

Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N :

**GREENPEACE CANADA (2471256 CANADA INC.) and WESTERN
CANADA WILDERNESS COMMITTEE**

Applicants

- and -

**MINISTER OF THE ENVIRONMENT, CONSERVATION AND PARKS,
MINISTER OF MUNICIPAL AFFAIRS AND HOUSING, MINISTER OF
AGRICULTURE, FOOD AND RURAL AFFAIRS, and MINISTER OF
TRANSPORTATION**

Respondents

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim made by the Applicants appears on the following pages.

THIS APPLICATION for Judicial Review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicants. The Applicants request that this application be heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicants' lawyer or, where the Applicants does not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicants' application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____, 2020

Issued By _____

Local Registrar
Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

TO: MINISTER OF THE ENVIRONMENT, CONSERVATION AND
PARKS
Ministry of Environment, Conservation and Parks
Minister's Office
College Park 5th Floor, 777 Bay Street
Toronto, Ontario
M7A 2J3

AND TO: MINISTER OF MUNICIPAL AFFAIRS AND HOUSING
Ministry of Municipal Affairs and Housing
Minister's Office
College Park 17th Floor, 777 Bay Street
Toronto, ON
M7A 2J3

AND TO: MINISTER OF AGRICULTURE, FOOD AND RURAL AFFAIRS
Ministry of Agriculture, Food and Rural Affairs
Minister's Office
11th Floor, 77 Grenville Street
Toronto, ON
M7A 1B3

AND TO: MINISTER OF TRANSPORTATION
Ministry of Transportation
Minister's Office
College Park 5th Floor, 777 Bay Street
Toronto, ON
M7A 1Z8

AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, ON
M7A 2S9

APPLICATION

1. Greenpeace Canada and Western Canada Wilderness Committee (**Applicants**) challenge the failure to comply with the mandatory public notice and comment process under s. 15(1) of the *Environmental Bill of Rights, 1993 (EBR)* by:
 - a) the Minister of the Environment, Conservation and Parks (**Minister of Environment**) in respect of Schedule 6 to Bill 197, the *COVID-19 Economic Recovery Act, 2020*;
 - b) the Minister of Municipal Affairs and Housing (**Minister of Municipal Affairs**) in respect of Schedules 3 and 17 to Bill 197;
 - c) the Minister of Agriculture, Food and Rural Affairs (**Minister of Agriculture**) in respect of Schedule 4 to Bill 197; and
 - d) the Minister of Transportation in respect of Schedules 19 and 20 to Bill 197.
2. Schedules 3, 4, 6, 17, and 19 proposed environmentally significant amendments to existing laws. Schedule 20 proposed to enact an environmentally significant new law.
3. The *EBR* required the Respondents to exercise a statutory power to consult with the public, through its notice and comment procedure, about these Schedules before implementing them at Bill 197's third reading. Each of the Respondents failed to do so.
4. The Minister of Environment intentionally flouted the *EBR*'s consultation requirements. When giving notice of Schedule 6, he stated that "consultation isn't required," because the Bill contained a clause that deems the consultation

provisions not to apply. By design, this clause lasts for just 30 days – the exact number of days for which his decision was open to judicial review. The Applicants anticipate that deeming clause, which expires August 20, 2020, will no longer be in force by the time this Application is heard.

5. The Minister of Municipal Affairs also failed to consult before the changes in Schedules 3 and 17 were implemented. As recently as last year, previous amendments to the affected statutes triggered public notice and consultation under s. 15(1) of the *EBR*. However, the Minister of Municipal Affairs broke with his past practice and did not consult, or consider whether to consult, when amending those statutes again this year.
6. The Ministers of Agriculture and Transportation simply failed to consult, or consider whether to consult, the public before Schedule 4, 19, and 20 were implemented.
7. In this application, the Applicants seek both declaratory relief and a determination of their statutory rights under the *EBR*. Within the last year, the first Applicant has brought similar issues before this Honourable Court. A majority held that the Minister of Environment's failure to consult under the *EBR* in that case was unlawful, but a different majority decided not to issue a declaration on the basis that it would not have practical effect.¹

¹ *Greenpeace Canada v. Minister of the Environment*, 2019 ONSC 5629.

