SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE MINISTRY OF THE ENVIRONMENT REGARDING PROPOSED GUIDELINES UNDER THE ENVIRONMENTAL ASSESSMENT ACT

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Prepared by Richard D. Lindgren[1]

PART I – INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 for the purposes 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 in the courts and before tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization and law reform activities.

Since its inception, CELA has been extensively involved in environmental assessment ("EA") at both the federal and provincial levels. With respect to Ontario's EA regime, CELA has undertaken a number of activities and initiatives, such as:

- preparing a detailed critique of the Bill 76 amendments to the *Environmental Assessment Act* ("EA Act");[2]
- participating in legislative committee proceedings regarding the Bill 76 amendments;
- appearing as counsel for citizens' groups in the only two EA hearings held under the EA Act since 1995 (eg. Adams Mine and Quinte Sanitation);
- making submissions to the Ministry of the Environment ("MOE") on the EA Act "timeline regulation" and various EA guidelines which have been previously proposed by the MOE;
- partcipating as a member of the Client Advisory Committee of the EA Board (now the Environmental Review Tribunal);
- making submissions to the MOE on behalf of individuals and citizens groups regarding various Terms of Reference ("ToR") and public hearing requests regarding individual EA's and Class EA's; and
- providing ongoing summary advice to individuals and citizens involved in the EA process in Ontario.

In addition, CELA is currently preparing a comprehensive review of principles, practice and procedure under the amended EA Act. It is anticipated that this review will be completed and published in late 2001.

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[1] Counsel, Canadian Environmental Law Association.

[2] R. Lindgren, *Submissions of CELA to the Standing Committee on Social Development Regarding Bill 76* (1996).

In light of this experience and background, CELA has carefully considered the three guidelines that have been proposed by the MOE:

- "A Guide to Preparing Terms of Reference for Environmental Assessments" (December 15, 2000);
- "Guideline on Consultation in the Environmental Assessment Process" (December 15, 2000); and
- "The Use of Mediation in Ontario's Environmental Assessment Process" (December 15, 2000).

These three guidelines are interrelated and contain some degree of overlap. However, the guidelines fail to fully advise the intended audience that they should not be read or applied in isolation from each other. Accordingly, the guidelines should be revised to ensure that readers are aware that the guidelines form part of an integrated package which should be considered in its entirety as proponents design and implement EA planning processes. In addition, each guideline could include more extensive cross-references to the relevant portions of the other guidelines.

CELA's more specific comments and concerns about these three guidelines are summarized below.

PART II – PROPOSED GUIDELINE ON TERMS OF REFERENCE

In its 1996 critique of Bill 76, CELA expressed considerable concern about the potential use of ToR's to wholly dispense with mandatory EA elements, such as need, alternatives to, and alternative methods. This concern was expressed as follows:

> CELA's concerns with the ToR proposal [includes]… the ability of the Minister to approve a ToR that does not meet essential EA requirements described in section 5(3) of the EA Act. This second problem is particularly objectionable since it has the effect of making the essential requirements of full EA… optional or negotiable rather than mandatory in every case. This unjustifiable change to the core features of the EA Act is arguably one of the most significant flaws within Bill 76, and signals a virtal "gutting" of the EA process in Ontario…
>
> In the landfill context, this means that municipalities or private waste companies could be directed by the Minister not to identify or examine alternative sites (i.e. sites that may be safer or more suitable than the preferred site), or not to identify or examine "alternatives to" (i.e. enhancing 3Rs programs and infrastructure). Such an approach would mark the end of comprehensive environmental planning required under the EA Act, and is

> inconsistent with government commitments to "full EAs" for waste management facilities.[3]

Since Bill 76 took effect in 1997, these concerns about ToR content have been substantiated. For example, in virtually every individual EA case that CELA is involved with at the present time, the proponents have not committed to undertaking a "full" EA pursuant to section 6.1(2) of the EA Act. Instead, these proponents have submitted ToR's which purport to wholly eliminate critically important EA requirements (eg. need, "alternatives to", alternative sites, etc.) from further study or consideration during the EA process.[4] While it is perhaps understandable why proponents might suggest a less-than-full EA, particularly for controversial proposals such as landfills or incinerators, it is less clear why these narrowly framed ToR's are routinely being approved by the MOE. In fact, CELA is unaware of a single instance where the Minister has rejected a proposed ToR to date.

