Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE STANDING COMMITTEE ON FINANCE AND ECONOMIC AFFAIRS REGARDING SCHEDULE 17 OF BILL 100

Prepared by
Richard D. Lindgren, CELA Counsel[1]

PART I - INTRODUCTION

These are the submissions of the Canadian Environmental Law Association (CELA) in relation to Schedule 17 of Bill 100 (*Protecting What Matters Most Act (Budget Matters), 2019*).[2]

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws in order to protect the environment and public health and safety. CELA lawyers represent low-income persons and vulnerable communities in the courts and before administrative tribunals in a wide variety of environmental matters.

(a) Overview of Schedule 17

If enacted, Schedule 17 proposes to repeal the existing *Proceedings Against the Crown Act*[3] (*PACA*) in its entirety, and to replace the *PACA* with the new *Crown Liability and Proceedings Act, 2019* (*CLPA*).

Among other things, the proposed *CLPA* contains provisions relating to Crown liability, procedural rules, notice requirements, and enforcement matters. While some of these provisions resemble those found in the current *PACA*, several new or expanded provisions are being proposed within the *CLPA*.

For example, section 11 of the *CLPA* proposes to extinguish causes of action against the Crown, or an officer, employee or agent of the Crown, in relation to:

- negligence or failure to take reasonable care when exercising powers, duties or functions of a legislative nature;

- negligence or failure to take reasonable care in regulatory decisions "made in good faith," or the purported failure to make a regulatory decision; and

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[1] The author acknowledges and appreciates the research assistance of CELA's student-at-law Rashin Alizadeh, and Anna Lindgren-Tanga (McGill B.C.L./LL.B. '19), in the preparation of these submissions.
[2] Bill 100 was introduced for First Reading by Ontario's Minister of Finance on April 11, 2019, and it received Second Reading (and was referred to the Standing Committee on Finance and Economic Affairs) on May 2, 2019: see https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-100.
[3] RSO 1990, c.P.27: see https://www.ontario.ca/laws/statute/90p27.

- negligence or failure to take reasonable care in policy decisions "made in good faith," or the purported failure to make a policy decision.

Section 11 is a new provision that has no counterpart in the *PACA*, and it represents a sweeping attempt to bar certain types of claims that have been traditionally available to Ontarians if they have suffered loss, injury or damages from negligent acts or omissions by provincial representatives.

In addition, it appears that the prohibitions under section 11 not only apply to current or future regulatory negligence claims against the Ontario government, but they also purport to retroactively extinguish any existing proceedings which involve causes of action that are being precluded by the *CLPA*.[4]

(b) CELA's Objections to Schedule 17

CELA is highly concerned that the repeal and replacement of the *PACA* is being fast-tracked and buried within omnibus legislation that is ostensibly aimed at budgetary matters. In our view, this expedited approach means that Schedule 17 will not receive the careful public scrutiny and invaluable input of all key stakeholders before the long-standing Crown liability regime is overhauled in Ontario.

On this point, we have reviewed the legislative debates on Bill 100 at the First and Second Reading stages, and we note that neither the Finance Minister nor his Parliamentary Assistant attempted to rationalize (or even mention) replacing the *PACA* with the *CLPA*. In addition, to CELA's knowledge, no governmental white papers, discussion documents or statistical analyses were released by the Ontario government prior to or after the introduction of Bill 100 to substantiate its perceived need to enact the *CLPA* at this time.

Similarly, CELA is unaware of any efforts by the Ontario government to solicit the views of all key stakeholders (e.g. private bar, law associations, legal aid clinics, non-governmental organizations, or members of the public) to assist in developing the content of the *CLPA* before it was tabled in the Ontario Legislature. In our view, this lack of pre-consultation may help explain the fundamental flaws in Schedule 17, as discussed below.

Aside from the questionable manner in which the *CLPA* is being advanced, CELA is strongly opposed to the inclusion of section 11 in the *CLPA*, which attempts to prohibit virtually all types of regulatory negligence claims against the Crown for acts and omissions that directly harm Ontarians.

In effect, this extensive prohibition will unjustifiably prevent the people of Ontario from suing the Crown where they have suffered loss, injury or damages arising from negligent acts, omissions or decisions by provincial officers, employees or agents. For the reasons described below, CELA

[4] Such claims are deemed to be dismissed, without costs, when the *CLPA* comes into force and extinguishes these causes of action: see *CLPA*, subsection 11(8).

concludes that the overbroad prohibition in section 11 is unnecessary, unprecedented and unduly impairs access to justice in Ontario.

