March 19, 2020 **BY EMAIL**

Natalia Kusendova, MPP
Chair, Standing Committee on Social Policy
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Ms. Kusendova:

RE: BILL 171 (*BUILDING TRANSIT FASTER ACT, 2020*) AND RELATED REGULATORY PROPOSALS UNDER THE *ENVIRONMENTAL ASSESSMENT ACT* (ERO #019-0614)

On behalf of the Canadian Environmental Law Association (CELA), I am writing to provide CELA's comments regarding Bill 171 (*Building Transit Faster Act, 2020*) and related regulatory proposals under the *Environmental Assessment Act* (*EAA*).

(a) Overview of Ontario's Proposals

In essence, Bill 171 is aimed at expediting the planning and construction of four specific transit projects in the Greater Toronto Area (GTA): the Ontario Line; the Scarborough Subway Extension; the Yonge Subway Extension; and the Eglinton Crosstown West Extension.[1]

To accomplish this goal, Bill 171 contains provisions that address various issues, including transit corridor control (Part II), expropriation (Part III), utility infrastructure (Part IV), municipal servicing and right of way access (Part V), administration and enforcement (Parts VI to IX), miscellaneous matters (Part X), and consequential amendments to other provincial laws (Part XI).

This legislative package is accompanied by new or amended regulations under the *EAA* that provide conditional EA exemptions for these transit projects if they follow the requirements of the streamlined transit planning process.[2] In particular, a new regulatory process is being proposed for the Ontario Line, while numerous revisions to the existing transit regulation (O.Reg.231/08) are being proposed to "prioritize" the other three transit projects.[3]

(b) CELA's Public Interest Perspective

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Over the past 50

[1] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-171.
[2] See https://ero.ontario.ca/notice/019-0614.
[33] See proposed subsection 15(22.1) of O.Reg.231/08.

years, CELA lawyers have represented low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental and public health issues. CELA has been particularly active in casework and law reform matters involving land use planning, transit-supportive development, and environmental assessment (EA).

In principle, CELA strongly supports the orderly and timely implementation of new or expanded public transit systems in order to help mitigate greenhouse gas emissions from the province's transportation sector. In addition, there are numerous other environmental and socio-economic benefits associated with suitably located, well-designed, and sustainable public transit services and systems, particularly within highly urbanized areas. Accordingly, CELA submits that the planning and approvals regime for public transit projects should be clear, effective, efficient and equitable.

However, for the reasons described below, CELA has a number of serious concerns about the need for, and the proposed content of, the above-noted legislative and regulatory reforms that are now being advanced by the Ontario government.

(c) CELA's Comments on Bill 171

Our primary concern about Bill 171 is that it appears to be proceeding on the erroneous assumption that the *Expropriations Act* and other provincial statutes constitute an insurmountable roadblock to transit projects in general, and to the four GTA projects in particular. In our view, the Ontario government has presented no compelling evidence to substantiate its position that sweeping legislative reforms are necessary to eliminate the alleged statutory barriers to transit planning and implementation

In addition, while the purpose of Bill 171 is framed as expediting the four GTA transit projects,[4] there are a number of highly questionable provisions that have little or nothing to do with speeding up the planning and approvals process. To the contrary, several of these provisions are aimed at reducing or removing important legal accountability mechanisms.

For example, Bill 171 proposes to exclude "hearings of necessity" under the *Expropriations Act* if property is taken from private landowners for transit purposes.[5] As noted above, CELA maintains that there is no evidence-based reason to oust this existing independent process for adjudicating objections to contested expropriation proposals.

We are aware that Bill 171 empowers the Minister of Transportation to establish an "alternative process" for soliciting and considering landowners' comments about proposed expropriations.[6] However, this Ministerial power is entirely discretionary, and it is uncertain whether (or when) such a process might be established by the Minister, or whether it will contain the same procedural safeguards that currently exist under the *Expropriations Act* in relation to hearings of necessity.

[4] Bill 171, section 1.
[5] Bill 171, section 44.
[6] Bill 171, section 45.