In fact, it is CELA's understanding that approximately 31 ToRs have been submitted to the MOE under the amended EA Act to date. Of these ToRs, 27 (87%) have been approved, while two have been withdrawn and two are currently awaiting a Ministerial decision on approval.[5] Given that the MOE has not rejected a ToR to date, it can be reasonably anticipated that two remaining ToRs will also be approved in the near future.

Assuming (without deciding) that the EA Act empowers the Minister to approve ToRs that wholly dispense with "alternatives to" and/or alternative sites, the approval of such ToRs is clearly at odds with earlier government assurances that full EAs will still be required under Bill 76. For example, when former Environment Minister Brenda Elliott introduced Bill 76 for First Reading, she stated that "a full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including… the examination of alternatives". The Minister also committed that "all proponents will be subject to full environmental assessments".[6]

Similarly, during Third Reading debate on Bill 76, MPP Doug Galt (Parliamentary Secretary to former Environment Minister Norm Sterling) repeated this commitment to full EA:

> We have taken great pains to ensure that the key elements of environmental assessment are maintained. These include… the examination of alternatives in environmental decision-making.[7]

Similar commitments were contained in MOE briefing notes and bulletins which accompanied Bill 76:

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[3] *Ibid.*, at pages 19 and 21.
[4] See, for example, the approved ToR's for the proposed expansions of the Warwick Landfill and Richmond Landfill, and the proposed ToR for the proposed establishment of a PCB incinerator in Kirkland Lake.
[5] Ariane Heisey, "Presentation on ToR Guideline" (public meeting held March 6, 2001).
[6] *Hansard*, June 13, 1996.
[7] *Hansard*, October 31, 1996.

> Developing Terms of Reference will be an open process, which will give interested parties an opportunity to comment on the concerns to be addressed in the EA. An environmental assessment must be prepared in accordance with the approved Terms of Reference. The key elements of an EA will be maintained and will include a broad definition of environment and identify which alternatives will be examined.[8]

Thus, there has been an alarming discrepancy between these governmental assurances of full EA, and the current practice of routinely approving "scoped" ToRs that eliminate alternatives analysis from the EA planning process.

CELA's concerns about excessively scoped ToRs are not alleviated by the proposed guideline on ToR preparation. Indeed, the draft guideline itself suggests that ToRs routinely require consideration of alternatives,[9] when, in fact, the alternatives analysis is typically the first thing jettisoned by the ToR, either in whole or in part.

More fundamentally, the draft guideline provides very limited direction to proponents (or the public at large) as to when – or to what extent – it may be appropriate to confine the alternatives analysis to a so-called "reasonable range" of options. For the most part, the guideline merely observes that sometimes "it is appropriate to propose a limited consideration of alternatives", and sometimes "a more extensive consideration of alternatives is warranted" (page 14). In CELA's view, this equivocation amounts to non-guidance on what is arguably the most important issue concerning ToR content and the cornerstone of good EA planning – the consideration of alternatives.

The guideline, however, does indicate that a scoped EA may be appropriate where the proponent has previously undertaken some sort of external planning exercise, such as a "master plan" or "business plan", prior to the preparation of the ToR (page 14). First, CELA disagrees with this proposition since there is no assurance that such plans are consistent with the public interest or the purpose of the EA Act, or that such plans were developed with full public participation. Second, it implies that full EA is only appropriate in those rare instances where no public or private planning whatsoever has occurred. Third, there is no indication in the guideline as to what type or quantum of non-EA planning would justify the submission of a scoped ToR that eliminates alternatives from further consideration. Fourth, the Joint Board has long held that municipal or corporate planning exercises do not – and should not – preclude full EA planning.

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[8] MOE, "In Brief" (January 1997). Similar comments were made by the former EA Branch Director in his presentation on Bill 76 to Environmental Law Section of the Canadian Bar Association – Ontario (November 7, 1996).

