

What a Long, Strange Trip It's Been:¹ Evaluating the Modernization of Ontario's *Environmental Assessment Act (EAA)* and Proposed Changes to the EA Program

An Overview of the *EAA*, the History of the EA Program, Recent Amendments to the *EAA*, and Next Steps

Environmental Assessment Primer, Dec. 2, 2021

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¹From the lyrics to “Truckin” (1970) by The Grateful Dead. “Sometimes the light's all shinin' on me, Other times I can barely see, Lately it occurs to me, What a long, strange trip it's been.”<https://youtu.be/pafY6sZt0FE?t=13>

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Summary of Paper

Environmental assessment (“EA”) in Ontario dates back to 1975 when the *Environmental Assessment Act (EAA)* was first enacted. Ontario’s *Environmental Assessment Act* was the first of its kind in Canada, and until 2019, had remained relatively unchanged during its 45+ year history. The *EAA* provides the framework for Ontario’s environmental assessment (EA) program, which applies to specified ‘undertakings’. These undertakings were originally divided into individual EAs (for complex, larger-scale projects with potentially significant environmental effects) and class EAs (streamlined processes for specified groups of undertakings with predictable, mitigable environmental effects), each with different application processes. In July 2019, Bill 108 (*More Homes, More Choice Act, 2019*) amended the *EAA* and implemented short-term actions to address longstanding concerns of certain stakeholders such as the Association of Municipalities of Ontario (AMO), the Municipal Engineers Association (MEA) and the Ontario Housing Building Association (OHBA).

In July 2020, Schedule 6 of Bill 197 (*COVID-19 Economic Recovery Act, 2020*) further amended the *EAA*, respectively replacing individual and class EAs with comprehensive and streamlined EAs, and shifting the process from a designation/exemption approach to a project list approach.

This paper provides a brief overview of the *EAA*’s history, recent amendments, and next steps in achieving its statutory purpose and modernizing this keystone piece of legislation.

Highlights of the Bill 108 amendments

Part II Orders under section 16 narrowed in scope: Under section 16 of the *EAA* (prior to Bill 108), the Minister could ‘bump up’ an undertaking (also referred to as a ‘Part II order’) from a class EA to an individual EA or impose additional conditions. These changes, although applicable for one year, were repealed by the Bill 197 amendments to section 16.

The Bill 108 amendments also clarified that the Minister may reconsider an undertaking's approval given under past versions of the *EAA*, and the Minister may request additional information from the proponent to inform this reconsideration, empowering the MECP to commence work on significant reforms to Class EAs in 2019.

Highlights of the Bill 197 amendments

Ontario's Bill 197, subsequently passed into law as the *COVID-19 Economic Recovery Act, 2020*⁴ [CERA,2020] made major changes to the *EAA*. On July 8th, 2020, the same day as Ontario gave 1st Reading to Bill 197, Ontario also announced a series of major environmental assessment ('EA') regulatory and program reforms. These major reforms included new exemptions, and changes to class and sectoral environmental assessments, and will have significant implications for the practice of EA in Ontario. Unfortunately, the MECP took a somewhat haphazard approach to announcing the reforms and failed to undertake appropriate consultations in tabling these reforms.

Transition to a project list approach: The Bill 197 amendments to the *EAA* enable a transition to a project list approach from the previous designation and exemption approach. Projects (formerly 'undertakings') are now split into Part II.3 projects (comprehensive EAs; called individual EAs as of Dec. 2021) and Part II.4 projects (streamlined EAs; formerly class EAs). This change is intended to allow the Ministry of the Environment, Conservation and Parks (MECP) to clearly identify projects that require an environmental assessment. This change aligns the *EAA* with its comparable federal law, the Impact Assessment Act, 2019 which also uses a project list approach to designating projects for impact assessments. Moreover, it also means that certain private sector projects that were previously excluded from the application of the *EAA* could be subject to the EA process.

Streamlined EA regulations to replace Class EAs with streamlined assessment frameworks that have consistent requirements: These amendments establish a new Part II.4 of the *EAA* to address all class and sectoral EA approvals under the heading of "Streamlined Environmental Assessments." The new Part II.4 also provides the Minister with the power to order that a streamlined EA be subject to Part II.3 and its more rigorous requirements for "Comprehensive Environmental Assessments."

Municipal support for new large landfills: Under the Bill 197 amendments, proponents of new, large landfill undertakings are required to obtain the support of host municipalities and any adjacent municipalities with residential land within 3.5 kilometres of the proposed landfill. This amendment also applies to landfill proposals that had been submitted prior to Bill 197 but are still in the process of receiving approval.

Expiry Dates: The amendments to the *EAA* provide for a 10-year expiry date for approvals of projects that: 1) do not already have an expiry date; and 2) have not substantially started within 10 years (or an extended period if the Minister grants an extension) of approval being obtained. The *EAA* changes also empower the Minister with the authority to issue a notice that extends the

⁴*COVID-19 Economic Recovery Act, 2020*, SO 2020, c.18 - Bill 197 [Bill 197].

expiry for certain older projects. This expiry date of 10 years, or any extended expiry date, will apply to approvals issued before the expiry date provision comes into force, if these older approvals do not have an expiry date.

Part II Order Requests Terminated

For individuals, civil society organizations, municipalities, corporations and other interested parties, s 38.2 prescribes that any request for a Part II order that was made before the *COVID-19 Economic Recovery Act, 2020* received Royal Assent was terminated, except for requests regarding adverse impacts on existing aboriginal and treaty rights.⁵

New *EAA* regulations in the proposal stage or under development include:

- Project Lists (for comprehensive and streamlined projects)
- New streamlined assessment processes
- Sectoral Terms of Reference
- Expiry date exemptions
- Deadlines

The changes to Ontario's *EAA* are intended to achieve the following goals:

- reduce the amount of time it takes to complete the comprehensive EA process from six years on average to three years;
- enable online submissions of environmental assessments to improve accessibility, timelines and sharing of information;
- standardize work plans for selected sectors to get important infrastructure, such as large electricity lines, built faster; and
- improve coordination of provincial and federal EAs.

To sum up, practitioners must currently grapple with EA laws, regulations and policies related to two EA programs in play in Ontario:

1. the *EAA* legislation and remnants of the EA programs that applied before Bill 108 and Bill 197 and related changes were enacted; and
2. the provisions related to Bill 108 and Bill 197 that have been proclaimed and implemented, including changes to the Class EAs.

In addition, practitioners must monitor the implementation of the MECP's regulatory proposals for project list regulations and related transitional provisions.

Eventually, say in two to four years, the Modernized EA system will be more fully implemented. We now have a good sense of what the general contours of the new system will be and how the

⁵*EAA*, s 38.2

revised EA program will work. However, many of the details likely will be implemented by subsequent Ontario governments. Thus, we may not know exactly how the new Modernized EA system will work until after the next election when we hopefully have a better understanding of the EA priorities of the next government.

Introduction and Overview of the Environmental Assessment Act

The *Environmental Assessment Act (EAA)*⁶ was the first of its kind in Canada, providing the framework for Ontario’s environmental assessment (EA) program since it was enacted in 1975. The stated purpose of the *EAA* is “the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.”⁷ One of the key aspects of the *EAA* is its broad definition of ‘environment’, which includes “(a) air, land or water,(b) plant and animal life, including human life, (c) the social, economic and cultural conditions that influence the life of humans or a community, (d) any building, structure, machine or other device or thing made by humans, (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or (f) any part or combination of the foregoing and the interrelationships between any two or more of them.”⁸

As originally conceived, the *EAA* was designed to apply to “undertakings”, which include: enterprises and activities of Provincial crown and agents, municipalities, and public bodies; designated enterprises or activities of private sector entities; and private sector enterprises or activities by voluntary agreement.⁹ These undertakings included all public sector projects carried out by provincial and municipal bodies, as well as a small number of private sector undertakings deemed to carry a higher likelihood of adverse environmental effects, such as certain waste management, electricity, and transit projects. Prior to the enactment of Bill 197, undertakings were divided into individual and class EAs; individual EAs were needed for complex, large-scale projects with potentially significant environmental effects, while class EAs were streamlined processes for specified groups of undertakings with predictable, mitigable environmental effects.¹⁰ The vast majority of EAs carried out in Ontario in the past twenty years have followed the class EA process.

For individual EAs, proponents of undertakings were required to submit an application for approval in order to proceed with their undertaking. The two-stage application process consisted of 1) proposed terms of reference for the environmental assessment and 2) the environmental assessment. The Minister then made a decision on the application with the approval of the Lieutenant Governor in Chief, or referred the application to the Ontario Lands Tribunal (previously called the Environmental Assessment Board (1975-1999) and the Environmental Review Tribunal (2000-2021)). Applications would either be given approval to proceed, given approval to proceed subject to conditions, or refused approval to proceed.¹¹

⁶*Environmental Assessment Act*, RSO 1990, c E.18 [EAA].

⁷EAA, s 2.

⁸EAA, s 1(1).

⁹EAA, s 3.

¹⁰Ministry of Environment, Conservation and Parks, “Modernizing Ontario’s Environmental Assessment Program” (2019), online (pdf): <<https://ero.ontario.ca/notice/013-5101>>.

¹¹EAA, s 9(1).

Figure 1: Environmental Assessment Process Outline¹²



Source: MECP, Discussion paper: modernizing Ontario's environmental assessment program, 2019

Under section 5 of the EAA, undertakings designated as belonging to a class environmental assessment (a standardized process for a set group or class of activities) did not require further approval, so long as they followed the procedures within the specified class environmental assessment. Class designations occurred through regulations, such as Electricity Projects,¹³ Waste Management Projects,¹⁴ and Transit Projects and Metrolinx Undertakings,¹⁵ or through exemptions granted by the Minister. A brief overview of the Individual EA, Class EA, Designation/Exemption Regulations, and Declaration Orders is provided below in Figure 1.

¹²Ministry of the Environment, Conservation and Parks, "Discussion paper: modernizing Ontario's environmental assessment program" (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>

¹³*Electricity Projects*, O Reg 116/01.

¹⁴*Waste Management Projects*, OReg 101/07.

¹⁵*Transit Projects and Metrolinx Undertakings*, O. Reg. 231/08.

In July 2020, Schedule 6 of the *COVID-19 Economic Recovery Act, 2020 (Hereinafter: Bill 197)* significantly amended the *EAA*. Individual and class EAs were respectively replaced by comprehensive and streamlined EAs, with projects (formerly ‘undertakings’) being designated through regulations and project lists. The application process for comprehensive EAs is the same as the former individual EA process. For the streamlined EAs, regulations will prescribe the EA requirements for classes of projects, though a proponent can choose to proceed with a comprehensive EA instead of a streamlined EA. Similarly, the Minister can make an order requiring a project to proceed with a comprehensive EA instead of a streamlined EA.¹⁶

As discussed below, the MECP is in the process of developing ‘project lists’ for comprehensive and streamlined EAs in an effort to “focus environmental assessment requirements and environmental oversight on high (comprehensive) and medium impact (streamlined) projects,”¹⁷ while reducing duplication and removing the burden on low-impact project proponents. The proposed project list for comprehensive EAs was posted to the Environmental Registry in September 2020, which included electricity, waste management, transit projects and Metrolinx undertakings.¹⁸ The proposed project list for streamlined EAs was posted on the Environmental Registry on November 26, 2021.

What a Long Strange Trip It’s Been: A Brief History of the *EAA*

Throughout its 45+ year history, the *Environmental Assessment Act* has faced criticisms and concerns surrounding its efficiency and alignment with its statutory purpose.¹⁹ As such, the *EAA* has undergone legislative amendments, continual policy and program reforms, adjustments, and administrative reforms with varying results.

The Ontario Ministry of the Environment first proposed a new environmental planning process in the 1973 *Green Paper on Environmental Assessment*, ultimately leading to the *EAA* being enacted in 1975.²⁰ At the time, the legislation was seen as fairly significant and onerous as it legally (and at least theoretically) required proponents to “(a) consider a reasonable range of alternatives; (b) assess the environmental effects of such alternatives; and (c) demonstrate that their preferred alternative is environmentally superior and necessary,” and seek public input at key points during the environmental assessment.²¹ In practice, the legislation met with significant resistance from larger and more powerful ministries and agencies in the Ontario government such as Municipal Affairs and Housing, Natural Resources and Forestry, Northern Development and Mines, Agriculture and Food, the Ontario Realty Corporation as they then were called.

