Analysis of Ontario Bill 245: *Accelerating Access to Justice Act, 2021*
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I. INTRODUCTION

(a) Overview

The Canadian Environmental Law Association ("CELA") has reviewed Bill 245: *Accelerating Access to Justice Act, 2021* ("the Bill"), which is omnibus legislation that was introduced for First Reading in the Ontario Legislature on February 16, 2021.[1] Second Reading debate on the Bill occurred between February 22 and March 1, 2021, and the Bill was referred to the Standing Committee on the Legislative Assembly on March 2, 2021.

The Bill contains eleven Schedules which, if enacted, will amend a large number of provincial laws of general application. However, CELA has focused its analysis on Schedules 6 and 10 of Bill 245, which are of particular concern to our client communities throughout Ontario.

Schedule 6 of the Bill proposes to amalgamate five provincial tribunals into a single entity to be known as the Ontario Land Tribunal ("OLT" or "Tribunal"). Schedule 6 also sets out a number of new procedural and substantive provisions in relation to OLT proceedings.

Schedule 10 of the Bill proposes a number of amendments to several provincial environmental laws, including the proposed elimination of existing rights of appeal under the *Environmental Protection Act* ("*EPA*"), *Ontario Water Resources Act* ("*OWRA*"), and other statutes.

For the reasons outlined below, CELA recommends that both Schedules 6 and 10 should be withdrawn from the Bill at the earliest possible opportunity. In our view, there is no evidence-based justification for the proposed merger of the five tribunals, and we anticipate that the problematic provisions in these Schedules will inhibit – not facilitate – access to environmental justice in Ontario.

In the event that the provincial government remains interested in reforming the five tribunals or amending environmental statutes, then the government should undertake meaningful public consultation with all persons who are interested in, or potentially affected, by such changes.

[1] See Bill 245, Accelerating Access to Justice Act, 2021 - Legislative Assembly of Ontario (ola.org).

(b) CELA's Background and Experience

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing laws to protect the environment and safeguard human health. Over the past five decades, CELA lawyers have represented low-income persons and vulnerable, disadvantaged or Indigenous communities in the courts and before tribunals on a broad range of environmental issues.

For example, CELA lawyers have represented clients who initiated or responded to appeals under the *Planning Act* in relation to official plans, zoning by-laws, subdivision plans and other land use instruments. In addition, CELA lawyers represent clients who have filed objections under the *Aggregate Resources Act* in relation to the proposed establishment or expansion of quarries. These appeals and objections are generally heard by the Local Planning Appeal Tribunal ("LPAT"), which is one of the adjudicative bodies that Schedule 6 of Bill 245 proposes to merge with several other existing entities.

Similarly, CELA lawyers have acted for clients who initiated or intervened in appeals filed under the *EPA* and the *OWRA* in relation to environmentally significant projects, facilities or activities (i.e. waste disposal, wastewater discharges, air emissions, water-takings, etc.). These appeals are generally heard by the Environmental Review Tribunal ("ERT"), which is another body that Bill 245 proposes to amalgamate into a single centralized entity.

In addition, CELA lawyers have served as counsel for clients involved in matters before the Joint Board (i.e. LPAT and ERT) established under the *Consolidated Hearings Act* (*CHA*) where a proposed large-scale project may trigger public hearing requirements under various provincial statutes, including the *EPA*, *OWRA*, *Clean Water Act, 2006, Environmental Assessment Act*, *Expropriations Act, Niagara Escarpment Planning and Development Act,* and *Planning Act*. However, Schedule 6 of Bill 245 proposes to repeal the *CHA*.

On the basis of CELA's decades-long experience with the ERT and LPAT (formerly known as the Ontario Municipal Board), our analysis primarily focuses on the impacts of Schedules 6 and 10 of the Bill on the hearing and decision-making process of these two administrative bodies. CELA's analysis has been undertaken through a public interest lens on how the Bill will impact our client communities.

II. CELA'S GENERAL COMMENTS

The administrative bodies that Schedule 6 proposes to amalgamate include the Conservation Review Board, ERT, LPAT, Mining and Lands Tribunal, and the board of negotiation continued under the *Expropriations Act*.

