provisions that:

- empower the Minister or the ERT to order the proponent to "provide plans, specifications, technical reports or other information, and to carry out and report on tests or experiments relating to the undertaking";[7]

- clarify that the approval being reconsidered by the Minister or the ERT may be amended or revoked;[8]

- specify that reconsideration decisions "shall be made in accordance with any rules and subject to any restrictions as may be prescribed";[9] and

- ensure that subsection 11.4 applies not only to EA approvals issued under the current Act, but also to EA approvals issued under the previous version of the *EAA*.[10]

CELA generally supports these proposed amendments since they add important clarity on how the reconsideration power shall be exercised by the Minister and by the ERT. At the same time, CELA recommends that the forthcoming rules under subsection 11.4 should be developed with public input, and should entrench opportunities for meaningful public participation in the decision-making process used by the Minister and by the ERT.

RECOMMENDATION 1: When developing reconsideration rules under subsection 11.4 of the *EAA*, the Minister should consult interested stakeholders to ensure that the rules entrench opportunities for meaningful public participation in the decision-making process.

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[6] The purpose of the *EAA* is "the betterment" of the people of Ontario "by providing for the protection, conservation and wise management" of the environment: *EAA*, section 2.
[7] Proposed subsection 11.4(3.1).
[8] Proposed subsection 11.4(4).
[9] Proposed subsection 11.4(4.1).
[10] Proposed subsection 12.4(4).

(c) Class EA Exemptions

Under Part II.1 of the *EAA*, there are a number of "parent" Class EAs that establish common planning processes for certain classes of small-scale projects that occur frequently and have environmental impacts that are well-understood and are amenable to known mitigation measures.

At present, Class EAs in Ontario cover various public and private activities, including: municipal projects; GO Transit facilities; provincial highways; provincial parks and conservation reserves, MNRF resource stewardship and facility development projects; remedial flood and erosion control projects; minor electricity transmission facilities; certain mining-related matters; and waterpower projects.[11] Accordingly, the vast majority of undertakings considered under the *EAA* are processed under Class EAs, and relatively few projects undergo an individual EA.

In general terms, projects planned under Class EAs are essentially "pre-approved" and can be undertaken by proponents (without project-specific Ministerial approval) once they have satisfactorily completed the notification, assessment and documentation requirements prescribed by the Class EA. However, for particularly significant or controversial projects, members of the public may file written requests to ask the Minister to elevate (or "bump up") projects from the streamlined provisions of the Class EA to an individual EA under Part II of the *EAA*, as discussed below.

In addition, for the purposes of greater certainty, current Class EAs typically have schedules or project categories that list and wholly exempt projects that truly pose no or low risks. In such cases, these projects do not require detailed environmental planning or project-specific reports before they may be undertaken.

For example, the Municipal Class EA contains Schedule A and Schedule A+ lists of normal operational or maintenance activities carried out by municipalities (including the "snow plowing" and "de-icing operations" mentioned in Registry Notice 013-5102). The Municipal Class EA is abundantly clear that these activities are pre-approved and can be immediately undertaken by municipalities without following Class EA planning procedures. Thus, the mere fact that these minor activities are mentioned in schedules to the Municipal Class EA does not mean that an EA is required.

Similarly, the Class EA for Provincial Transportation Facilities contains a Group D list of routine maintenance activities carried out by the Ministry of Transportation of Ontario (MTO). Again, however, there is no requirement for MTO to conduct an individual EA, and there is no requirement under the Class EA for a project-specific study, report or consultation, before these maintenance activities may be undertaken.

Although these schedules and categories already effectively exempt low risk projects from Class EA planning requirements, Schedule 6 of Bill 108 proposes *EAA* amendments that will require Class EAs to identify the types of undertakings within the defined class that will be exempt from the *EAA*.[12] Similarly, Schedule 6 mentions four specific Class EAs for provincial undertakings that are in effect at the present time, and provides that proponents do not need to conduct further

[11] See https://www.ontario.ca/page/class-environmental-assessments-approved-class-ea-information.
[12] Proposed subsections 14(2)(1.1) and 15.3.

assessment or public consultation in relation to undertakings that are exempted under these Class EAs.[13] It is unclear to CELA why this subset of current Class EAs has been singled out for preferential treatment under Schedule 6, or why a different list of Class EAs is described in Registry Notice 013-5102, which states that "the projects within the [following] categories/groups/schedules are proposed to be exempted":