8. Now, the Respondents are *again* violating the Applicants' rights under the *EBR*. The Applicants seek practical relief to stop the Respondents from further engaging in this pattern of illegal conduct.

RELIEF SOUGHT:

9. The Applicants Greenpeace Canada and Wilderness Committee make application for:
- (a) With respect to Schedule 6 of Bill 197, a declaration that the Minister of Environment's noncompliance with the mandatory public notice and comment process of s. 15(1) and associated provisions of the *EBR* prior to its third reading on July 21, 2020 was unlawful;
 - (b) A declaration that the Minister of Environment's failure or refusal to comply with s. 15(1) and associated provisions of the *EBR* prior to July 21, 2020 was knowingly or willingly unlawful;
 - (c) A declaration that s. 51(7) of Bill 197 (enacting s. 33.1 of the *EBR*), s. 51(8) (repealing s. 33.1 of the *EBR*), and s. 66(2), which together deem the above-mentioned noncompliance lawful for only the exact duration during which an application must be filed under s. 5(1) of the *Judicial Review Procedure Act*, have the improper purpose to preclude judicial review for illegality, and are colourable as a privative clause;
 - (d) A declaration that following August 20, 2020, s. 51(7) of Bill 197 (currently s. 33.1 of the *EBR*) is spent and of no force and effect;

- (e) With respect to Schedules 3 and 17 of Bill 197, a declaration that the Minister of Municipal Affairs' noncompliance with the mandatory public notice and comment process of s. 15(1) of the *EBR* prior to its third reading on July 21, 2020 was unlawful;
- (f) With respect to Schedule 4 of Bill 197, a declaration that the Minister of Agriculture's noncompliance with the mandatory public notice and comment process of s. 15(1) of the *EBR* prior to its third reading on July 21, 2020 was unlawful;
- (g) With respect to Schedules 19 and 20 of Bill 197, a declaration that the Minister of Transportation's noncompliance with the mandatory public notice and comment process of s. 15(1) of the *EBR* prior to its third reading on July 21, 2020 was unlawful;
- (h) A determination that s. 15(1) and associated provisions of the *EBR* respecting public notice and comment accord the Applicants both substantive rights to information, and procedural rights to be consulted, about Schedules 3, 4, 6, 17, 19 and 20 of Bill 197, which must be exercised in conformity with reasonableness and procedural fairness;
- (i) A declaration or determination that ss. 15(1), 35(1), and 36(1) and (4) of the *EBR* provides quasi-constitutional rights to information and consultation which cannot lawfully be abrogated in anticipation of possible future enactments;

(j) Costs of this application if the parties cannot agree on costs or, in the alternative, an order that the parties bear their own costs; and

(k) Such further and other relief as counsel may advise and this Honourable Court may deem just.

GROUND:

10. The grounds for the application are as follows.

The parties

11. 2471256 Canada Inc., doing business as Greenpeace Canada, is a non-profit environmental interest group. Greenpeace Canada has a long history of using and advocating for the proper use of the *EBR*.

12. Western Canada Wilderness Committee (**Wilderness Committee**) is a non-profit environmental interest group and federal charity that works to preserve wilderness, protect wildlife, defend parks, safeguard public resources and fight for a stable and healthy climate. Wilderness Committee has a history of using the *EBR*.

13. Greenpeace Canada and Wilderness Committee bring this Application because each has been denied substantive and procedural rights, pursuant to Part II of the *EBR*, to receive notice and give comment on Schedules 3, 4, 6, 17, 19 and 20 to Bill 197 before it was implemented as the *COVID-19 Economic Recovery Act, 2020*.

14. Although directly affected as users of the *EBR*, in the alternative, the Applicants assert public interest standing to bring this Application.