Accordingly, CELA recommends to the Standing Committee that:

1. Schedule 17 should be immediately withdrawn from Bill 100. If the Ontario government wants to replace the *PACA*, then the proposed replacement legislation should be introduced by the Attorney General in due course (after consulting key stakeholders), and should be subject to meaningful public and political review in order for the Ontario Legislature to reach an informed decision on whether (or how) the new legislation should be implemented.

2. In the alternative, if Schedule 17 remains within Bill 100, then section 11 must be deleted in its entirety, and the existing basis for Crown liability in section 5 of the *PACA* should be retained in the *CLPA*.

PART II - CELA COMMENTS ON SCHEDULE 17 OF BILL 100

(a) Background: The PACA Provisions

Historically, governments in Canada enjoyed general immunity from being sued in tort, and the only way for a citizen to bring a claim against the Crown was by a petition of right.[5] However, starting with the federal government's 1947 enactment of Crown liability legislation, all provincial governments (except for Quebec, as noted below) passed substantially similar statutes between 1951 and 1974 in order to empower citizens to sue their governments for torts (civil wrongs).

There is considerable uniformity between most of these Crown liability statutes in Canada since they were largely based on a model law developed in 1950. The central feature of these various laws – including the *PACA* in Ontario – is the imposition of vicarious liability upon the Crown for torts committed by its agents and servants. Thus, these statutes are landmark reforms that facilitate access to justice since aggrieved citizens can commence civil actions to obtain compensation for harm or loss caused by governmental negligence or other tortious conduct.

The *PACA* was enacted in 1963,[6] and the Act currently describes how – and under what circumstances – Ontarians may commence a civil action against the provincial Crown. Many of the *PACA*'s provisions are procedural in nature, and the Act addresses various matters such as: notices of claim; discovery; service; remedies; and Crown defences.

However, subsections 5(1) and (2) of the *PACA* are substantive provisions which impose civil liability upon the Crown as follows:

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[5] See P. Hogg, P. Monahan and W. Wright, *Liability of the Crown*, 4th ed. (Toronto: Thomson Reuters, 2011) at 9.
[6] *Proceedings Against the Crown Act,* SO 1962-1963, c. 109. A decade earlier, a previous version of this legislation was passed but never proclaimed in force: see *Proceedings Against the Crown Act,* SO 1952, c. 78.

> **5** (1) Except as otherwise provided in this Act, and despite section 71 of the *Legislation Act, 2006*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,
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> (a) in respect of a tort committed by any of its servants or agents;
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> (b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;
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> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
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> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.
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> (2) No proceeding shall be brought against the Crown under clause (1) (a) in respect of an act or omission of a servant or agent of the Crown unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent or the personal representative of the servant or agent.

In 1989, the Ontario Law Reform Commission conducted a comprehensive review of the *PACA*, and reported to the Attorney General of Ontario that such legislation should create more (not less) Crown liability for the following reasons:

> In our view, the present law governing liability of the Crown, insofar as it still provides privileges and immunities not enjoyed by ordinary persons, is opposed to popular and widely-held conceptions of government. We share a deeply-held notion that the government and its officials ought to be subject to the same legal rules as private individuals and, in particular, should be accountable to injured citizens for unauthorized action. This is a notion that lies at the heart of the "rule of Law" and of "constitutionalism" as those concepts have been conventionally understood in the common law world. An important, if not central, aspect of this concept is the fact that the application of ordinary principles of law to government is placed in the hands of the ordinary courts. The courts are perceived to be independent of government and therefore capable of being relied upon to award an appropriate remedy to a person who has been injured by illegal government action (emphasis added).[7]

Similarly, the Ontario Law Reform Commission report concluded:

> [A]t this point we think it is important to indicate that, as a matter of general principle, we believe that the Crown should be subject to the same law as any other person, and that any exception to this general rule must be clearly justified. Accordingly, our general and central recommendation is that the privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity…. However, we wish to emphasize that this

[7] Ontario Law Reform Commission, *Report on the Liability of the Crown* (Toronto: OLRC, 1989) at 2-3.