[9] For example, the draft guideline claims that "an approved ToR represents an agreement between the proponent and the Minister about the work that is required in the EA to determine the potential impacts of the proposed undertaking and its alternatives on the environment" (page 6, emphasis added). Similarly, the draft guideline asserts that the ToR "outlines the alternatives that will be considered in the EA" (page 10), and that the ToR should describe potential environmental effects of "the proposed undertaking and its alternatives" (page 14, emphasis added).

For example, in the *SNC* decision, the Joint Board held that the private proponent's business objectives should not be used to constrain the consideration of alternatives:
The requirements for the description of the undertaking and the purpose of the undertaking should be consistent for private and public sector proponents. In this instance, the proponent is implementing part of Peel's Master Plan and is, in effect, the agent of the Municipality. To accept the suggestion that the proponent's business mandate alone should determine the definition of the purpose of an undertaking could, in the Board's view, lead to such narrow definitions of purpose as to render the EAA process meaningless. Municipalities would be encouraged to contract out their contentious projects to avoid the requirements of the government approvals process.

The identification of alternatives should be determined by the purpose of the functions of the undertaking, not by the purpose of the business aims of the private proponent. When alternatives have been identified, the proponent may wish to discard those alternatives which are not within its business mandate or capabilities to implement for economic reasons.[10]

Similar conclusions were reached in Re Laidlaw (Storrington)[11] and Re Steetley Quarry Products.[12]

CELA recognizes that the ToR guideline cannot amend or supersede the provisions of the EA Act, but CELA submits that the MOE should provide far more detailed guidance to proponents on the critical importance of alternatives analysis during the EA process. For example, the guideline should provide specific direction to proponents and stakeholders on mechanisms or approaches for identifying and evaluating "alternatives to" and alternative methods. As well, the guideline should provide guidance to proponents on documenting and evaluating alternatives suggested by stakeholders at the outset of the ToR exercise or during the course of the EA process.

Moreover, it would be entirely consistent with the EA Act for the ToR guideline (or other MOE policy) to contain a rebuttable presumption in favour of "full" EA (eg. consideration of need, "alternatives to", and alternative methods), unless the proponent can demonstrate, on a balance of probabilities, that certain elements should be narrowed for public interest reasons. Thus, it may be possible for a proponent to reduce – but not wholly eliminate -- the range of reasonable "alternatives to" and alternative methods that should be retained and refined for the purposes of EA planning. Adopting such a broad approach from the outset of EA planning would also help address the statutory inability to amend an approved ToR if new issues, concerns, or technological advances arise during the course of the EA process (page 16).

With respect to the submission of a proposed ToR, CELA notes that the draft guideline merely suggests that it may be "appropriate" to circulate the ToR proposal for public and agency review prior to its formal submission to the MOE (page 18). In CELA's view, circulation of a draft is

[10] (1988), CH-87-01 (Jt. Bd.), at page 30.
[11] (1993), EA-91-01 (EA Board).
[12] (1995), 16 C.E.L.R. (N.S.) 161 (Jt. Bd.).

not just "appropriate" – it is reasonably necessary in order to ensure that all relevant issues are identified for further consideration. Accordingly, the draft guideline should not simply encourage proponents to circulate draft ToRs. Instead, the guideline should provide positive direction to proponents to circulate draft ToRs for public review and comment prior to its formal submission to the MOE.

CELA further notes that the guideline claims that any supporting documents (eg. backgrounders, studies, consultation records, etc.) submitted by the proponent in conjunction with the ToR do not get approved by the Minister, nor do they form part of the ToR approval (page 17). In CELA's view, this claim is questionable since, as a matter of law, documents put forward in support of the ToR must be considered as part of the record leading to the Minister's decision, and can be used to interpret or delineate the scope of the ToR approval.[13]

CELA is also concerned that the draft guideline contains only a single sentence regarding the need for the proponent to develop an appropriate monitoring strategy and schedule (page 15). Given the fundamental importance of proper compliance monitoring and environmental effects/effectiveness monitoring, CELA submits that this section of the guideline needs much more detailed elaboration to ensure that the ToR (and subsequent EA process) adequately deals with the nature, scope and implementation of post-EA monitoring.[14] In addition, this section (and the consultation guideline, *infra*) should direct proponents to fully involve the public in monitoring programs as well as other significant post-EA matters, such as technical design and construction details.

