Court File No. 187/20

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

B E T W E E N:

EARTHROOTS COALITION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, FEDERATION OF ONTARIO NATURALISTS carrying on business as ONTARIO NATURE, MICHEL KOOSTACHIN, and COOPER PRICE, a minor, by his litigation guardian ELLIE PRICE

Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF ENVIRONMENT, CONSERVATION AND PARKS and the MINISTER OF MUNICIPAL AFFAIRS AND HOUSING

Respondents

AFFIDAVIT OF THERESA McCLENAGHAN

I, Theresa McClenaghan, of the Town of Paris, in the County of Brant, MAKE OATH AND SAY:

1. I am employed as Executive Director and Counsel with the Canadian Environmental Law Association ("CELA"), one of the applicants in the within application for judicial review

and, as such, I have knowledge of the matters hereinafter deposed to in this affidavit. I have been on staff at CELA since 1998, except for an 18-month leave in 2006-2007.

A. OVERVIEW

2. CELA is a federally incorporated non-profit environmental law organization with over 50 years of experience in environmental litigation, law reform, public education, and research. As a specialty legal aid clinic funded by Legal Aid Ontario, CELA represents low-income Ontarians, disadvantaged communities, and vulnerable populations experiencing environmental problems. CELA appears as counsel on their behalf in administrative and court proceedings, including civil actions, judicial review, private prosecutions, appeals, interventions, and tribunal hearings. As described below, CELA has considerable experience with the origins, development, interpretation, implementation, reform of, and litigation with respect to, the *Environmental Assessment Act* ("*EAA*"), the *Environmental Bill of Rights* ("*EBR*"), and the *Planning Act*, three laws amended by Bill 197 (*COVID-19 Economic Recovery Act, 2020*), the subject of the within application for judicial review.

B. CELA's BACKGROUND, MANDATE, EXPERIENCE, AND INTEREST

3. CELA was founded in 1970 to use and improve laws to protect human health and the environment. Casework and law reform advocacy have been the central focus of CELA's work over the past 50 years, but we also undertake community organization, public education, and outreach activities.

4. CELA was incorporated as the Canadian Environmental Law Association/ L'Association Canadienne du Droit de L'Environnement by Letters Patent from the Government of Canada on September 21, 1981 as a corporation without share capital. CELA's objects, as set out in the Letters Patent, include using and promoting use of the legal system to defend the environment through advocacy before the courts and administrative tribunals, law reform, and community education. A copy of the Letters Patent dated September 21, 1981 is attached to this affidavit as **Exhibit "A".** A copy of the Certificate of Continuance and Articles of Continuance dated August 14, 2014 is attached to this affidavit as **Exhibit "B".**

5. CELA's long history of involvement with the *EAA*, the *EBR*, and the *Planning Act* includes litigating under these regimes, participating in provincial advisory committees, giving testimony before legislative standing committees on reforms to these laws, and writing and speaking extensively on these laws before lay and professional audiences and in the media. Each of these laws is important to CELA and to the clients that CELA represents. My affidavit provides an overview of the importance of these laws as they existed before Bill 197, followed by a brief summary of some of CELA's numerous activities in connection with each of these laws over the years, and describes our key concerns about the changes to these laws contained in Schedules 6 and 17 of Bill 197.

1. *EAA*

6. The *EAA*, which came into force in 1976, established an information-gathering and decision-making framework for evaluating the potential environmental impacts of

undertakings (or classes of undertakings) before they can proceed. This participatory, evidence-based process is required under the *EAA* primarily in relation to public-sector undertakings, such as highways or other transportation systems, water and sewer infrastructure, and certain types of energy projects. Over the years, however, the *EAA* has also been applied to some environmentally significant undertakings proposed by the private sector, including large landfills and waste incinerators.

7. The overarching purpose of the *EAA* is to establish open and accountable processes that identify and prevent potential environmental problems before actual environmental damage occurs, in order to protect, conserve and wisely manage the environment for the "betterment" of Ontarians. Environmental assessments ("EAs") are intended to achieve this public interest purpose by generally requiring: (1) identification of ways to prevent, minimize, or mitigate negative effects of undertakings; (2) demonstration of the undertaking's purpose and rationale; (3) examination of whether there are any preferable or environmentally sound alternatives to the proponent's proposal; and (4) transparent consideration of public or agency concerns prior to deciding whether to approve the undertaking, with or without terms and conditions.

8. At present, the Ministry of Environment, Conservation and Parks ("MECP") is responsible for administering the *EAA*. The nature, scope, and extent of the environmental impacts to be assessed under the *EAA* is broader than other provincial statutes and includes impacts on the natural environment, human life, and the social, economic, and cultural conditions that influence communities. For certain classes of smaller projects that recur

frequently and have predictable and mitigable impacts, proponents can go through less rigorous planning procedures prescribed under class EAs that have been approved under the *EAA*. Under the class EA regime, projects are essentially "pre-approved" and do not require project-specific Ministerial approval to proceed, provided that the proponent has satisfactorily followed the prescribed notification, planning, and documentary requirements. However, for particularly significant or contentious projects, the Minister can, upon public request, order the "elevation" (or "bump-up") of the project from the class EA to a more rigorous individual EA. In CELA's experience, most of the activity under the *EAA* to date has occurred under class EAs rather than individual EAs. Over the years, many of our clients and other Ontarians have exercised their right to make "elevation" requests on environmental grounds.