- Schedules A and A + of the Municipal Class Environmental Assessment;
- Category A of the Class Environmental Assessment for Public Works;
- Category A of the Class Environmental Assessment for Provincial Parks and Conservation Reserves;
- Category A of the Class Environmental Assessment for Resource Stewardship and Facility Development Projects;
- Category A of the Class Environmental Assessment for Activities of the Ministry of Northern Development and Mines under the *Mining Act*;
- Group A of the GO Transit Class Environmental Assessment; and
- Group D of the Class Environmental Assessment for Provincial Transportation Facilities.

Given that these Class EAs already exempt routine or low risk undertakings from Class EA requirements, CELA submits that the Ontario government has failed to demonstrate why it is now necessary to amend the *EAA* itself in order to ensure that exemptions are addressed in Class EAs when they are being approved or amended by the Minister. This has been standard practice for decades, and CELA sees no compelling legal or jurisdictional reason to codify this practice in the *EAA* at this time.

In addition, CELA is concerned that these statutory amendments are intended to set the stage for a rapid expansion of the types of undertakings that will be exempted from *EAA* coverage. In our view, the low level of public trust in the Class EA regime will be further eroded if even more projects are exempted from Class EA planning requirements, which, by their very nature, are more streamlined (and less onerous) that those established for individual EAs.

RECOMMENDATION 2: The Ontario government should not proceed with Schedule 6's statutory amendments which require Class EAs to specify types of undertakings that will be exempt from the *EAA*.

(d) Filing and Deciding Part II Order Requests

As noted above, parent Class EAs typically contain provisions which enable members of the public to file elevation (or "bump up") requests with the Minister. In essence, these requests ask the Minister to elevate contentious projects from a streamlined Class EA process to an individual EA

[13] Proposed subsection 15.3(3).

process in order to address unresolved concerns about potential environmental impacts (or alternatives) that were not examined adequately (or at all) in the Class EA planning process.

Thus, the public's ability to file requests for Part II orders by the Minister represents an important safety valve for situations when Class EA procedures are not being adequately followed, or where environmentally significant projects are being inappropriately rammed through a Class EA process despite public objections.

In CELA's experience, there have been long-standing concerns about the overall Class EA regime, but particular criticism has been properly aimed at the process for deciding requests for Part II orders. For example, the Environmental Commissioner of Ontario made the following findings in his 2003-04 annual report to the Ontario Legislature:

> MOE staff have observed that some proponents under the Municipal Class EA submit inadequate environmental studies, and have incomplete or missing project files at key review stages of projects. For example, information on water quality, water quantity, contingency plans and baseline data has been lacking. Tight timelines prohibiting proper technical reviews are also cited as concerns.
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> In some cases, EA processes governing provincial highway projects fail to achieve the intended levels of environmental protection… MNR staff have similarly raised concerns that the MTO Class EA for highway construction has been unable to achieve environmental protection in instances involving provincially significant wetlands and threatened species habitat. There is also no requirement to prevent a continual net loss of natural heritage features.
>
> Under Class EAs, the public does have certain time-limited opportunities to request more detailed environmental studies (termed "Part II Orders" or, previously, "bump-up requests"). But in practice, there is a very low likelihood that such requests will be granted by MOE. For example, MOE reviewed 11 such requests under the Municipal Class EA in 2002, and all were denied. Similarly, MOE reviewed six such requests under MTO's Class EA in 2001/2002, and all were denied. Under MNR's Class EA for Timber Management, over 80 bump-up requests were made from 1994 to 2001, and all were denied.
>
> In some cases, members of the public are frustrated when proponents operating under Class EAs change their projects in a significant way after most of the public consultation opportunities are over. The ECO has observed that concerned residents have very few options of redress in such situations.
>
> Under Class EAs, public comments and concerns are submitted to the proponent, rather than to an independent arbiter. The proponent can decide how (or whether) to respond to the concerns. MOE also tends to bounce commenters' procedural concerns about a project back to the proponent.[14]

[14] ECO 2003-04 Annual Report, pages 56-57: see http://docs.assets.eco.on.ca/reports/environmental-protection/2003-2004/2003-04-AR.pdf.