¹⁶*EAA*, s 17.29.

¹⁷Ministry of the Environment, Conservation and Parks, “Proposed Project List for comprehensive environmental assessments under the Environmental Assessment Act (*EAA*)” (last updated 11 September 2020), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/019-2377>>.

¹⁸*ERO Notice 019-2377*, *ibid*.

¹⁹For a detailed overview of the *EAA*’s history, see: Richard D. Lindgren & Burgandy Dunn, “Environmental Assessment in Ontario: Rhetoric vs. Reality” (2010) 21 *Journal of Environmental Law and Practice* 279 [*Lindgren and Dunn*].

²⁰*Environmental Assessment Act*, RSO 1990, c E.18.

²¹*Lindgren and Dunn* at 280.

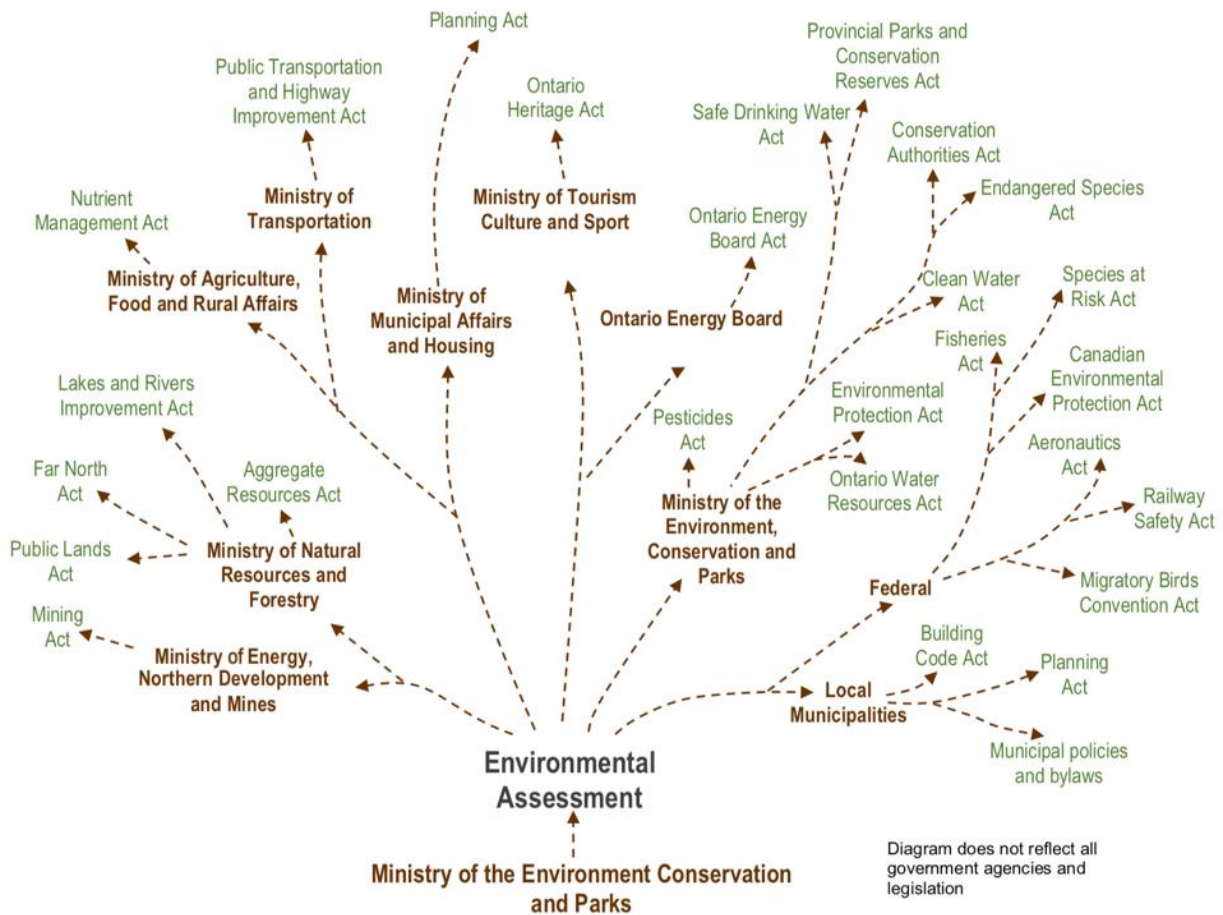
Table 1: Summary of the EAA Timeline (1975-2021)

1973	Ministry of Environment releases <i>Green Paper on Environmental Assessment</i>
1975	<i>Environmental Assessment Act (EAA)</i> enacted
1975-'90s	EAA faced significant resistance from other ministries and stakeholders
1980s	First Class EAs developed and approved
1985	Final Report of the Royal Commission on Northern Environment Report (Fahlgren) released; critical of lack of planning in northern Ontario, identifies need for EA processes
1986	MOE/MECP Guide on Public Consultation released
1986	MOE/MECP funds 50% of Municipal Waste Mgt. Master Planning (WMMP)
1989	Ontario Hydro (OH) Demand Supply Plan EA Hearings commence
1990	Municipal Engineers Association Class EA is approved by MECP
1991	Interim Waste Authority (IWA) EA Process commenced; EFW and MSW Export are excluded as alternatives
Feb. 1993	OH Demand Supply Plan EA Hearings cancelled
1994	Forest activities now fall under EAA under the Class EA for Timber Management, following 6-year EA hearing process (ENGOs, First Nations)
1996	Amendments to EAA (e.g., minister-approved Class EAs, ToRs, Scoping)
2000	Creation of Environmental Review Tribunal; end of EA hearings?
2004	MOE forms EA Advisory Council; 2005 report provides 41 recommendations for EAA reform, many of which were never implemented
2019	EAA amended by Bill 108; Class EAs holders bring forward proposals
2020	EAA amended by Bill 197; MECP launches significant EA Program changes
2021	Ontario Land Tribunal assumes responsibility for tribunal hearings on land use and environmental issues, including environmental assessment

When the EAA was enacted, numerous development-oriented and resource-extraction approval regimes were administered by these large ministries and agencies. The regimes existed for the drainage of wetlands (*Drainage Act*), urban planning (*Planning Act*), pits and quarries (*Pits and Quarries Act*, replaced by the *Aggregate Resources Act*), development of new mines (*Mining Act*), gasoline handling, forestry (*Timber Management Act*), parks planning, and numerous other spheres of provincial activity. For more than forty-five years, these alternate approval regimes have run both in parallel and in tandem with the EAA approval system. As seen in Figure 2, projects undergoing the EA process can require additional licences, permissions and approvals under municipal policies, 11 federal statutes, and 26 provincial statutes administered by 10 provincial ministries.²²

²²Ministry of the Environment, Conservation and Parks, “Discussion paper: modernizing Ontario’s environmental assessment program” (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>

Figure 2: Additional Environmental and Development Approvals Systems in Ontario²³



Source: MECP, Discussion paper: modernizing Ontario’s environmental assessment program, 2019

Factors which contributed to resistance to implementation of the *EAA* included the attitudes of managers in the Ontario civil service, the prevalence of silo mentalities, and perceptions amongst some senior managers in development-oriented ministries that the *EAA* represented an incursion into their jurisdiction and mandates. Ministries such as MNR and MNDM often were populated with tough-minded civil servants and retired military men. The idea of a new, junior ministry called the MOE (as it then was called) imposing ambiguous goals such as protection of the environment, the social environment and/or cultural artifacts, whatever these goals meant in practice, probably seemed somewhat unworkable and, perhaps, even preposterous. These tough-minded folks believed their important work was to help run the vast machinery of Ontario, generating the revenues and royalties from exploitation of Ontario’s forests, quarries and mines to pay for new schools, hospitals, hockey rinks, roads and sewage treatment plants that Ontarians

²³Ministry of the Environment, Conservation and Parks, “Discussion paper: modernizing Ontario’s environmental assessment program” (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>

and their growing communities needed. Further, as documented in numerous books and government reports prepared in the 1960s, 1970s and 1980s, the impacts of these development activities on traditional Indigenous activities and Indigenous constitutionally protected rights to harvest wildlife, fish and resources usually did not factor into decision-making.²⁴ Additionally, impacts to land, natural systems and the environment also did not figure prominently in their thinking as a general rule.

One of the first declaration orders to be issued was Declaration Order MNR-75 which exempted the Ontario forest industry from the *EAA*. Consequently, forestry activities were not subjected to proper scrutiny under the *EAA* until the completion of the Class EA for Timber Management in 1994. Moreover, this was after a gruelling 6-year EA hearing process where ENGOs, First Nations and Indigenous organizations battled with the MNR and the forest industry to put in place a proper system of terms and conditions for industry activities and a fairly comprehensive set of operational guides and manuals that were intended to improve forest practices and better protect fisheries, watersheds and endangered species.²⁵

Many engineers at the Ministry of Transportation (MTO) and municipalities apparently also had trouble wrapping their heads around the concept and practice of EA in the late 1970s. Consequently, it surprised few consultants, environmental lawyers and almost no staff at the EA Branch of the MECP that the first prosecution of a proponent for failing to comply with the requirements of the *EAA* was undertaken by the MECP against MTO for problems in the construction of the James Snow Parkway in Milton, Ontario.

Other ministries such as OMAFRA made the case for moving adjudication of disputes between farmers, environmental ministries, municipalities and local residents to a completely separate tribunal²⁶ and the case for their own approval system for handling manure and wastes generated by large hog and cattle farms, called the *Nutrient Management Act*. However, that legal regime only was enacted in 2002 in the wake of the Walkerton water contamination disaster in May 2000 and came into force in the mid 2000s. Similarly, for decades mining projects and related infrastructure also were not subject to scrutiny under the Ontario *EAA* and instead subject to numerous bifurcated approvals under the *Mining Act*. In the early 1990s, the *Mining Act* regime evolved to include mine site rehabilitation in the early 1990s after a series of spills from improperly managed mine tailings sites, with appeals on technical details to the Mining and Lands Commissioner. Further changes to the *Mining Act* in the late 2000s resulted in a more

²⁴ Royal Commission on the Northern Environment, Final Report (1985). Commissioner: J. Fahlgren. Toronto: Queen's Printer; Anastasia M. Shkilnyk, *A Poison Stronger Than Love: The Destruction of an Ojibwa Community* (1985). New Haven: Yale University Press, 274 pp.

²⁵ David McRobert alongside three Master in Environmental Studies students prepared a report in 1988 on the EA for the Red Squirrel road into Temagami which was intended for the harvesting of an old growth forest. His proposal to use a multi-stakeholder, consensus-building process for Temagami was adopted by the Ontario Cabinet with the support of Premier David Peterson and Attorney General Ian Scott. The approach later was used to shape forestry and mining planning through the late 1990s and into the early 2000s by the Harris-Eves government. The full report can be accessed here: <http://envstudiesyork.ca/public/law/temagami.htm>

²⁶Now called the Normal Farm Practices Protection Board. For a history on this legislation, David McRobert, In-House Counsel, Environmental Commissioner of Ontario, *WHAT MAKES NUTRIENT MANAGEMENT SO CONTROVERSIAL?* (2004) In: Proceedings of the London Swine Conference, Nov. 2004. https://www.researchgate.net/publication/242141412_WHAT_MAKES_NUTRIENT_MANAGEMENT_SO_CON_TROVERSIAL

elaborate consultation process to ensure that improved consultation with Indigenous communities and rightsholders, as well as other stakeholders, was undertaken but the *EAA* still wasn't applied to a limited range of projects until a Class EA was approved in the mid 2010s. However, mining projects across Canada almost always trigger federal EA scrutiny because proponents require various approvals under the federal *Fisheries Act* and for infrastructure or discharges under other federal laws or programs.

