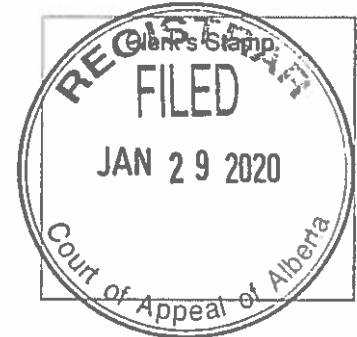


COURT FILE NUMBER 1901-0276 AC
COURT COURT OF APPEAL OF ALBERTA
REGISTRY OFFICE CALGARY



In the matter of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c. 28 and the *Physical Activities Regulations*, SOR/2019-285

And in the matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c.J-2, s.26

DOCUMENT **AFFIDAVIT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
55 University Avenue, 15th Floor
Toronto, Ontario M5J 2H7

Attention: Richard Lindgren/Joseph Castrilli
Tel: 416-960-2284, ext. 7214/7218
Fax: 416-960-9392
Counsel for the Proposed Interveners

AFFIDAVIT OF THERESA McCLENAGHAN

Sworn on January 28, 2020

I, Theresa McClenaghan, Barrister & Solicitor, of the Town of Paris, in the Province of Ontario,
MAKE OATH AND SAY THAT:

1. I am the Executive Director and counsel of the Canadian Environmental Law Association (“CELA”), and have been on staff at CELA since 1998 except for an eighteen-month period in 2006-7 when I was on leave to fulfill another role. I therefore have personal knowledge of the matters hereinafter deposed to, except where my knowledge is identified as being based on information and belief, in which case I state both the source of the information and my belief in that information.

A. OVERVIEW

2. The purpose of my affidavit is to describe CELA’s experience, expertise, and interest demonstrating that CELA will be able to provide useful and relevant submissions to this Honourable Court if granted leave to intervene in this reference. In summary:

- a) CELA is a federally incorporated non-profit organization with almost 50 years of experience in environmental litigation, law reform, public education, and research;
- b) As a specialty legal aid clinic funded by Legal Aid Ontario, CELA represents low-income Ontarians, disadvantaged communities, and vulnerable populations experiencing environmental problems, and CELA appears on their behalf in administrative and court proceedings, including civil actions, judicial review, private prosecutions, appeals, interventions, and tribunal hearings;
- c) CELA has a long history of involvement in court cases in relation to environmental assessment (“EA”) legislation and the interpretation of the constitutional authority of Parliament and provincial legislatures to enact environmental legislation;

- d) CELA has been involved extensively in writing, speaking, and appearing before committees of Parliament in relation to the *Impact Assessment Act* (“*IAA*”) and the *Physical Activities Regulations* at issue in this reference;
- e) CELA is a frequent participant in federal EA processes under the *IAA* and its predecessor legislation;
- f) CELA seeks leave to intervene in this reference, along with two other public interest environmental organizations (Environmental Defence Canada, and MiningWatch Canada), to assist the Court in interpreting the constitutionality of the *IAA* and the *Physical Activities Regulations*;
- g) CELA proposes that its intervention, in conjunction with the two above-noted organizations (which have filed separate affidavits as part of this application (collectively the “Proposed Interveners”), be permitted on the following terms:
 - (i) that the Proposed Interveners be permitted to serve and file a factum, not exceeding 20 pages;
 - (ii) that the Proposed Interveners be permitted to make oral submissions at the hearing of the reference not exceeding 15 minutes (or such other duration as the Court may deem appropriate);
 - (iii) that, in the alternative, the Proposed Interveners be permitted to appear through counsel at the hearing of the reference for the purposes of answering questions the Court may have with respect to their factum;
 - (iv) that the Proposed Interveners shall not supplement the record, file additional affidavits, or raise new issues in the reference; and

- (v) that costs of this application and the reference hearing shall not be awarded to or against the Proposed Interveners.

B. CELA'S BACKGROUND AND MANDATE

3. CELA is a non-profit public interest organization founded in 1970 to use existing laws to protect human health and the environment and to advocate law reforms, where necessary.

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, as well as by engaging in law reform, and community education.

5. CELA is also a specialty legal aid clinic funded by Legal Aid Ontario to provide summary advice to the public, and to represent low-income individuals and groups, as well as disadvantaged communities, in the courts and before administrative tribunals on a wide variety of environmental matters, as well as to undertake law reform and public education initiatives in support of such entities.