15. Under the *EBR*, the Respondents were required to exercise statutory powers to consult with the public—including the Applicants—on Schedules 3, 4, 6, 17, 19 and 20 of Bill 197.

The *EBR*'s consultation scheme was breached

16. The *EBR* is premised on the recognition that the people of Ontario have a right to a healthful environment. It aims to protect and conserve the environment and to protect “the right to a healthful environment” by the means provided in the legislation. To fulfill its purposes, the *EBR* provides for “means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario” and “increased accountability of the Government of Ontario for its environmental-decision making.”

17. Various provisions of Part II of the *EBR*, beginning with s. 15(1), give persons the substantive right of notice and the procedural right to offer comment on proposed Bills having a significant effect on the environment. This consultative scheme required the Respondents to consult the public for at least 30 days before Bill 197 was implemented. Per s. 1(6)(b), the Bill was implemented at third reading in the Legislative Assembly on July 21, 2020. The Respondents did not carry out this mandatory consultation.

18. The Respondents cannot lawfully disregard this consultative scheme. They are required by *EBR* ss. 35 and 36 to consider the public's comments prior to deciding

on their proposals, and to give reasons explaining how the public's comments impacted their eventual decision. They did not do so.

19. Further, *EBR* s. 8 requires the Respondents to establish a “statement of environmental values” in cooperation with the public, and thereafter, s. 11 obliges the Respondents to “take every reasonable step to ensure that the ministry statement of environmental values is considered.” There is no public indication that the Respondents considered their respective statements of environmental values prior to implementing Bill 197. That failure was unreasonable.

No notice or consultation for Schedule 3, 4, 6, 17, 19, and 20 amendments

20. The Ontario government tabled Bill 197, the *COVID-19 Economic Recovery Act, 2020*, for first reading in the Legislative Assembly on July 8, 2020. Schedules 3, 4, 6, 17 and 19 of the Bill proposed environmentally significant changes to existing statutes, while Schedule 20 proposed an environmentally significant new statute. Bill 197 was implemented, for the purposes of the *EBR*, when it received third reading on July 21, 2020, and it went on to receive Royal Assent later the same day. Simply put, the Respondents rushed the Bill from first reading to Royal Assent in under two weeks.

21. The Respondents: (i) did not post *EBR* s. 15(1) notices on the Environmental Registry of Ontario; (ii) did not seek public comment on the proposed Schedules 3, 4, 6, 17, 19 and 20 to Bill 197 prior to its implementation, and; (iii) did not invoke any lawful exception to this consultation process under *EBR* s. 30 or otherwise.

The Minister's intentional refusal to consult on Schedule 6

22. On July 8, 2020, the Respondent Minister of Environment posted information bulletin #019-2051 on the Environmental Registry of Ontario, concerning the proposed amendments to the *Environmental Assessment Act* contained in Schedule 6. That bulletin asserted that notice was given “for informational purposes only,” and that “there is no requirement to consult on this initiative.” The Minister gave this reason in bulletin #019-2051 for breaching the statutory requirement of consultation:

To ensure that these proposed changes can be implemented expeditiously to support recovery efforts, the proposed amendments [to the *Environmental Assessment Act*] include a provision making them not subject to the minimum 30-day posting requirement under the *Environmental Bill of Rights*.

23. The “provision” to avoid the 30-day consultation process referred to in the above passage is contained in s. 51(7) of Schedule 6, which amends the *Environmental Bill of Rights* to insert s. 33.1. It reads:

51(7) The [EBR] is amended by adding the following section immediately before the heading “Ministerial Role after Giving Notice of a Proposal”:

Exception: *COVID-19 Economic Recovery Act, 2020*

33.1 The requirements of this Part are deemed not to have applied with respect to the amendments made by Schedule 6 to the *COVID-19 Economic Recovery Act, 2020*.

24. This clause came into force upon Bill 197 receiving Royal Assent on July 21, 2020. However, the above-mentioned amendment to the *EBR* is temporary and

self-destructs after only 30 days, because ss. 51(8) and 66(2) of Schedule 6 automatically repeal it on August 20, 2020. Those sections read:

51(8) Section 33.1 of the [Environmental Bill of Rights], as enacted by subsection (7), is repealed.