9. Certain types of undertakings, regardless of whether they are proposed by the private or public sector, have the potential to significantly harm the environment, wildlife, ecosystem function, and human populations if carried out without due regard to their impact. For example, private or public waste disposal sites can cause soil contamination, degradation of groundwater or surface water, adverse effects upon local air quality, destruction of habitats (including for species at risk), and emission of greenhouse gases. These and other environmental effects can be extensive, last for many years, and cause human health, social, economic, and cultural problems.

10. In my experience, these environmental and socio-economic concerns are particularly acute for CELA's clients or other low-income Ontarians, disadvantaged

communities, and vulnerable populations that are disproportionately affected by pollution impacts. In short, the pre-Bill 197 *EAA* is designed to help Ontario society to act in a proactive, precautionary and equitable manner at the outset in relation to proposed undertakings, instead of attempting to react, after the fact, to environmental problems that could have been otherwise anticipated and avoided, or that may be irreversible or prohibitively expensive to remediate. Integral to this approach is a strong role for meaningful public participation at all stages of *EAA* processes to facilitate access to environmental justice.

11. As part of our on-going involvement with this important statute over the years, CELA staff members have served on the following provincial advisory bodies regarding the *EAA*:

(a) Ontario Minister of the Environment's Environmental Assessment Advisory Panel – Executive Group (June 2004 to March 2005; released a two-volume report on recommended legislative, regulatory, and administrative reforms to Ontario's EA program); and

(b) Ontario Environmental Review Tribunal Client Advisory Committee (formerly the Ontario Environmental Assessment Board Client Advisory Committee) (general mandate to review/revise ERT rules of practice to ensure fairness, accessibility, and accountability during the EA hearing process);

12. Since the 1970s, CELA has researched and written numerous submissions to the Ontario government and made presentations to legislative standing committees on EA matters. Some early and more recent examples include:

(a) Submissions to the Ontario Ministry of the Environment on "Environmental Impact Assessment: The Law as it is and as it Should be" (May 1974);

(b) Submissions to the Standing Committee on Social Development Regarding Bill 76 – *Environmental Assessment and Consultation Improvement Act, 1996* (July 1996);

(c) Submissions to the Ministry of the Environment Regarding Proposed Guidelines under the *Environmental Assessment Act* (March 2001);

(d) Submissions to the Environment Ministry on Proposed EA Changes for Ontario's Waste Sector (March 2007);

(e) Submissions on Draft Regulations under the Environmental Assessment for Public Transit Projects and the Draft Transit Priority Statement (May 2008);

(f) *EBR* Application for Review to the Ontario Minister of the Environment on the *Environmental Assessment Act* and Six Associated Regulations (December 2013);

(g) Submissions to the Ministry of the Environment and Climate Change on Using Environmental Assessment to Address Climate Change (October 2016);

(h) Submissions to the Ministry of the Environment and Climate Change on Proposed Operational Policy on Submission of Part II Order Requests under the Environmental Assessment Act (April 2018);

(i) Submissions to the Ministry of the Environment, Conservation and Parks on Modernizing Ontario's Environmental Assessment Program: Discussion Paper (May 2019);

(j) Presentation and Written Submissions to the Standing Committee on Justice Policy on Bill 108, More Homes, More Choices Act, 2018 (May 2019);

(k) Submissions to the Ministry of the Environment, Conservation and Parks in relation to the Ontario government's proposals to revise several approved Class EAs and other EA-related changes (August 2020).

13. CELA staff members have also written extensively on the *EAA* for lay and professional audiences for the purposes of public legal education, including the following:

(a) "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010) *Journal of Environmental Law and Practice*, vol. 21, pp. 279-303 (presentation at JELP's third annual conference);

(b) "Why Science Matters in Environmental Assessment" (Presentation to the Ontario Association of Impact Assessors, October 2013);

(c) "Recent Environmental Assessment Reforms in Ontario" (*The Lawyer's Daily*, September 2019);

(d) "What is New with Environmental Assessment?" (Presentation to the Six Minute Environmental Lawyer CPD session held by the Law Society of Ontario in October 2019); and

(e) annual EA presentations to the Environmental Toolkit Workshop held by the Ontario Sustainability Network).

14. CELA has also provided summary legal advice to numerous members of the Ontario public respecting the *EAA* and, where necessary, has represented clients in cases involving the application and interpretation of requirements under the *EAA* in the courts and before administrative tribunals. This casework includes participation by CELA lawyers on behalf of our clients in: (1) ongoing EA processes that are currently underway (i.e. Beechwood Road Environmental Centre (Lennox & Addington County) and

Southwestern Landfill (Oxford County); (2) recently concluded EA processes (i.e. Capital Region Resource Recovery Centre (Ottawa); (3) recently revoked EA approvals (i.e. ED-19 Landfill (Leeds & Grenville County); and (4) precedent-setting EA cases, such as:

(a) *Sutcliffe v. Ontario (Minister of the Environment)* (2003), 65 O.R. (3d) 457 (Ont. S.C. – Div. Ct.); rev. (2004), 72 O.R. (3d) 213 (Ont. C.A.);

(b) Adams Mine Landfill EA (Environmental Assessment Board, 1998) and *Adams Mine Intervention Coalition v. Ontario*, 1999 Carswell 2193 (Ont. Div. Ct.);

(c) Timber Management Class Environmental Assessment (Environmental Assessment Board) (1994); and

(d) Halton Region Landfill Environmental Assessment (Joint Board under the *Consolidated Hearings Act*, 1989; and *NSP Investments Ltd. v. Ontario* (1990), 72 O.R. (2d) 379 (Ont. Div. Ct.).