6. Because of CELA's expertise in matters of environmental law and policy, CELA has been asked to participate on a number of federal and provincial advisory committees and task forces on environmental protection, including issues related specifically to EA processes. For example, CELA staff members have served on and/or given testimony before the following bodies:

- a) Ontario Minister of the Environment's Environmental Assessment Advisory Panel – Executive Group (June 2004-March 2005; released a two-volume report on legislative, regulatory and administrative reforms to Ontario's EA process);
 - b) The Ontario Environmental Review Tribunal Client Advisory Committee (formerly the Ontario Environmental Assessment Board Client Advisory Committee) (general mandate is to review/revise ERT rules of practice to ensure fairness, accessibility and accountability during the EA hearing process);
 - c) The Canadian Environmental Assessment Research Council (CEARC), an advisory body established by the federal Minister of the Environment and the Federal Environmental Assessment Review Office, during 1984 and 1985;
 - d) *Environmental Contaminants Act* Advisory Committee, a minister's advisory committee where environmental assessment principles were discussed with respect to contaminants evaluation; and
 - e) Various other bodies concerned with making recommendations and implementing law and policy on EA, land-use planning and public participation, including the Ontario's former Environmental Assessment Advisory Committee (EAAC).
7. CELA regularly participates in activities with other non-governmental organizations and networks in Canada concerned with EA matters. Past efforts include:
- a) participation in the Canadian Environmental Network's Environmental Planning and Assessment Caucus, including the period leading up to the enactment of Canada's first federal EA law (*Canadian Environmental Assessment Act, 1992*), and when amendments to this legislation were tabled and considered by Parliament in 2003, as

described below;

- b) participation in the Canadian Environmental Network's Harmonization Working Group that commented extensively on the impact of the Canada-Wide Accord on Environmental Harmonization (January, 1998) and its Sub-Agreement on Environmental Assessment; and
- c) participation in the *Fisheries Act* Working Group of the Canadian Environmental Assessment Network that examined, *inter alia*, federal proposals to remove the *Fisheries Act* "triggers" from the *Law List Regulations* under the *Canadian Environmental Assessment Act, 1992*.

C. The Constitution and Environmental Law

8. CELA has a long record of appearing in provincial and federal appellate courts (including the Supreme Court of Canada) in interventions or appeals involving interpretation of constitutional authority for management and protection of the environment, including EA cases that are relevant to this reference. Examples of these cases (several of which are cited in Alberta's factum filed in this reference) include, but are not necessarily limited to, the following:

- a) *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [division of powers and the constitutionality of the federal EA regime established under the *Environmental Assessment and Review Process Guidelines Order* in relation to a dam project in Alberta];
- b) *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 [application of the federal *Environmental Assessment and Review Process Guidelines Order* to a provincial electricity proposal in Quebec];

- c) *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 [interjurisdictional immunity and section 7 of the *Charter*]
- d) *Attorney General of Canada v. Hydro-Quebec*, [1997] 3 S.C.R. 213 [constitutionality of toxics regulation under the *Canadian Environmental Protection Act, 1999*];
- e) *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [division of powers and interpretive principles regarding pesticides regulation by federal, provincial and municipal levels of government]
- f) *MiningWatch Canada v. Canada*, [2010] 1 S.C.R. 6 [statutory interpretation of the *Canadian Environmental Assessment Act, 1992*];
- g) *Inter-Church Uranium Committee Educational Co-operative v. Canada (Atomic Energy Control Board)*, 2004 FCA 218 [applicability of *Canadian Environmental Assessment Act, 1992* to a proposed tailings management facility at an uranium mine in Saskatchewan];
- h) *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)*, 2001 FCA 347 [applicability of the *Canadian Environmental Assessment Act, 1992* to a provincial highway project in Ontario].

9. CELA was also granted leave to intervene in the recent references held by the Saskatchewan Court of Appeal (2019 SKCA 40) and the Court of Appeal for Ontario (2019 ONCA 544) regarding the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act*. CELA is currently intervening in two appeals in the Supreme Court of Canada in relation to this matter. I note that the factum filed by the Alberta government in this reference cites the Ontario court's opinion about the federal carbon pricing legislation.