At present, these five tribunals independently exist within an overall cluster known as the Ontario Land Tribunals.[2] Under the cluster structure, each tribunal retains its own statutory jurisdiction

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[2] The Ontario Lands Tribunals used to be known previously as the Environment and Lands Tribunal Ontario. On June 17, 2020, pursuant to O. Reg. 282/20, the Board of Negotiation (per the *Expropriations Act*), the Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal, and the Mining and Lands

and institutional expertise, but operates within a single organization headed by an Executive Chair.[3]

Earlier in January 2021, the Ontario Land Tribunals released the *Draft Ontario Land Tribunals Rules of Practice and Procedure* ("OLT Rules") for public consultation until late February 2021.[4] These draft Rules pre-date the introduction of Bill 245, but it is anticipated that they will apply to the amalgamated Tribunal established under the Bill. Since the draft OLT Rules provide insight on the procedures that will likely govern the new Tribunal, the following analysis will also refer to the OLT Rules.

In CELA's opinion, Schedule 6 and 10 of the Bill have serious implications for Ontario's administrative justice system, and may impair accountability for environmental decision-making and adversely affect the quality and credibility of tribunal proceedings and outcomes. In particular, CELA is concerned that enactment of Schedule 6 in its present form will: (i) likely result in loss of specialized subject-matter expertise within the five tribunals; (ii) allow the use of hearings, practices or procedures that are ill-conceived alternatives to traditional adjudicative or adversarial procedures; (iii) allow hearings to be held electronically or in writing without providing any criteria as to when this would be appropriate; (iv) unduly restrict judicial reviews or appeals for certain OLT decisions; and (v) deprive non-parties of the opportunity to make oral submissions to the OLT. In addition, Schedule 10 of the Bill eliminates ministerial appeals from ERT decisions made under environmental legislation.

These impacts, as well as other related measures by the Ontario government that have undermined access to justice for Ontarians, are discussed in more detail below.

III. CELA'S SPECIFIC COMMENTS

(a) Lack of meaningful public consultation on Schedules 6 and 10

Schedules 6 and 10 of Bill 245 were introduced in the Ontario Legislature without any pre-consultation with CELA, our client communities, or other environmental stakeholders. During Second Reading debate on Bill 245, the Attorney General of Ontario referred to a number of professional groups, justice sector representatives, and provincial agencies that provided input on other Schedules of the Bill (i.e. estates and family law, judicial appointments, French language rights, etc.).[5] However, this list did not include any references to environmental non-governmental organizations that regularly participate in appeal proceedings before the ERT and the LPAT.

Given the significance of the proposed changes for Ontario's administrative justice system, CELA submits that there should have been prior consultation with interested or affected stakeholders

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Tribunal were clustered. These five tribunals previously existed as part of the Environment and Land Division of Tribunals Ontario, along with the Assessment Review Board.

[3] *Adjudicative Tribunals Accountability, Governance and Accountability Act*, 2009, S.O 2009, Chap 33, Sch. 5, s. 15 and s.16.

[4] See Draft OLT Rules for Consultation - Tribunals Ontario - Environment & Land Division (gov.on.ca).

[5] See Hansard Transcript 2021-Feb-22 | Legislative Assembly of Ontario (ola.org).

about the need for, and the proposed content of, Schedules 6 and 10 of the Bill before they were introduced for First Reading.

CELA further notes that to date, the provincial government has declined to post a public notice or information bulletin on the Environmental Registry of Ontario in relation to Bill 245. It is arguable that the amendments contained in Schedule 6 of the Bill are predominantly administrative in nature, and may therefore fall under the exception to public participation in section 15(2) of the *Environmental Bill of Rights* ("*EBR*"). However, as discussed below in more detail, the proposed changes in Schedule 6 will directly, indirectly or cumulatively affect environmental and land use decision-making by the OLT, and are therefore environmentally significant proposals that warrant posting on the Environmental Registry.