15. Additionally, prior to joining CELA, I had acted for several clients on Ontario provincial environmental assessment matters in the 1980s and 1990s. These included representing citizens' groups during environmental assessment proceedings and hearings, such as: (1) the Eastview landfill case in Guelph; (2) the Storrington landfill case north of Kingston; and (3) the Glenridge landfill case near St. Catherine's. I also represented clients in several provincial environmental assessment proceedings relating to the energy sector,

including: (1) a long-term supply plan for electricity in Ontario, and (2) a significant electricity transmission project in southwest Ontario.

2. *EBR*

16. The *EBR* is rights-based legislation. It recognizes and entrenches certain environmental rights possessed by every resident of Ontario. The legislation recognizes several rights that establish procedures and mechanisms that enhance the ability of Ontario residents to participate in government decisions about the environment. These include: (a) the right to a healthy environment by the means identified in the statute; (b) the right to participate in environmental decisions; (c) the right to hold government accountable for its environmental decisions; and (d) the right of public access to the courts to ensure environmental protection.

17. In my experience, the public right under the *EBR* to participate in environmental decision-making, which is a key issue in the within application for judicial review, necessarily includes a number of key components, such as the right to receive timely notice and to have sufficient opportunity to review and provide comment on environmentally significant proposals. This *EBR* right generally extends to governmental proposals to make, amend, or revoke statutes, regulations, policies, and instruments (e.g. licences, permits, approvals, orders) before the proposed steps are enacted or implemented. The *EBR* also requires governmental decision-makers to consider the principles, commitments and other obligations set out in their respective "Statements of Environmental Values" issued under the *EBR*.

18. It also has been my experience that the primary mechanism by which the public is notified of governmental proposals is through information posted on the Environmental Registry, an on-line registry that is established by the *EBR* and maintained by the MECP. Generally, the *EBR* establishes a minimum 30-day notice and comment period for all proposals and requires the responsible ministry to consider comments submitted. The *EBR* also requires prescribed ministries to post the final decision on the Environmental Registry, to summarize the comments made, and how the comments were or were not addressed in the final decision on the proposal. The MECP and the Ministry of Municipal Affairs and Housing ("MMAH") are listed by regulation as prescribed ministries for the purposes of Part II of the *EBR*. Similarly, the *EAA*, *EBR*, and the *Planning Act* are prescribed statutes in the applicable *EBR* regulations.

19. CELA has a lengthy history of involvement in the development of the *EBR*, and the right of members of the public to participate in environmental decision-making has been a cornerstone of CELA's approach to environmental law development and reform since the organization's inception in 1970. This approach is reflected in detail in *Environment on Trial*, a book written by CELA staff and first published in 1974 (with subsequent updates) that strongly advocated the passage of an *EBR* and related legislative reforms, including EA requirements. After the *EBR* was enacted and proclaimed in force, CELA lawyers wrote another book, *The Environmental Bill of Rights: A Practical Guide*, that describes various *EBR* rights and how they can by utilized by Ontarians to protect public health and the environment.

20. As a result of CELA's interest in, and extensive experience with, the development of the concept of environmental rights, over the years CELA lawyers were appointed as members of the following provincial advisory bodies concerning the *EBR*:

(a) Ontario Advisory Committee on the Environmental Bill of Rights (1990-1991) (a multi-stakeholder body that was the precursor to the Ontario Task Force, referred to below, that developed the *EBR*);

(b) Ontario Task Force on the Environmental Bill of Rights (1991-1992) (multi-stakeholder task force established by the Ontario Ministry of the Environment and tasked with drafting an advisory report, a model bill, and detailed recommendations for what eventually became the *EBR*).

21. Since the 1970s, but particularly since the enactment of the *EBR* in 1993, CELA has researched and written numerous submissions to the government and made presentations to standing committees or professional bodies on the need for, the content of environmental bill of rights legislation generally, and the application, interpretation, and implementation of the *EBR*, in particular. Some of the more recent presentations and submissions include:

(a) "Third-Party Appeals under the *Environmental Bill of Rights* in the Post-Lafarge Era: The Public Interest Perspective" – (Presentation to the Ontario Bar Association, February 2009);

(b) *EBR* Application for Review to the Minister of the Environment of Section 27 of the *Environmental Protection Act* (July 2013);

(c) *EBR* Application for Review to the Minister of Municipal Affairs and Housing of Section 5.1(2) of the *Emergency Management and Civil Protection Act*; Sections 3, 4 and 6 of the *Places to Grow Act*; and of the *Planning Act* (September 2016);

(d) *EBR* Application for Review of the *Environmental Bill of Rights, 1993* (November 2017);

(e) *Environmental Bill of Rights* Application for Review of Regulation to End Cap-and-Trade (July 2018);

(f) "Why the Environmental Commissioner of Ontario Matters: Legal Analysis of Schedule 15 of Bill 57" (November 2018); and

(g) *EBR* Tools for Protecting the Environment – Annual Presentations to Environmental Law Toolkit Workshop (held by the Ontario Sustainability Network).