> recommendation is intended to apply with respect to all causes of action, including tort, contract, restitution and breach of trust (emphasis added).[8]

In light of this expert commentary, CELA submits that Schedule 17 of Bill 100 is heading in the wrong legal and policy direction by adding even more special immunities and privileges upon the Crown and, more generally, by completely re-writing the *PACA* despite the fact that this statute has worked reasonably well in providing Ontarians access to justice for several decades.[9]

(b) Summary of Schedule 17

If enacted, the *CLPA* will generally apply to legal proceedings under the *Rules of Civil Procedure* (e.g. civil actions or applications) where damages are being requested by the plaintiff or applicant.[10] While this appears to exclude applications for judicial review (which typically focus on questions of law or jurisdiction), the *CLPA* will apply to individual actions and class proceedings where damages (e.g. monetary compensation) are being claimed.

Subsection 8(1) of the *CLPA* establishes general Crown liability in a manner that is similar to subsection 5(1) of the *PACA* (see above), including liability for "a tort committed by an officer, employee or agent of the Crown."[11] However, the *CLPA* provides that the Crown (defined as "the Crown in right of Ontario") is not liable for torts committed by Crown agencies, Crown corporations, transfer payment recipients, or independent contractors providing services to the Crown for any purpose.[12]

As noted above, section 11 of the *CLPA* proposes to extinguish Crown liability for certain governmental functions (e.g. legislative activities, regulatory decisions, and policy decisions), even if they are performed negligently and result in direct harm or loss to Ontarians.[13] This provision does not exist in the *PACA*, and represents a new and wide-ranging constraint on Ontarians' current legal right to seek damages if they have suffered loss, injury or damages as a result of governmental negligence.

The all-encompassing nature of section 11 is reflected in the broad definitions of the various types of governmental functions that would enjoy immunity from negligence actions if the *CLPA* is enacted. For example, "regulatory decision"[14] is defined as a decision in relation to:

- whether a person, entity, place or thing has met a requirement under an Act;

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[8] *Ibid*, at 6.
[9] *Ibid* at 22: The *PACA* has "largely succeeded in making the Crown subject to the same principles of liability in tort as any other person."
[10] *CLPA*, subsection 1(1) definition of "proceeding." Section 6 of the *CLPA* sets out some exceptions to the Act's application (e.g. expropriation matters).
[11] *CLPA*, subsection 8(1)(a).
[12] *CLPA*, subsection 9(1). This is a new list of statutory limitations that are not currently found in the *PACA*.
[13] *CLPA*, subsection 11(7).
[14] *CLPA*, subsection 11(6).

- whether a person or entity has contravened any duty or other obligation set out under an Act;
- whether a licence, permission, certificate or other authorization should be issued under an Act;
- whether a condition or limitation in respect of a licence, permission, certificate or other authorization should be imposed, amended or removed under an Act;
- whether an investigation, inspection or other assessment should be conducted under an Act, or the manner in which an investigation, inspection or other assessment under an Act is conducted;
- whether to carry out an enforcement action under an Act, or the manner in which an enforcement action under an Act is carried out; or
- any other matter that may be prescribed.

This expansive definition of "regulatory decision" would appear to catch virtually all of the regulatory activities (e.g. approval issuance, monitoring, inspection and enforcement) carried out by provincial officers, employees and agents under Ontario's environmental law framework, including (but not limited to): the *Aggregates Resources Act; Clean Water Act, 2006; Environmental Assessment Act; Environmental Protection Act, Invasive Species Act, 2015; Lake Simcoe Protection Act, 2008; Lakes and Rivers Improvement Act; Nutrient Management Act, 2002; Oil, Gas and Salt Resources Act; Ontario Water Resources Act; Pesticides Act; Safe Drinking Water Act, 2002*; *and Toxics Reduction Act, 2009.* CELA notes that these and numerous other statutes are being consequentially amended by the *CLPA*.[15]

CELA acknowledges that the *CLPA* bars negligence actions in respect of regulatory decisions (and policy decisions[16]) that were "made in good faith." However, the *CLPA* provides no definition or criteria to assist in determining whether a provincial decision was – or was not – *bona fide*. Therefore, this subjective term appears to create considerable uncertainty, and will undoubtedly result in litigation in order to clarify its nature and scope.

