CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Standing Committee on Finance and Economic Affairs
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Via e-mail and facsimile

Dear Members of the Standing Committee on Finance and Economic Affairs:

RE: BILL 212, GOOD GOVERNMENT ACT, 2009

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purpose of using and improving laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public legal education, community organization, and law reform activities.

The following are our comments on the legislation, Bill 212, *Good Government Act, 2009*. We have confined our comments to the issue of the removal of cabinet appeals and change to conflict-rules for the Ontario Municipal Board (OMB) membership.

Analysis:
The process of appeals to cabinet is arcane and not very transparent, and has largely been a poor process. The entire process is cloaked in secrecy and the types of clients CELA represents are generally at a significant disadvantage because they lack access to decision makers, in contrast to more powerful interests. For example, there may be no guidelines setting out what materials should be put before Cabinet or prescribed timelines for sending submissions. The procedural requirements are generally made up as the matter proceeds and generally have not favoured CELA's clients. Moreover, while the matter is before Cabinet, there have been instances of the adversary frequently meeting with senior government officials and the relevant Minister. Not surprisingly, the resulting decisions, if not favourable to CELA's clients, may be perceived by those clients as other than unbiased or fair. Consequently, the average person seeking justice is not able to fairly participate in the cabinet appeals process as currently conducted.

If cabinet appeals were removed, there would still be the possibility of (rare) judicial review operating to ensure valid administrative processes, and operating as a "safety valve" to ensure that truly egregious decisions could be set aside by the Courts.

On the other hand, Cabinet appeals have operated as a safety valve; the one advantage of Cabinet appeals is that they ensure accountability by the government for what are generally policy decisions by administrative tribunals. The decisions made by the OMB are essentially policy decisions in the land use context (e.g. should the wetland be paved or development proceed) and it would be very difficult to judicially review these decisions in Divisional Court. Consequently, Cabinet appeals can provide a necessary appeal route when the Tribunal's decision was reached largely on the basis of facts or policy considerations which do not favour public interest clients.

Moreover, a Judicial Review process is very expensive and there is a risk of costs. These considerations don't apply for Cabinet appeals.

Recommendations:

(1) Cabinet Appeals
Consequently, Cabinet appeals do have some advantage but the process requires reform to ensure that procedural steps are clearly spelled out and restrictions are placed on lobbying after an appeal has been filed.

If the government proceeds with removal of Cabinet appeals, it should ensure that the appointment process for tribunal members is also reformed. The government has taken some measures along this line but the reforms need to be set out in statute as in Quebec so that they can they can not be readily overridden by future governments. The appointment process needs to be done along the lines of what currently exists for the judiciary. This would ensure that tribunals, in fact, possess the expertise that they are deemed to have and that appointments are free of patronage considerations.

The government should also bring back intervener funding so that there is a level playing field when the matter is before a tribunal to ensure that it reaches the correct decision. If we no longer have appeals to Cabinet, it will be all the more critical to ensure that the tribunal gets it right the first time on issues of fact, as parties won't be successful challenging the tribunal decision on a judicial review.

In addition, if government is removing the possibility of Cabinet appeal at the end of a hearing process, then it should reinstate the Cabinet's former ability to declare a "provincial interest" under the *Planning Act* at the front-end of the process. If exercised, this would give the Cabinet the last word on contentious policy and factual disputes.

(2) Removal of Restriction for Ontario Municipal Board Members
The removal of restrictions on OMB members working for municipalities is troubling. We don't appreciate the context that is prompting the government to permit OMB members to work for municipalities or how that constitutes "reform" and improvement to the OMB system. This

change would be perceived as another erosion of the independence, impartiality, and credibility of the OMB, which is contrary to the changes that are needed.

Thank you for the opportunity to make comments.

Sincerely,

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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