In addition, we note that Bill 171 specifically excludes the *Statutory Powers Procedure Act* (*SPPA*) from applying to the new Ministerial process.[7] In effect, this enables the Minister to establish a process that conflicts with the *SPPA*'s guarantees of procedural fairness (e.g. right to notice, right to make submissions, right to be represented, right to present evidence, right to examine and cross-examine witnesses, etc.) whenever statutory powers of decision are being exercised under Ontario law. On this point, CELA submits that the Ontario government has fundamentally failed to provide any public interest justification for overriding or circumventing the *SPPA* in the manner proposed by Bill 171.

Similarly, Bill 171 purports to prohibit aggrieved persons from commencing civil actions against various entities (e.g. Ontario government, Metrolinx, prescribed public bodies, etc.) in relation to various activities or decisions under the legislation.[8] This blanket immunity extends to acts or omissions that create liability under common law and statutory causes of action,[9] excludes numerous types of judicial remedies or relief,[10] and is both prospective and retrospective in nature.[11]

CELA is gravely concerned about this extraordinary – and wholly unacceptable – attempt to bar lawsuits launched by persons whose personal, pecuniary or proprietary interests have been adversely affected by activities undertaken under Bill 171. In such circumstances, Ontarians should continue to be entitled to have their day in court, and if the named defendants have valid defences to such actions (e.g. limitations, statutory authority, etc.), then they can be presented to, and weighed by, the civil courts in the normal course.

Finally, Bill 171 provides that various activities under the legislation do not constitute injurious affection for the purposes of the *Expropriations Act* "or otherwise at law."[12] The *Expropriations Act* currently defines "injurious affection"[13] as follows:

> "injurious affection" means,
>
> (a) where a statutory authority acquires part of the land of an owner,
>
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
>
> (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
>
> (b) where the statutory authority does not acquire part of the land of an owner,

[7] Bill 171, section 81.
[8] Bill 171, section 82.
[9] Bill 171, subsection 82(3).
[10] Bill 171, subsection 82(4).
[11] Bill 171, subsection 82(5).
[12] Bill 171, section 83.
[13] *Expropriations Act*, RSO 1990, c.E.26, section 1.

(i) such reduction in the market value of the land of the owner, and

(ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired.

The *Expropriations Act* goes on to establish a general right to compensation for loss or damage resulting from injurious affection.[14]

In light of these existing provisions, CELA submits that Bill 171 is an objectionable attempt to prevent or restrict Ontarians from seeking compensation for injurious affection in relation to certain transit project activities or decisions. Although transit projects may generally benefit Ontarians as a whole, CELA submits that individual residents who disproportionately suffer loss or damage from injurious affection should not be forced to bear these impacts without appropriate compensation.[15]

Accordingly, CELA does not support the unwarranted legal rollbacks contained in Bill 171, which will inevitably and unfairly prevent Ontario residents from seeking appropriate redress in the event that they suffer unreasonable loss, injury or damages from activities or decisions under Bill 171.

RECOMMENDATION 1: If Bill 171 proceeds, then Part III and sections 81 to 83 should be deleted.

(d) CELA's Comments on Proposed *EAA* Regulations

When O.Reg.231/08 was first being proposed over 12 years ago, CELA generally supported the governmental intention to create a specialized transit planning assessment process (TPAP) under the *EAA*.[16] At the same time, CELA made some specific recommendations on how to strengthen and improve this new regulatory process for public transit projects, but these recommendations were not incorporated into the regulation when it was promulgated in June 2008.

Similar concerns were raised by the Environmental Commissioner of Ontario (ECO) in his 2008-09 annual report to the Ontario Legislature.[17] Among other things, the ECO correctly noted that:

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[14] *Ibid*, section 21.

[15] See *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, where the Supreme Court of Canada upheld a compensation award made against the Ontario government under the *Expropriations Act* for injurious affection (e.g. nuisance impacts) arising from a provincial highway project.

[16] See https://cela.ca/response-draft-regulations-under-emenvironmental-assessment-act-emfor-public-transit-pr/.

[17] See http://docs.assets.eco.on.ca/reports/environmental-protection/2008-2009/2008-09-AR.pdf.