Moreover, CELA draws no comfort from the "good faith" qualifier used in section 11 of the *CLPA*. In virtually all of the regulatory negligence cases discussed below, the governmental agents and servants were presumably acting in good faith, in the sense that they did not intentionally attempt to harm the plaintiffs. Nevertheless, liability was imposed upon the Crown by the courts, primarily because negligence involves considerations of neglect or default, rather than deliberate or malicious conduct by public servants.

(c) Schedule 17 is Unnecessary

From both a legal and practical perspective, CELA submits that the section 11 prohibitions are unnecessary for a number of reasons.

[15] *CLPA*, sections 35 to 167.
[16] "Policy decisions" are also broadly defined: see subsection 11(5) of the *CLPA*.

First, the tort of negligence has a number of built-in safeguards that help determine when a public authority can – or cannot – held liable for damages incurred by the plaintiff. Generally, in order to succeed in a negligence claim, the plaintiff must demonstrate, on a balance of probabilities, that:

- the defendant owed a duty of care to the plaintiff;
- the defendant breached the duty of care;
- the defendant's breach caused harm to the plaintiff; and
- the harm was foreseeable and not too remote.

These essential elements are applicable regardless of whether the defendant is a person (e.g. individual or corporation) or a governmental entity.[17] However, negligence actions against governmental defendants (also known as "regulatory negligence" claims) often focus upon special threshold issues.

For example, in the upfront "duty of care" analysis, the courts examine two key questions: (a) is there is sufficient foreseeability and proximity between the plaintiff and the governmental defendant so as to give rise to a *prima facie* duty of care; and (b) if so, are there any residual policy considerations which may negate that duty of care?[18] This two-step inquiry has led the courts in some cases to relieve governmental defendants of liability for discretionary policy decisions made to protect the general public interest,[19] but to impose liability in other cases for negligent operational decisions (including those related to the implementation of government policy).[20] Accordingly, CELA submits that the courts have both institutional experience and jurisprudential flexibility to weigh competing public and private interests, and to determine whether negligence actions should be allowed or dismissed against governmental defendants. Accordingly, CELA submits that it is not necessary for section 11 of the *CLPA* to wholly remove such disputes from the civil courts.

Second, if the Ontario government's motivation in passing the *CLPA* is, in part, to deter negligence claims that are frivolous, vexatious or abusive, then CELA notes that the *Rules of Civil Procedure* already provide the Crown with various mechanisms for requesting the court to terminate proceedings at an early stage. These procedural options include: motions for summary judgment dismissing the claim;[21] motions for determination of an issue before trial (including whether the

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[17] See, for example, *Just v British Columbia* (1989), 64 DLR (4th) 689 (SCC).
[18] *Anns v Merton London Borough Council*, [1978] AC 728 (HL), which has been adopted and clarified by the Supreme Court of Canada in a number of judgments: see *Kamloops (City) v Nielsen*, [1984] 2 SCR 2; *Cooper v Hobart*, 2001 SCC 79; and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42.
[19] *Eliopoulos v Ontario (Minister of Health and Long-Term Care)*, (2006), 82 OR (3d) 321 (ONCA); *Attis v Canada (Health)*, 2008 ONCA 660.
[20] *Just v British Columbia* (1989), 64 DLR (4th) 689 (SCC). See also the Ontario-based environmental civil actions discussed below where the Ontario government was held to be liable in negligence for damages suffered by private landowners.
[21] Rule 20.

pleadings disclose a reasonable cause of action);[22] or motions striking out pleadings.[23] Since the Ontario government is willing and able to pursue these options where appropriate, it appears to CELA that the section 11 prohibitions in the *CLPA* are not needed to discourage or dismiss untenable claims. At the same time, however, CELA is greatly concerned that section 11 will effectively preclude legitimate negligence claims against the Crown, as discussed below.

Third, to our knowledge, the Ontario government has not publicly presented any empirical evidence or statistical analysis indicating that there has been a floodgate of regulatory negligence claims against the Crown that must now be curtailed by repealing the *PACA* and enacting the *CLPA*. CELA is aware that last year, there was a high-profile case involving Tesla Motor Canada's challenge against the current Ontario government's decision regarding the winding down of the electric vehicles incentives program.[24] However, it should be noted that this proceeding was an application for judicial review, not a regulatory negligence claim for damages. In any event, CELA concludes that the Ontario government has failed or refused to demonstrate that it is now necessary to overturn the *PACA* and to enact the *CLPA* in its place.