Similarly, Schedule 10 of the Bill proposes to eliminate long-standing public rights under various environmental laws to appeal ERT decisions to the Minister, as discussed below. On this point, CELA observes that these rights are being removed from environmental statutes that are prescribed under the *EBR*, and that ERT decisions are, by their very nature, environmentally significant (particularly if they authorize discharges of contaminants into air, land or water). Accordingly, pursuant to section 15(1) of the *EBR*, it is our opinion that notice of this Schedule 10 proposal should be placed on the Environmental Registry of Ontario for public review and comment before Bill 245 is enacted.

(b) Lack of rationale or evidence to support the Bill

The provincial government's media release on Bill 245 states that it is intended to eliminate "unnecessary overlap between cases."[6] Similarly, the Attorney General, without elaboration or explanation, claimed during Second Reading debate that creating a single tribunal "will help to reduce bureaucratic red tape."[7]

However, no statistical information about the nature, extent or frequency of alleged "overlap" or "red tape" has been provided by the Ontario government to substantiate its position that duplicative overlap exists and must be eradicated. Moreover, as noted above, the *CHA* already exists to enable a single public hearing to be held in relation to an undertaking for which more than one hearing may be required by more than one tribunal.[8]

Nevertheless, CELA acknowledges that under the *CHA,* hearing consolidation is largely a proponent-driven exercise, as only the proponent can approach the hearings registrar to seek a consolidated hearing.[9] Unfortunately, this restriction is carried forward in section 21(3) of Schedule 6, which will greatly diminish the availability and utility of consolidated hearings. At the same time, section 21 omits the *CHA* provision that enables other parties to apply to the Divisional Court for an order directing the proponent to apply for consolidation.[10]

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[6] Ontario, *Backgrounder, Accelerating Access to Justice Act* (February 16, 2021), online <Accelerating Access to Justice Act | Ontario Newsroom>.
[7] See Hansard Transcript 2021-Feb-22 | Legislative Assembly of Ontario (ola.org).
[8] *Consolidated Hearings Act*, R.S.O. 1990 c.C 29, s. 2.
[9] *Ibid*, s. 3.
[10] *Ibid*, s. 3(3).

In CELA's view, instead of proposing to repeal the *CHA* in its entirety (and incorporating some – but not all – of its provisions) via Schedule 6 of Bill 245, the government should have explored and consulted on options for improving and strengthening the *CHA* itself. For example, the *CHA* can be readily amended to give prescribed tribunals (including the OLT) broad authority to order consolidation on its own initiative, or upon request by parties other than the proponent.

These and other potential *CHA* amendments provide an effective solution that could have addressed the possibility of multiple hearings involving the same undertaking. Such amendments would also mitigate concerns about perceived "overlap" between tribunals, the timeliness of hearing processes, and the risk of inconsistent decisions by different tribunals about the same undertaking. Accordingly, CELA concludes that the Ontario government's purported rationale for Schedule 6 (including the repeal of the *CHA*) is unjustified.

(c) Loss of expertise

As discussed above, Schedule 6 of the Bill proposes to amalgamate five tribunals that have previously operated effectively and efficiently within a cluster for a number of years. In this regard, CELA concludes that Schedule 6 fails to recognize that the five tribunals have very different statutory purposes and objectives and "unique stakeholder and user relationships."[11]

For example, under the previous cluster model, the ERT and LPAT retained their discrete jurisdiction, and developed their own rules of practice to govern their hearing processes. This ensured members of each of the five tribunals acquired and retained expertise, and became highly specialized and knowledgeable in their respective fields. In contrast, the proposed amalgamation of specialized decision-makers into a centralized body will likely result in considerable loss of institutional expertise, which has been a foundational principle of the administrative justice system since its inception.[12]

In our view, the practical effect of amalgamating the five tribunals is that any member of the OLT may preside over any proceeding that was previously within the exclusive jurisdiction of one of the five tribunals. Consequently, an OLT member with little or no environmental or land-use planning expertise will be permitted by Schedule 6 to hear and decide matters that previously would only have been adjudicated by the ERT or the LPAT.