Similar observations were made by the Auditor General of Ontario in her 2016 report to the Ontario Legislature:

> The majority of projects that are subject to an environmental assessment in Ontario are assessed under a streamlined process. The Ministry has limited involvement in these assessments. While the Ministry is responsible for administering the *Environmental Assessment Act*, it does not know how many streamlined assessments are completed annually, nor does it have assurance that these assessments are being done properly…
>
> Ministry staff also informed us that in some instances the Ministry became aware of a Class EA project only through bump-up requests from the public. Staff at the Ministry's regional offices had no previous information on approximately one-quarter of the 177 Class EA projects for which the Ministry had received bump-up requests in the last five-and-a-half years. In these cases, the project owner had already conducted public consultation and prepared the assessment report before the Ministry became aware of the project. As a result, the Ministry missed opportunities to contact project owners in the early stages of the assessment to ensure that all the risks are identified and addressed…
>
> Ministry regional office staff reviews of streamlined assessments often identified deficiencies in the environmental assessment done by project owners. Such deficiencies confirm the need for the Ministry to provide feedback on streamlined assessments.
>
> In our review of a sample of streamlined assessments, we found that the Ministry identified deficiencies in about three-quarters of the assessments it reviewed. Such deficiencies include insufficient public and Indigenous consultation, lack of details to support the project owner's assessment of environmental impact, and additional measures needed to mitigate impact on the environment. Many of these deficiencies would otherwise not have been detected and corrected, since the only other means of identifying these would have been through a public request for a bump-up to a comprehensive assessment—which occurs with less than 10% of projects.[15]

In CELA's view, the above-noted findings and concerns expressed by the Environmental Commissioner and the Auditor General remain equally valid in 2019. However, Schedule 6 of Bill 108 does not adequately rectify these systemic problems within Ontario's Class EA regime.

Instead, the MECP's Discussion Paper[16] and Schedule 6 of Bill 108 largely focus on the timeliness of Part II order decisions. CELA agrees that elevation requests often take too long for the Minister to decide, and we note that most of the time, the public requests are refused. On this latter point, the Discussion Paper states that out of the 172 elevation requests received by the Minister from 2012 to 2017, only one request was granted.[17] In CELA's experience, this excessively high refusal

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[15] Auditor General of Ontario, 2016 Annual Report, Chapter 3.06: Environmental Assessment, pages 356-57, 359: see http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.
[16] Discussion Paper, page 12.
[17] *Ibid*. The 2016 Annual Report of the provincial Auditor General similarly found that only one of 177 elevation requests was granted by the Environment Minister in the previous 5.5 year period: see http://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf.

rate has been a long-standing problem under Class EAs in Ontario, but the Discussion Paper and Schedule 6 of Bill 108 offer the wrong solution.

From our public interest perspective, CELA's fundamental concern is that the existing Part II order process has become non-credible and over-politicized, largely because elevation requests are determined behind closed doors by the Minister, not an independent decision-maker. We are also concerned by claims that the dismal track record of unsuccessful elevation requests demonstrates that these requests do not have merit. This line of argument was expressly rejected years ago by Environment Minister's EA Advisory Panel in no uncertain terms:

> Some proponents whose projects are covered by Class EAs claim that the absence of successful bump-up requests demonstrates that such requests are unmeritorious, and proves that Class EA planning procedures are working well. The Executive Group respectfully disagrees with this claim, especially given the inherently political nature of the current bump-up decision-making process. In our view, the fact that bump-up requests continue to be filed by Ontarians (despite the strong likelihood of rejection) suggests that there is significant and ongoing public dissatisfaction with Class EA implementation (i.e. insufficient or untimely public notices, inadequate documentation prepared by proponents, unacceptable environmental impacts or tradeoffs, inappropriateness of Class EA procedures for particularly significant projects or sensitive sites, etc.).[18]

To remedy this situation, the EA Advisory Panel made two key recommendations for quickly resolving project-specific disputes that may arise during the Class EA planning process, and for adjudicating Part II order requests that may get filed to address outstanding issues at the end of the Class EA planning process.