To make the *EAA* and the MECP's EA program more palatable to some sectors such as municipalities, MECP began to develop the concept of Class EAs in the mid 1970s. The concept of Class EAs was described in "EA Updates," bulletins the ministry regularly issued beginning in the 1970s. The basic idea was that a Class EA would be a document that sets out a standardized planning process for classes or groups of activities such as road construction, expansions for sewage treatment facilities, and some highway projects. A summary of the approach is outlined by David Estrin and John Swaigen in the second edition of *Environment on Trial* (1978) and was described as a possible "useful supplement" to individual EAs.²⁷ However they cautioned that general provisions contained in a Class EAs might be unhelpful when applied to environmental and social conditions at a particular site. Unsurprisingly, the first Class EAs were proposed, developed and implemented by the Municipal Engineers Association of Ontario in the 1980s.²⁸ Moreover, the first comprehensive Municipal Class EA was approved by the MECP in 1990 and proponents began to implement it that year.²⁹

And so it went. The environmental, economic, cultural and social impacts of small, medium and even large projects generally were not necessarily monitored, and the terms and conditions of EA approvals often were not followed by proponents and enforced by the MOE. Through the 1980s and into the 2000s Ontario continued to grow, sprawling out on some of the best agricultural land in Canada in the GTA and Niagara Region³⁰ despite legislation such as the *Oak Ridges Moraine Conservation Act, 2002* and the *Greenbelt Act, 2005* and their associated plans. This growth occurred without due regard for Treaty relations and Duty to Consult and Accommodate with Indigenous communities, while creating many unmitigable impacts to Aboriginal rights and practices.

Not all Ontario ministries, agencies or sectors resisted being prescribed of course. Eventually a number became subject to various Class EA processes. Under the leadership of the Honourable Jim Bradley, Minister of the Environment between 1985 and 1990, the EA Branch was strengthened thanks in part to the reports of the Environmental Assessment Advisory Committee

²⁷David Estrin and John Swaigen, *Environment on Trial: A Handbook of Ontario Environmental Law*, 2nd ed (Canadian Environmental Law Research Foundation, 1978) at 51-52.

²⁸Municipal Engineers Association of Ontario (MEA), *Class Environmental Assessment for Municipal Sewage and Water Projects*, (1987). Toronto: Municipal Engineers Association of Ontario, 88 pp.; MEA, *Class Environmental Assessment for Municipal Road Projects* (1987). Toronto: MEA, 71 pp.

²⁹For various materials on the Municipal Class EA, including proposed 2019 amendments, see Municipal Engineers Association <<https://municipalclassea.ca/>>

³⁰David McRobert, *Deference to the Marketplace: A Case Study of the Role of the Ontario Municipal Board in Agricultural Land Conservation, 1975-1985* (Charleston: Createspace/Amazon, 2012). <<https://www.amazon.ca/Deference-Marketplace-Municipal-Agricultural-Conservation/dp/1470168499>>

and the vision of staff in his office. Regulation 334 (General Requirements)³¹ made under the *EAA* began to evolve, and to continue to provide many of the details that specify which ministries and public sector agencies and proponents are subject to the *EAA*.

There was fiddling around the edges by governments as they tried to determine how to make the EA process fit their political agendas. In 1988 the *Intervenor Funding Project Act* (IFPA) was enacted,³² thus addressing a peculiar imbalance that had arisen between practices for energy rate and transmission line approval hearings at the Ontario Energy Board and those at the Environmental Assessment Board (the tribunal that conducted hearings on the adequacies of environmental assessments until the late 1990s).³³

Thanks in part to new MOE policies encouraging public consultation on environmentally significant approvals and important policies and regulations the Waste Management Branch at MOE increasingly began to find its staff and financial resources increasingly entangled in controversies about issues such as hazardous waste handling, and the siting of solid waste transfer stations and landfills.

In some cases, very serious problems were arising for municipalities, especially for those running out of landfill capacity and seeking waste approvals for new landfills to serve the needs of their residents. When Halton Region ran out of landfill space for its solid waste in the late 1980s, the region was forced to ship its solid waste to the Hooker Chemical incinerator in Love Canal, New York state to be disposed of at a cost of approximately \$150/tonne. Meanwhile, the Halton Region's staff, consultants and lawyers found themselves immersed in the lengthiest and most contentious EA and planning approval process for a new landfill in Ontario history³⁴ with the hearing itself lasting a total of 19 months. The situation was made more complex by the opposition of the Town of Milton to the preferred site.³⁵

³¹*General Requirements*, RRO 1990, Regulation 334; Regulation 334 is a general regulation under the *EAA* which sets out additional details on how the *EAA* will be applied to certain types of undertakings. This can include requiring certain proponents or projects to meet the requirements of the Act or exempting projects from having to meet these requirements. Regulation 334 will be amended to include this exemption.

³²For background, see: David S. McRobert and Paula Boutis, "Proposal for a new Ontario Participant and Intervenor Funding Act filed with the Environmental Commissioner of Ontario" (2012) 22:1 Ontario Bar Association *Environment*; See also: *Lindgren and Dunn* at 286.

³³The Ontario Energy Board (OEB) had begun to require large proponents such as Ontario Hydro, Hydro One, and gas companies to provide cost awards and advanced funding (i.e. 'intervenor funding' and 'pre-hearing participant') to intervenors in its hearings on the basis of administrative fairness. The initial legal authority to do this stemmed from a series of Divisional and Ontario Court of Appeal rulings on challenges to transmission line locations to service large nuclear plants sought by Ontario Hydro and Hydro in the early 1980s. The IFPA, which was brought forward by Ian Scott, the then Minister of Attorney General, was intended to address this discrepancy.

³⁴See: Piero Carmine Amodeo, "A Critical Evaluation of Ontario's Environmental Assessment Approval Process" (April 1991), online (pdf): <<https://macsphere.mcmaster.ca/bitstream/11375/13875/1/fulltext.pdf>>; Robert S Turland, "Municipal Organizations and Environmental Assessment in Ontario: Challenges and Opportunities" (September 1989), online (pdf): <https://publications.gc.ca/collections/collection_2018/acee-ceaa/En107-3-132-1989-eng.pdf>

³⁵Consolidated Hearing Board. 1989. Reasons for Decision and Decision in the Matter of an Application by the Regional Municipality of Halton for Approval of a Sanitary Landfill Site. The Joint Board of Ontario. CH-86-02., 210 pp. Turland, supra note 33, comments as follows: "Ontario has a two-tier system of local government. For example, the City of Burlington and the Town of Milton are all lower-tier municipalities within the upper-tier Regional Municipality of Halton. The decision-making body of the lower-tier municipalities are comprised of

In February 1989, a decision of the Joint Board constituted under the *Consolidated Hearings Act* provided Halton Region with EAA and other approvals for a proposed new landfill site in the Town of Milton. This was the first hearing on a landfill site under the EAA, and the decision established a range of principles that were adopted by other proponents, and reflected in later Board decisions on waste management EAs. These included: a requirement for rigorous consideration of waste diversion in establishing the need for a landfill and the required landfill capacity; a consistent and traceable approach to site selection with the application of standard siting criteria; and a set of principles for establishing the hydrogeological suitability of a landfill site.

The wide ranging Conditions of Approval imposed by the Joint Board included a requirement to conduct further studies if a waste diversion rate of 50 per cent was not achieved within eight years (a later Minister's Declaration Order noted that this target was achieved), as well as further conditions related to hazardous waste diversion, a Citizens' Advisory Committee of local residents, and the establishment of a Special Policy Area to avoid the introduction of conflicting uses around the landfill.

The MOE responded by adopting more systematic policies on Waste Management Master Planning (WMMP), a process that was intended to provide municipalities with a sounder basis for their waste program, 3Rs activities and disposal site applications. Some facets of the WMMP process and related policies and initiatives flowed out of decisions of the Environmental Assessment Board (the tribunal that conducted hearings on the adequacies of environmental assessments until the late 1990s) and subsequent Cabinet or Ministerial efforts to overturn or amend some of the most controversial landfill site approval decisions.³⁶

In the late 1980s, the Ministry of Energy finally relented after years of pressure and agreed that Ontario Hydro's (OH) plans to build a series of new nuclear plants, hydro power dams, natural gas plants and energy from waste incinerators should undergo EA Hearings. The plan was bundled up in OH's massive and sprawling Demand Supply Plan (DSP). The Darlington Nuclear facility already was well underway, although it was unclear as to what the final cost would be. Pollution Probe and its consultants decided to intervene in the EA hearings, intending to show that the lack of energy conservation planning was a fundamental flaw in the process and that

elected officials. The decision-making body of the upper-tier municipality is comprised of appointees from the elected bodies of its member municipalities. Problems develop when the agendas of the lower-tier municipalities conflict with each other or with the agenda of the upper-tier municipality. This type of conflict developed between the Regional Municipality of Halton and the Town of Milton during an EA for its regional sanitary landfill site. Regional Council had as an agenda item identification of potential sites for a regional sanitary landfill. Milton Council had as an agenda item opposition to a regional landfill in Milton. Subsequently, Milton Council passed a resolution prohibiting sanitary landfills within the Town's boundaries. This manoeuvre complicated and lengthened the assessment proceedings while providing nothing in the way of meaningful input towards finding a suitable site for a sanitary landfill within the region. The above case is an example of the NIMBY (not in my backyard) syndrome working at an organizational level."

³⁶Under the WMMP, MOE began to fund approximately 50% of the cost of preparing WMMP. Municipalities retained consultants and lawyers to prepare lengthy WMMP reports to support their EA applications for new landfills, landfill expansions, transfer stations, waste sites, and potential EFW facility approvals. However, the consulting reports often were prepared by a small number of firms and seemed to be formulaic, reflecting the growing use of cut and paste and search functions available through new word-processing technologies such as WordPerfect.

OH's plan to build new energy-from-waste plants was contrary to other solid waste policies to promote the 3Rs.³⁷ Other environmental groups and First Nations questioned fundamental policy and planning planks of the DSP.³⁸

The surprise election of an NDP government in September 1990 also resulted in the start of an entirely new beast of an EA process whereby the MOE created and funded a new agency called the Interim Waste Authority (IWA) to site new landfills in the Greater Toronto Area (GTA). Since Michigan and other USA states had not yet opened their doors to Ontario's solid waste, many large municipalities were facing a severe shortage of disposal capacity at their facilities. The IWA was created to develop large, new disposal facilities for the solid waste generated in the GTA and other communities in southern Ontario. The IWA quickly became joined at the hip with the newly created Waste Reduction Office (WRO)³⁹ at the MOE, the new office charged with preparing estimates on future diversion opportunities and helping to estimate exactly how big future disposal facilities planned and sited by the IWA should be. Unfortunately, the IWA's EA process suffered from an instantaneous credibility gap in the rural and suburban areas of the GTA after the NDP Cabinet decided to remove both long-distance waste export to Kirkland Lake (and other northern Ontario municipalities such as Ignace) and the construction of new energy from waste (EFW) incinerators as possible alternatives to the construction of local landfills for disposing of solid waste from the GTA when it enacted Part II of the *Waste Management Act, 1992*.⁴⁰ Many experienced EA practitioners and staff at MOE, other parts of the Ontario government and in the private sector expressed exasperation and incredulity about the proposed EA process that the IWA was tasked with leading.⁴¹ Even so, pressure to complete the IWA process for siting new landfills continued because public sector unions such as the Canadian Union of Public Employees (CUPE) expressed opposition to any approach that might reduce the number of jobs available to public sector workers who then made up the lion's share of the workers who hauled and managed garbage and recyclables at the curbside in most GTA and southern communities. The IWA process met its quick demise in July 1995 when Mike Harris' Conservative government took power and quickly dissolved the authority and halted its EA process. The Harris government expressed its intention to facilitate waste approvals for new

³⁷ David McRobert coordinated Pollution Probe's intervention application in the DSP hearings and the initial work.

³⁸ When an experienced Deputy Minister from the federal government called Richard Dicerri was dispatched to become the new MECP Deputy in June 1992, he urged Cabinet to merge the Environment and Energy ministries. He thus was well positioned in early 1993 to help convince Cabinet to end the EA hearing process for Ontario Hydro's DSP. While Ontario Hydro had spent millions on its planning processes and it had paid an estimated \$25 million in funds to various intervenors by Ontario Hydro to participate in the DSP EA Hearings taxpayers were spared the ongoing spectacle of watching Ontario Hydro try to rationalize its DSP, an ambitious but ultimately misguided effort. Ontario remained mired in one of the worst recessions of the 20th century; demand for electricity was collapsing and the case for an avoided cost approach to energy planning based on conservation and other management tools had become more logical.