22. For the past three decades, CELA has extensively exercised *EBR* rights in its own name and on behalf of our clients. These include filing: (a) comments on proposals posted

on the Environmental Registry under Part II of the *EBR*; (b) applications for review under Part IV of the Act; and (c) applications for investigation under Part V of the Act. CELA also has represented clients in several cases involving the application and interpretation of Part II requirements (including third-party appeal rights) under the *EBR* in the courts and before administrative tribunals. Some early and more recent ones follow:

(a) *In re Barker* [1996] 20 C.E.L.R. 72 (Ontario Environmental Appeal Board) (first successful leave to appeal application under Part II of the *EBR*);

(b) *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (N.S.) (3d) 191 (Ont. Div. Ct.) (upholding tribunal decision granting leave to appeal under Part II of *EBR* to CELA clients and other persons);

(c) *Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Environment and Climate Change)*, 2012 CarswellOnt 3680 (Ontario Environmental Review Tribunal) (successful leave to appeal application under Part II of the *EBR*);

(d) *Citizens Against Melrose Quarry v. Ontario (Environment and Climate Change)*, 2014 CarswellOnt 15166 (Ontario Environmental Review Tribunal) (successful leave to appeal application under Part II of the *EBR*);

(e) *Concerned Citizens of Brant v. Ontario (Environment and Climate Change*), 2016 CanLII 17291 (Ontario Environmental Review Tribunal) (successful leave to appeal application under Part II of the *EBR*).

23. In April 2020, the Ontario government posted a bulletin on the Environmental Registry (ERO 019-1599) to advise Ontarians that it had passed a regulation (O.Reg.115/20) that temporarily suspended the requirements of Part II of the *EBR* until 30 days after the emergency declaration on COVID-19 (dated March 17, 2020) has ended. In effect, this regulation temporarily exempted proposed Acts, policies, regulations, and instruments from the requirements of Part II of the *EBR*, even if the proposals were unrelated to Ontario's response to the COVID-19 situation. In response, CELA and 49 other non-governmental organizations jointly wrote a letter to the Premier, MECP, MMAH and other Cabinet Ministers to strongly object to this unprecedented suspension of important public rights under the *EBR*. A copy of the April 2020 government bulletin is attached to this affidavit as **Exhibit "C"**. A copy of the non-governmental organizations' letter is attached to this affidavit as **Exhibit "D"**.

24. In June 2020, the Ontario government posted a second Environmental Registry bulletin (ERO 019-1939) to advise Ontarians that O.Reg.115/20 had been subsequently revoked by O.Reg.277/20. According to the bulletin, this revocation "fully restored the requirements in Part II of the *EBR* to post acts, policies, regulations and instruments" on the Registry, and "to consider SEVs when making decisions that could significantly affect the environment." On the basis of this statement, CELA reasonably expected that

meaningful public notice and comment opportunities would be provided under the *EBR* in relation to the environmentally significant aspects of Bill 197, which was introduced in the Ontario Legislature approximately three weeks after O.Reg.115/20 had been revoked. A copy of the June 2020 government bulletin is attached to this affidavit as **Exhibit "E"**.

3. *Planning Act*

25. In my experience, the *Planning Act*, the principal law regulating land use planning in the province, plays a critical role in controlling the growth of communities and protecting the environment in southern Ontario through the legal tools it gives to provincial and municipal governments. The *Planning Act* entrenches public participation rights and authorizes municipal government control of the use of private lands through official plans, zoning bylaws, site plan and subdivision controls. Through the development of provincial policy statements ("PPS") issued by the MMAH, matters of provincial interest are integrated into municipal planning decisions. PPSs attempt to balance development interests with protection of the environment and natural resources.

26. In my experience, provincial policy can also be implemented by Ministerial zoning orders under section 47 of the *Planning Act* that can unilaterally zone (or re-zone) any property in the province without the consent of municipalities and without triggering public notice, comment and appeal rights under the *Planning Act*. However, until recently, Ministerial zoning orders have rarely been used where municipalities already have existing zoning by-laws. Nevertheless, the expanded authority for the use and content of Ministerial

zoning orders under Schedule 17 of Bill 197 is of particular concern to CELA and its clients, as described below.

27. It has also been my experience that because the *Planning Act* is Ontario's primary land use planning statute, it is a growth management tool important to many CELA clients because it can address: (1) urban sprawl and its consequences, such as loss of prime agricultural land, encroachment of human development on natural habitats, and public expenditures on infrastructure, such as roads and sewers, which support unsustainable low density development; and (2) intensification, which through re-focusing and encouraging growth on serviced lands within existing urban areas, can reverse the trend of urban sprawl and its impacts on environmental and agricultural land resources in rural areas.

28. It has been my further experience that many local disputes involving the environmental impacts of land use and development are resolved by the Local Planning Appeals Tribunal ("LPAT"), an independent provincial adjudicative tribunal that hears appeals from developers and members of the public under the *Planning Act*. In deciding appeals, the LPAT interprets and applies policies, such as the PPS, and, as a result, its decisions are important for land use planning and environmental protection in the province. For members of the public and many CELA clients, LPAT hearings are the final step in the opportunities for public involvement in land use planning processes under the *Planning Act*. Therefore, effectively by-passing or sidestepping this traditional safety valve, as will occur with expanded authority to issue Ministerial zoning orders pursuant to the Bill 197 amendments to the *Planning Act*, is especially concerning to CELA.

29. As a result of CELA's long-standing interest in, and experience with, land use planning matters, a CELA lawyer was provincially appointed to serve on the Sewell Commission, which consulted on and published *New Planning for Ontario – The Final Report of the Commission on Planning and Development Reform in Ontario* (1993).