10. Since the 1970s, CELA has researched and written a number of submissions on the issue of the Constitution and federal environmental law, such as:

- a) J. Castrilli, "Environmental Impact Assessment: The Law As It Is and As It Should Be (No. 2)" (May 1974) CELA Brief No. 25;
- b) CELA, "Legislative Jurisdiction in Environmental Law" (February 1977);
- c) CELA, "Brief to the Joint Senate/House of Commons on the Constitution of Canada, Bill C-60" (September 1979);
- d) G. Patterson, "The Future of Environmental Assessment in Canada: The Ontario Public Interest Context" (October 1983) CELA Brief No. 116;
- e) R. Gibson & G. Patterson, "Environmental Assessment in Canada" (February 1984) CELA Brief No. 118;
- f) S. Shrybman, "Submission to Environment Canada on Reforming Federal Environmental Law" (January 1988);
- g) CELA, "Submission on the Legislative Committee on Bill C-74, the Canadian Environmental Protection Act" (January 1988);
- h) R. Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government" (October 1989);
- i) Maureen Turner, "Application of the Federal *Environmental Assessment and Review Process Guidelines Order* to the National Energy Board Natural Gas Export Licensing" (September 1990) CELA Brief No. 184;

- j) T. Vigod and R. Lindgren, “Overview of Federal Law Regulation and Policy” (May 1990);
- k) T. Vigod et al., “Submission to the Select Committee on Ontario in Confederation: Environmental Protection in a New Constitution” (June 1991);
- l) B. Rutherford, “A Healthful Environment: Privilege, Right, or Responsibility?” (December 1991);
- m) B. Rutherford, “The Constitutional Division of the Environment” [1992] 2 N. J. C. L. 111;
- n) B. Rutherford et al., “Correcting Environmental Neglect in the Constitutional Debate” (May 1992);
- o) J. Castrilli, “Legal Authority for Emissions Trading in Canada”, *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: NRTEE, 1999);
- p) K. Keenan, “Submissions Of The Canadian Environmental Law Association To The Standing Committee On Environment and Sustainable Development Regarding Bill C-5 (Species At Risk Act)” (July 2001); and
- q) T. McClenaghan, *Constitutional Environmental Rights: Law Society of Upper Canada Special Lectures* (2017).

D. CELA’S INVOLVEMENT IN FEDERAL EA CASES

11. In addition to the above-noted court interventions, CELA is a frequent participant in administrative proceedings under the *IAA* and its predecessor legislation (e.g. *Canadian Environmental Assessment Act, 2012* (“*CEAA 2012*”) and *Canadian Environmental Assessment*

Act, 1992 (“CEAA 1992”).

12. In some of these federal EA processes, CELA has been a party in its own name in order to safeguard human health and environmental quality. Examples of such cases include:

- a) the proposed Deep Geologic Repository at Kincardine, Ontario for the long-term management and disposal of low- and intermediate-level radioactive waste [EA started under *CEAA 1992* then transitioned to *CEAA 2012*];
- b) the proposed construction and operation of new reactors, and the proposed refurbishment of existing reactors, at the Darlington nuclear generating station east of Toronto [EA’s under *CEAA 1992*];
- c) the Nuclear Power Demonstration Closure Project for *in situ* decommissioning of the nuclear facility at Rolphton, Ontario [EA under *CEAA 2012*];
- d) the proposed Near Surface Disposal Facility at Chalk River, Ontario for low and intermediate radioactive waste [EA under *CEAA 2012*]; and
- e) the proposed *in situ* decommissioning of the Whiteshell nuclear reactor in Pinawa, Manitoba [EA under *CEAA 2012*].

13. In other federal EA cases, CELA has served as counsel to represent the interests of local residents, groups or communities. Examples of such cases include:

- a) representing First Nations representatives in two ongoing impact assessments under the *IAA* in relation to proposed road projects in the Ring of Fire region in northern Ontario;

- b) representing a citizens' group in a project-level EA under the *CEAA 1992* in relation a proposed ethanol refinery in Oshawa, Ontario; and
- c) representing a citizens' group in Renfrew, Ontario in at least four Canadian Nuclear Safety Commission nuclear facility licencing renewal hearings which involved the application of *CEAA 1992* or *CEAA 2012*.