66(2) Subsection 51(8) comes into force 30 days after the day the COVID-19 Economic Recovery Act, 2020 receives Royal Assent.

25. The Applicants anticipate that by the time this Application is heard, s. 33.1 of the *EBR* will be repealed, spent, and of no force or effect, and plead this aspect of the case on that basis.
26. On July 16, 2020, Greenpeace Canada wrote a letter to the Respondent Minister of Environment expressing concern that information bulletin #019-2051 proposing amendments to the *Environmental Assessment Act* was deficient. Greenpeace Canada noted that any such amendments proposed in Schedule 6 to Bill 197 required public consultation under the *EBR*, and that the Minister could not lawfully deflect that duty by relying on an as-yet-unproclaimed amendment to the *EBR*. Greenpeace Canada asked the Minister to post his proposal for amending the *Environmental Assessment Act* for public consultation on the Environmental Registry of Ontario.
27. The Minister declined to act on Greenpeace Canada's concerns. Nor did he respond to them at the material time, because his response is dated July 24, 2020, three days after Bill 197 received Royal Assent.

28. Because of the Minister of Environment's intentional refusal to engage in public consultation as Part II of the *EBR* requires, even after that deficiency was pointed out by Greenpeace Canada, Greenpeace Canada and other interested parties such as Wilderness Committee were denied the opportunity to comment on Bill 197.
29. There is no indication that the Minister of Environment considered his Ministry's statement of environmental values in respect of Schedule 6 to Bill 197, including the proposed new s. 33.1 of the *EBR*, as he was required to do under the *EBR*.
30. The Minister of Environment's decision not to give public notice and seek comment on the proposed Schedule 6 amendments of Bill 197, for the stated reason that the future enactment of s. 33.1 of the *EBR* obviated any such requirement, illegally defeated the consultative scheme of Part II of the *EBR*, in a manner that is unreasonable and that violates procedural fairness as prescribed by the *EBR*.
31. Taken together, ss. 51(7), 51(8), and 66(2) of Schedule 6 to Bill 197 are tantamount to a privative clause, designed to be in force for only the same 30 days that the *Judicial Review Procedure Act* requires this Application be filed. This colourable attempt to defeat judicial review for illegality underscores that the Minister of Environment acted intentionally for an improper purpose.
32. The Minister of Environment unreasonably failed to exercise his statutory power to notify and consult the public under s. 15(1) of the *EBR*.

No notice or consultation for Schedules 3 and 17

33. No *EBR* s. 15(1) notice of any kind was given by the Respondent Minister of Municipal Affairs on the Environmental Registry of Ontario concerning the proposed amendments to the *Development Charges Act, 1997* and the *Planning Act* in Bill 197.

34. The deeming clause in Schedule 6 to Bill 197 (now s. 33.1 of the *EBR*) does not apply to the amendments in Schedules 3 or 17. That deeming clause does not purport to cure the Minister of Municipal Affairs' failure to comply with the *EBR* notice and consultation requirements.

35. The Minister of Municipal Affairs unreasonably failed to exercise his statutory power to notify and consult the public under s. 15(1) of the *EBR*.

No notice or consultation for Schedule 4

36. No *EBR* s. 15(1) notice of any kind was given by the Respondent Minister of Agriculture on the Environmental Registry of Ontario concerning the proposed amendments to the *Drainage Act* in Bill 197.

37. The deeming clause in Schedule 6 to Bill 197 (now s. 33.1 of the *EBR*) does not apply to the amendments in Schedule 4. That deeming clause does not purport to cure the Minister of Agriculture's failure to comply with the *EBR* notice and consultation requirements.

38. The Minister of Agriculture unreasonably failed to exercise his statutory power to notify and consult the public under s. 15(1) of the *EBR*.