30. Because of its importance to overall environmental protection goals, CELA has researched and written numerous submissions to the provincial government and made presentations to standing committees or professional bodies on land use planning and its reform in Ontario. Several illustrative examples of these submissions follow:

(a) Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development Reviewing Bill 20, the "Land Use Planning and Protection Act" (February 1996);

(b) Comments from the Canadian Environmental Law Association to the Ministry of Municipal Affairs and Housing regarding the Proposed Provincial Policy Statement (March 1996);

(c) Presentation to the Smart Growth Network on Understanding and Applying Planning Law (May 2005);

(d) Submissions on the Provincial Policy Statement Five Year Review: Public Consultation on Draft Policies and the Review Cycle for the Provincial Policy Statement (November 2012);

(e) Submissions to the Ontario Ministry of Municipal Affairs and Housing on Proposed Land Use Planning Reforms in Ontario's Bill 139: A Public Interest Perspective (August 2017);

(f) "Open-for-Business" Planning By-laws, Drinking Water Safety, and the Lessons of the Walkerton Tragedy: Legal Analysis of Schedule 10 of Ontario Bill 66 (December 2018);

(g) Comments on the Proposed Amendment to the Growth Plan (February 2019);

(h) Submission on Planning Act changes in Bill 108 (May 2019);

(i) Submissions on the Provincial Policy Statement Issued under the *Planning Act* (October 2019).

31. CELA has also represented clients in cases involving the application and interpretation of requirements under the *Planning Act* in the courts and before administrative tribunals. Recent examples follow:

(a) *Brantford (City) v. Ontario (Municipal Affairs & Housing)*, 2015 CanLII 49340 (LPAT);

(b) *Miller Paving Ltd. v. McNab / Braeside (Township)*, 2015 CanLII 70369 (LPAT), leave to appeal refused, 2016 ONSC 6570 (Ont. Div. Ct.);

(c) *Walker Environmental Group Inc. v. Oxford (County)*, 2018 CanLII 37765 (LPAT); and

(d) several pending appeals in central and southwest Ontario before the LPAT respecting land use planning decisions in relation to such matters as waste management facility siting and resource extraction activities.

32. The consequences of poor planning and its impact on vulnerable communities, such as those represented by CELA, are illustrated by the just-released report of the United Nations Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes. The report addresses the results of the Special Rapporteur's 2019 visit to Canada at the invitation of the federal government. The office of the Special Rapporteur, Baskut Tuncak, advised our office on September 11, 2020 that the advanced, unedited, report of his 2019 visit was now available. CELA had provided input to his investigation, including by way of hosting a meeting between him and Indigenous elders at our offices at the request of the Chiefs of Ontario. At that time, the attendees outlined examples of hazardous facilities that had been

established near First Nations communities in Ontario, with adverse impacts on their health and quality of life. The Rapporteur's report discusses examples of discrimination against Indigenous peoples in Canada. In particular, at paragraphs 33 to 44 he reviews the impacts of a number of hazardous activities and facilities on Indigenous communities and his report, at paragraph 66, concludes that: "The right to information is crucial for protection of human rights of all people. Information must be available, accessible and in an appropriate and usable form, including to those most vulnerable". A copy of the Special Rapporteur's report is attached to this affidavit as **Exhibit "F"**.

33. The Special Rapporteur's report is but one example that illustrates the significance of planning and assessment laws on communities such as those represented by CELA and, accordingly, the importance of protecting the right of the public, including such communities, to comment on, and provide input to, the provincial government on significant changes to these laws as guaranteed by the *EBR*.

34. In summary, it has been my experience that the *EAA*, *EBR*, and the *Planning Act* are integral laws in CELA's overall mandate to assist and represent low income Ontarians, disadvantaged communities, and vulnerable populations who experience environmental problems. As such, CELA has a vital and direct interest on behalf of its client communities in both the process and substance of these laws and their amendment. In the alternative, it is my view that CELA brings a public interest perspective to these matters sufficient to bring this application.

C. BILL 197, *COVID-19 ECONOMIC RECOVERY ACT*

35. On July 8, 2020, Bill 197 *(COVID-19 Economic Recovery Act, 2020*), was tabled by the Minister of Municipal Affairs and Housing for First Reading in the Legislative Assembly of Ontario. Bill 197 contained 20 Schedules of amendments to provincial statutes. However, over 50 percent of the pages in Bill 197 were devoted to just two schedules: Schedule 6 (35 pages) and Schedule 17 (10 pages). Schedule 17 of Bill 197 contained amendments to the *Planning Act* in relation to Ministerial zoning orders, and other land use planning matters, while Schedule 6 of Bill 197 contained numerous, substantial, and detailed amendments to the *EAA*, as well as what was termed a "consequential amendment" to the *EBR*. In particular, section 51(7) of Schedule 6 added new section 33.1 to the *EBR* that provided that the requirements of Part II of the *EBR* "are deemed not to have applied with respect to the amendments made by Schedule 6 to the *COVID-19 Economic Recovery Act, 2020*". In addition, under s. 66(2) of Schedule 6, s. 51(8) of the Schedule repeals section 33.1 of the *EBR* 30 days after Bill 197 received Royal Assent (i.e. on August 20, 2020).

36. On the same day that Bill 197 was tabled in the Legislative Assembly of Ontario, the Minister of Environment, Conservation and Parks web-posted a bulletin about Bill 197 on the Environmental Registry (ERO 019-2051) which stated that the notice was for informational purposes only as "there is no requirement to consult on this initiative". The bulletin also claimed that in order to expedite infrastructure projects to support economic recovery from the pandemic, the proposed amendments to Schedule 6 of Bill 197 "include

a provision making them not subject to the minimum 30-day posting requirement under the [*EBR*]". To my knowledge, at the time the bulletin was posted on the Environmental Registry, this provision (i.e. new section 33.1 of the *EBR*) was not the law in Ontario. A copy of the bulletin is attached as an exhibit to the affidavit of Priyanka Vittal in the *Greenpeace Canada, et al v. Minister of the Environment, Conservation and Parks, et al* judicial review application (Court File No. 342/20).