E. CELA'S INVOLVEMENT IN THE DEVELOPMENT OF THE FEDERAL EA REGIME, INCLUDING THE *IAA*

14. For several decades, CELA has been extensively involved in the development, passage, amendment and Parliamentary review of EA legislation at the federal level. Among other things, this involvement has included the submission of numerous CELA briefs that address the procedural, substantive and constitutional aspects of the federal EA program. CELA has also been frequently invited to appear as a witness before various House of Commons and Senate committees on federal EA matters.

15. For example, when the *Canadian Environmental Assessment Act, 1992* was first introduced and debated in the early 1990s, CELA prepared and filed a number of detailed written submissions (and testified before a parliamentary committee) on the Act and the various implementing regulations (e.g. the Law List, Comprehensive Study List, etc.). These submissions include the following CELA briefs:

- a) T. Vigod, "Submissions Regarding Proposed *CEAA* Regulations" (December 1993) CELA Brief No. 232;
- b) C. Boljkovac & K. Campbell, "Comments on two draft Regulations under Bill C-13, the Proposed Canadian Environmental Assessment Act" (February 1992) CELA Brief

No. 207;

- c) R. Lindgren, "Submission of CELA regarding Bill C-13 (*Canadian Environmental Assessment Act*): update" (March 1992) CELA Brief No. 199a;
- d) R. Lindgren, "Preliminary Response of the Canadian Environmental Law Association to the Legislative Committee on Proposed Amendments to Bill C-13 (the Canadian Environmental Assessment Act)" (March 13, 1992) CELA Brief No. 199;
- e) K. Cooper, "Reforming Federal Environmental Assessment: Submission of the Environmental Assessment Caucus on the *Canadian Environmental Assessment Act*, Bill C-78" (November 1990) CELA Brief No. 188;
- f) T. Vigod, "Submission to the Special Committee on Bill C-78, the Proposed *Canadian Environmental Assessment Act*" (November 1990) CELA Brief No. 187;
and
- g) S. Shrybman, "Submissions of the Canadian Environmental Law Association: Reforming Federal Environmental Assessment" (December 1987) CELA Brief No. 154.

16. In addition, CELA was actively engaged in reviewing and responding to the 2003 amendments to the *Canadian Environmental Assessment Act, 1992*. For example, CELA testified before, and filed written submissions to, the House of Commons Standing Committee on the Environment and Sustainable Development, which was reviewing Bill C-19 (*An Act to Amend the Canadian Environmental Assessment Act*).

17. After the enactment and amendment of the *Canadian Environmental Assessment Act, 1992*, CELA prepared a number of briefs, articles and public legal education materials on the federal EA regime. Examples of these CELA publications include the following:

- a) R. Lindgren et al., “Federal Environmental Assessment Briefing Note: Weakening Canada’s Environmental Protection Laws” (March, 2009) CELA Brief No. 645 (co-drafted by West Coast Environmental Law);
- b) T. McClenaghan, “The Approvals Process for New Reactors in Canada: Comments to the Canadian Nuclear Safety Commission and Canadian Environmental Assessment Agency” (March 2008) CELA Brief No. 607;
- c) H. Benevides, “Real Reform Deferred: Analysis of Recent Amendments to the *Canadian Environmental Assessment Act*” (2004) 13 J. Env’tl. L. & Prac. 195; and
- d) T. McClenaghan, “Comments by CELA and Citizens’ Environment Alliance of Southwestern Ontario to Legislative and Regulatory Affairs, Canadian Environmental Assessment Agency regarding the *Canada Port Authority Environmental Assessment Regulations*” (March 3, 1999) CELA Brief No. 365.

18. In 2010, further amendments were proposed to the *Canadian Environmental Assessment Act, 1992* in omnibus Bill C-9 (*Jobs and Economic Growth Act*). CELA filed submissions and appeared as a witness before the Standing Committee on Finance in relation to the Bill C-9 amendments. Examples of CELA’s work at this time includes the following:

- a) T. McClenaghan and R. Lindgren, Letter to Prime Minister Harper re Bill C-9 amendments to *CEAA 1992* (April 15, 2010);

b) R. Lindgren, Speaking Notes for Presentation to the Standing Committee on Finance regarding Bill C-9 Proposals to Amend *CEAA 1992* (May 11, 2010);

c) R. Lindgren, Submissions to the Standing Committee on Finance regarding Bill C-9: Proposed Changes to *CEAA 1992* (May 13, 2010);

d) R. Lindgren, Submissions to the Standing Committee on Finance regarding Bill C-9: Proposed Changes to *CEAA 1992* (July 6, 2010); and

e) R. Lindgren, Letter to the Standing Committee on Finance regarding Bill C-9: Proposed Changes to *CEAA 1992* (July 9, 2010).