The first reform recommended by the Panel was that disagreements which arise between the proponent and members of the public during the Class EA process should be resolved in an expedited process administered by the ERT. This reform was explained by the Panel as follows:

> During the time that a parent Class EA is being applied to a project and an Environmental Study Report (ESR) is being prepared, where there are differences of opinion between the proponent and others as to the proper project schedule, the appropriate level of public consultation, or adequacy of studies required to comply with the parent Class EA, there is no meaningful procedure or mechanism for resolving such issues. Failing agreement between the proponents and EA participants, the only remedy is for those concerned to await the completion of the project-specific Class EA and resulting ESR, and then request a bump-up/Part II order. The same issue exists in relation to projects subject to environmental screening under the Electricity Projects Regulation. The lack of a mechanism for resolving issues prior to completion of the project-specific Class EA is problematic both for proponents and others. Both sectors would benefit by having timely procedures which can resolve disputes during, and not at the end of, the preparation of the ESR, with the objective of avoiding or limiting subsequent bump-up requests…

[18] EA Advisory Panel Report, *Environmental Assessment in Ontario: A Framework for Reform* (Vol. I, March 2005), page 93: see https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1.

> In light of the foregoing observations, the Executive Group concludes that there should be processes and means for dealing with obvious problems in the preparation of a project-specific Class EA/ESR while it is ongoing, instead of waiting until the end for a "bump-up" request. For example, those persons who are concerned about the process might identify a problem with the "need" discussion, or allege there are deficiencies in the scope of alternatives being considered, or the screening criteria being used. If the proponent and stakeholders cannot resolve these themselves, provision should be made for seeking directions from the ERT which could include ERT mediation, or rulings from the ERT during a "time out". We observe that if these procedures are established, the mere fact they exist will likely cause proponents to more carefully consider and use more genuine effort to resolve community concerns during the preparation of an ESR, and not allow these to fester until the end of the process.

The second reform recommended by the Panel was that Part II requests should be adjudicated in writing by the ERT, not the Minister:

> In addition to the foregoing procedures that may be triggered during Class EA planning exercises, the Executive Group is also recommending the creation of a formal adjudicative process, administered by the ERT, to expeditiously hear and determine requests for bump-ups/Part II Orders/elevation requests after the completion of an ESR/screening report. For the reasons outlined above, the Executive Group considers that the ERT is best positioned to serve as the adjudicative body to hear and determine bump up or elevation requests that arrive at the end of planning procedures.

The EA Advisory Panel's suggested framework for implementing these reforms is set out below in Schedule 1 of these submissions. However, the Panel's sound recommendations have not been adopted by the Ontario government to date.

To the contrary, Schedule 6 of Bill 108 now proposes *EAA* amendments that:

- prohibit the Minister from issuing a Part II order unless the Minister opines that the order will "prevent, mitigate or remedy adverse effects" upon:

  > (i) existing treaty and aboriginal rights affirmed by section 35 of the *Constitution Act, 1982*; or
  >
  > (ii) a prescribed matter "of provincial importance";[19]

- require an MECP Director to review the Part II request to ensure that it raised an issue related to the above-noted grounds, and it was made by a person "qualified" to make the request;[20]

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[19] Proposed subsection 16(4.1). To date, no information has been provided by the Ontario government to describe what constitutes a prescribed matter of public importance for the purposes of this new subsection. Moreover, there is no mandatory duty on the Cabinet to pass a regulation prescribing matters since section 39 of the *EAA* is permissive in nature. Thus, it is unknown when – or if – any matters will be prescribed in relation to Part II order requests.

[20] Proposed subsection 16(7.2).

- empower the Director to refuse the Part II order request, in whole or in part, if these conditions precedent are not satisfied,[21] and to notify the requester, with reasons, if the request is summarily refused;[22]

- impose a new Ontario residency restriction for individuals or groups that file requests for Part II orders;[23]

- indicate that the Minister shall make his/her decision on the requested Part II order before the prescribed deadline, but if the deadline is missed, the Minister must provide reasons to the proponent and requestor to explain why a decision could not be made by the deadline, and to indicate the timeline in which the decision is expected to be made.[24]

In CELA's view, these proposals are unacceptable because they will not fix the fundamental structural problems that undermine the credibility of the Part II order process. CELA is particularly concerned about the unwarranted proposal to restrict the grounds for elevation requests to treaty/aboriginal rights and to unspecified matters of undefined "provincial significance."