With respect to approving a proposed ToR, the guideline suggests that the Minister will make his or her decision on the basis of various considerations, including "the recommendations of the Government Review Team" (page 21). If so, then CELA submits that such recommendations should be open and accessible to the public in accordance with the common law principles of fairness and natural justice.

PART III – PROPOSED GUIDELINE ON CONSULTATION

CELA has no objection in principle to the development of a proposed guideline on consultation in Ontario's EA process. Indeed, CELA submits that an update and expansion of the 1987 *Guideline on Pre-Submission Consultation in the EA Process* is long overdue.

Nevertheless, CELA must question the intended purpose and overall utility of the draft guideline as presently proposed by the MOE. In essence, the guideline just reaffirms the well-known importance of public consultation, lists some basic consultation principles, and points out that

[13] For example, the Divisional Court has held that a landfill approval is limited in scope by the materials filed in support of the application: *Re Township of Harwich and Ridge Landfill Corp.* (1981), 127 D.L.R. (3d) 134 (Ont. Div. Ct).

[14] Assuming, of course, that the undertaking receives approval to proceed under the EA Act.

public consultation is now explicitly mandated under the EA Act. Indeed, the guideline itself recognizes that it is not a "how to" manual (page 5).

In CELA's view, the guideline merely restates the obvious, and provides no detailed guidance on precisely how proponents can actually satisfy the obligation to undertake *meaningful* public consultation in Ontario's EA process. Accordingly, the proposed guideline, as currently drafted, is unlikely to improve the nature and extent of public participation in Ontario's EA process. Simply repeating timeworn axioms about the value of public participation does little to ensure that proper consultation programs are designed and implemented by proponents in Ontario. While it may be useful to compile consultation principles in the guideline, this information should be accompanied by much more detailed guidance specifically developed to ensure that proponents fully understand – and comply with – the legal duty to consult under the EA Act.

Interestingly, the draft guideline claims that when assessing a consultation program, the MOE will determine whether the proponent allowed "interested parties to participate in a *reasonable* and *meaningful* way" (page 26, original emphasis). However, the guideline fails to identify which specific indicia or benchmarks will be used to determine how "reasonable" or "meaningful" the program was from the MOE's perspective. Unless some substantive criteria are developed to guide this evaluation on a case-by-case basis, then proponents and the public alike still have no real idea of what the MOE may require for a particular undertaking. Similarly, the MOE's *ex post facto* evaluation of the proponent's consultation program (or any public complaints thereof) will continue to be highly discretionary and subjective judgment calls.

In addition, CELA is concerned that the draft guideline does not give proponents sufficient direction on the types of public and private interests that should be represented in the EA planning process. In particular, CELA submits that the guideline should be revised to clearly indicate that the term "stakeholder" or "interested party" is <u>not</u> limited to persons with a direct personal, pecuniary or proprietary interest in the proposed undertaking. The related guidelines on ToRs and mediation should also be revised in this manner to ensure consistency.

Similarly, CELA is concerned by the draft guideline's apparent suggestion that consultation is largely intended "to achieve public acceptance" of the preferred undertaking (page 7). EA planning is not a popularity contest, nor should it be reduced to a public relations exercise on the acceptability of the undertaking. First and foremost, the EA planning process (and all related consultation efforts) should be driven by the overarching public interest purpose of the EA Act – the protection, conservation and wise management of the environment (section 2). Thus, CELA submits that the draft guideline should explicitly recognize that the purpose of consultation is to achieve protection, conservation, and wise management of the environment. This public interest purpose can only be achieved if the proponent properly collects (and acts upon) evidence, opinions and perspectives from all interested or affected stakeholders, who are to be fully involved in the decision-making process from the earliest opportunity. Even if some stakeholders provide input late in the process, their comments should not be ignored, discounted or glossed over by the proponent since the overall purpose of EA planning is environmental protection, <u>not</u> fast-tracked approvals.

Aside from these general concerns, CELA has three specific concerns in relation to the draft guideline's treatment of participant funding, First Nations, and consultation methods, as described below.