³⁹ Unfortunately, though staffed with many visionary staff intent on diverting waste from disposal and implementing 3Rs regulations and programs that would make Ontario into a leader, the WRO was unable to make much progress for a range of reasons including the fact that they were slightly ahead of their time.

⁴⁰ Waste Management Act, 1992. S.O. 1992.

⁴¹ David McRobert participated in numerous meetings in 1991 and 1992 with MECP senior staff on the IWA EA process. Many experienced EA practitioners and MOE staff expressed incredulity and exasperation about the proposed EA process that the IWA was tasked with leading. Indeed the then Director of the EA Branch, who was concerned about the implications of the IWA process for the reputation of Ontario's EA program, would sometimes ask whether staff of the Waste Reduction Office of the MECP were wearing Black Hats or White Hats at some Intra- and Inter-ministerial meetings.

EFW plants, but few new facilities actually have been built in the past 25 years, partly because of increased operational costs and public opposition to siting.

The *EAA* itself remained largely untouched until 1996 when the Harris government undertook significant amendments that created additional substantive and procedural requirements. The primary changes included streamlined assessment procedures such as Terms of Reference (ToRs), mandatory public consultation, and additional steps for the individual environmental assessment process. During this time, the Ontario Government also abolished the Environmental Assessment Advisory Committee which had provided many of the recommendations used within the *EAA*'s amendment, and allowed the *Intervenor Funding Project Act* (IFPA) to expire.⁴² The expiration of the IFPA in particular has created longstanding barriers for citizens and NGOs seeking to participate in the environmental assessment process because they are unable to obtain intervenor and participant funds previously available under the IFPA.⁴³

One of the most significant amendments to the *EAA* in 1996 was regularizing a de facto MECP practice started in the 1980s of allowing proponents like the MEA to develop "Class EA" document.⁴⁴ The 1996 amendments empowered the Minister to approve certain classes of undertakings – such as municipal infrastructure work, provincial highway repairs, and electricity transmission facility upgrades – expected to have relatively minor and better understood environmental impacts.

A Minister-approved Class EA document authorizes proponents of projects described in the document to carry out their projects following a streamlined "self-assessment" process. Class EA documents generally divided the class of undertakings subject to the document into sub-categories, setting different requirements for project planning, documentation, and public consultation based on project categorization. These categories were devised based on the nature of the project activities and the potential for environmental impacts to be caused by those activities, with more onerous requirements being imposed on undertakings associated with more significant potential impacts. Regulations were also used by the government to exempt certain activities that would have otherwise been required to undergo an individual EA from some or all of the requirements of the *EAA*.

The enactment of the *Environmental Review Tribunal Act* in 2000 resulted in the merger of the Environmental Assessment Board and the Environmental Appeal Board. With the creation of the ERT, the MOE embarked on a review of its approach to referring matters to the ERT for EA

⁴²*Lindgren and Dunnat* 286.

⁴³For more information, see: David McRobert and Paula Boutis, "Proposal for a new Ontario Participant and Intervenor Funding Act filed with the Environmental Commissioner of Ontario" (2012) 22:1 Ontario Bar Association Environews.

⁴⁴Projects defined within a Class EA do not require approval under section 5 of the *EAA*, as long as they are: being planned according to the procedures set out in the Class EA; and not subject to a Part II Order from the Minister requiring that the proponent undertake a full environmental assessment. The former requirement is unaffected by Bill 197 but Part II Order Requests made under section 16 now are restricted in scope as noted elsewhere in this paper.

hearings. As a matter of informal policy, the then Director of the EA Branch, Michael Williams, clarified that he expected few future EA approvals would be referred to the ERT for hearings.⁴⁵

Stakeholders continued to raise concerns around the cost, efficiency, inconsistency, timeliness, and purpose of the EA process, and in 2004, the Minister of the Environment formed an advisory panel, seeking recommendations for improving the EA program. The advisory panel provided 41 recommendations in their 2005 report,⁴⁶ however, many of the Minister's commitments to reform the *EAA* based on the work of the advisory panel were not fulfilled, with only a few "Codes of Practice" and regulations being implemented to inform and streamline certain procedures.⁴⁷

MEA and RCCAO file EBR Application for Review on MCEA

When the Environmental Registry took effect, MNR and some other ministries (as it was then known in 1994) took the position that approvals issued under Class EAs were not subject to the notice and comment provisions in Part II of the EBR, consistent with certain exemptions spelled out in sections 32 and 34 of the EBR. Some prescribed ministries and agencies also refused to post revised Class EAs as regular proposals on the Registry, subject to notice and comment and review by the Office of the Environmental Commissioner of Ontario.

Despite this, in 2017 the MEA and the RCCAO filed an Application for Review of the MEA's Municipal Class EA.⁴⁸ The MECP decided to accept the application which is a fairly rare event under the EBR as some members of today's panel can attest. This appears to have been an important catalyst in understanding many of the changes to the Class EA program that has followed.

The Ontario government commits to Modernizing the Environmental Assessment Act

Despite the many lingering concerns and unresolved issues, the EA program and the *EAA* continued to limp along until November 2018, when Doug Ford's Conservative government

⁴⁵ Between 1999 and 2001 the chair of the ERT, Carl Dombek, convened regular meetings of an oversight committee to facilitate implementation of administrative and policy changes to the work of the merged Environmental Appeal Board, Environmental Assessment Board and several other environmental tribunals subject to the *ERT Act*. As part of the process, Michael Williams, then Director of the EA Branch, laid out the MECP's case for transforming oversight of the *EAA* into primarily an administrative process controlled by the MECP's EA staff, engineers and consultants and further shifting the process out of "costly and endless EA hearing processes" involving lawyers and expert witnesses at the EA Board/ERT.

⁴⁶Environment Minister's Environmental Assessment Advisory Panel Executive Group, "Improving Environmental Assessment in Ontario: A Framework for Reform" (2005), online (pdf): <<https://cela.ca/wp-content/uploads/2019/07/EA-Panel-Report-VolOne.pdf>>

⁴⁷*Lindgren and Dunnat* 287.

⁴⁸ MEA and RCCAO, "Application for Review on the Municipal Class EA and Related Policies and Processes"(January 2017), online (pdf): <<https://www.rccao.com/news/files/RCCAO%20and%20MEA%20Signed%20Applic%20and%20Appendics%20Jan%2031%202017.pdf>>.

committed to modernizing the EA process as part of the Made-In Ontario Environment Plan outlined in its discussion paper of the same name.⁴⁹ In the November 2018 paper, the Ontario government signalled its intention to “modernize” the *EAA* to better align the level of review with the degree of potential environmental risk associated with a project and streamline review processes for low-risk projects.

On April 25, 2019, the Ministry of the Environment, Conservation, and Parks (MECP) released a discussion paper to consult Ontarians on a modern vision for the EA program.⁵⁰

The four main goals of the proposed law reform process were described by the MECP in their discussion paper as the following:

1. “ensure better alignment between the level of assessment and level of environmental risk associated with a project;
2. eliminate duplication between environmental assessments and other planning and approvals processes;
3. find efficiencies in the environmental assessment process and related planning and approvals processes to shorten the timelines from start to finish; and
4. go digital by permitting online submissions.”⁵¹

In the discussion paper, the MECP articulated the following core principles of Ontario EA’s system:

“Ontario’s environmental assessment program is based on core principles that seek to maximize the benefits of environmental assessment as a decision-making tool.

...

- Considering a reasonable range of alternatives that includes both alternatives to a proposed project (functionally different ways of approaching and dealing with a problem or opportunity) and alternative methods (different ways of doing the same activity).
- Considering all aspects of the environment, including natural, social, economic, cultural, and built conditions.
- Systematically evaluating net environmental effects of alternatives (i.e., the advantages and disadvantages of the alternatives) to find a preferred solution.”

⁴⁹Ministry of the Environment, Conservation and Parks, “A Made-in-Ontario Environment Plan” (last updated 17 August 2021), online: *Government of Ontario*<<https://www.ontario.ca/page/made-in-ontario-environment-plan>>

⁵⁰Ministry of the Environment, Conservation and Parks, “Discussion paper: modernizing Ontario’s environmental assessment program” (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>

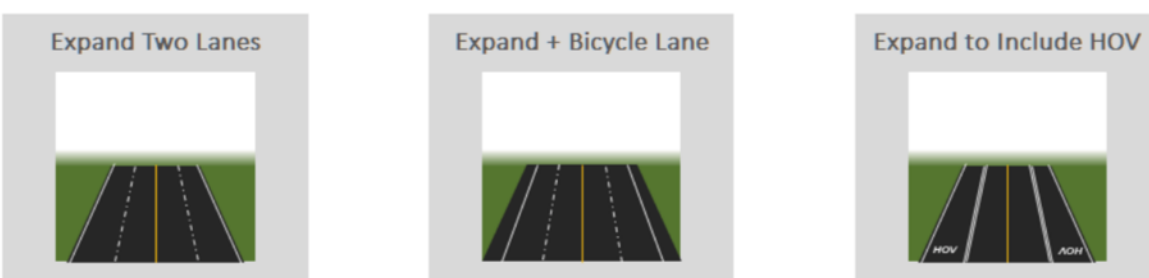
⁵¹*MECP, Ibid.*

Figure 3: Examples of Alternatives in the EA Process⁵²

Alternatives To:



Alternative Methods:



Source: MECP, Discussion paper: modernizing Ontario's environmental assessment program, 2019

The MECP offered a range of explanations for its approach to reform. One of the principal rationales offered is that regulatory frameworks at various provincial ministries and agencies have evolved considerably in recent decades. Consequently, there is growing duplication between EA and other planning and approvals processes, resulting in the need for the MECP to review their processes to ensure they are as efficient as possible. In addition, the MECP noted that the EA approval process, prior to the Bill 108 and Bill 197 amendments, was perceived by proponents and many stakeholders as slow and cumbersome, especially in comparison with some of the other approval processes administered by ministries such as MMAH, MNR, OMAFRA, MNM, MGCS and agencies such as the Technical Standards and Safety Authority. MECP acknowledged that for some projects, a comprehensive EA under the pre-Bill 197 EA system could take over 6 years on average from start to finish. Moreover, they noted that for streamlined EAs, the Part II Order process is not working – as a single request can delay a project by over a year.

The comment period for the MECP discussion paper closed on May 25, 2019. Stakeholders expressed a range of views on how the proposed legislation should alter the EA process as outlined in Appendix D.

⁵²Ministry of the Environment, Conservation and Parks, "Discussion paper: modernizing Ontario's environmental assessment program" (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>.

Bill 108 – More Homes, More Choices Act, 2019

In June 2019, the *More Homes, More Choice Act, 2019*⁵³ received Royal Assent, resulting in several amendments to the *EAA*. The MECP aimed to address pressing stakeholder concerns through the short-term actions enabled by this Act. The Bill 108 amendments clarified that the Minister may reconsider an undertaking’s approval given under past versions of the *EAA*, and the Minister may request additional information from the proponent to inform this reconsideration, empowering the MECP to commence work on significant reforms to Class EAs in 2019.

According to the MECP, the main effect of the Bill 108 amendments on approvals is that low-risk projects and specific low-risk groups of class EAs have been exempted from EA requirements. These projects include certain municipal, public works, Ministry of Northern Development and Mines, resource stewardship, facility development, provincial transportation facilities, GO Transit, provincial parks, and conservation reserve EAs.⁵⁴

To facilitate implementation of these Bill 108 changes in a rapid manner, in early 2019 MECP asked class EA holders⁵⁵ to bring forward additional low-risk projects that could be considered for exemption in order to “create consistency with our modernized vision.”⁵⁶ The MECP cited their goals for this process as: aligning the level of environmental risk with the level of assessment required, eliminating duplication with other processes, and finding efficiencies in the environmental assessment process. Again, as in the past, very little consultation with Indigenous communities took place through the process of these amendments under Bill 108.

Part II Order Requests (PIORs) Are Narrowed

Bill 108 also amended section 16 of the *EAA*⁵⁷ such that Part II Order Requests (PIORs; also known as elevation requests or bump-up requests) only can be issued if the Minister is of the opinion that the order may prevent, mitigate or remedy adverse impacts on, (a) the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*; or (b) a matter of provincial significance. Some Indigenous legal experts and consultants argue that this type of provision does not require

⁵³*More Homes, More Choice Act, 2019*, SO 2019, c. 9 - Bill 108 [*Bill 108*].