To our knowledge, the Ontario government has presented no empirical evidence or statistical analysis indicating how often treaty/aboriginal rights have served as the basis for Part II order requests. However, even if such requests only constitute a small percentage of elevation requests over the years, CELA agrees that Indigenous communities should continue to be empowered to file elevation requests on the basis of potential impacts on treaty/aboriginal rights.

At the same time, based on our *EAA* experience in recent decades, it is CELA's understanding that Part II order requests have been much more frequently filed by non-Indigenous individuals, groups and communities on grounds other than treaty/aboriginal rights.

However, if future Part II orders are only available for treaty/aboriginal rights, and given that no provincially significant matters have been prescribed or even identified by the Ontario government, then Schedule 6 will inappropriately reduce the number of requests to a relatively small handful each year. In CELA's view, arbitrarily restricting Part II requests to a single ground (or two) will diminish the efficacy of this important safety valve, and will undermine accountability and transparency under Class EAs.

CELA is aware that Part II order requests often raise public concerns about potential effects upon provincially significant natural heritage (e.g. species at risk or their habitat). However, a number of elevation requests address impacts to natural heritage that may not be provincially significant, but may be highly valuable and ecologically important at the local or regional level.

For example, given the extensive loss of wetlands across southern Ontario, it is important to protect and conserve the remaining wetlands even if they do not qualify as provincially significant under Ontario's wetlands evaluation system. Accordingly, CELA submits that Part II order requests

[21] Proposed subsection 16(7.3)
[22] Proposed subsection 16(7.4).
[23] Proposed subsection 16(5).
[24] Proposed subsection 16(7.1).

should not be limited to only those matters that are deemed by Ontario government to be worthy enough at the provincial scale to warrant the application of the elevation request process.

In addition, while Schedule 6 of Bill 108 proposes to prohibit persons from filing elevation requests unless they are "resident in Ontario," there is no actual definition of this key term in Schedule 6. Instead, Schedule 6 merely enables the Cabinet to pass a regulation to define or clarify this critically important phrase, but there is no mandatory duty to so under the *EAA*. It therefore remains unclear under Schedule 6 whether elevation requests can be filed by federal ministries or agencies, non-Ontario corporations that carry on business in the province, persons from other provinces or states who own Ontario properties (e.g. homes, cottages, etc.), unincorporated associations based in Ontario, or officials from neighbouring jurisdictions that may be concerned about potential transboundary impacts.

At the same time, Schedule 6 also proposes that the Cabinet may make regulations that permit non-Ontarians to file Part II order requests.[25] If the Cabinet intends to exercise this regulation-making authority, then there appears to be no compelling need to change the status quo by initially restricting Part II order requests to Ontario residents. In CELA's view, requests for Part II orders should be available to any person (resident or otherwise) who is interested in, or potentially affected by, projects that are being planned under Class EAs.

More fundamentally, CELA observes that the Ontario government has offered no evidence-based justification for fundamentally altering who can – or cannot – file Part II order requests under the *EAA*. For example, the Government of Ontario has not demonstrated that the elevation request process needs to be constrained by residency requirements because the process has been "hi-jacked" or subverted by a proliferation of requests filed by non-Ontario organizations, persons or entities.

Similarly, the Schedule 6 proposal to prescribe a deadline for the Minister's decision-making is misplaced and ambiguous. For example, CELA notes that Schedule 6 and the Discussion Paper do not specify an actual timeframe for the Minister's decision. Instead, Schedule 6 merely enables the Cabinet to pass a regulation that sets a deadline, but there is no legal obligation upon the Cabinet to do so. Therefore, despite Schedule 6's provisions, proponents, stakeholders and members of the public have no indication how long (or how short) the decision-making timeline may be in relation to elevation requests.

More generally, CELA understands the political attractiveness of setting deadlines in order to be seen as providing more certainty and predictability to parties involved in disputes over elevation requests. However, Schedule 6 itself undermines this timeliness objective by specifying, in effect, that the Minister's failure to make a decision by the prescribed deadline is neither fatal to, nor determinative of, his/her decision on the merits of the request.

Instead, the Minister is simply required to provide an explanation as to why more time may be required to decide the elevation request. By giving the Minister an open-ended discretion to decide elevation requests well after the prescribed deadline, CELA submits that, as a matter of law, Schedule 6 does not establish any binding or enforceable timelines at all.