In the absence of any evidence-based justification for enacting the prohibitions in section 11, it is reasonable to anticipate that the underlying intent of the proposed *CLPA* may be to shield the Ontario government from potential civil liability for harm or loss arising from the recent round of budget cuts, staffing reductions, de-regulation measures and legislative rollbacks, particularly in the environmental and public health context.

If so, then CELA submits that instead of barring persons from seeking judicial redress against the Crown, it would be more prudent and precautionary, from the public interest perspective, for the Ontario government to re-consider, revise or reverse the governmental actions that may create risks to Ontarians in the first place.

(d) Schedule 17 is Unprecedented

CELA's jurisdictional scan of Crown liability legislation across Canada reveals that no other level of government has enacted the types of broad prohibitions now being proposed in section 11 of the *CLPA*.

At the federal level, for example, the *Crown Liability and Proceedings Act*[25] contains the usual assortment of procedural provisions, and imposes civil liability upon the Government of Canada as follows:[26]

> **3** The Crown is liable for the damages for which, if it were a person, it would be liable…
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> (b) in any other province [except Quebec], in respect of

[22] Rule 21.
[23] Rule 25.11.
[24] *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062 (Ont. SCJ).
[25] RSC 1985, c.C-50: see https://laws.justice.gc.ca/PDF/C-50.pdf.
[26] *Ibid*, sections 3 and 10.

(i) a tort committed by a servant of the Crown…

10 No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

In CELA's view, these federal provisions are substantially similar to subsections 5(1) and (2) of the *PACA*, and are in no way analogous to section 11 in the proposed *CLPA*.

Similarly, in the common law provinces across Canada,[27] Crown liability provisions tend to mirror those found in the *PACA*, and do not include or resemble the substantial constraints proposed by section 11 of the *CLPA*. For example, Alberta's Crown liability provisions[28] are typical of those found in other provincial statutes in Canada, and are virtually identical to the current *PACA*:

Liability of Crown in tort
5(1) Except as otherwise provided in this Act and notwithstanding section 14 of the *Interpretation Act*, the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(a) in respect of a tort committed by any of its officers or agents,

(b) in respect of any breach of those duties that a person owes to that person's servants or agents by reason of being their employer,

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property, and

(d) under any statute or under any regulation or bylaw made or passed under the authority of any statute.

(2) No proceedings lie against the Crown under subsection (1)(a) in respect of an act or omission of an officer or agent of the Crown unless the act or omission would, apart from this Act, have given rise to a cause of action in tort against that officer or agent or that officer's or agent's personal representative.

In addition, article 1376 of Civil Code of Quebec (CCQ)[29] establishes that the provincial government and its agents are subject to the same obligations as other persons under Quebec's

[27] See, for example, Alberta's *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25; British Columbia's *Crown Proceeding Act*, R.S.B.C. 1996, c. 89; Manitoba's *Proceedings Against the Crown Act*, C.C.S.M. c. P140; New Brunswick's *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18; Newfoundland and Labrador's *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26; Nova Scotia's *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360; Prince Edward Island's *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32; and Saskatchewan's *Proceedings Against the Crown Act*, R.S.S. 1978, c. P-27.
[28] *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, subsections 5(1) and (2).
[29] See article 1376 CCQ: "The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them."

civil liability regime.[30] For example, the Quebec government and its agents may be liable for injuries caused by acts or omissions that breach article 1457 (or other articles) of the CCQ:

> **1457.** Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
> He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.[31]
>
> **1463.** The principal is bound to make reparation for injury caused by the fault of his subordinates in the performance of their duties; nevertheless, he retains his remedies against them.
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> **1464.** A subordinate of the State or of a legal person established in the public interest does not cease to act in the performance of his duties by the mere fact that he performs an act that is illegal, beyond his authority or unauthorized, or by the fact that he is acting as a peace officer.

Accordingly, CELA concludes that the prohibitions in section 11 of the proposed *CLPA* are wholly unprecedented not just in Ontario, but across Canada. In short, no other Canadian jurisdiction has attempted to impose the types of broad prohibitions found in section 11 of the *CLPA* in order to bar its own citizens from bringing regulatory negligence actions.