The loss in subject-matter expertise that will result from the amalgamation also threatens access to justice. As noted by a former Executive Chair of the Environment and Land Tribunals Ontario, (the predecessor to the Ontario Land Tribunals):

> Maintaining subject matter expertise not only reflects the reason why most tribunals were created and serves to meet the needs of a tribunal's users and those affected by its decisions, but as well directly advances access to justice… It also indirectly supports access to justice

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[11] Michael Gottheil and Doug Ewart, "Lessons from ELTO: The Potential of Ontario's Clustering Model to Advance Administrative Justice," March 11, 2011, online: < Tribunals Ontario | Lessons from ELTO The Potential of Ontario's Clustering Model to Advance Administrative Justice:>.

[12] David J. Mullan, *Administrative Law, Cases, Text and Materials, 5th ed.* (Toronto: Emond Montgomery Publications Ltd., 2006) pp.4-8.

> by providing a principled basis for deference by the reviewing courts, which enhances the finality of a tribunal's decisions and limits the advantage that those with the resources to re-litigate issues would otherwise have.[13]

Accordingly, CELA concludes that the Schedule 6 proposal to combine functionally different tribunals into a single blended entity (and thereby transforming specialists into generalists) militates against access to justice. In short, this proposal strikes CELA as a solution in search of a problem.

(d) Bill allows use of alternative practices or procedures

Section 13 of Schedule 6 of the Bill proposes to give the OLT wide-ranging authority to make rules which provide for the use of hearings, practices and procedures that are alternatives to traditional adjudicative or adversarial procedures. It is unclear precisely which alternative procedures that the OLT is contemplating beyond mediation. If the intent is to usher in more inquisitorial hearing modes, then CELA finds that this objective is entirely misplaced since it is already open to the members of the ERT and the LPAT to control and directly engage in the hearing process (i.e. by asking questions of witnesses, retaining independent experts, etc.).

In addition, section 13 confers very broad powers upon the OLT to establish alternative modes of conducting a hearing without specifying any actual criteria, benchmarks or constraints to govern such novel proceedings. Given the ambiguous language in section 13, and in light of other questionable provisions in Schedule 6 (see below), CELA remains concerned that the OLT may favour procedures that promote fast-tracked outcomes at the expense of ensuring deliberative decision-making and improving the procedural quality and substantive results of the hearing process. At a minimum, the use of any alternative hearing, practice or procedure should not adversely affect a party's right to natural justice and procedural fairness.

(e) Bill allows hearings to be heard electronically or in writing

Section 14 of Schedule 6 of the Bill allows the OLT to hold a hearing electronically or in writing. However, the draft OLT Rules fail to specify any criteria for when these alternative modes of hearing will be utilized.

In contrast, the ERT's Rules of Practice and Practice Directions ("ERT Rules") specify that when determining the suitability of a written or electronic hearing format, the tribunal should consider several factors. These considerations include: (i) whether the nature of evidence is appropriate for a written or electronic hearing; (ii) the extent to which the matters in dispute are questions of law; (iii) the convenience of the parties, including any anticipated prejudice to a party; (iv) the cost, efficiency and timeliness of the proceeding; (v) ensuring a fair and understandable process; (vi) the desirability or necessity of public participation or public access to the Tribunal's process; and

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[13] Michael Gottheil and Doug Ewart, "Lessons from ELTO: The Potential of Ontario's Clustering Model to Advance Administrative Justice," March 11, 2011, online: < Tribunals Ontario | Lessons from ELTO The Potential of Ontario's Clustering Model to Advance Administrative Justice:>.

(vii) the fulfillment of the ERT's statutory mandate.[14] These factors are inexplicably absent from the draft OLT Rules.

Accordingly, CELA concludes that the OLT Rules should outline the factors that should be considered by an OLT member in determining whether an electronic or written hearing is more appropriate than an in-person hearing. This direction would help guide the exercise of the member's discretion and ensure that decisions about when to hold an electronic or written hearing are not made on an arbitrary or *ad hoc* basis.