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[25] Proposed subsection 39(g.2).

In summary, CELA concludes that even if the Schedule 6 amendments are enacted, the decision-making process will remain intact as an indiscernible "black box" in which elevation requests are sent by the public to the Minister but are almost always rejected, often for specious reasons. This unsatisfactory arrangement will not be fixed by *EAA* changes that are intended to simply speed up Ministerial decision-making, restrict who may file Part II requests, limit the grounds for such requests, and empower the Director to screen out requests on a preliminary basis. In fact, given that virtually all Part II order requests are rejected by the Minister in any event, we see no persuasive reason for any of these new Schedule 6 changes to the decision-making process.

Accordingly, CELA recommends that Schedule 6's proposed amendments regarding Part II order requests should not be enacted under Bill 108. Instead, the EA Advisory Panel's above-noted recommendations should be developed and implemented forthwith by the Ontario government. As noted above, the fact that numerous elevation requests are filed every year by concerned citizens suggests that there is a high level of public dissatisfaction with the current state of Class EA planning processes.

Thus, CELA submits that it would make more sense for the Ontario government to systematically review and address the root causes of elevation requests, rather than try to expedite or constrain the Ministerial decision-making process in the manner set out in Schedule 6 of Bill 108.

RECOMMENDATION 3: The Ontario government should not proceed with Schedule 6's proposed revisions of section 16 of the *EAA* in relation to elevation (or "bump up") requests filed by members of the public pursuant to Class EAs.

RECOMMENDATION 4: The Ontario government should develop and consult upon appropriate amendments to section 16 of the *EAA* that reflect the reforms suggested by the EA Advisory Panel in relation to Class EAs and elevation (or "bump up") requests.

(e) Essential EA Reforms Missing From Schedule 6 of Bill 108

In the wake of the 1996 amendments to the *EAA*, there has been a widespread consensus that Ontario's EA program needs to be renewed, revised and revitalized. Thus, important recommendations for critically needed EA reforms have been offered over the years by CELA,[26] other environmental groups,[27] the Environment Minister's EA Advisory Panel,[28] the Auditor General of Ontario,[29] and the Environmental Commissioner of Ontario.[30]

It is beyond the scope of these submissions on the Registry posting and Schedule 6 of Bill 108 to describe in detail the various EA reforms that are overdue in Ontario, such as:

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[26] See http://www.cela.ca/publications/application-review-environmental-assessment-act-and-six-associated-regulations.
[27] See http://www.cela.ca/publications/briefing-note-need-environmental-assessment-ontario.
[28] *Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Recommendations 1-41: see https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1.
[29] See http://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html.
[30] See http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf and http://docs.assets.eco.on.ca/reports/environmental-protection/2007-2008/2007-08-AR.pdf.

- updating and improving the purposes and principles of the *EAA* to reflect a sustainability focus;
- ensuring meaningful opportunities for public participation in individual EAs and Class EAs;
- enhancing consultation requirements for engaging Indigenous communities in a manner that aligns with the United Nations Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent;
- reinstating "proponent pays" intervenor funding legislation to facilitate public participation and Indigenous engagement;
- entrenching a statutory climate change test to help *EAA* decision-makers to determine whether particular undertakings should be approved or rejected in light of their greenhouse gas emissions or carbon storage implications;
- curtailing the ability of the Minister to approve Terms of Reference that narrow or exclude the consideration of an undertaking's purpose, need, alternatives or other key factors in individual EAs;
- extending the application of the *EAA* to environmentally significant projects within the private sector (e.g. mines);
- requiring mandatory and robust assessment of cumulative effects;
- facilitating regional assessments for sensitive or vulnerable geographic areas;
- ensuring strategic assessments of governmental plans, policies and programs;
- referring individual EA applications to the ERT for a hearing and decision upon request from members of the public;
- reviewing and reducing the lengthy list of environmentally significant undertakings that have been exempted from the *EAA* by regulation, declaration orders, or legislative means; and
- removing or revising section 32 of the *EBR*, which currently exempts from the *EBR*'s public participation regime any licences, permits or approvals that implement undertakings that have been approved or exempted under the *EAA*.