⁵⁴*Bill 108*, s 15.3(4).

⁵⁵The Class EAs and the respective holders who were consulted are: Municipal Class EA (Municipal Engineers Association) ; Waterpower projects (Ontario Waterpower Association); Minor Transmission Facilities (Hydro One); Remedial Flood and Erosion Control Projects (Conservation Ontario); Activities of ENDM under the Mining Act (Ministry of Energy, Northern Development and Mines); Resource Stewardship and Facility Development (Ministry of Natural Resources and Forestry); Public Work (Ministry of Government and Consumer Services); and Provincial Transportation Facilities (Ministry of Transportation).

⁵⁶Ministry of Environment, Conservation and Parks, “Modernizing Ontario’s Environmental Assessment Program” (2019), online (pdf): <https://oiaa.on.ca/wp-content/uploads/2019/12/Session-1-2_2019-Conference_OAIA.pdf>.

⁵⁷From Bill 108, <https://www.ontario.ca/laws/statute/s19009#BK8>; Section 16 of the Act is amended by adding the following subsection: Grounds for order

(4.1) After considering the matters set out in subsection (4), the Minister may issue an order under subsection (1) or (3) only if the Minister is of the opinion that the order may prevent, mitigate or remedy adverse impacts on, (a) the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*; or (b) a prescribed matter of provincial importance.

consultation but merely is a non-derogation clause. These clauses, and their potential impacts on the safeguarding of Indigenous rights, were critically assessed in a 2007 report for the Senate of Canada.⁵⁸

These Bill 108 changes were repealed and replaced when Bill 197 was enacted as discussed further below. The subsection 16(4.1)(b) no longer appears in section 16. In addition, the wording of subsection 16(4.1)(a) now specifies that Part II Orders only may be requested by Ontario residents and considered by the Minister on the grounds “that the order may prevent, mitigate or remedy adverse impacts on the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*.”⁵⁹

As discussed further below, the repeal and replacement of the previous provisions in section 16 is a significant change that will affect the evaluation of small and medium-sized projects including municipal infrastructure.

Background to the Part II Order Reform

Part II Order Requests have been controversial for decades. From an environmental justice perspective, Part II Order Requests have provided an important mechanism for individuals, civil society organizations, municipalities, corporations and other interested parties to raise concerns and issues about inadequacies in EA studies or proposed mitigation measures, weak or unenforceable proposed terms and conditions, and inadequate monitoring systems. While very few bump-up requests have been granted in the history of the *EAA*, the existence of the formal mechanism did result in improved decision-making by the MECP.

In the late 2010s, controversy began to erupt amongst municipal politicians and staff that delays in ministerial decisions on PII OR were affecting project constructions and the flow of federal and provincial infrastructure improvement funds to municipalities. The Auditor General’s 2016 “Value for Money Audit” of EA system stated that PIIOR decisions were delayed an average of 110 days waiting on the Minister’s signature.⁶⁰ The Auditor General recommended that the PIIOR system needed to be revamped so that the review focuses only on the issues raised in the PIIOR and suggested that the authority to make a decision on a PIIOR needed to be delegated to the Director of the EA Branch. The Municipal Engineers Association also began to express concern that Schedule A and A+ projects should be exempted from Part II Order Requests because the mechanism was being used to delay simple projects and was seen as a type of

⁵⁸ Government of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights: Final Report*. (2007). <https://sencanada.ca/Content/SEN/Committee/392/lega/rep/rep05dec07-e.pdf>; As noted in the report, “Such clauses were included in certain federal statutes in response to Aboriginal people’s concerns about the legislations’ potential effect on their interests. First Nations and other Aboriginal groups saw inclusion of a non-derogation clause as a minimum stipulation that the law should be interpreted so as not to negatively affect their constitutional Aboriginal and treaty rights. It appears that for its part, the [federal] Department of Justice may have agreed to the clause’s inclusion as a matter of expediency, to avoid delays in the passage of a bill. Justice officials considered these clauses largely superfluous reminders of section 35 of the *Constitution Act, 1982*.”

⁶⁰ Auditor General of Ontario, “Annual Report: Value for Money Audit, Environment Assessment” (November 2016), online (pdf): <<https://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html>>.

⁶⁰ Auditor General of Ontario, “Annual Report: Value for Money Audit, Environment Assessment” (November 2016), online (pdf): <<https://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html>>.

loophole in the approval system.⁶¹ As an example, they cited the 2017 case of a small Eastern Ontario municipality which had a simple road paving project (Schedule A+) delayed for an entire year because of a PIIOR by an individual. They argued that “it is urgent that this be addressed.”⁶²

Class EA Exemptions Fast Tracked by Bill 108

On March 31, 2021, the Ministry provided an update on work on Bill 108, stating that they are still considering comments on class EA amendments⁶³ and exemption regulations that would reduce project delays and eliminate duplications.⁶⁴

Table 2: Low Risk Projects Exempted after Bill 108⁶⁵

Class EA	Class EA Holder	Exemptions
Municipal Class Environmental Assessment	Municipal Engineers Association	Schedule A and A+ projects
Public Work Class Environmental Assessment	Ministry of Infrastructure / Ministry of Government and Consumer Services	Category A projects
Class Environmental Assessment for Activities of the MENDM under the Mining Act(1)	Ministry of Energy, Northern Development and Mines	Category A projects
Class Environmental Assessment for Resource Stewardship and Facility Development Projects	Ministry of Natural Resources and Forestry	Category A projects
Class Environmental Assessment for Provincial Transportation Facilities (1)	Ministry of Transportation*	Group D projects
GO Transit Class Environmental Assessment(3)	GO Transit / Metrolinx	Group A projects
Class Environmental Assessment for Provincial Parks and Conservation Reserves(2)	Ministry of the Environment, Conservation and Parks (previously MNRF lead)	Category A projects

- (1) – Class EA to be subject to Future Proposed Project List Regulations
- (2) – Removed by amendments to R.R.O. 1990 Regulation 334

⁶¹Municipal Engineers Association (MEA), “Notice of Proposed Amendments: Municipal Class EA – Proposed 2019 Amendments”, online: <<https://municipalclassea.ca/amendments/notice-of-proposed-amendments.html>>.

⁶²Municipal Engineers Association (MEA), *Notice of Proposed Amendments: Municipal Class EA – Proposed 2019 Amendments*, <https://municipalclassea.ca/amendments/notice-of-proposed-amendments.html>

⁶³Ministry of the Environment, Conservation and Parks, “Environmental assessment modernization: amendment proposals for Class Environmental Assessments” (last updated 18 August 2020), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/019-1712>>.

⁶⁴Ministry of the Environment, Conservation and Parks, “Discussion paper: modernizing Ontario’s environmental assessment program” (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>.

⁶⁵Based on MOE presentation by Jamie Flagal to the OBA, MECP Update Day, May 2021.

(3) – to be removed by proposed exclusion from Future Proposed Project List Regulations

For further information on implementation of Bill 108, see Appendix A below.

Bill 197 - COVID-19 Economic Recovery Act, 2020

*Bill 197 (COVID-19 Economic Recovery Act, 2020)*⁶⁶ was introduced on July 8, 2020 and received Royal Assent on July 21, 2020.⁶⁷ This omnibus bill amended 43 pieces of legislation, including the *EAA* through Schedule 6.

Consultations on Bill 197 Exempted from EBR

The process to enact the Bill 197 amendments to the *EAA* immediately attracted considerable controversy in some sectors because the bill exempted the proposed changes to the *EAA* from the minimum 30-day notice and comment requirement as well as the public participation process under the Environmental Bill of Rights (EBR). To support its position, MECP posted notices on the Registry explaining that this approach would ensure that these proposed changes can be implemented expeditiously in order to support economic recovery efforts in the face of the COVID-19 pandemic. Despite this exemption embedded in Bill 197, the Ontario government has also stated that it intends to consult with the public, Indigenous communities, and stakeholders on new regulations to implement the amended *EAA*. Legal action was brought alleging that the Ontario government contravened the EBR when it proceeded with Bill 197 in the manner described above. For further discussion, see the summary of the Greenpeace case⁶⁸ in the final sections of this paper.

Shift to Project-based Approach

Prior to Bill 197, and until the transition is completed, EAs are required for all public sector activities. The *EAA* currently applies based on “who” is doing the work and not necessarily the impacts of the project being done. Since its introduction in 1975, various governments and public- and private-sector proponents have argued there has been a need to exempt many types of projects and some plans from the *EAA* requirements.

45 years after the *EAA* came into force, there are more than 50 exemption regulations under the *EAA* for large projects and smaller projects such as emergency wells, monuments, and minor road projects. Many private sector activities (e.g., waste management and electricity generation or transmission) are also subject to EA requirements through specific regulations.

⁶⁶MECP, "Proposed Environmental Assessment Act (*EAA*) Amendments in the COVID 19 – Economic Recovery Act" (July 8, 2020), online: <<https://ero.ontario.ca/notice/019-2051>>; *Bill 197*, *supra* note 4.

⁶⁷*Bill 197*, *supra* note 4.

⁶⁸Greenpeace Canada (2471256 Canada Inc.) v. Ontario (Minister of the Environment, Conservation and Parks) (“Greenpeace”), 2021 ONSC 4521 (Div Ct) [Hereinafter: Greenpeace].
<https://www.canlii.org/en/on/onscdc/doc/2021/2021onsc4521/2021onsc4521.html?autocompleteStr=2021%20ONSC%204521&autocompletePos=1>

Bill 197 amends the *EAA* to enable the development of a Project List through regulation, which will clearly identify the projects that are subject to EA, and move from “undertakings” to “projects”. The *EAA* will only apply to projects on the Project List, once it is developed.

The MECP’s position is that this new approach is consistent with EA frameworks across Canada and the new model will focus EA requirements and environmental oversight on high and medium impact projects.

As part of this transition, project lists are being drafted by the MECP. The proposed comprehensive EA project list was posted to the Environmental Registry in September 2020 and remains in the proposal stage. On November 26, 2021, the Ministry posted a revised proposal for the draft regulation on the Registry, outlining several amendments and the transition to a project list approach.⁶⁹ This posting was updated on December 20, 2021 “to clarify the voltage for transmission stations that would require a comprehensive environmental assessment.”⁷⁰

Private sector companies and proponents will want to monitor the MECP’s regulation development processes closely in the coming years to determine whether their proposed projects eventually are subject to one of the activity descriptions contained in the draft Project List regulations. It seems likely that future Project List regulations will include project types that were not included in the definition of an “undertaking” under the *EAA* and, thus, not previously subject to the *EAA*. Even so, it is conceivable that these projects could be subject to a streamlined EA process.

Narrowing Provisions on Part II Order Requests (PII ORs) are Clarified

As noted above, Bill 108 amended section 16 of the *EAA*⁷¹ such that Part II Order Requests (PII ORs; also known as elevation requests or bump-up requests), could only be issued by the Minister on fairly narrow grounds.⁷² The grounds for those requests were clarified by a significant rewrite of sections 16 and 16.1. This is a significant change that will affect the evaluation of small and medium-sized projects including municipal infrastructure.

Previously, the grounds for a bump up request were not limited in any way and often were made by individuals and civil society organizations outside of Ontario and Canada. Under the Bill 108 changes, only Ontario residents may request a Part II order, and requests from non-Ontarians

⁶⁹Ministry of the Environment, Conservation and Parks, “Moving to a project list approach under the Environmental Assessment Act” (last updated 18 January 2022), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/019-4219>>

⁷⁰ *Ibid.*

⁷¹From Bill 108, <https://www.ontario.ca/laws/statute/s19009#BK8>; (4) Section 16 of the Act is amended by adding the following subsection:

Grounds for order

- (4.1) After considering the matters set out in subsection (4), the Minister may issue an order under subsection (1) or (3) only if the Minister is of the opinion that the order may prevent, mitigate or remedy adverse impacts on,
- (a) the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the Constitution Act, 1982; or
 - (b) a prescribed matter of provincial importance.

