

**SUBMISSIONS OF THE  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION  
TO THE STANDING COMMITTEE OF THE LEGISLATIVE ASSEMBLY  
RE: ADAMS MINE LAKE ACT, 2004 (BILL 49)  
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## **EXECUTIVE SUMMARY**

The Ontario Government has proposed to enact the *Adams Mine Lake Act, 2004* (Bill 49), which prohibits waste disposal at the Adams Mine Site. The Bill also revokes certain statutory approvals issued in relation to the proposed Adams Mine Site landfill, and establishes a compensation scheme to reimburse the landfill proponent for various expenses. In addition, the Bill amends the *Environmental Protection Act* to prohibit new or expanded landfills within “lakes”. CELA supports Bill 49 for policy, technical and legal reasons.

## **PART I – INTRODUCTION: THE RATIONALE FOR BILL 49**

The Canadian Environmental Law Association (“CELA”) welcomes this opportunity to address the Standing Committee on the Legislative Assembly regarding the *Adams Mine Lake Act, 2004* (Bill 49).

CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Over the past three decades, much of CELA’s casework and law reform activities have focused on waste disposal sites and waste management issues. For example, CELA has appeared before the courts and environmental tribunals in numerous waste disposal cases, and has frequently submitted briefs to the Ontario government on laws, regulations and guidelines related to landfills, incineration, diversion, and related waste management issues.

For the record, it should be noted that CELA served as counsel for the “Adams Mine Intervention Coalition” at the scoped, 15 day environmental assessment (“EA”) hearing held by the EA Board in 1998 regarding the proposed Adams Mine Site landfill. CELA also represented this coalition during subsequent legal proceedings involving the EA Board’s decision in this matter.

CELA supports Bill 49 and recommends its immediate passage by the Ontario Legislature. In our opinion, there are sound public policy grounds to enact legislation that prohibits landfilling at the Adams Mine Site and similar “lake” locations. Regardless of the site-specific debate over whether the Adams Mine Site is “safe”, it is clearly open to the Legislature, as a matter of public policy, to declare what areas, locations, or site types in Ontario should be off-limits for landfilling purposes. In this regard, Bill 49 is not unprecedented; for example, the Legislature amended the *Environmental Protection Act* (“EPA”) in 1994 to prohibit new or expanded landfills in the Niagara Escarpment Plan Area: see section 27(2) of the EPA.

Moreover, it is CELA's view that the establishment of any long-term, large-capacity mega-landfill – whether at the Adams Mine Site<sup>1</sup> or elsewhere – is inconsistent with 3R efforts and conflicts with waste diversion objectives recently endorsed by members of the public, municipalities (i.e. Toronto), and the Ministry of the Environment (“MOE”).

Indeed, the protracted debate over the Adams Mine Site has consumed considerable public, municipal and agency attention and resources over the past decade, and has unfortunately overshadowed more important priorities, such as strengthening and funding ambitious 3Rs programs and infrastructure. In our view, the fundamental policy question is not “Where do we put 20 million tonnes of waste”, but rather “How do we stop generating so much waste in the first place?” To the extent that Bill 49 may bring some final closure to the Adams Mine Site debate – and refocus regulatory attention on setting and achieving aggressive waste reduction targets – then CELA firmly believes that the legislation is long overdue and should be enacted forthwith.

Aside from this public policy perspective, there are also, in our opinion, serious technical issues associated with landfilling at the Adams Mine Site. For example, it should be noted that the EA Board hearing only focused on the novel “hydraulic trap” design to contain leachate at the Adams Mine Site, and did not address other operational or environmental issues (i.e. surface water, landfill gas, waste transportation, financial assurance details, etc.). Nevertheless, despite the hearing's restricted focus on leachate containment, there was still profound disagreement among expert witnesses whether the proposed design would actually work as claimed over the 1,000 year contaminating lifespan of the landfill. Ultimately, even the members of the EA Board could not agree among themselves that the proposed design would work, and the result was a split 2:1 decision of the EA Board. In our view, the fact that expert witnesses and Board members could not unanimously agree on the design's effectiveness raises a serious red flag about the suitability of the Adams Mine Site for landfilling purposes.

Finally, leaving aside the Adams Mine Site aspects of Bill 49, CELA submits that there are sound legal reasons to amend the EPA to make it abundantly clear that water-filled locations are not acceptable candidates for landfill sites. In our view, this upfront legislative certainty will go a long way in setting out clear rules for proponents (and the public) to determine what is – or is not – an approvable location for landfilling. In our experience, it makes little sense to allow proponents to go through an EA (or EPA) process that may end up identifying a “lake” as the preferred alternative. We would also point out that prohibiting waste disposal within “lakes” is consistent with (if not mandated by) the Ontario government's commitment to implementing drinking water source protection, as recommended by Mr. Justice O'Connor's Part II Report from the Walkerton Inquiry.

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<sup>1</sup> The Adams Mine Site landfill proposed to accept 20 million tonnes of solid waste over a 20 year period.

## **PART II – COMMENTS ON BILL 49**

As noted above, CELA supports Bill 49 on policy, technical and legal grounds. However, CELA has some specific comments about two provisions of Bill 49: (a) the compensation scheme set out in section 6; and (b) the definition of “lake” in section 7.

### **(a) The Compensation Scheme**

During the legislative debates on Bill 49, some opposition members expressed concern about the Bill’s retroactive revocation of certain approvals (section 3) and the Bill’s extinguishment of causes of action (section 5(1)). In particular, it was suggested by these members that such provisions violated “property rights” and contravened the rule of law. With respect, CELA disagrees with this assessment, and simply notes that, in fact, there are precedents for such provisions in the environmental context.