(a) Participant Funding

A good example of the draft guideline's shortcomings is found in relation to participant funding in the EA process. Incredibly, this critically important issue is not raised until nearly the end of the draft guideline (page 24). Moreover, the draft guideline's commentary on "participant support" is largely limited to a single bullet point which meekly suggests that proponents should consider "providing funding for peer review of technical work produced for the EA" (page 25).

In CELA's view, participant funding should not be treated as an afterthought or as a matter of secondary importance. To the contrary, the upfront provision of adequate participant funding is the *quid pro quo* for meaningful public participation throughout the EA process. This is particularly true in light of the highly technical and complex nature of most undertakings which are subject to the EA Act. If the MOE wants to ensure that participants "raise concerns and issues in a timely manner" (page 22), then the proposed guideline must provide clearer, more substantive direction to proponents to provide participant funding. Moreover, if proponents have confidence in their EA work, then they should not have any fear or reluctance about providing funds to citizens' groups to retain independent experts for peer review purposes.

CELA's concern about the lack of participant funding has been expressed as follows:

> Of course, public participation rights are meaningless without adequate resources or funding with which to exercise those rights… Bill 76's failure to [expressly] require participant or intervenor funding casts serious doubt on the Minister's professed commitment to entrenching and enhancing public participation rights under the EA Act.
>
> The value, utility, and societal benefits of participant and intervenor funding have been fully documented by [the Environmental Assessment Advisory Committee], various studies and reports, and the independent [*Intervenor Funding Project Act*] review which was commissioned by the Ontario government, and which recommended the continuation of Ontario's intervenor funding program… [Without funding,] public participation rights under Bill 76 are illusory at best for most Ontario residents and non-governmental organizations.[15]

In fact, it is arguable that a proponent's legal duty to consult under section 5.1 of the EA Act cannot be fully satisfied in most instances unless adequate participant funding is provided by the proponent. It appears somewhat inevitable that this argument will be tested in court challenges by aggrieved parties seeking a judicial declaration that the duty to consult under the EA Act necessarily includes a duty to provide sufficient resources to needy participants.

[15] *Supra*, f.n. 2, at pages 25-26

It should be further noted that the unfortunate demise of the *Intervenor Funding Project Act* ("IFPA") has made it exceedingly difficult for EA participants to secure adequate funding prior to and during hearings before the Environmental Review Tribunal. Significantly, when the IFPA expired, the MOE noted that it was still open to proponents to voluntarily provide funding to public interest representatives. However, the practical reality has been that few, if any, proponents have provided much or any participant funding, particularly for undertakings that were not referred to public hearings. Similarly, commitments by proponents to provide participant funding to citizens' groups have been conspicuously absent from most, if not all, the ToRs that CELA has reviewed to date. In the absence of such commitments, proponents have flatly refused to provide funding in response to reasonable, indeed modest, requests by public interest groups.

For the foregoing reasons, CELA strongly recommends that the proposed guideline be substantially revised to place greater upfront emphasis on the compelling need for proponents to routinely provide participant funding at the outset of ToR consultation and throughout the EA process, including the hearing stage.

(b) Role of First Nations

The draft guideline appears to provide little direction regarding the responsibilities of the proponent or the MOE in relation to First Nations communities which may be interested in, or affected by, a proposed undertaking.

For the purposes of the EA process, First Nations should not be considered as just another "stakeholder" or "interest group" to be consulted by proponents and their consultants. This is because First Nations enjoy certain constitutional guarantees (eg. treaty and aboriginal rights under section 35 of the Charter), unlike municipalities, conservation groups, and other participants in the EA process. Indeed, given their constitutional status, it appears that First Nations should be consulted on a "government-to-government" basis in the EA process, particularly as self-government initiatives and co-management regimes continue to evolve across Ontario.

In CELA's view, these fundamental principles are not properly reflected in the proposed consultation guideline. In fact, the guideline simply lumps First Nations into the usual list of stakeholders to be consulted, and seems to imply that First Nation interests are no higher or different than canoeists, cottagers, or bird-watchers:

> Parties with an interest in a particular undertaking often include neighbours and individuals, First Nations and other aboriginal communities and individuals, special interest groups, environmental groups or clubs, naturalist organizations, agricultural organizations, sports or recreational groups, organizations from the local community, ratepayers associations, cottage associations and businesses (page 11).