19. In 2011 to 2012, CELA participated in the mandatory Parliamentary review of the *Canadian Environmental Assessment Act, 1992*, and appeared as a witness before the House of Commons Standing Committee on the Environment and Sustainable Development, which conducted the review. Examples of CELA's work during this timeframe includes:

a) R. Lindgren, Legal Analysis of the Report of the Standing Committee on the Environment and Sustainable Development regarding *CEAA 1992* (March 12, 2012);

b) R. Lindgren, Speaking Notes for Presentation to the Standing Committee on the Environment and Sustainable Development: Review of *CEAA 1992* (October 27, 2011);
and

c) R. Lindgren, Letter to Prime Minister Harper regarding the Parliamentary Review of *CEAA 1992* (March 27, 2012);

20. In 2012, Parliament passed omnibus Bill C-38, which repealed the *Canadian Environmental Assessment Act, 1992*, and replaced it with a more narrowly framed federal EA law, the *Canadian Environmental Assessment Act, 2012*. CELA testified before the Senate committee on the new legislation, and submitted a number of briefs in response to the statutory changes and revised project list regulations. Examples of these CELA publications include the following:

- a) T. McClenaghan & R. Lindgren, Letter to Prime Minister Harper regarding Bill C-38 Repeal of *CEAA 1992* (June 7, 2012);
- b) R. Lindgren, Submissions on Amendments to Project List Regulations under *CEAA 2012* (August 23, 2012); and
- c) R. Lindgren, Submissions on Proposed Amendments to the *Regulations Designating Physical Activities* under *CEAA 2012* (May 13, 2013).

21. In 2015-16, the federal government commenced a comprehensive public review of the *Canadian Environmental Assessment Act, 2012* in order to regain public trust in federal EA processes. CELA participated in all aspects of this review, and made various submissions to (and appeared as a witness before) the Expert Panel that was established to consult Canadians and to recommend changes to the federal EA regime. Examples of these CELA publications include:

- a) CELA et al, Letter to Environment Minister regarding Public Review of Environmental Assessment Processes (December 22, 2015);
- b) R. Lindgren, Submissions on Proposed Terms of Reference of Expert Panel – Review of *CEAA 2012* (July 19, 2016);

- c) R. Lindgren, *Going Back to the Future: How to Reset Federal Environmental Assessment Law – Preliminary Submissions to the Expert Panel Regarding CEAA 2012* (November 7, 2016); and
- d) R. Lindgren, *The Legal Path to Sustainability: The Top Five Reforms Needed for Next-Generation Assessment – Final Submissions to the Expert Panel Regarding CEAA 2012* (December 22, 2016).

22. After the Expert Panel released its final report on revising the federal EA regime, the federal government released a June 2017 discussion paper that outlined its proposals for statutory and regulatory reform. CELA filed detailed briefs in relation to this discussion paper, including the following publications:

- a) R. Lindgren, *Ensuring Sustainability through Statutory Reform: Essential Elements of Impact Assessment Law in Canada – Submissions to the Government of Canada regarding Environmental and Regulatory Reviews: Discussion Paper* (August 28, 2017);
- b) T. McClenaghan & R. Lindgren, *Supplementary Submissions on Environmental and Regulatory Reviews: Discussion Paper* (September 8, 2017);
- c) T. McClenaghan & R. Lindgren, *Submissions on Environmental and Regulatory Reviews Discussion Paper – Proposed Role of the Canadian Nuclear Safety Commission* (September 13, 2017); and

- d) CELA et al, Letter to Environment Minister and Minister of Natural Resources regarding Federal Environmental Assessment Legislation: Role of the Canadian Nuclear Safety Commission (December 19, 2017).

23. In February 2018, omnibus Bill C-69 was introduced in Parliament, and Part 1 of this Bill contained the *IAA* that is at issue in this reference. CELA participated extensively throughout the legislative process as Bill C-69 was debated, amended and eventually given Royal Assent in June 2019.