> Through careful integration with smart land use planning, such projects can help curb urban sprawl, reduce greenhouse gas emissions, lower aggregate vehicle emissions, and help make cities much more liveable and sustainable. Not every proposed transit project is going to be a good one, however, and each project will have its own unique impacts and benefits. As well, individual transit projects must be viewed within the larger context of an enhanced transportation framework. Fundamentally, the goal should not be an increase in transit projects, but a substantial increase in transit usage which is accomplished through effective overall transit planning (emphasis added).[18]

Similarly, the ECO was skeptical that a "faster" process is necessarily a "better" process for transit planning purposes, and criticized the regulation's exclusion of key environmental planning considerations:

> Accordingly, while O. Reg. 231/08 has removed some key requirements of the EA process, such as the requirement to consider both the "need" for and the potential "alternatives" to a particular project, the ECO hopes that the planning processes used by all proponents will still include these considerations. While the ECO agrees that the requirement to determine "need" is much less relevant given the benefits of increased public transit, a requirement to consider "alternatives" is still in the public interest, particularly when various transit options have differing impacts socially, economically and environmentally. A careful weighing of alternatives, with public scrutiny, can lead to better overall outcomes and a wiser use of scarce public resources (emphasis added).[19]

Despite these and other concerns, O.Reg.231/08 has remained largely unchanged over the intervening years, and is presently focused on impact mitigation rather than comprehensive EA planning. Moreover, CELA is unaware of any systematic attempt by the Ontario government to publicly review the overall effectiveness of this regulatory regime in order to solicit feedback from interested stakeholders on potential reforms.

In the absence of an open and accessible public review of O.Reg.231/08, the Ontario government suddenly announced last month that there would be a 30 day comment period on its proposed regulatory changes to the current regime. We are unaware if provincial officials undertook any pre-consultation steps with non-governmental stakeholders behind closed doors to help develop the regulatory proposals, but if such a process occurred, CELA was not invited to participate or contribute to such discussions.

In any event, the Registry notice for these regulatory proposals under the *EAA* concedes that "transit planning in Ontario is already supported by an efficient environmental assessment process." CELA generally concurs with this Registry statement, which appears to be at odds with the Transportation Minister's questionable claim during Second Reading debate on Bill 171 that the existing TPAP constitutes "red tape" and imposes "regulatory burdens" on transit projects.[20]

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[18] *Ibid*, pages 80-81.
[19] *Ibid*, page 81.
[20] *Hansard*, February 24, 2020: see https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2020-02-24/hansard#para719.

Nevertheless, the Registry notice goes on to assert that "in order to accommodate innovation and efficient delivery of priority transit lines, more needs to be done." To date, however, the Ontario government has presented no persuasive evidence to substantiate its claim that the current TPAP is broken, unworkable or causing undue construction delays in relation to the four GTA projects.

As noted below, three of the four GTA projects did, in fact, receive approval to proceed under the streamlined TPAP, and any subsequent delays in implementation (e.g. the first phase of the Eglinton Crosstown project) appear to be attributable to political or economic factors rather than to the TPAP itself. Moreover, anecdotes about congested roads, crowded subways or lengthy commuting times are not an adequate substitute for robust data collection and analysis that actually verifies the need for the specific legislative and regulatory reforms now being proposed by the Ontario government in relation to the GTA transit projects.

Similarly, the apparent rationale for the regulatory proposals has been based on the claimed benefits of public-private partnerships in the transit context:

> Ontario has determined that a public-private partnership (P3) can get transit constructed as quickly, economically, and transparently as possible, while maintaining environmental oversight.
>
> In this model, early design work would be done by Metrolinx, who will lead the development of these projects, but the final project design will be done later in the process by the project contractor.
>
> We are proposing new regulations that modify the existing TPAP to better suit this delivery model, while ensuring appropriate consultation occurs, and that the protection of the environment remains a priority.

To our knowledge, however, the province has not released any credible cost-benefit analyses which quantify the alleged superiority of using the P3 model for GTA transit projects, or which provide an empirical basis for Ontario's opinion that P3 arrangements are inherently more efficient, transparent and accountable.

For the Ontario Line, the provincial government is proposing a separate TPAP that sets out basic notification, consultation and documentation requirements, which are to be completed by the proponent within a compressed timeframe. While the Registry notice calls this a "new environmental assessment process," the legal reality is that the new regime does not replicate the requirements for individual EAs under Part II of the *EAA*.