⁷² Bill 108, s. 16(4)(1).

now are screened out. These amendments also clarified that the Minister may reconsider an undertaking's approval given under past versions of the *EAA*, and the Minister may request additional information from the proponent to inform this reconsideration.⁷³

Consistent with the *EAA* prior to the reforms contained in Bills 108 and 197, the Minister of the MECP may make the PII Order on their own initiative or on the request of a person.⁷⁴ However, under the Bill 108 amendments to the *EAA*, such requests were only available "on the grounds that the order may prevent, mitigate or remedy adverse impacts on the existing aboriginal and treaty rights of the aboriginal peoples of Canada."⁷⁵ Under section 15.1.1(9) of the *EAA*, proponents may not proceed with an undertaking if a section 16(6) request has been made until a decision on the request is reached. There is no time limit on when the Minister can make an order that has been requested by a person under section 16(6).

Previous Part II Orders Terminated

For individuals, civil society organizations, municipalities, corporations and other interested parties, s 38.2 prescribes that any request for a Part II order that was made before the *COVID-19 Economic Recovery Act, 2020* received Royal Assent was terminated, except for requests regarding adverse impacts on existing aboriginal and treaty rights.⁷⁶

The amendments also set timelines for when the Minister can intervene on their own initiative to impose conditions on or bump up a streamlined project. The Minister must make such an order within 30 days after the end of the comment period provided for in a notice of completion issued under the approved Class EA, unless the Minister provides notice otherwise.⁷⁷ The new time limit took effect when the Bill received Royal Assent.

For orders made by the Minister's own initiative, s 38.2 does not apply. The prohibition on proceeding with the undertaking under s 15.1.1(9) does not apply when the Minister is pursuing an order under their own initiative. Under section 16.1, the Minister cannot make an order on their own initiative if more than 30 days have elapsed since the comment period for the notice of EA completion ended, unless the Minister notifies the Director of their intention to make an order within the 30 days. As part of the notice of a proposed order, the Minister can include a request for information needed to determine whether or not to make the Part II order.⁷⁸ The proponent must provide the Director with the requested information within the specified timeline.⁷⁹ The director will then provide the proponent a notice of satisfactory or unsatisfactory response. Following a satisfactory response, the Minister has 30 days to make a Part II order.⁸⁰

⁷³*EAA*, s 11.4, 15.1.3.

⁷⁴*EAA*, s 16(4).

⁷⁵*EAA*, s 16(6).

⁷⁶*EAA*, s 38.2

⁷⁷*EAA*, s. 16.1(1)

⁷⁸*EAA*, s 16.1(3)

⁷⁹*EAA*, s 16.1(5)

⁸⁰*EAA*, s 16.1(6)

Following an unsatisfactory response, the proponent must issue a new notice of completion and provide the Director with the requested information within the specified time limit.⁸¹

Although the formal process for bump-ups has now been removed, concerned stakeholders can still raise concerns about flawed EAs using conventional advocacy tools such as letters to the Minister, the Premier, and the Auditor General of Ontario (where the office of former Environmental Commissioner of Ontario has been based since May 2019). In addition, working with the media and advocacy at municipal council are among the myriad tools available.⁸²

Bump-up case study: Guelph Residents for a Safe Speedvale Avenue

On October 29, 2020, the Guelph Residents for a Safe Speedvale Avenue sent a letter to the Minister of Environment, Conservation and Parks regarding the City of Guelph's Emma-Earl Bridge (EEB) Environmental Assessment requesting the project be bumped-up from a Schedule B to C project.⁸³ We believe this probably is the first bump-up request under the amended *EAA*. On December 16, 2020, the Ministry replied and determined that the project had not been planned in accordance with its Class EA requirements and that the Ministry had requested additional information from the proponent.⁸⁴ As of December 16, 2021, the Guelph Residents for a Safe Speedvale Avenue have not received any further communications or updates on this project from the City.

Streamlining of EAs

Prior to the Bill 197 amendments, the *EAA* applied to all "undertakings" in the province, with specific regulations or Ministry-approved documents reducing the procedural requirements for certain classes of projects or, in some cases, entirely eliminating the requirement for assessment. In order to streamline EA processes and expedite lower risk projects, the MECP relied on two principal mechanisms: Class EA documents and regulations.

As discussed above, a Class EA is a document that sets out a standardized planning process for classes or groups of activities. At present there are eight approved Class EAs, setting out streamlined processes for provincial highways, municipal works, minor transmission facilities, etc. However, as noted below under Class EAs section of this paper two Class EAs on forestry activities and parks planning are being phased out.⁸⁵

⁸¹*EAA*, s 16.1(9)

⁸²I recommended such an approach to an ENGO in the past year related to a Class EA project and it was successfully pursued.

⁸³ See Appendix G to read the full letter.

⁸⁴ MECP, Letter to Guelph Residents for a Safe Speedvale Avenue, December 16, 2020 regarding their Part II Order Request dated Oct. 29, 2020.

⁸⁵Ontario is implementing new regulatory exemptions from the *EAA* to remove forestry projects and projects within provincial parks from the *EAA* regime altogether. As a result, these amendments would terminate all *EAA* consultation obligations for applicable projects. On the Class EA for provincial parks, see: Ministry of the Environment, Conservation and Parks, "Environmental assessment modernization: Projects and activities within provincial parks and conservation reserves" (last updated 18 August 2020), online: <<https://ero.ontario.ca/notice/019-1804>>

In its 2019 discussion paper on the *EAA*, the MECP noted the pre-Bill 197 system for streamlined EA requirements for medium impact projects including eight Class EAs, and 3 regulations was inconsistent and irrational in the view of many proponents. Each streamlined and Class EA process has unique requirements for technical studies, assessment of impacts, public consultation and notification, and a variety of unique processes to address objections from the public. The MECP has further noted that the Part II Order process associated with streamlined or Class EAs has been subject to significant criticism for causing undue delay.

Bill 197 amends the *EAA* to establish a new Part II.4 to address all class and sectoral EA approvals under the heading of "Streamlined Environmental Assessments." This new Part II.4 provides the Minister with the power to order that a streamlined EA be subject to Part II.3 and its more rigorous requirements for "Comprehensive Environmental Assessments." According to the MECP, these changes will enable the Ontario government to promulgate new streamlined regulations with consistent and standardized processes to replace Class EAs. Class EAs will remain in place until these regulations are developed.

The streamlined EA project list has yet to be posted on the Environmental Registry. The Ministry has advised it will be implementing a phased approach to move from designating and exempting class EAs to the project list approach for streamlined EAs. As discussed further below, during the first phase of this transition, a new regulation designating projects as requiring comprehensive EAs will be enacted. In the interim, electricity, waste, and transit class projects will continue under the previous streamlined EA process set out in specific regulations (e.g., the designation and conditional exemptions).

Any undertakings to which class EAs applied must continue to comply with Part II.1 of the *EAA*. In the subsequent phases, projects will be moved from class EA or conditional exemptions to the streamlined EA process under Part II.4 of the *EAA*. New projects will be designated as Part II.4 projects rather than class EAs or conditional exemptions, with a regulation prescribing the EA requirements for Part II.4 projects.

Comment: Streamlining and scoping of approvals has been a type of 'Holy Grail' sought by consultants, engineers, proponent lawyers and others working in the environmental approvals and assessment fields since the early 1980s.⁸⁶ The Ontario MECP has developed various models in the past 30 years including "permit by rule" systems⁸⁷ for streamlining approvals for recycling

⁸⁶Audrey Armour and Reg Lang at the Faculty of Environmental Studies, York University began writing on the application of scoping in EIA and SIA in the late 1970s and early 1980s.

⁸⁷David McRobert, Reforming Legislation and Regulations to Promote the 3Rs: Some Observations on Ontario's Waste Management Act, 1992 and the Proposed 3Rs Regulations, Waste Reduction Office. Ontario Ministry of the Environment, September 1992, Presented to The Legal Implications of Legislating Waste "Destination Elimination: An Economic Vision", 13th Annual Conference, Recycling Council of Ontario October 7-9, 1992. Ottawa Congress Centre, Ottawa, Ont; <http://envstudiesyork.ca/public/law/wma-3r.htm> As described in the paper, "the provisions in subsection 34(2) of the WMA will allow accelerated approvals for certain key types of recycling sites by clarifying and streamlining the current approvals process under the EPA. At present (i.e. 1992), a "Provisional Certificate of Approval" (C of A) must be issued under section 27 of the EPA. Obtaining a C of A can be lengthy and cumbersome. Delays and uncertainties about approvals under these provisions have acted as a major regulatory barrier to implementing the 3Rs in Ontario.

and composting sites as part of the 3Rs regulations in 1994,⁸⁸ the various sectoral approvals regimes under the *Open Business for Act, 2011*, the streamlined approvals for renewal energy projects such as large solar arrays and wind turbine farms under the *Green Energy and Green Economy Act, 2009*⁸⁹ to name a few.

One of the effects of these transitions has been to shift many of these approvals out of the overall public participation process that previously was grafted onto existing approval systems under various environmental laws (e.g. *EPA, OWRA*) by Ontario's *Environmental Bill of Rights, 1993* (*EBR, 1993*). An environmental justice perspective would suggest we should fiercely protect public participation, accountability and transparency tools and often these scoping efforts, as well-intended as they may be, can be highly problematic for First Nations and Indigenous communities, ENGOs, citizen groups and other parties who have fewer financial resources to undertake judicial reviews or have less access to government officials.⁹⁰ First, they deprive civil society organizations, ENGOs, individuals and other concerned parties of the express opportunity to comment on proposed approvals and have those comments reviewed and summarized in a decision notice on the Environmental Registry.⁹¹ Second, the prescribed Ministries and proponents also are not required to consider the applicable Ministry Statement of Environmental Values (SEV). In certain cases, third-party appeal rights provided for approvals subject to the *EBR* may also be sacrificed.⁹² In addition, the jurisdiction of the Auditor General of Ontario to review compliance with various *EBR* requirements also is undermined, resulting in further reductions in transparency and accountability for decisions in the respective ministries.

The new approach, often called "permit-by-rule", should eliminate these barriers. Clear rules governing how sites must be developed and safeguarded to protect the environment will be published. Thus, the operator of a recycling site that meets the rules outlined in the proposed 3Rs regulations will be deemed to have a C of A for the site. The approval process will be enhanced further by a "one window, one voice" approach whereby approvals are coordinated by the regional operations staff of the MOE with the assistance of the WRO. As indicated in Initiatives Paper No. 1 (1991), the recycling sites or facilities that will be eligible for rapid approval under the new provisions include: deinking facilities for recycling paper; gypsum recycling plants; leaf and yard material composting sites; multi-material recycling facilities such as those that process Blue Box materials; and wood recycling sites.

⁸⁸See David McRobert, Reforming Legislation and Regulations to Promote the 3Rs; <http://envstudiesyork.ca/public/law/wma-3r.htm>. *ibid.*

⁸⁹For discussion, see David McRobert, Julian Tennent-Riddell and Chad Walker, Ontario's Green Energy and Green Economy Act, *Renewable Energy Law and Policy Review*, Vol. 7, No. 2 (2016). <https://www.jstor.org/stable/26256490>

⁹⁰David McRobert comments: The Commissioners, my colleagues and I at the Environmental Commissioner of Ontario saw many of these scoping provisions and streamlining processes as problematic. Indeed, at the ECO we saw one of our key roles as attempting to fiercely protect public participation, accountability and transparency mechanisms established under the *EBR, EAA, the ARA* and other key environmental laws.

⁹¹CELA, CIELAP and Ecojustice, ENVIRONMENTAL GROUPS CHALLENGE ONTARIO GOVERNMENT'S OPEN FOR BUSINESS ACT, 16 May 2010; http://www.cielap.org/pdf/May18OntENGO_ChallengeAct.pdf Under the proposed Act, Ontarians would lose fundamental legal rights established under the *Environmental Bill of Rights*, one of Ontario's most important laws. The *Open for Business Act* would remove the opportunity for public notice and comment for certain industrial activities that will be subject to a new environmental approvals process. Citizens would also lose the right to seek leave to appeal approval of these activities to the Environmental Review Tribunal. "The proposed legislation lays the foundation for the rollback of public participation rights in Ontario," said Ramani Nadarajah, counsel with the Canadian Environmental Law Association. "The government's action would undermine important legal rights which Ontario citizens have had since the enactment of the *Environmental Bill of Rights* in 1993."

⁹²*Environmental Bill of Rights, 1993*, SO 1993, c. 28, s 38 [*EBR*].