24. During this timeframe, CELA filed detailed briefs on the *IAA*, and was invited twice to appear as a witness before the Standing Committee on the Environment and Sustainable Development and the Standing Senate Committee on Energy, the Environment and Natural Resources in order to speak to the *IAA*. CELA also served as an alternate member of the Multi-Interest Advisory Committee, which was appointed by the federal Environment Minister to provide advice from stakeholders on implementing the *IAA*. Examples of CELA submissions on the *IAA* during this timeframe include the following:

- a) R. Lindgren, Presentation by CELA to the Standing Committee on the Environment and Sustainable Development regarding Part 1 of Bill C-69 (*Impact Assessment Act*) (April 6, 2018);
- b) R. Lindgren, Canada's Proposed *Impact Assessment Act*: How to Regain Public Trust through Appropriate Amendments – Submissions the Standing Committee on the Environment and Sustainable Development regarding Part 1 of Bill C-69 (April 6, 2018); and

- c) R. Lindgren, Comments to the Standing Senate Committee on Energy, the Environment and Natural Resources regarding Part 1 of Bill C-69 (*Impact Assessment Act*) (March 29, 2019).

25. Before and after the *IAA* was proclaimed into force, the federal government undertook public consultations on proposed *IAA* regulations, including the *Physical Activities Regulations* that are at issue in this reference. CELA undertook a legal analysis of the proposed project list (including its constitutional aspects), and provided detailed submissions on both proposed regulations, such as:

- a) CELA et al, Letter to Environment Minister regarding Revisions to the Project List Regulation (April 18, 2018);
- b) R. Lindgren & K. Blaise, Submissions to the Government of Canada regarding *Consultation Paper on Approach to Revising the Projects List* (May 28, 2018);
- c) R. Lindgren, Submissions to the Government of Canada regarding *Consultation Paper on Information Requirements and Time Management Regulations* (June 1, 2018); and
- d) R. Lindgren, Submissions to the Government of Canada regarding *Discussion Paper on the Proposed Projects List and Discussion Paper on Information Requirements and Time Management Regulatory Proposal* (May 29, 2019).

26. Now that the *IAA* and regulations are being implemented across Canada, CELA has prepared numerous documents, newsletter articles, blogs, webinars and public legal education materials to explain the new federal EA regime. Examples of CELA's work in this area include:

- a) R. Lindgren, Briefing Note on Bill C-69: Overview of Canada's New *Impact Assessment Act* (August 6, 2019);
- b) T. McClenaghan & K. Blaise, Workshop Presentation: Residual Concerns in Siting a Nuclear Fuel Repository (August 2019); and
- c) R. Lindgren, What's New with Environmental Assessment? Law Society of Ontario: The Six-Minute Environmental Lawyer – Continuing Professional Development (October 2, 2019).

F. CELA'S INTEREST IN THE LEGAL ISSUES ARISING IN THIS REFERENCE

27. Due to its casework, public legal education, and law reform mandate, CELA has extensive knowledge and experience with respect to federal EA legislation, and jurisdictional issues concerning the division of powers under the *Constitution Act, 1867* in relation to environmental matters.

28. In CELA's view, the issue of whether the *IAA* and the *Physical Activities Regulations* are *ultra vires* of Parliament is of profound public interest and importance, in that it will have far-reaching environmental and constitutional law implications that will affect the public as a whole, including CELA and our client communities. In addition, the resolution of this issue may fundamentally affect the ability of Parliament to act under the Constitution to effectively assess and approve designated projects that affect areas of federal interest.

G. CELA'S PROPOSED INTERVENTION

29. As a public interest law group with almost 50 years' experience in public education, research, law reform, and public interest litigation in the area of environmental law, CELA is

well-positioned to render useful and insightful assistance to this Honourable Court by way of written and oral submissions on the overarching question of law in the reference, namely whether the *IAA* and the *Physical Activities Regulations* are unconstitutional, in whole or in part?

30. I have read the factum that the Alberta government has recently filed in the reference, and I note that the province disputes the constitutionality of the entire *IAA* and *Physical Activities Regulations*. In particular, I note that Alberta's primary argument is that the *IAA* and regulations are wholly *ultra vires* of Parliament.

31. Having reviewed the factum filed by the Alberta government, and considering its serious environmental implications for assessing designated projects in Ontario, across Canada and within different industrial sectors, I believe that it is important and appropriate for groups with knowledge and expertise regarding the matters at issue to intervene in order to assist this Honourable Court in rendering its opinion in this reference.