37. The bulletin further stated that the proposed amendments to the *EAA* build on a November 2018 "Made in Ontario" Environment Plan released by the MECP, and an April 2019 Discussion Paper by the MECP on modernizing Ontario's EA program. The MMAH did not web-post its own bulletin on the Environmental Registry about Bill 197 in general, or about the *Planning Act* changes in Schedule 17, in particular. Excerpts from the Environment Plan, and the full EA Discussion Paper, are attached to this affidavit as **Exhibits "G"** and **"H"**, respectively.

38. Notice of the Environment Plan had been web-posted by the MECP on the Registry (ERO 013-4208) on November 29, 2018 for a 60-day public consultation period. In response, CELA submitted comments that noted that the Plan only contained a single vague sentence about "modernizing" Ontario's EA program. No legislative language for amending the *EAA* was proposed in this Plan. At the present time, the Registry notice still denotes the Environment Plan as a "proposal," rather than as a final "decision." A copy of the Registry notice is attached to this affidavit as **Exhibit "I"**. Excerpts from CELA's

comments concerning the treatment of EA issues in **Exhibit "G"** are attached to this affidavit as **Exhibit "J"**.

39. Similarly, notice of the MECP's EA "modernization" Discussion Paper (**Exhibit "H"**) had been posted on the Registry (ERO 013-5101) on April 25, 2019 for a 30-day public consultation period. A copy of the Registry notice is attached to this affidavit as **Exhibit "K"**. In essence, **Exhibit "H"** posed general questions about EA reform, described a broad vision for modernizing Ontario's EA program, and solicited ideas from the public on what "could" be done to modernize EA in the province. However, it proposed no legislative language or text for any specific amendments to the *EAA*, but assured Ontarians that "there will be additional opportunities for you to participate on new initiatives" (**Exhibit "H"**, page 30)."

40. In response to this Registry posting, CELA submitted comments that expressed concern that the "sparse" and "superficial" Discussion Paper "fails to provide key implementation details on how and when these or other changes will be implemented…and fails to specify what mechanisms will be used by the government to operationalize the changes (e.g. legislative changes, regulatory revisions, policy development, or administrative improvements)." A copy of CELA's comments on the Discussion Paper is attached to this affidavit as **Exhibit "L"**. At the present time, the relevant Registry notice, which is attached to this affidavit as **Exhibit "K"**, still describes the EA Discussion Paper (**Exhibit "H"**) as a "proposal", rather than as a final decision.

41. On July 10, 2020, CELA prepared and web-posted its preliminary analysis of the significant environmental effects of some of the numerous actual *EAA* amendments introduced by the Ontario government, which were publicly revealed for the first time in Schedule 6 of Bill 197. Despite the Ontario government's failure to provide public notice or comment opportunities on these amendments under the *EBR*, CELA nevertheless subsequently provided our Bill 197 analysis to the Minister of Environment, Conservation and Parks for his consideration. The CELA analysis outlined critical concerns that CELA had with the proposed *EAA* amendments, including: (1) removal of the automatic application of the *EAA* to public sector undertakings (which has been a hallmark of the statute since the law's inception in the mid-1970s), and its replacement with virtually unfettered Cabinet discretion to decide by regulation which projects are, and are not, subject to the *EAA*; (2) termination of the 10 currently approved Class EAs, and their intended replacement with yet to be determined "streamlined" EA requirements by regulation; and (3) significant restriction of the grounds upon which the public can request that a streamlined EA of a contentious infrastructure project can be elevated to a comprehensive EA. A copy of the CELA preliminary analysis is attached to this affidavit as **Exhibit "M".**

42. Despite the claim in the Environmental Registry bulletin that COVID-19 was the rationale for introducing and enacting the *EAA* amendments in Schedule 6 of Bill 197 without prior public consultation, the Minister of the Environment, Conservation and Parks advised the Legislative Assembly on July 15, 2020 that his ministry had been working on the amendments for over a year and a half (that is, well before the advent of the pandemic

which was the reason given by the ministry as the justification for the amendments). A copy of the Minister's comment is attached to this affidavit as **Exhibit "N".**

43. On July 16, 2020, twelve non-governmental organizations, including CELA, wrote to the Minister of the Environment, Conservation and Parks advising him of three concerns. First, the letter noted that posting the *EAA* amendments for public comment was mandatory under section 15 of the *EBR*. Second, the letter indicated there were no other exceptions to public participation rights under the *EBR* that were applicable to Schedule 6 of Bill 197. Third, the letter stated that the Minister could not rely on the proposed new section 33.1 of the *EBR* – which had not yet been enacted or proclaimed into force – as the legal basis for exempting the *EAA* amendments from the consultation requirements of Part II of the *EBR*. A copy of the letter is attached as an exhibit to the affidavit of Priyanka Vittal in the *Greenpeace Canada, et al v. Minister of the Environment, Conservation, and Parks, et al* judicial review application (Court File No. 342/20).

44. On July 21, 2020 Bill 197, the *COVID-19 Economic Recovery Act, 2020*, was given Third Reading and Royal Assent and new section 33.1 of the *EBR* purportedly came into force at that time. Bill 197 amended, repealed, and enacted numerous provincial statutes, the particulars of which were contained in 20 Schedules. The legislative provisions in 18 of the Schedules were relatively short. However, the amendments contained in two Schedules that are at issue in this application are lengthier and, in the case of one of these, extraordinarily complex. More specifically, Schedule 6 of Bill 197, which substantially amended the *EAA*, contained 35 pages of numerous, detailed, and complex amendments,

including 5 pages of "consequential amendments" one of which purported to exclude the application of the *EBR* to Schedule 6.