In sum, streamlining processes risk closing the door to early citizen input into a significant number of the government's environmental decision-making processes and can prevent potential environmental problems from being identified and corrected before final decisions are made and implemented. Indeed, there is a significant risk that, if streamlining isn't carried out in a careful manner, this could further weaken the implementation of Ontario's revised *EAA* and undermine its new EA decision-making processes.

Prescribing Standardized Workplans

For each project that undergoes a comprehensive (individual) EA, proponents must develop and consult on a workplan for the EA (e.g., Terms of Reference or ToR). For some sectors, such as waste management and electricity, workplans do not vary significantly from project to project. These projects typically require the same types of studies, alternatives and mitigation.

Bill 197 amends the *EAA* to clarify the authority to create standardized workplans (Sectoral Terms of Reference) through regulation for selected sectors. MECP has indicated that it will propose regulations for standardized Terms of Reference for key sectors including defining which projects are eligible to use the workplans.

The MECP estimates that project-specific workplans often take two years to complete and expects that standardized workplans based on sectoral considerations could reduce the length of time to complete the ToRs by up to one-and-a-half years

Deadlines and Expiry Dates

The *EAA* was amended to enable imposing a time limit through regulation on the submission of an EA following approval of a TOR, so that EA studies are completed in a reasonable period.

For 45 years, proponents and the Ministry have rarely met deadlines⁹³ and EAs without expiry dates never expire even though environmental conditions have changed (e.g., requirements for improved storm drains related to more intense rainfall events caused by climate change). In addition, prior to Bill 197, there was no maximum timeline under the *EAA* for proponents to carry out a comprehensive EA, nor is there an expiry date for some approvals. While there is a Deadlines Regulation under the *EAA*⁹⁴ that applies to the MECP, there are no consequences for a missed deadline.

Bill 197 amends the *EAA* to provide expiry dates for all comprehensive EAs that do not currently have an expiry date and that are not listed by regulation. Sections 11.5 and 17.25 of the amended

⁹³ At the MECP in the 1980s and the early 1990s draft EA studies and approval documents would sometimes languish on the desks of engineers and other MOE staff awaiting final review and comments. On occasion, it was suggested or rumoured that workload issues was not the main reason for the delay; indeed it was suggested that reviews of particular projects had been put "on hold" by the Minister's Office or Cabinet Office in advance of a municipal, provincial, or federal election or a by-election call. The concern was around the controversy that releasing approval information or MOE comments about a particular landfill, EFW, transfer station, recycling or composting site might generate for certain incumbent candidates involved in the approval.

⁹⁴ *Deadlines Regulation*, O. Reg. 616/98.

EAA create an expiry date for projects that have not been substantially commenced ten years after receiving approval,⁹⁵ though these amendments have not yet been proclaimed. This will include the possibility for extension if appropriate. The MECP argues that this will ensure that if a project isn't built in a timely manner and environmental circumstances have changed, a new EA would be required in order to proceed, unless the project is listed in a regulation.

MECP has indicated that it will develop and consult on a regulation that will list projects which are not subject to the expiry provisions. These *EAA* amendments will come into force on proclamation of Schedule 6, section 17 of the *COVID-19 Economic Recovery Act, 2020*. On November 26, 2021 the MECP posted its proposal to extend the expiry date for *EAA* approvals by 10 years for certain projects once the relevant amendments to the *Act* come into effect. This extension will allow the projects to proceed (subject to any other permits and approvals required) instead of requiring a new environmental assessment to be completed.⁹⁶ The proposal notice lists nine projects that will not be subject to the normal 10-year expiry provisions.⁹⁷ The proposed extensions would be granted through Minister's notices and the approval for these projects will not expire upon proclamation of the expiry date provisions in the *EAA*. The MECP states that the extensions "will ensure that the commitments made by proponents during consultation on these projects will be carried out and subject to any other permits and approvals required."⁹⁸ However, the MECP goes on to note that, if at any time new information or a change in circumstance comes to the attention of the ministry, the Minister may consider this information and, where appropriate, may reconsider the approval and revoke or amend it.

Federal-Provincial Coordination

As a matter of policy, Ontario supports the principle of "one project-one review". In the late 1980s, the Canadian Council of Ministers of the Environment (CCME) began to work on the coordination of environmental laws, standards and policies across Canadian jurisdictions. One of the areas that was targeted for greater coordination and cooperation was EA work under provincial laws and policies and the federal EA law.

Since the mid 2000s, federal and provincial EAs in Ontario have been coordinated, but still follow two processes and have two decisions. In 2004, Ontario and Canada reached a cooperation agreement signed outlining a process for coordination when both provincial and federal EA requirements occur.

The Ontario-Canada Agreement on EA Cooperation (2004) sets out how the two jurisdictions coordinate EA processes when a provincial and federal EA is required for the same project.

⁹⁵*EAA*, s 11.5, 17.25.

⁹⁶MECP, "Extending the expiry date for Environmental Assessment Act approvals for certain projects" posted to ERO on November 26th, 2021 (ERO 019-4428); <https://ero.ontario.ca/notice/019-4428>

⁹⁷The projects subject to extensions include: H. Dodge Haulage Landfill Expansion project; the Markham North-South Corridor Public Transit Improvement Project; the Niagara People Mover Transit System project; the Ottawa-Carleton Cumberland Transitway project; the Windsor Marina project; and the Highway 17 Haley Station to Meath Hill project.

⁹⁸MECP, "Extending the expiry date for Environmental Assessment Act approvals for certain projects" posted to ERO on November 26th, 2021 (ERO 019-4428); <https://ero.ontario.ca/notice/019-4428>

While the intent was to have one-project, one-process, with two decisions (provincial and federal), in practice, proponents must complete requirements under both processes, which can require lengthy consultation and assessment.

Bill 197 amends the *EAA* to clarify existing provisions that allow for harmonization to include substitution (one process, two decisions) where both federal and provincial EA requirements exist. The MECP also has stated that Ministry staff will continue working with the federal government to update the current Ontario-Canada Agreement on EA Cooperation. Moreover, provincial staff were actively engaged in the federal government's initiative to review its impact assessment legislation before it came into force in August 2019. However, sore spots remain. As discussed below, perhaps the most prominent example is the controversy about development in the Ring of Fire region of northern Ontario.

Shift to Digital Platforms for EA Documents

For 45 years, the EA program in Ontario was a paper-based program. EA studies and documents are large and often have been hard to access. Ontario currently is the only jurisdiction in Canada that does not allow online submission of EA documents and studies. In addition, not all proponents make EA information available online. Consequently, EA information is often found in different places. For comprehensive EAs, information is posted on www.ontario.ca and proponent websites. For streamlined EAs, information may be posted on a proponent website, but not in all cases.

Bill 197 amends the *EAA* to enable the Ministry to require online submissions of EAs in the future, once a platform is developed. The amended law also enabled the Ministry to require proponents of Comprehensive EAs (formerly individual EAs) to make information available online.

Municipalities provided with the authority to approve landfills

In 2018, Ted Comiskey, the Mayor of Ingersoll, established the "Demand the Right" Coalition of Ontario Municipalities, and began seeking support from other municipalities for legislation that would allow municipalities to say no to large projects like wind farms and landfills.⁹⁹ On March 1, 2018, Ernie Hardeman, MPP for Oxford, the riding that includes Ingersoll, introduced a Private Members' Bill dealing with the issue.¹⁰⁰ During the 2018 election campaign,

⁹⁹Harry Dahme and Jessica E.M. Boily, "The end of new landfills in Ontario? Proposed amendments to the Environmental Assessment Act and the impact on waste management," (22 July 2020), online: *Gowling WLG* <<https://gowlingwlg.com/en/insights-resources/articles/2020/end-landfills-ontario-impact-waste-management/>>.

¹⁰⁰Bill 201, Respecting Municipal Authority over Landfilling Sites Act, 2018, <https://www.ola.org/en/legislative-business/bills/parliament-41/session-2/bill-201>. Bill 201 would have amended the *EAA* to prevent the Minister of the Environment, Conservation and Parks from giving approval to an undertaking unless the municipal council had passed a resolution supporting the establishment of the landfilling site. The Bill did not receive Second Reading in the Legislature and died on the Order Paper when the Legislature was dissolved before the June 2018 provincial election.

Conservative Leader Doug Ford stated that he respected "the right for local municipalities to make the decisions best for their communities."¹⁰¹

By late 2018, more than 140 municipalities had signed on to the "Demand the Right" coalition to provide municipalities with the authority to approve new landfills and wind turbines. In November 2018, the MECP stated it intended to provide "municipalities and communities they represent with a say in landfill siting approvals" when it released its Made-in-Ontario Environment Plan.¹⁰² However, no firm commitment to a municipal veto was made by the MECP at that time. Moreover, it is unclear as to whether most municipal members of the "Demand the Right" Coalition believed that the proposed changes should only apply to new landfills, and not also to expansions of existing landfills.

Apart from reference to the commitment in Made-in-Ontario Environment Plan, there were no further public consultations on the proposed amendments to the *EAA* affecting landfill approvals prior to the introduction of Bill 197 and the issue was not expressly raised in the MECP's April 2019 discussion paper on EA reforms. Consequently, it was somewhat surprising to and unanticipated by many private sector waste companies, as well as their lawyers and their consultants, that Bill 197 amended the *EAA* to require the proponents of new, large landfills (e.g., those that require an individual (comprehensive) EA) to obtain support from:

1. host municipalities; and
2. adjacent municipalities where there is land with authorized residential uses that is within a 3.5km distance (or such distance as may otherwise be prescribed) from the proposed new landfill site property boundary.¹⁰³

This requirement applies to single tier and lower tier municipalities. The MECP has advised that existing regulation-making authority could be employed when needed to provide exemptions from the requirement for proponents to obtain municipal support (e.g., may want to override where there is severe landfill constraint, public health concerns).

The amendments also apply to landfill proposals that had been submitted prior to Bill 197 but are still in the process of receiving approval through transition provisions. Thus, municipal support would be required before a decision could be made on the EA. It is unclear as to how exactly these changes will affect future approvals for landfills. In an article in July 2020, Harry Dahme and Jessica Boily state that the amendments appear to "provide municipalities with the unprecedented ability to stop new landfills for any reason, even where the environmental assessment for that landfill would otherwise be satisfactory to the provincial government."¹⁰⁴

¹⁰¹Ted Comiskey, "As promised, municipal powers need to include the right to approve landfill sites" (last updated 2 March 2020), online: *The Hamilton Spectator* <<https://www.thespec.com/opinion/contributors/2018/11/11/as-promised-municipal-powers-need-to-include-the-right-to-approve-landfill-sites.html>>.

¹⁰²Ministry of the Environment, Conservation and Parks, "A Made-in-Ontario Environment Plan" (last updated 17 August 2021), online: *Government of Ontario* <<https://www.ontario.ca/page/made-in-ontario-environment-plan>>.

¹⁰³*EAA*, s 6.0.1.

¹⁰⁴Harry Dahme and Jessica E.M. Boily, "The end of new landfills in Ontario? Proposed amendments to the Environmental Assessment Act and the impact on waste management," (22 July 2020), online: *Gowling WLG* <<https://gowlingwlg.com/en/insights-resources/articles/2020/end-landfills-ontario-impact-waste-management/>>.

This amendment further highlights the clear lack of meaningful Indigenous consultation within these processes. Furthermore, it is unclear whether neighbouring reserves or traditional territories would fall under “adjacent municipalities” in this consultation process. Landfill siting has historically faced severe NIMBYism (‘not in my backyard’) and has disproportionately impacted marginalized, racialized, and Indigenous communities. Should Indigenous communities not be included within this new municipality-centred process, these impacts would only be made worse.

Proposed Project List Regulation for Comprehensive EAs

As part of the transition to the new *EAA* regime, project lists are being drafted by MECP staff. A proposed comprehensive EA project list was posted on the Environmental Registry in September 2020¹⁰⁵ and remains in the proposal stage, and the Ministry has committed to a subsequent posting of the draft regulation designating Part II.3 projects.

According to the September 2020 proposal, transition provisions will be in place to ensure that projects already undergoing an Individual EA (e.g., projects for which, at a minimum, ToRs have been submitted to the Ministry) can continue uninterrupted and not have to duplicate or redo any work solely as a consequence of the new project list.¹⁰⁶ Once the project list is finalized, the MECP will proceed to develop specific regulatory language for posting and public comment. The adoption of project list regulations will not affect the Minister’s authority to designate non-listed projects for review.