Given the COVID-19 pandemic, CELA lawyers have been involved in ERT and LPAT hearings that were conducted electronically or in writing. Based on our experience, while such hearings may be suitable for resolving discrete legal or jurisdictional questions (or conducting case management conferences), they are less than ideal for adjudicating factual, technical or scientific disputes on the merits of the appeal, particularly since it can be difficult to effectively present or test expert evidence using these alternative hearing formats.

CELA further notes that it has been a long-standing and commendable practice for the ERT and the LPAT to hold in-person hearings in the local community where the dispute has arisen. This ensures that the impacted community can directly participate in the tribunal's decision-making process. Once the COVID-19 crisis ends, CELA strongly recommends an immediate return to this practice to maintain public access to the hearing process. Many of CELA's ERT and LPAT cases occur in rural and northern areas of the province where reliable broadband internet service is limited or non-existent, which militates against routinely holding hearings via videoconferencing software or platforms. Accordingly, even if electronic hearings are administratively expedient (or may produce some cost savings) for the OLT, CELA submits that this consideration does not override the public interest in ensuring local access to in-person hearings.

(f) Bill restricts judicial review or appeal for non-compliance with OLT Rules

Schedule 6 of the Bill proposes to unduly restrict judicial reviews or appeals of certain decisions by the OLT.

In particular, section 13(4) of the Bill states that unless the OLT's failure to comply with the rules, or its exercise of discretion under the rules in a particular manner, causes a substantial wrong that affects the final disposition of a proceeding, it cannot be a ground for setting aside the Tribunal's decision on an appeal or judicial review application. This is a new provision that does not currently exist in either the *Environmental Review Tribunal Act, Local Planning Appeal Tribunal Act*, *Judicial Review Procedure Act,* or *Statutory Powers Procedure Act.*

The OLT Rules address matters that are fundamental to ensuring a fair hearing process, including the provision of notice, the procedure for the exchange of documents and orders for discovery. Thus, the OLT Rules address matters of natural justice and procedural fairness which are integral

[14] Rules of Practice and Practice Directions of the Environmental Review Tribunal (Effective September 12, 2016) ("ERT Rules"), Rule 189.

to a fair hearing process. Parties to a hearing before the OLT are entitled to expect that it will abide by the rules it has drafted to govern proceedings. Consequently, the restriction under section 13(4) of Schedule 6 of Bill 245 is a matter of significant concern, especially since it appears to invite appellate judges to speculate whether the OLT member's procedural non-compliance materially affected the outcome.

In short, section 13(4) of the Bill improperly insulates the OLT from oversight or supervision by the courts where its action or inaction has caused a substantial wrong to a party. As such, it undermines OLT's accountability to the public and the requirement it operate in accordance with the rule of law.

(g) Bill inappropriately limits non-party participation

Schedule 6 of the Bill proposes to greatly limit non-party participation at public hearings. In particular, section 17 of the Bill states that a non-party can make submissions to the OLT in writing only.

On this point, CELA notes that both the ERT and the LPAT have a well-established practice of allowing non-parties at hearings to make oral submissions. In addition, it has been our experience that participants' oral submissions have not resulted in hearing delays, increased costs or unfairness to the parties. Participants have the right to make oral submissions to the ERT at the beginning and end of a hearing.[15] A participant can also be a witness at an ERT hearing.[16]

Under the LPAT's Rules of Practice and Procedure ("LPAT Rules"), a person who was granted participant status prior to September 3, 2020, has a right to make an oral submission.[17] Participant status provides an important mechanism for individuals and citizen groups, particularly those who are unrepresented, to participate in hearings without facing the risk of an adverse cost award.[18]

In addition to party and participant status, the ERT Rules also provide for presenter status.[19] A presenter is permitted to attend a hearing and make an oral presentation.[20] The oral presentation can be supplemented with a written statement.[21] However, a presenter, unlike a participant, cannot make oral submissions to the tribunal before or after the hearing.[22] Presenter status is intended to provide an opportunity for members of the public who had to work during the day to attend before the tribunal at an evening session and make an oral submission.