Significantly, this appears to be the sole reference to First Nations in the entire draft guideline. Accordingly, CELA submits that the draft guideline should be revised to provide further and better direction regarding the involvement by First Nations in the EA process.

(c) Timing and Methods of Consultation

In its attempt to offer proponents guidance on selecting "appropriate consultation methods" (page 21), the draft guideline contains comments which are inconsistent with long-standing public consultation policy and principles in Ontario.

In particular, the draft guideline suggests that it is up to the proponent to decide when and how interested parties become involved in the decision-making process:

> In deciding how to involve interested parties in the EA planning process, the proponent will need to consider which decisions participants will be able to influence and to what extent they will be involved in making a particular decision. For some decisions, it may not be possible for the proponent to share the decision-making, whereas, for other decisions, it may be desirable to arrive at a decision cooperatively (page 21).

In CELA's view, this equivocal language virtually guarantees "closed-door" decision-making by proponents, particularly on the critical, upfront EA planning questions, such as: defining the purpose of undertaking; deciding which, if any, "alternatives to" should be considered; or determining whether to undertake a site selection process. Accordingly, the guideline's comments provide a sure-fire recipe for token consultation efforts that are largely limited to peripheral issues arising well after significant planning decisions have been made by the proponent.

More fundamentally, the above-noted comments conflict with previous MOE policy and Joint Board decisions under the EA Act which confirm that members of the public help *plan* the undertaking. This important principle is stated clearly in the 1987 consultation guideline as follows:

> Pre-Submission Consultation means that affected parties help plan the undertaking. Consultation is not a separate procedure conducted parallel or subsequent to a planning process. Instead, the planning process is constructed around the involvement and contributions of affected parties (original emphasis).

In addition, the 1987 guideline stipulates that consultation should occur early, often, and before irreversible decisions are made by the proponent:

> Planning occurs through a phased sequence of decisions. Consultation occurs before final decisions are made and in a manner that allows affected parties to contribute intelligently to the decisions required…
>
> Consultation begins with the earliest planning stages. Affected parties are consulted long before any irreversible decisions are made. Early decisions are often among the most controversial and significant and therefore particularly deserve consultation (original emphasis).

These important consultation principles have been upheld and endorsed in a number of key Joint Board decisions. For example, in *Re Township of St. Vincent and Town of Meaford*,[16] the Joint Board strongly criticized a consultation program in which critical landfill siting decisions were made by the proponent without meaningful public input:

> In the Board's view, the public participation here was informative, and not consultative. The decisions were generally made without public input, and the public was informed of those decisions. The decision that the preferred "alternative to" was a new landfill site in the Township was made without public involvement. The criteria… were selected and prioritized… without public involvement. The decision to go to the Gillespie site was made without consulting the public.[17]

Similarly, in *Re Steetley Quarry Products*,[18] the Joint Board rejected a proposed landfill for various reasons, and found that the proponent had carried out an inadequate public consultation program:

> The Board believes that the [1987] Guidelines clearly contemplate meaningful public consultation in a cooperative atmosphere, commencing in the earliest stages of planning, before any final or irreversible decisions are made. In the Board's opinion, a review of the [1987 Guidelines] would lead the public to reasonably envision taking part in the planning process and to expect to be able to influence decisions.
>
> The evidence indicates that the proponent had little, if any, regard for the [1987 Guidelines]. The decision to landfill the South Quarry was made in the absence of meaningful public participation. At best, the public consultation process was used to canvass reactions to the decision to landfill, to identify community concerns, and to develop mitigation measures and a compensation package. The Board finds this approach not only inadequate but also inconsistent with the [1987 Guidelines]. The proponent should have made every effort to include the community from the earliest stages in a meaningful public consultation process, particularly when there was already discontent within the community with Steetley's past and current operations.[19]

CELA acknowledges that there are various consultation methods available to a proponent, and that the guideline should recognize this variety. However, CELA strongly submits that the above-noted comments should be deleted from the guideline, for the reasons discussed above. Otherwise, proponents will undoubtedly attempt to exclude the public from threshold EA planning decisions on the grounds that it was not "possible" or "desirable" to involve the public in such decisions.