45. On July 24, 2020, the Minister of the Environment, Conservation and Parks responded in writing to the twelve non-governmental organizations, including CELA, and suggested three different justifications for the Decision not to subject the *EAA* amendments to the mandatory public consultation requirements under section 15 of the *EBR*. First, the Minister stated that the pandemic necessitated swift action to get the province's economic recovery "back on track". Second, he referred to the November 2018 Environment Plan (**Exhibit "G"**) and the April 2019 Discussion Paper (**Exhibit "H"**), which set out the government's overall vision for a modernized EA program, and indicated that these documents had each been the subject of public consultation at the time they were released. Third, he stated that the retroactive exemption of Part II of the *EBR* contained in section 51(7) of the *EAA* amendments (adding section 33.1 to the *EBR*) was within the full legal authority of the Ontario Legislature to make. A copy of the Minister's letter is attached as an exhibit to the affidavit of Priyanka Vittal in the *Greenpeace Canada, et al v. Minister of the Environment, Conservation and Parks, et al* judicial review application (Court File No. 342/20).

D. CONCERNS ABOUT MINISTER'S DECISION AND RATIONALE

46. I am greatly concerned by the various reasons offered in the Minister's letter to explain or excuse the government's failure to undertake *EBR* consultation on Bill 197. First, I note that the Environment Plan (**Exhibit "G"**) and the Discussion Paper (**Exhibit**

"H") predate the pandemic by a year or more. Therefore, it is my view that these documents' generalized prescriptions for new directions in the EA regime were not informed by the pandemic, and cannot now be invoked or relied upon to justify the Minister's failure to comply with section 15 of the *EBR*.

47. Second, the Ministry's November 2018 Environment Plan (**Exhibit "G"**) and April 2019 Discussion Paper on modernizing EA (**Exhibit "H"**), generally contained high-level conceptual discussions, broad "vision" statements, and non-committal policy suggestions. As discussed above, no specific statutory language was proposed and CELA, in its 2019 submissions (**Exhibits "J"** and **"L")** on both these exhibits, pointed out these problems in the Environment Plan and the Discussion Paper, respectively.

48. All that the Environment Plan (**Exhibit "G"**) states about the *EAA* is contained in one bullet point paragraph on page 48 of that document, which simply says that the government looks "to modernize Ontario's environmental assessment process, which dates back to the 1970s, to address duplication, streamline processes, improve service standards to reduce delays, and better recognize other planning processes". In my view, nothing in that statement or in **Exhibits "G"** and **"H"** taken together, prepared CELA (or other interested members of the public) for: (1) section 33.1 of the *EBR*; (2) section 8 of Schedule 6 regarding a new section 4.1 of the *EAA* (respecting removal of the right to review decisions made under Part II of the *EAA* pursuant to the *Statutory Powers Procedure Act*); (3) the all but complete removal of the right of members of the public to request a "bump-up" of a project on environmental grounds from a class to a comprehensive EA; (4) the

immediate termination of all outstanding "bump-up" requests that had been previously filed on environmental grounds by members of the public; and (5) the legislative detail embodied throughout Schedule 6.

49. I am also concerned that the process used to enact the amendments to the *EAA* and the *EBR* contained in Schedule 6, as well as the content of those amendments, regressively depart from domestic requirements and international conventions, principles and norms regarding EA practice and protection of human rights, such as public participation and access to justice in environmental decision-making. These include the right of the public: (a) to participate in a process that allows them to provide their concerns to officials and legislators, including regarding proposed legislation or proposed government approval of public and private projects that may affect the environment and to have their views considered before such legislation or decisions are finalized; and (b) to review by the courts and/or administrative bodies of such decisions when their rights to public participation have been violated.

50. My fears are also heightened by a September 11, 2020 Environmental Registry notice (019-2377) that as a result of Bill 197: (1) introduces a proposed project list for comprehensive EAs under the *EAA* that suggests only 13 types of projects that should be subject to individual EAs; and (2) fails to designate high-level plans, proposals, or programs as subject to the Act at all. In comparison, the project list under the federal *Impact Assessment Act* designates 61 different types of projects subject to that Act. In my experience, Ontario's new approach of selectively listing a narrow range of project types for application under the *EAA*: (1) will significantly reduce the scope and application of the *EAA* to public sector undertakings; (2) constitutes a major rollback of EA practice in

Ontario; and (3) underscores why the *EAA* amendments in Schedule 6 of Bill 197 should have been the subject of public notice and comment under the *EBR*. Copies of the Registry notice and Ontario's project list proposal are attached to this affidavit as **Exhibit "O"** and **Exhibit "P"**, respectively.

51. Third, in my experience the usual practice under Part II of the *EBR* is for the Ontario government to consult with the public about potential legislative change in two main (and sometimes overlapping) stages. The first stage is the government's policy discussions and soliciting of public input about possible options or directions that might be built into a new or amended law. The second stage is to obtain public feedback on the actual amendments that are drafted to implement or operationalize the governmental policy decision made in relation to the topic.