(e) Schedule 17 Unduly Impairs Access to Justice

If enacted, section 11 of the proposed *CLPA* will bar virtually all Ontarians from commencing otherwise meritorious litigation for loss, injury or harm attributable to regulatory negligence by provincial representatives. This is particularly true in the environmental context, where careless conduct by agents and servants of the provincial government has directly resulted in harm to Ontarians' health, property or pecuniary interests.

The best example that illustrates this concern is the Walkerton drinking water tragedy in 2000, when seven people died and thousands more were sickened after consuming contaminated water from a municipal system that was approved, inspected and regulated by the provincial Ministry of the Environment. This public health catastrophe led to the establishment of a commission under the *Public Inquiries Act* headed by Mr. Justice O'Connor. After considering the available evidence, the Part 1 Report of the Walkerton Inquiry found that the Ontario government's budgetary

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Online: https://www.canlii.org/en/qc/laws/stat/cqlr-c-ccq-1991/latest/cqlr-c-ccq-1991.html?autocompleteStr=civil%20&autocompletePos=1>.

[30] See *Prud'homme c Prud'homme*, 2002 SCC 85 at para 31:"The new provisions of the *Civil Code of Québec*, and more particularly art. 1376, [... mean that] the civil law principles of civil liability now apply, as a rule, to wrongful acts by such [governmental] bodies."

[31] See *Allendale Mutual Insurance c Hydro-Quebec*, 2001 CanLII 39614 (QCCA) at paras 29, 31-33: "Accountability is a fundamental precept of the civil law of Quebec."

cutbacks, inspection and oversight deficiencies, and overzealous de-regulation (and the related failure to pass a notification regulation requiring drinking water testing facilities to report adverse water quality results) were among the causes of the Walkerton disaster.[32]

In light of its regulatory failures, the Ontario government was also named as a co-defendant in a class action that was brought on behalf of Walkerton residents. Fortunately, this class action was certified on consent under the *Class Proceedings Act, 1992* and settled without trial,[33] and compensation has been paid to numerous Walkerton families for the grievous harm suffered (and, in some cases, continues to be suffered) as a result of this tragic event. In CELA's opinion, the Walkerton litigation against the Crown is precisely the type of regulatory negligence case that will be prohibited by section 11 of the *CLPA*, which would be a highly undesirable consequence.

Other Ontario-based examples of environmental litigation against the Crown that would no longer be possible under the *CLPA* include the following cases:[34]

- *Swaita v Her Majesty the Queen in the Right of Ontario (Environment)*:[35] A homeowner in Ottawa brought a negligence claim against the Ministry of the Environment (MOE) concerning soil contamination of the plaintiff's property which resulted from an oil spill that originated on a neighbouring property. The court refused Ontario's preliminary motion to dismiss the action, and noted that "the MOE decided to get involved in the oil spill on the Shell property, made the decision regarding excavation, and failed to ensure that the contaminants were controlled; as a result, the plaintiff's property became contaminated and the plaintiff sustained damages." Further, the judge held that "I can see no policy reasons that ought to negate a finding of a duty of care to the plaintiff at this pleadings stage."

- *Heighington v Ontario*:[36] This case involved negligence (and breach of contract) claims by plaintiffs who were owners and former owners of residences in a Scarborough subdivision where refining of radioactive materials had taken place during a prior use of the property. Elevated levels of radioactivity - up to 20 times above the standard - were found. Although provincial officials were aware of the situation, no conditions were imposed for the safe disposal of the radioactive material or the decontamination of the soil. Ontario was held to be negligent for failing to ensure that radioactive materials were safely removed from the site in accordance with the duties imposed by the *Public Health Act*. The court also found that it was foreseeable that leaving these materials on-site may harm the health of future occupants of the property.

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[32] CELA served as counsel for Walkerton citizens at Parts 1 and 2 of the Walkerton Inquiry. The Part 1 Report is available at: http://www.archives.gov.on.ca/en/e_records/walkerton/report1/index.html.
[33] See http://walkertoncompensationplan.ca/.
[34] These examples are examined in CELA's recent blog by Sara Desmarais and Rashin Alizadeh about the environmental implications of Schedule 17 of Bill 100: see http://www.cela.ca/blog/2019-04-26/preliminary-observations-crown-liability-and-proceedings-act-2019-schedule-17-bill-1. See also https://www.oktlaw.com/big-changes-coming-to-ontario-crown-liability/, which anticipates that Schedule 17 "could have sweeping effects on Crown liability for institutional and regulatory failures with respect to First Nations, including in child protection and environmental protection."
[35] 2016 ONSC 5785 (Ont. SCJ). CELA is unaware of the current status of this litigation.
[36] (1987), 2 CELR (NS) 93 (Ont. HCJ); affd. (1989), 4 CELR (NS) 65 (ONCA).