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[15]Rules of Practice and Practice Directions of the Environmental Review Tribunal "(ERT Rules") (Effective September 12, 2016), Rule 67(c).
[16] ERT Rules, Rule 67(a).
[17] Local Planning Appeal Tribunal Rules of Practice and Procedure ("LPAT Rules") (Effective February 25, 2020), Rule 7.7. The LPAT Rules have since removed this right and now only permits participants to make a written statement.
[18] Under the ERT Rules and LPAT Rules, only parties can receive or be ordered to pay cost awards. See Rule 214 of the ERT Rules and Rule 23.1 and Rule 23.9 of the LPAT Rules.
[19] ERT Rules, Rule 69.
[20] ERT Rules, Rule 70 (a).
[21] ERT Rules, Rule 70(c).
[22] ERT Rules, Rule 71 (e).

In short, public participation rights are well-entrenched in the ERT Rules and they have played a vital role in the tribunal's decision-making process. As held by the former Chair of the Environmental Appeal Board (the predecessor to the ERT), a hearing before the Board is not merely a *lis inter partes* but is a determination, in the public interest, of policy issues that affect a much broader public than the two statutory parties to a hearing.[23]

Schedule 6 of the Bill and the draft OLT Rules will undoubtedly result in a significant loss of public participation rights, thereby depriving OLT members of relevant evidence and perspectives, and adversely impacting access to justice. Public trust and confidence in the outcome of the hearing is enhanced if members of the public are able to voice their concerns directly to the OLT. The opportunity to make an oral submission directly to the OLT member gives a person the assurance that they have been heard, and offers the OLT member the opportunity to ask questions and seek clarifications from the person. In contrast, a person making a written submission will not necessarily know whether it has been read and understood. Furthermore, making an oral submission at a proceeding is generally a more expeditious process than preparing, serving and filing written submissions.

Oral submissions also allow a tribunal member to resolve any confusion that may not be readily apparent if the submissions are confined to writing. Moreover, an opposing party can also question a participant if there are gaps or errors in the information. This could not occur if submissions are limited to writing only. Accordingly, the opportunity for a non-party to orally share relevant information with the OLT (and to respond directly to questions) ensures the integrity and transparency of the hearing process for all parties.

(h) Bill significantly expands the OLT's authority to summarily dismiss an appeal

Schedule 6 of the Bill gives the OLT broad discretion to summarily dismiss a proceeding without holding the public hearing required by law.

In particular, section 19(1)(c) of Schedule 6 allows the OLT, on the motion of any party or its own initiative, to dismiss the proceeding without a hearing if the OLT is of the opinion that the proceeding has "no reasonable prospect of success." However, this new test is undefined in Schedule 6, and it is unclear whether section 19 empowers the OLT to partially dismiss an appeal, as opposed to dismissing an appeal in its entirety. In addition, section 19 fails to include any meaningful criteria to assist the OLT (and hearing parties) in determining when the "no reasonable prospect of success" test is – or is not – satisfied on the facts or in law.

In contrast, under the current ERT Rules, the tribunal can only dismiss a matter on its own initiative on jurisdictional grounds. These include whether the proceeding relates to a matter outside the tribunal's jurisdiction or some aspects of the statutory requirements for bringing the proceeding has not been met.[24]

The ERT Rules also permit a party to bring a motion to dismiss a proceeding but only on strict prescribed grounds. These involve whether: (i) the proceeding was frivolous, vexatious or was

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[23] *Uniroyal Chemical Ltd v. Director, Ministry of Environment* (1992), 9 C.E.L.R (N.S.) 151 (Env.App.Bd.)
[24] ERT Rules, Rule 119 (a) and (b).

commenced in bad faith; (ii) the proceeding related to a matter outside the tribunal's jurisdiction; (iii) some aspect of the statutory requirements for bringing the proceedings were not met; or (iv) another party has caused undue delay or has not complied with orders, undertakings, written request from the ERT or with the ERT's Rules.[25] On this point, CELA notes that section 15.4 of the draft OLT Rules includes substantially similar grounds for dismissing a proceeding, but does not include the "no reasonable prospect of success" test proposed in section 19 of Schedule 6.