32. In CELA's view, the resolution of the constitutional question will have significant and far-ranging implications which transcend the interests of the immediate parties in the reference (e.g. the governments of Alberta and Canada). The position of Alberta, if accepted by this Honourable Court, will have ramifications in Ontario and other provinces by negating (or substantially narrowing) the applicability and implementation of the *IAA* in relation to numerous types of designated projects across Canada, and by unduly constraining Parliament's legislative authority to protect the environment and human health.

33. For example, a ruling that the *IAA* is *ultra vires* of Parliament may have profound and unintended consequences with respect to the review and approval of nuclear power plants or

other nuclear facilities in Ontario. Since the Ontario government does not apply its own *Environmental Assessment Act* to such projects on the grounds that they fall within the exclusive jurisdiction of Parliament, a ruling by this Honourable Court that the *IAA* is *ultra vires* may mean that certain nuclear projects in Ontario would not be subject to any provincial or federal EA requirements whatsoever. This result would leave such projects only subject to the technical licencing provisions of the *Nuclear Safety and Control Act*, which is not an EA statute.

34. More generally, the outcome of the reference will effectively determine the nature, extent and enforceability of the important participatory rights provided under the *IAA* and exercised by CELA, our client communities, and other persons and groups across Canada. In summary, the Court's opinion will greatly affect the public's ability to utilize the *IAA* to achieve the stated objectives of the legislation, including environmental sustainability, integrated and coordinated decision-making, and timely and meaningful public participation throughout the impact assessment process for designated projects.

35. If granted leave to intervene, CELA intends to submit that the *IAA* and *Physical Activities Regulations* are *intra vires* of Parliament. While the Attorney General of Canada ("AGC") has not yet filed its factum, CELA anticipates that the federal government will take the same position.

36. Despite the absence of the AGC factum at this time, I anticipate that the perspective that CELA (and the other Proposed Intervenors) will bring to the reference question is unique, broader, materially different from, and not duplicative of, that represented by the AGC. In addition, if leave to intervene is granted, CELA and the Proposed Intervenors intend to

coordinate their efforts in order to ensure that there is no unnecessary overlap or duplication between the AGC submissions and the submissions of the Proposed Intervenors.

37. In the event that other persons, groups or First Nations are granted leave to intervene in the reference, CELA and the Proposed Intervenors intend to coordinate with similarly situated intervenors in order to avoid unnecessary overlap or duplication in their respective submissions.

38. More specifically, CELA and the other Proposed Intervenors will comply with the deadlines that have been set in this reference, and intend to focus their submissions on the following matters:


- a) the appropriate characterization of the pith and substance of the *IAA*;
- b) the relevant heads of power under section 91 of the *Constitution Act, 1867* under which the *IAA* and the *Physical Activities Regulations* can be upheld;
- c) the examination of comparable EA regimes and their constitutional underpinnings, such as the U.S. *National Environmental Policy Act*, which was the original model for federal EA law in Canada; and
- d) the international law context within which the *IAA* should be interpreted, including application of the precautionary principle developed under international law and entrenched within the *IAA* and the *Physical Activities Regulations*.

39. Due to the collective nature of this proposed intervention, and the complexity of the constitutional issues at play, the Proposed Intervenors respectfully request leave to jointly file a single factum. In particular, the Proposed Intervenors seek an Order granting them leave to intervene in the reference on the following terms:

- (i) that the Proposed Interveners be permitted to serve and file a factum, not exceeding 20 pages;
- (ii) that the Proposed Interveners be permitted to make oral submissions at the hearing of the reference not exceeding 15 minutes (or such other duration as the Court may deem appropriate);
- (iii) that, in the alternative, the Proposed Interveners be permitted to appear through counsel at the hearing of the reference for the purposes of answering questions the Court may have with respect to their factum;
- (iv) that the Proposed Interveners shall not supplement the record, file additional affidavits, or raise new issues in the reference; and
- (v) that costs of this application and the reference hearing shall not be awarded to or against the Proposed Interveners.

40. I swear this affidavit in support of CELA's application for leave to intervene in this reference, and for no other or improper purpose.

SWORN BEFORE ME at Toronto, Ontario,)
 this 28th day of January, 2020.)


 _____)
 Commissioner for Oaths in and for the)
 Province of Ontario)
 RICHARD LINDGREN)
 LSO #28529E)


 _____)
 Theresa McClenaghan)