Until these and other key reforms are implemented, CELA fully agrees with the 2014 commentary by the Environmental Commissioner of Ontario that the province's current EA program is a "vision lost":

> Given the unaddressed concerns and unfulfilled recommendations of the EA Advisory Panel, the ECO and many observers and stakeholders, the ECO believes a comprehensive and public review of the EAA is long overdue. The ECO also believes that MOE should

> conduct such a review with an open mind, listening to concerns from all sectors and utilizing the consultative power afforded by the Environmental Registry.[31]

Unfortunately, the above-noted reforms are not addressed by Schedule 6 of Bill 108, nor are they mentioned in the Registry posting or the Discussion Paper. Rather than tackling the serious systemic problems in Ontario's EA program, Schedule 6 proposes piecemeal "efficiency" measures (e.g. exemptions, deadlines, etc.). In CELA's view, this narrow approach falls considerably short of the mark if the Ontario government is interested in pursuing appropriate *EAA* reforms that benefit all Ontarians, not just proponents or their shareholders.

RECOMMENDATION 5: The Ontario government should develop and consult upon appropriate legislative and regulatory changes to the current EA program that are needed to achieve the public interest purpose of the *EAA*.

PART III – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA supports Schedule 6's proposed additions to subsection 11.4 of the *EAA*. However, CELA objects to Schedule 6's unwarranted and unacceptable proposals to amend the existing Class EA regime to exempt certain undertakings, and to unduly constrain the process for filing and deciding Part II order requests.

In addition, CELA concludes that Schedule 6 of Bill 108 does not contain the types of broad *EAA* reforms that are needed to safeguard the public interest in Ontario in an effective, enforceable and equitable manner.

Accordingly, CELA makes the following recommendations in relation to the Registry posting and Schedule 6 of Bill 108:

RECOMMENDATION 1: When developing reconsideration rules under subsection 11.4 of the *EAA*, the Minister should consult interested stakeholders to ensure that the rules entrench opportunities for meaningful public participation in the decision-making process.

RECOMMENDATION 2: The Ontario government should not proceed with Schedule 6's statutory amendments which require Class EAs to specify types of undertakings that will be exempt from the *EAA*.

RECOMMENDATION 3: The Ontario government should not proceed with Schedule 6's proposed revisions of section 16 of the *EAA* in relation to elevation (or "bump up") requests filed by members of the public pursuant to Class EAs.

RECOMMENDATION 4: The Ontario government should develop and consult upon appropriate amendments to section 16 of the *EAA* that reflect the reforms suggested by the EA Advisory Panel in relation to Class EAs and elevation (or "bump up") requests.

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[31] ECO Annual Report 2013-14, at pages 132-39: see http://docs.assets.eco.on.ca/reports/environmental-protection/2013-2014/2013-14-AR.pdf.

RECOMMENDATION 5: The Ontario government should develop and consult upon appropriate legislative and regulatory changes to the current EA program that are needed to achieve the public interest purpose of the *EAA*.

We trust that these recommendations will be considered and acted upon as the MECP determines its next steps in this matter. If requested, CELA would be pleased to meet with MECP staff to further elaborate upon the above-noted recommendations.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

SCHEDULE 1:
EXCERPTS FROM THE REPORT OF THE ENVIRONMENT MINISTER'S ENVIRONMENTAL ASSESSMENT ADVISORY PANEL (2005)

This Schedule contains verbatim excerpts from the EA Advisory Panel's proposals to improve and strengthen the process for addressing disputes that arise during and after Class EA planning procedures.

The full text of the Panel's report is available at: https://www.cela.ca/publications/improving-environmental-assessment-ontario-framework-reform-volume-1

1. *EAA* Reforms to Obtain ERT Directions on Issues Arising during Class EA Planning

(a) The ERT should be enabled to provide guidance on the need for the proponent to take further steps to comply with the parent Class EA (e.g., consider further alternatives, gather more or further analyze data, undertake further consultation), and generally advise on or direct the resolution of differences between the proponent and the public. The jurisdiction of the ERT to provide such rulings should, if necessary, be clarified under the EA Act for these purposes.

(b) The ERT should have the authority to determine that the parent Class EA schedule/category being used by the Proponent should be changed to a more rigorous one, require the proponent to carry out supplementary studies and consultation prior to completing the ESR, as well as direct that the Class EA process be terminated and an individual EA be undertaken, with Terms of Reference to be approved by the ERT.