No notice or consultation for Schedules 19 and 20

39. No *EBR* s. 15(1) notice of any kind was given by the Respondent Minister of Transportation on the Environmental Registry of Ontario concerning the proposed amendments to the *Public Transportation and Highway Improvement Act* or the proposed enactment of the *Transit-Oriented Communities Act, 2020* in Bill 197.

40. The deeming clause in Schedule 6 to Bill 197 (now s. 33.1 of the *EBR*) does not apply to the changes proposed in Schedules 19 and 20. That deeming clause does not purport to cure the Minister of Transportation's failure to comply with the *EBR* notice and consultation requirements.

41. The Minister of Transportation unreasonably failed to exercise her statutory power to notify and consult the public under s. 15(1) of the *EBR*.

The Applicants had a legitimate expectation that the Ministers would consult

42. The Applicants had a legitimate expectation that the Ministers would give proper *EBR* s. 15(1) public notice and seek comment on amendments, having made that their past practice on various occasions recorded in the Environmental Registry of Ontario.

43. At no time did the Ministers consult on their decision to depart from past practice on *EBR* consultation, which gives rise to a violation of procedural fairness.

The Applicants seek practical relief

44. The Respondents' efforts to avoid consulting the public under the *EBR* about Schedules 3, 4, 6, 17, 19 and 20 to Bill 197 are the latest instalment in an ongoing

pattern of behaviour in which the Government of Ontario avoids consulting the public about environmentally significant decisions under the *EBR*. This serial misconduct has been denounced by the Auditor General of Ontario, the Environment Commissioner of Ontario, and was the subject of previous litigation in this Honourable Court in *Greenpeace Canada v. Minister of the Environment*, 2019 ONSC 670 and *Greenpeace Canada v Minister of the Environment*, 2019 ONSC 5629.

45. While Schedules 3, 4, 6, 17, 19 and 20 to Bill 197 received Royal Assent on July 21, 2020, many of their provisions have not entered into force, nor has the Lieutenant Governor proclaimed a date on which this will occur.

46. In the absence of reasoned judicial declarations and determinations of the Applicants' rights under the *EBR*, it can be anticipated that the Respondents will continue to flout the consultation duties of that law, and may bring into force the balance of Schedules 3, 4, 6, 17, 19 and 20 without due consideration of those duties.

STATUTORY INSTRUMENTS RELIED UPON

47. *COVID-19 Economic Recovery Act, 2020*, SO 2020, c 19.

48. *Courts of Justice Act*, RSO 1990, c C.43.

49. *Environmental Bill of Rights, 1993*, SO 1993, c 28.

50. *General*, O Reg 73/94.

51. *Judicial Review Procedure Act*, RSO 1990, c J.1.

52. *Rules of Civil Procedure*, RRO 1990, Reg 194.

53. Such further and other grounds as counsel may advise and this Honourable Court may deem just.

DOCUMENTARY EVIDENCE

54. The following documentary evidence will be used at the hearing of the application:

- (a) Affidavits of Greenpeace Canada and Wilderness Committee, to be affirmed
- (b) The record of decision of the Ministers' statutory power of decision not to subject Schedules 3, 4, 6, 17, 19 and 20 of Bill 197 to the public notice and comment process under s. 15(1) of the *EBR*, to be furnished by the Respondents forthwith and filed with the Court.
- (c) Such other affidavit material and evidence as counsel may advise and this Honourable Court may deem proper.

August 7, 2020

Amir Attaran, LSO #503660
Ian Miron, LSO #634450
1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8
aattaran@ecojustice.ca
imiron@ecojustice.ca

Tel: 416.368.7533
Fax: 416.363.2746

Counsel for the Applicants

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PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPLICATION
FOR JUDICIAL REVIEW**

Amir Attaran, LSO # 503660
Ian Miron, LSO # 634450

1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8

aattaran@ecojustice.ca

imiron@ecojustice.ca

Tel: 416-368-7533

Fax: 416-363-2746

Counsel for the Applicants,
Greenpeace Canada (2471256 Canada Inc.) and
Western Canada Wilderness Committee