The OLT's broad discretion to summarily dismiss a matter pursuant to section 19 of Schedule 6 raises concerns that proceedings may be terminated abruptly and unfairly after a preliminary assessment before the appellant's evidence (including opinion evidence from experts) has even been presented to the OLT. This risk is considerably exacerbated by the loss of subject-matter expertise that will result from amalgamation, as described above.

Moreover, it seems that section 19 is largely aimed at expediting the early termination of OLT proceedings for the benefit of proponents. However, this one-sided proposal may, in fact, have unintended consequences and produce the opposite effect. If section 19 is enacted, then it is reasonable to anticipate that proponents will frequently bring motions to strike appeals at an early stage of the proceedings, thereby causing appellants to prepare, serve and file their own responding materials. For self-represented persons, this may pose intractable difficulties, particularly if affidavits are exchanged and subject to cross-examination. If the proponent's motion is ultimately unsuccessful, then this new screening mechanism serves only to add a new interlocutory step, increase costs for all parties, and cause unnecessary hearing delays.

It further appears to CELA that section 19 represents an inappropriate and misguided attempt to import the summary judgment mechanism from the Rules of Civil Procedure which govern civil litigation in Ontario's courts.

Under Rule 20, for example, a motion for summary judgment is only available after pleadings (i.e. statements of claim and defence) have been exchanged by the litigants. In contrast, in a typical appeal to the ERT or the LPAT, the appellant files a notice of appeal or objection, but there is no corresponding duty on the proponent or other respondents to file a response to the appeal.

Moreover, while civil courts typically adjudicate private disputes involving the parties' rights, the ERT and the LPAT are not adjudicating a *lis* and are instead deciding policy matters of wider public interest. CELA further notes that while Rule 20 includes cost sanctions if a party acts unreasonably in bringing a motion for summary judgment, proposed section 19 of Schedule 6 is silent on this important point.

(i) Schedule 10 improperly eliminates ministerial appeals

Schedule 10 of the Bill proposes to wholly eliminate appeals to the Minister from decisions made by tribunal members under environmental legislation.

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[25] ERT Rules, Rule 111.

At present, for example, ERT decisions under the *EPA* may be appealed to the Minister on questions of fact or policy. In our view, the existence of ministerial appeal rights provides an important safeguard since appeals from ERT decisions to Divisional Court are restricted to a question of law.

Accordingly, CELA concludes that Schedule 10 undermines public access to justice by precluding appeals on questions of fact and policy. On behalf of our clients, CELA has filed or responded to Ministerial appeals, and regardless of the outcome in specific cases, it has been our experience that this appeal route is an important "safety valve" mechanism.

However, despite proposing Schedule 10, the Ontario government has not provided any evidence demonstrating how frequently the Minister is called upon to adjudicate appeals from the ERT. To our knowledge, Ministerial appeals have not been numerous, and the Minister does not appear to be unduly burdened by adjudicating such appeals from time to time.

(j) Other governmental measures that undermine access to justice

In CELA's view, the implications of Schedules 6 and 10 of Bill 245 should be considered in conjunction with other recent changes that the Ontario government has recently made in relation to the ERT and the LPAT. Although these changes pre-date Bill 245 and are therefore not a direct consequence of Schedules 6 and 10, it is nevertheless important to situate the Bill within the broader context of other government measures that, individually and collectively, impede access to justice.

For example, the provincial government has significantly increased the filing fees for commencing an appeal to the LPAT.[26] Beginning on July 1, 2020, fees for appeals to the LPAT of an official plan amendment and zoning by-law amendment were set at $1,100. This was more than a three-fold increase of the previously filing fee of $300. The filing fee for the LPAT is now higher than the fee to commence a civil action in Ontario's Superior Court of Justice, which is $229. Moreover, a person can seek to have the fees waived at the Superior Court of Justice if their household income is below a certain threshold.

While the LPAT allows a filing fee to be reduced to $400, the request for a reduction can only made at the time of filing. The process therefore creates considerable uncertainty for individuals and citizen groups who may be considering an appeal under the *Planning Act*. Moreover, even the reduced amount (if granted) is steep when compared to court filing fees. The imposition of costly filing fees will deter the public from commencing legitimate appeals and constitutes an inappropriate financial barrier to access to justice.