(c) The ERT should have the authority to impose a "time out" on the proponent proceeding further with or completing the ESR process, where the ERT is of the opinion such time out is appropriate.

(d) Applications to the ERT should be dealt with in an expedited way, and any hearing for these purposes should be limited to one day or less, unless the ERT is persuaded otherwise. Subject to any rules made by the ERT, the hearing should occur within 10 business days of the applicant's materials being filed with the ERT and any usual notice provisions should be modified so as not to delay the hearing of the application. The ERT should be encouraged to provide its direction as soon as possible, and in any event within one week of hearing the application.

(e) MOE staff should be encouraged to provide the Ministry's views on the matter to the parties, and make a written submission to the ERT with the objective of attempting to provide a resolution of the issues, without prejudice to any decision by the ERT.

(f) Where the ERT deems it appropriate, the proponent may be required to provide funding to the community for their engagement of independent expertise and obtaining expert information, and for participation in mediation, with the objective of resolving differences and avoiding bump-up requests at the end of the process.

(g) The ERT should clearly have the authority to engage in mediation as well as rule on applications.

(h) Where the ERT directs that an individual EA with appropriate Terms of Reference be undertaken in substitution for the Class EA process, this ruling becomes final and binding unless within 30 days the Minister rejects or modifies the direction.

(i) Factors to be considered by the ERT in considering whether an undertaking should be required to be processed under a more rigorous category or pursuant to an individual EA should include:

- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or complaining party in the planning of the project; - the nature of the specific concerns which remain unresolved;
- details of any discussions held between the community or person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.

2. *EAA* Reforms to Enable the ERT to Adjudicate Part II Order Requests

(a) Where a request is made for a Part II order, bump-up or elevation ("a request") unless the Minister decides the request within 30 days, or within the 30 day period the Minister stipulates a decision will be made within a further 30 day period and makes a decision within a total of 60 days, the proponent or requestor who has substantively participated throughout the project-specific Class EA process, may require the project-specific Class EA to be referred to the ERT for its consideration and decision;

(b) The Minister shall provide reasons for any decision made regarding such requests;

(c) The ERT shall not consider a request for an individual EA where, prior to completion of the ESR, the ERT had determined no individual EA was warranted for the specific project in issue;

(d) Where the ERT holds a hearing in respect of the ESR, the ERT shall have the power to:

- approve the undertaking with or without conditions;
- require an individual EA, including approval of the Terms of Reference, and the completion of the EA within specified time limits;
- require further studies and consultation within specified time limits and adjourn the hearing pending completion of such requirements, following which it shall determine whether or

not to approve the ESR/undertaking, unless in the interim the bump-up requests have been withdrawn, whereupon it shall be deemed approved;

(e) A hearing before the ERT may be in writing only or an oral hearing. Any hearing before the ERT shall be commenced within 30 days of a hearing request, the hearing limited to 1 day, and a decision rendered within 45 days of the hearing request, unless the ERT otherwise orders;

(f) No request shall be granted by the ERT where:

- There is an objective and apparent basis to conclude that the proponent's project-specific Class EA process conformed to all substantive and procedural requirements of the applicable parent Class EA for the undertaking and the commitments, if any, made by the proponent during the preparation of its ESR or which may have been ordered during that period by the ERT; and,
- The decision by the proponent as to the schedule in the parent Class EA used for its project was not patently unreasonable.

(g) Factors to be considered by the ERT in making its decisions should include:

- the intended timing of and any substantive urgency related to the proponent's undertaking;
- likely environmental impacts of the project and their significance;
- the extent and nature of public concerns;
- the adequacy of the proponent's planning process;
- the availability of other alternatives to the project;
- the adequacy of the public consultation program and the opportunities for public participation;
- the involvement of the community or requesting person in the planning of the project;
- the nature of the specific concerns which remain unresolved;
- details of any discussions held between the community or requesting person and the proponent;
- benefits of requiring the proponent to undertake further studies and/or an individual EA;
- degree to which public consultation and dispute resolution have occurred;
- how the proposed undertaking differs from other undertakings in the class and the significance of those factors; and
- any other important matters considered relevant.