For example, certain types of existing water-taking permits under the *Ontario Water Resources Act* were wholly revoked by section 6(1)(a) of O.Reg 434/03. Similarly, section 9 of the *Oak Ridges Moraine Protection Act, 2001* barred legal proceedings and extinguished causes of action in relation to steps taken under that Act. Similar provisions exist in section 20 of the *Oak Ridges Moraine Conservation Act, 2001*. Indeed, the above-noted EPA amendment that prohibited landfills in the Niagara Escarpment Plan Area was accompanied by a provision barring legal action against the Crown in relation to the prohibition: see section 27(4) of the EPA. Thus, the provisions in Bill 49 are not novel or unprecedented; in fact, it appears that Liberal, Conservative and NDP governments have all used these kinds of legislative mechanisms.

In any event, CELA agrees with section 5(10) of Bill 49 that steps or measures taken pursuant to the Bill do not constitute “expropriation” or “injurious affection” under the *Expropriations Act* or at common law. In our opinion, this characterization is correct and unassailable.

Accordingly, we are not entirely clear why section 6 of Bill 49 then goes on to expressly entitle the landfill proponent to apply for and obtain “compensation” from the Crown’s consolidated revenue fund. If Bill 49 is not “expropriation”, then why is compensation payable at all?

However, we note that during the Second Reading debate, the Minister suggested that compensation is included in Bill 49 as a matter of “fairness”.<sup>2</sup> If the Legislature wants to self-impose a compensation scheme in Bill 49, then CELA supports the exclusion of compensation for loss of goodwill or possible profits (section 6(6)).

CELA further supports the proposal to deduct the fair market value of the Adams Mine Site from any compensation that is payable under Bill 49 (section 6(1)). “Fair market value” is not defined in Bill 49, nor does the Bill specify the appraisal process or criteria to be used for determining fair market value. In any event, CELA presumes that this term is referring to the

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<sup>2</sup> *Hansard* (April 20, 2004).

amount of money that the land might be expected to realize if sold on the open market to a willing buyer from a willing seller.

### **(b) The Definition of “Lake”**

CELA supports the Bill 49 proposal to amend the EPA to prohibit the use, operation, establishment, alteration, enlargement or extension of a waste disposal site “if any part of the waste disposal site is located in a lake.”

As drafted, the definition of “lake” in Bill 49 appears to be predominantly aimed at situations where human activity (i.e. excavations intercepting the watertable) has resulted in a water body greater than 1 hectare in area. If the legislative intent is to capture only man-made bodies of water in the definition (i.e. to prevent landfill proponents from draining and using the countless flooded pits and quarries that dot the Ontario landscape), then this definition is adequate (although we remain unclear why 1 hectare was selected as the threshold criterion).

However, if the legislative intent is to prohibit landfilling in all lakes (i.e. natural and artificial) in order to protect water quality, then CELA would suggest that the definition of “lake” be broadened as follows:

“lake” means any natural or artificial body of water, river, pond, stream, creek, brook, spring, reservoir, or other watercourse, and includes the beds of such bodies of water.

If this suggested definition is adopted, it does not necessarily follow that the practice of “lakefilling” (i.e. depositing clean fill along shorelines for development or erosion control purposes) would cease. This is because material that meets the definition of “inert fill”<sup>3</sup> is exempted from Part V of the EPA and the general waste management regulation: see section 3(1) of Ontario Regulation 347. Lakefilling would also remain subject to the MOE’s *Fill Quality Guidelines for Lakefilling in Ontario: Application of Sediment and Water Quality Guidelines to Lakefilling*, and may trigger approval requirements under the *Fisheries Act*, *Lakes and Rivers Improvement Act*, and other environmental statutes.

CELA’s final comment regarding “lakes” is that it is unclear what is meant by the phrase “if any part of the site is located in a lake”. In general terms, a landfill site can consist of several parts: access roads, berms, buffer areas, engineered works, and other features. We presume that under the Bill 49 prohibition, “part” of the site includes, at a minimum, the actual fill area or footprint of a waste disposal site, but does it include on-site buffers (where actual disposal does not occur)? Does it include the contaminant attenuation zone (“CAZ”) beyond the actual landfill property boundaries? Without further specificity in Bill 49, it is unclear whether such site components are “parts” of waste disposal sites that are caught by the intended prohibition. This omission may leave it open to proponents to propose sites where the actual fill area is not in a lake, but the ancillary parts of the landfill may be located upon lands formerly covered by a

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<sup>3</sup> This term is defined as “earth or rock fill or waste of a similar nature that contains no putrescible materials or soluble or decomposable chemical substances”: see section 1(1) of Ontario Regulation 347.

“lake” within the meaning of Bill 49. For the purposes of greater certainty, CELA suggests that further consideration be given to defining the phrase “part of the site” in an expansive manner under Bill 49.

### **PART III – CONCLUSIONS**

Subject to the foregoing comments, CELA supports Bill 49 and commends the Legislature for attempting to terminate the intractable and highly polarized debate over the proposed Adams Mine Site landfill. When enacted, Bill 49 should allow legislators, regulators, municipalities, members of the public and other stakeholders to focus their energy and attention on higher societal priorities, *viz.*, the waste reduction agenda. Not only is this approach consistent with the public interest, but it will also serve to relegate the proposed Adams Mine Site landfill to its rightful place – as an unfortunate footnote in the environmental history of Ontario.