Accordingly, it is misleading to characterize the Ontario Line TPAP as an EA process; at best, it is a streamlined exercise that may – or may not – satisfactorily address the public or Indigenous impacts of the project.

This is particularly true since the revised TPAP places the primary responsibility for "issue resolution" with the proponent itself (Metrolinx), and the issue resolution process cannot cause

"unreasonable delay to the implementation of the Ontario Line Project or early works."[21] We further note that public and Indigenous consultation shall be conducted in a manner considered "appropriate" by Metrolinx.[22] Given these constraints, CELA anticipates that public or Indigenous concerns may be improperly discounted, glossed over or otherwise dismissed by the proponent in order to implement the project as soon as possible.

Furthermore, the Ontario Line TPAP is a truncated process since "early works" can be designed and built (e.g. station construction, rail corridor expansion, utility relocation, bridge replacement/expansion, etc.) prior to the release of the draft Environmental Impact Assessment report, and long before the overall transit planning process has been completed. This bifurcation strikes CELA as a classic example of "piecemealing" (or project splitting) that is inconsistent with good environmental planning, and that has been discouraged under EA legislation for decades.

We further note that even if Metrolinx manages to successfully resolve public or Indigenous issues about early works, the Minister is empowered to impose conditions that "modify" the resolution if it "would cause unreasonable delay to the implementation of the Ontario Line Project."[23] Similar Ministerial power to override issue resolution outcomes has been provided in relation to the Environmental Impact Assessment report.[24]

In our view, these provisions undermine the credibility and utility of the issue resolution process, and will likely militate against meaningful public and Indigenous consultation regarding the Ontario Line Project. Moreover, it is unclear to us why the Minister's focus on timeliness should trump the paramount consideration of safeguarding the environment and public health against transit-related impacts that are identified by residents or Indigenous communities during the TPAP for this project.

For the other three GTA transit projects (which have previously issued approvals under the *EAA*), the provincial government proposes to revise the existing TPAP by allowing even significant changes to be made in the approved undertakings. If there are public or Indigenous concerns arising from such changes, Metrolinx is supposed to respond to and "manage" these issues. However, since Metrolinx is the proponent, it stretches credulity to suggest that Metrolinx is an independent, objective or disinterested party for issue resolution purposes.

Accordingly, CELA submits that the existing TPAP should be left intact, and in the event that major post-approval changes are proposed to any of the four GTA projects, then the relevant notice, consultation and reporting obligations under the TPAP should remain applicable. In our view, significant *ex post facto* changes should only be permissible if there is full compliance with the current provisions in section 15 of O.Reg.231/08.

RECOMMENDATION 2: The proposed amendments to O.Reg.231/08, and the proposed *EAA* regulation in relation to the Ontario Line, should be withdrawn.

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[21] See proposed subsection 21(12) of the draft regulation. Identical language is set out in proposed subsection 15(22.7) of O.Reg.231/08 for the other three GTA projects.
[22] See, for example, proposed subsections 6(3), 10(3), 17(3) and 21(9) of the draft regulation.
[23] See subsection 12(2) of the draft regulation.
[24] See subsection 19(2) of the draft regulation.

(e) Conclusions and Summary of Recommendations

For the foregoing reasons, CELA remains highly concerned about key aspects of Ontario's proposed legislative and regulatory changes in relation to the four GTA transit projects.

In our view, there is a dearth of evidence supporting the problematic and controversial aspects of Bill 171 and the proposed *EAA* regulations. In short, it appears to us that these transit measures are "solutions" in search of an actual problem, particularly since the current TPAP under the *EAA* is more than adequate to ensure that transit projects are fast-tracked in the public interest while being protective of the natural, social, economic and built environments.

Accordingly, CELA makes the following recommendations:

RECOMMENDATION 1: If Bill 171 proceeds, then Part III and sections 81 to 83 should be deleted.

RECOMMENDATION 2: The proposed amendments to O.Reg.231/08, and the proposed *EAA* regulation in relation to the Ontario Line, should be withdrawn.

We trust that these recommendations will be taken into account as the Ontario government considers its next steps in this matter. Please contact the undersigned if you have any questions arising from this submission.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Richard D. Lindgren
Counsel

cc. Ken Cunningham, MECP EA Branch
Jerry DeMarco, Commissioner of the Environment (AGO)