More generally, neither Bill 245 nor the draft OLT Rules address long-standing public concerns about other economic barriers to meaningful public participation in administrative proceedings in

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[26] Jacqueline Wilson, "CELA Opposes LPAT's Increase to Appeal Fees as a Barrier to Access to Justice," (2020), Canadian Environmental Law Association, online: <Canadian Environmental Law Association (CELA) CELA Opposes LPAT's Increase to Appeal Fees as a Barrier to Access to Justice >.

Ontario (i.e. adverse cost awards against public interest representatives pursuant to section 20 of Schedule 6).

In CELA's view, if the provincial government is serious about improving Ontarians' access to justice, then it is time to develop appropriate legislative, regulatory or procedural changes (i.e. progressive cost reforms, re-introduction of intervenor funding legislation, etc.) to better facilitate public participation in OLT proceedings, particularly those involving major undertakings. Otherwise, the prospect of a sizeable adverse cost award, and the daunting expenses incurred while pursuing an appeal, may continue to dissuade some Ontarians from exercising their legal rights of appeal under environmental and land use legislation.

Another measure that weakened access to justice in Ontario was the provincial government's 2019 decision to terminate funding for the Local Planning Appeal Support Centre (LPASC). The LPASC was established to provide services to the public on planning matters. It was intended to help "individuals and rate payers [who] felt disenfranchised and unable to influence the plans of developers who typically could rely on extensive legal and planning resources to promote their plans."[27] Thus, LPASC helped to even the playing field and provided a valuable resource for ordinary citizens attempting to navigate Ontario's complex land-use planning and appeal system.

The government's process for appointing members to the ERT and the LPAT has also been the subject of public criticism and media coverage.[28] For example, over the past two years, highly qualified members with environmental expertise and legal training did not have their ERT appointments renewed by the Ontario Cabinet, thereby undermining the capacity of this tribunal to determine technically or scientifically complex cases. In the result, there are now fewer full- and part-time members at the ERT, which will undoubtedly create scheduling delays and backlogs.[29] As noted above, the decreasing amount of environmental expertise at these tribunals will be further compounded by the proposed amalgamation.

In summary, the above-noted factors, when considered in totality with Bill 245, erodes access to justice and will diminish public confidence in Ontario's administrative justice system.

IV. CONCLUSION AND RECOMMENDATIONS

For the foregoing reasons, CELA finds that the rationale for Schedules 6 and 10 of Bill 245 is unsupported by evidence, and unjustifiable from a public interest perspective.

In particular, CELA concludes that the proposed amalgamation of the ERT and the LPAT with other administrative bodies is unnecessary and counter-productive. In fact, merging these existing bodies into a single Tribunal will likely result in the loss of institutional expertise and undermine the capacity to effectively adjudicate cases.

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[27] Ontario, Local Planning Appeal Support Centre- Annual Report 2018/2019, Section 2, Message from the Executive Director, online:< Local Planning Appeal Support Centre - Annual Report 2018/2019 (gov.on.ca)>.
[28] Gray, Jeff, "Ex-Lobbyist named to land-use tribunal," *The Globe and Mail*, February 7, 2020.
[29] Based on data collected by Tribunal Watch Ontario, it appears that the number of ERT members dropped from 12 to 4 from 2018 to 2020. See statement-of-concern-may-14.pdf (wordpress.com).

CELA is also extremely concerned that the merger proposal is accompanied by other provisions (e.g. summary dismissal of appeals without hearings) that will impair access to justice and diminish the quality and credibility of administrative decision-making under Ontario's environmental and land use statutes.

Finally, the proposed elimination of Ministerial appeals under Ontario's environmental laws is an undesirable rollback that deprives Ontarians of an important safety valve, prevents the Minister from remedying OLT decisions that are contrary to the public interest, and inevitably forces such disputes into the courts for redress.

Accordingly, CELA recommends that both Schedules 6 and 10 be withdrawn from Bill 245.

March 2, 2021