- *Bisson v Brunette Holdings Ltd*:[37] In this case, the Ontario government was held liable in negligence in the context of a gasoline leak from a service station into the plaintiffs' basement in Timmins. The plaintiffs detected gasoline fumes emanating from their home, and observed raw gasoline which had pooled in a depth of 18 inches in their basement. Thus, the plaintiffs and their tenants were forced to evacuate the building for excavation and remediation operations. The MOE became involved pursuant to its mandate under the *Environmental Protection Act*. The on-site excavation took place with Ministry supervision, but without instructions from a structural engineer which subsequently resulted in substantial damage to the building foundation. The plaintiffs' action was successful and the MOE was held liable for damages incurred by the plaintiffs after the Ministry had made the decision to undertake clean-up and restoration.

- *Gauvin v Ontario*:[38] The plaintiffs were homeowners in the Ottawa area who brought a claim against the MOE for improper approval of their septic sewage system, which had been installed by a private contractor. They began to experience problems with the system, and it was only when they dug up the area that they discovered that no filter sand had been installed, contrary to what was required by law. According to the court, the *Environmental Protection Act* sets out detailed methods to control and contain raw sewage from entering into the environment. The MOE's approval of the deficient system was considered by the court to be a breach of duty by the approval authority, and the plaintiffs were successful in their claim against the MOE.

The above-noted judgments confirm that these kinds of negligence cases against the Crown are not frivolous, vexatious or brought in bad faith. To the contrary, these judgments demonstrate that the plaintiffs' claims were well-founded in law and on the facts.

If, however, the *CLPA* is enacted, then section 11 of the Act would legally bar all of these (and similar) environmental and human health claims since they involve the negligent exercise of regulatory duties, powers and responsibilities by provincial officials acting under Ontario statutes. In short, the section 11 prohibitions effectively let the Ontario government off the hook for such claims even though the loss, injury or damage was directly caused by the fault or neglect of provincial officers, employees and agents.

In our view, it is not an acceptable trade-off to force aggrieved persons to bear the burden of harm that was directly caused by the Crown's regulatory negligence. In effect, section 11 improperly attempts to expropriate Ontarians' right to the quiet use and enjoyment of their property – and to their personal health, safety and livelihood – without any compensation if such rights are breached or harmed by negligent acts and omissions by the provincial Crown. As noted by a legal commentator:

> [T]he plaintiff in a meritorious tort action has incurred a disproportionate private loss as a result of action taken for the collective benefit. As a result, is seems eminently reasonable

[37] (1993), 15 CELR (NS) 201 (Ont.Gen.Div.).
[38] (1995), 22 CELR (NS) 277 (Ont.Gen.Div); affd. (1997), 26 CELR (NS) 325 (Ont.Div.Ct.).

for the collective to essentially insure the injured party by spreading the cost throughout society.[39]

PART III - CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the Ontario government should not enjoy blanket immunity in the civil courts in relation to regulatory negligence actions, especially those involving environmental or public health impacts. To the contrary, the Ontario government should continue to be held legally accountable by the courts if Ontarians suffer harm or loss arising from the careless acts or omissions of Crown officers, employees or agents.

In addition, CELA maintains that section 11 of the proposed *CLPA* is fundamentally unfair and highly unconscionable since it deprives Ontarians of access to justice and leaves them uncompensated for harm or loss attributable to regulatory negligence. Moreover, this section's purported extinguishment of Ontarians' current and future legal rights provides no incentive for the Crown, and its officers, employees and agents, to ensure that they act with due care and skill when addressing or deciding matters involving environmental or public health.

Accordingly, CELA recommends that Schedule 17 should be withdrawn from Bill 100. In the alternative, section 11 of the proposed *CLPA* should be deleted, and section 5 of the *PACA* should be retained in the *CLPA*.

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Richard D. Lindgren, CELA Counsel

May 8, 2019

[39] Lynda Collins, "Tort, Democracy and Environmental Governance: The Case of Non-Enforcement" (2007), 15 Tort Law Review 107.