52. In fact, this is precisely the two-track consultation process that the Ontario government itself followed in the wake of the April 2019 Discussion Paper (**Exhibit "H"**) with respect to other changes to the *EAA* that pre-date Bill 197. For example, the Discussion Paper briefly outlined some possible "early actions" that could make EA processes more timely and focused upon the most significant undertakings, and these general proposals were subject to public notice and comment under the *EBR*, as noted above. At or about the same time, the Ontario government proposed to pursue certain "early actions" via specific provisions that were incorporated into Schedule 6 of Bill 108 (*More Choices, More Homes Act, 2019*), which was introduced in May 2019 (ERO 013-5102) and triggered public hearings before a Standing Committee. The fact that these "early actions" were briefly

mentioned in the Discussion Paper did not obviate the need for the Ontario government to also conduct *EBR*-based consultation on the proposed *EAA* amendments that were ultimately included in Bill 108. A copy of ERO 013-5102 is attached as an exhibit to the affidavit of Priyanka Vittal in the *Greenpeace Canada, et al v. Minister of the Environment, Conservation and Parks, et al* judicial review application (Court File No. 342/20).

53. Considering the *EBR* track record, it is my view that the Ontario government's failure or refusal to undertake meaningful public consultation on Schedule 6 of Bill 197 is contrary to well-established practice under Part II of the *EBR*. Given the enormous detail and the fundamental changes included in Schedule 6, it is my further view that public consultation on the Environment Plan (**Exhibit "G")** and Discussion Paper (**Exhibit "H"**) was not an adequate substitute for the public participation rights under Part II of the *EBR* in relation to the numerous amendments to the *EAA* contained in Schedule 6 of Bill 197. Moreover, I am unaware of any other instance in the history of the *EBR* where significant changes to the *EAA* were undertaken without public notice or comment opportunities under Part II of the *EBR*.

54. In my view, the need for public participation was particularly acute in relation to the new and unprecedented provision in Schedule 6 (i.e. new section 38.2 of the *EAA*) that purports to retroactively extinguish all existing Class EA "bump-up" (or "elevation") requests that had been filed on environmental or planning grounds, and that had not been decided by the Minister at the time that Bill 197 received Royal Assent. In my experience, a large number of such requests are filed each year by concerned citizens across Ontario

who have duly exercised their rights under the 10 existing Class EAs to seek a more rigorous EA process (i.e. individual EA) in order to address unresolved environmental issues arising from contentious infrastructure projects. Accordingly, the Ontario government's unannounced and unilateral termination of these outstanding public requests has adversely affected the rights of the requestors who were not given any notice or comment opportunities to express their views on the soundness or fairness of this approach.

55. Fourth, in terms of the public's *EBR* right to participate in environmental decision-making, I am concerned that the government's attempt to exempt Schedule 6 of Bill 197 from Part II of the *EBR* represents an unreasonable and undesirable step backwards. In my view, the *ex post facto* rationale provided by the Minister for circumventing Part II of the *EBR* is unpersuasive, inconsistent with the purposes and provisions of the *EBR*, and stands in stark contrast to the fundamental principles described below by the 1992 multi-stakeholder Ontario Task Force (on which CELA staff served) that developed the *EBR*. A copy of excerpts from the *EBR* Task Force Report is attached to this affidavit as **Exhibit "Q".**

56. The concerns of the *EBR* Task Force that animated its 1992 report and proposals for reform included that:

- "Public participation in significant environmental decision making, while often encouraged by government policy or practice, is not consistently provided as a right in law. Where the public is uninformed or uninvolved in such decision making, government accountability for such decisions is not high" (page 8);

- "…the public cannot be assured that a government policy or practice inviting its participation in significant environmental decisions will continue without change. Indeed, the Task Force found that government policies requiring public participation were varied and discretionary" (page 10);

- "An Environmental Bill of Rights should recognize the right of the public to participate in significant environmental decision making by government. It should prescribe in law a uniform system that is transparent and that provides an opportunity for better decisions and greater government accountability" (page 10).

57. It is concerning to CELA that Bill 197 and the process surrounding its enactment resurrects the very problems that the *EBR* Task Force found needed to be reformed to ensure the right of the public to participate in environmentally significant decisions. Given the sweeping (if not alarming) nature of the *EAA* changes contained in Schedule 6 of Bill 197, CELA would have participated in governmental consultations if they had been conducted under Part II of the *EBR*. This is also true in relation to the *Planning Act* changes contained in Schedule 17 of Bill 197.

58. Although Bill 197 has received Third Reading and Royal Assent, most of the *EAA* changes in Schedule 6 have not yet been proclaimed into force, and will likely not be in force for a prolonged period of time due to the need to develop key implementing regulations (i.e. the Project List, new "streamlined" EA requirements, etc.). Accordingly, it is my view that there is practical value and considerable benefit in declaring (or requiring)

that *EBR*-based public consultation should be conducted by the Ontario government on the *EAA* amendments even at this late stage.

59. For example, in my experience, after the conclusion of the overdue consultation, it would still be open to the Ontario government to: (1) refrain from proclaiming certain provisions in light of public objections; (2) introduce further amendments that address concerns identified by the public; or (3) adjust the implementation of Schedule 6 provisions via regulations, policies or guidelines that are responsive to public input on Bill 197. In addition, the results of any forthcoming Bill 197 consultations may assist the Auditor General of Ontario in exercising her reporting duties and accountability functions under Part III of the *EBR*. Accordingly, if such public consultations are undertaken, CELA intends to fully participate in this exercise.

60. I swear this affidavit in support of the within application for judicial review, and for no other or improper purpose.

SWORN BEFORE ME at the ~~Town of Paris~~ City of Brantford,)
in the County of Brant, on this)
5th day of November, 2020.)
)

Theresa McClenaghan

Commissioner for Taking Affidavits
Barrister + Solicitor