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[16] (1990), CH-88-03 (Jt. Bd.).
[17] *Ibid.*, at page 37.
[18] (1995), 16 C.E.L.R. (N.S.) 161 (Jt. Bd).
[19] *Ibid.*, at page 218. It is noteworthy that the Board made these critical findings despite the fact that the MOE's Government Review had concluded that the consultation program was "comprehensive and satisfied all policy requirements": *loc. cit.*, at pages 216 and 378.

Unless the above-noted revisions are made to the draft guideline, CELA views the current proposal as even less helpful than the 1987 guideline that it purports to replace. Given that Bill 76 was entitled the *Environmental Assessment and Consultation Improvement Act*, it is highly ironic that the MOE is now proposing a guideline which diminishes – not improves – public consultation in Ontario's EA process.

PART IV – PROPOSED GUIDELINE ON MEDIATION

CELA has no substantive concerns or comments about the proposed guideline on using mediation in Ontario's EA process.

CELA would, however, point out that the guideline's list of mediation benefits (page 4) could be amended to include "manage and minimize conflict". In addition, the guideline could expressly recognize that both "self-directed" and "referred" mediations are also available in the context of Class EAs,[20] rather than just individual EAs.

With respect to the mediator's report (page 11), CELA submits that the report must be reviewed and approved by the mediation parties before it is submitted to the Minister. Otherwise, the prescribed content of the report (eg. options discussed and agreements reached) may abridge or contravene the confidentiality of the mediation process.

In closing, CELA must respond to the questionable claim in the mediation guideline that there is "dissatisfaction with more formal processes such as hearings" (page 4). First, it should be noted that this vague statement does not specify precisely *who* is "dissatisfied", or *why* they may be "dissatisfied" with public hearings under the EA Act. Second, it may well be that some disgruntled or unsuccessful proponents are "dissatisfied" with public hearings, but this is definitely not the view of CELA's clients or the public at large. If anything, these persons are dissatisfied (and highly frustrated) with the current lack of public hearings under the EA Act.[21] In CELA's view, full EA hearings represent the highest form of public participation in the EA decision-making process, and it is inaccurate (if not misleading) to suggest that the rationale for mediation rests on public "dissatisfaction" with the formal hearing process.

In any event, CELA generally agrees that mediation can be a useful tool in resolving certain environmental disputes, particularly when the number of participants and the nature of contentious issues are limited. For example, on behalf of its clients, CELA has occasionally requested that mediation be used to resolve outstanding public concerns about the adequacy of certain ToR's. In such cases, however, the Minister has, without reasons, refused or declined to send the disputes to mediation, despite the willingness of CELA's clients to engage in non-

[20] Section 15 of the EA Act provides that most of Part II of the Act – including mediation provisions in section 8 – apply to Class EAs.

[21] In CELA's experience, public criticism about hearings is usually confined to the lack of intervenor funding, or to "scoped" hearing referrals, rather than to the hearing process *per se*.

adversarial dispute resolution. Indeed, to CELA's knowledge, the Minister has yet to send any substantive matter to formal mediation under the EA Act since it was amended in 1997.[22]

This dismal track record is compounded by the Minister's virtually unfettered discretion regarding mediation. In particular, section 8 of the EA Act contains no criteria to guide the Minister's exercise of discretion regarding mediation, and it imposes no express requirement upon the Minister to provide reasons for accepting or rejecting a mediation request. Moreover, aside from some general platitudes about when environmental mediation is workable (page 6), the proposed guideline sheds no additional light on the specific criteria that the Minister will employ to determine if a particular dispute will be referred to mediation.

Accordingly, CELA regards the proposed mediation guideline as somewhat academic and largely hypothetical. Unless and until the Minister actually refers disputes to mediation, and provides reasons where referral requests are denied, then the benefits of mediation in the EA process in Ontario will remain more theoretical than real.

March 30, 2001

[22] Eugene Macchione, "Presentation on Mediation Guideline" (public meeting held March 6, 2001).