In its September 2020 Registry notice, the MECP explains that its Project List approach will be guided by the principle that “projects with the most significant impacts” will have the most comprehensive assessment process. Accordingly, the MECP has identified criteria based on its experience with the EA process that staff will use to develop the Comprehensive EA Project List.

In the ministry’s experience, the following criteria tend to be predictors of the significant potential environmental impacts that would warrant listing a project as requiring a Comprehensive Individual EA:

1. the magnitude of the effect
2. the geographic extent of the effect
3. the duration of the effect
4. the frequency of the effect
5. the degree of reversibility of the effect
6. the possibility of occurrence of the effect¹⁰⁷

¹⁰⁵Ministry of the Environment, Conservation and Parks, “Proposed Project List for comprehensive environmental assessments under the Environmental Assessment Act (*EAA*)” (last updated 11 September 2020), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/019-2377>>; See also Ontario Regulatory Registry, Proposed Project List for comprehensive environmental assessments, under the Environmental Assessment Act (*EAA*), <https://www.ontariocanada.com/registry/view.do?postingId=34327>

¹⁰⁶ This was reiterated in the regulatory proposals posted on the Environmental Registry on November 26, 2021.

¹⁰⁷MECP, Proposed Project List for comprehensive environmental assessments under the *EAA*, supra note 89.

Nevertheless, the MECP also notes that “eliminating duplication with other legislation, policies or processes is another consideration that has guided this proposal and will continue to guide the finalization of the Comprehensive EA Project List.”¹⁰⁸

With respect to waste management, transportation and electricity projects,¹⁰⁹ the MECP’s proposal includes projects that are currently designated for Individual EAs and has generally maintained the same trigger thresholds. The proposal also covers other projects for which no regulatory exemptions are available (including by way of allowing a less onerous EA screening).

The project categories as set out in a chart included with the September 20, 2020 proposal¹¹⁰ include:

- Electricity—including certain large-scale transmission lines, transformer stations, hydroelectric facilities, generation facilities that use oil as a fuel, as well as significant modifications to existing electricity projects of these types.
- Waste Management—including certain landfills, disposal sites for hazardous or liquid industrial waste, thermal treatment sites, and significant changes to existing waste disposal sites.¹¹¹

¹⁰⁸ MECP, *Ibid.*

¹⁰⁹ See: *Waste Management Projects*, O Reg 101/07, *Transit Projects and Metrolinx Undertakings*, O Reg 231/08, and *Electricity Projects*, O Reg 116/01.

¹¹⁰ Ministry of the Environment, Conservation and Parks, “Proposed Project List for comprehensive environmental assessments under the Environmental Assessment Act (EAA)” (last updated 11 September 2020), online: Environmental Registry of Ontario <https://ero.ontario.ca/notice/019-2377>; See also Ontario Regulatory Registry, “Proposed Project List for comprehensive environmental assessments, under the Environmental Assessment Act (EAA)” (online): <<https://www.ontariocanada.com/registry/view.do?postingId=34327>>

¹¹¹ This regulation will replace the Waste Management Projects regulation (O. Reg. 101/07) promulgated under the EAA in March 2007 – as well as an incorporated guide, which together establish a simplified assessment process for certain types of waste disposal projects in Ontario and will have applied for nearly 15 years if the new regime begins to apply in 2022. The 2007 process, called the Environmental Screening Process for Waste Management Projects (the “Screening Process”), was intended to provide a faster, easier and more predictable assessment process for some waste projects than the full EA. Proponents under the Screening Process are required to screen their proposed projects for potential negative environmental effects, conduct studies, and develop mitigation measures. However, proponents are not required to consider the “need” for the project or to consider potential “alternatives” (including alternatives to the project type, the technologies employed or the location selected).

Proponents are required to notify the public of their Screening Process, as well as engage in two additional phases of public consultation. However, they are allowed to use their discretion in determining the method of consultation. Proponents are also required to consult with the affected government agencies (including MOE) during the Screening Process, but the government is not required to provide any comments or advice to the proponents.

At the end of the Screening Process, the proponents must publish an Environmental Screening Report. At this point, members of the public may submit a request to the MOE Director to have the project elevated to an individual EA. Only if an elevation request is made, is the ministry required to review the Screening Report. Moreover, there is no requirement for the government to either approve or reject the Screening Report, nor is there any requirement for the ministry to monitor the proponents’ compliance with these reports.

Because of its lower level of scrutiny, the Screening Process is intended to be used only for projects that have “predictable environmental effects that can be readily mitigated”. However, the Waste Management Projects

- Transportation—including certain provincial freeways and municipal expressways. While most provincial and municipal transportation projects are subject to streamlined class EA under the current O. Reg. 231/08, the MECP is proposing to set the threshold for Comprehensive EA at 75 km (either new or extension) in alignment with the federal impact assessment threshold.

The MECP also proposed to include three additional project types for Comprehensive EA:¹¹²

- Conservation—significant flood and erosion control projects, excluding projects on previously developed lands. Example criteria include: land area, total shoreline affected, proximity to major settlement areas, amount of river re-aligned, siting in an area of concern, and natural heritage impact.

Regulation designates a number of waste disposal projects as subject to the Screening Process that were previously subject to the full EA requirements under the EAA, and thus previously deemed to be “major projects with the potential for significant environmental effects”. For example, proponents of mid-size municipal landfills (with a capacity between 40,000 m³ and 100,000 m³), most energy-from-waste (EFW) facilities, and small incinerators that do not produce energy – which were all previously required to conduct a full EA – are now eligible to conduct the Screening Process instead.

MOE did not provide any science-based rationale to support the government’s decision to change the EA treatment for many waste projects. Nor did the government finalize a provincial waste management policy to support its decisions to favour certain types of waste management projects and ‘fast track’ them under the simpler Screening Process. Many commenters on the 2007 regulation via the Environmental Registry noted that the policy decisions implemented in the regulation – such as the preference for EFWs and smaller landfills over other types of incinerators and larger landfills – remain unsupported by transparent and credible policy rationales. Most of these commenters were strongly opposed to the direction taken in this regulation. In addition, since both public and private sector prescribed waste management projects undergoing the Screening Process will be proceeding in accordance with an EAA designation and exemption, all approvals related to these projects (such as Certificates of Approval for air emissions) – which would otherwise be subject to public notice, comment and appeals rights under the *Environmental Bill of Rights (EBR)* – will now be exempt from the EBR public consultation requirements. Given that projects under the Screening Process are only subject to minimal consultation requirements, the effect of the *EBR* exemption is a serious loss of transparency and public participation and appeal rights for approvals related to waste management projects.

While providing a streamlined EA process for a group of similar projects is appropriate in many cases, an adequate policy framework (which is subject to public consultation and debate) to provide the context and support for the development of such a streamlined process. In this case, the government did not develop the necessary framework to support the streamlined Screening Process. An appropriate framework should include a provincial waste management strategy that clearly sets out the actual need for waste disposal capacity in the province and the province’s preferences for different types of waste projects, as well as sound scientific information regarding the environmental impacts of the different waste options. Without such a policy framework developed in consultation with the public, it is arguable that it was premature for the MECP to develop a new Screening Process that promotes certain types of waste facilities, and eliminates the requirement to assess “need” and “alternatives”.

¹¹²Ministry of the Environment, Conservation and Parks, “Moving to a project list approach under the Environmental Assessment Act” (last updated 18 January 2022), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/019-4219>>

- Railway—intra-provincial rail lines capable of carrying freight or passengers between cities and requiring at least 50 km of new right of way (or an extension of 50 km or more on a new right of way), which aligns with the federal impact assessment threshold.
- Mining—In September 2020, the MECP indicated it was seeking feedback on whether certain mining projects should be included in the Comprehensive EA project list. Indigenous organizations, First Nations, northern communities and ENGOs have advocated that large mining projects ought to be subject to the *EAA* for decades.¹¹³

Update on Project List Consultations and the Comprehensive EA Project List, Nov. 2021

On November 26, 2021, the MECP posted a revised proposal titled “Moving to a project list approach under the *EAA*” on the Registry.¹¹⁴ (See ERO number 019-4219). Comments close on January 25, 2022.

If approved by the provincial cabinet, the proposed regulation will:

- Revoke the Electricity Projects regulation (O. Reg. 116/01) and Waste Management regulation (O. Reg. 101/07), which currently designate the electricity and waste management projects that require an individual EA;¹¹⁵
- Set new thresholds for certain electricity, waste management and transit projects to undergo a comprehensive EA, rather than a streamlined EA;
- Specify which electricity, waste management and transit projects can proceed following a streamlined self-assessment process, in most cases permitting projects currently allowed by regulation to follow a streamlined EA process to continue to follow such a process;
- Clarify that transit projects currently captured by the Transit Projects and Metrolinx Undertakings regulation¹¹⁶ are conditionally exempt from the requirement to undergo a comprehensive EA, so long as their proponents comply with the TPAP described in that regulation or another streamlined process set out in an applicable Class EA document;
- Change the trigger for assessment from the planning, design, operation and decommissioning of a project, to the “establishment” of a project, which is defined to exclude project planning, land acquisition and the issuance of licences or permits for a project;
- Prohibit proponents seeking to expand the capacity of existing facilities from artificially segmenting prospective expansions to avoid a comprehensive EA;
- Revoke the Class EA for GO Transit Facilities, as this Class EA is rarely used by Metrolinx (they follow the Transit Project Assessment Process (TPAP) instead);
- Designate highways under 75 kilometres in length as subject to the streamlined EA process under the MTO Class EA;

¹¹³In the late 2000s, a coalition of the ENGOs submitted a request for review to various ministries prescribed under the EBR to require that mining projects be subject to the *EAA*.

¹¹⁴MECP, “Moving to a project list approach under the *EAA*” Posted on the Registry on Nov. 26, 2021. (See ERO number 019-4219); Comments close on Jan. 25, 2022; (<https://ero.ontario.ca/notice/019-4219>)

¹¹⁵*Ibid.*

¹¹⁶O. Reg. 231/08 (Transit Projects and Metrolinx Undertakings Regulation)

- Designate certain new passenger rail projects requiring more than 50 kilometres (km) of new right of way and highway projects requiring more than 75 km of new right of way as subject to a comprehensive EA; and
- Designate waterfront “works” along the Great Lakes-St. Lawrence River System as subject to a comprehensive EA if they both alter at least one kilometre of shoreline and require at least four hectares of lakebed to be filled.

The proposed regulations and future amendments also will include:¹¹⁷

- Revoking *EAA*, R.R.O. 1990, Regulation 334 (General Requirements);¹¹⁸
- Establishing a regulation exempting from the application of all or part of the *EAA* certain undertakings and designated projects, including municipal waste pilot projects, municipal zoning orders, undertakings by specific provincial ministries and provincial government undertakings carried out for the purpose of implementing a renewable energy project; and
- Creating a transitional regulation setting out rules governing how projects currently required to undergo individual EAs will be dealt with once the “project list” regulations made under the *EAA* enter into force.

The MECP has further advised the ministry will not be incorporating any EA requirement changes for advanced recycling projects into the proposed Comprehensive EA projects regulation, and continues to consider how to streamline this EA process.¹¹⁹

As part of the transition to the project list approach, the MECP posted the “Environmental assessment requirements for advanced recycling facilities under the Environmental Assessment Act (EAA)” to the ERO on January 14, 2022.¹²⁰ These proposed changes are intended to simplify the EA approval process for recycling and energy from waste (EFW) facility projects that meet high standards. The reasoning behind this is that “advanced recycling and energy recovery technologies can help recover valuable resources from Ontario’s waste and keep it out of landfills. They use heat and pressure to break down hard-to-recycle plastics and other waste into materials that can be reused to create new products or replace fossil fuels,” and thus the Government of Ontario wants to support the implementation of these technologies at a faster pace.

Although its initial “Proposed Project List Regulation for Comprehensive EAs” released in Sept. 2020 included mineral development projects, the MECP has not included them in the proposed regulation, and they will remain under the streamlined process as applicable. The MECP has decided not to designate mining projects as subject to the *EAA*, on the basis that environmental considerations are adequately considered through the application of other legislation such as the Mining Act.

¹¹⁷*Ibid.*

¹¹⁸*General Requirements*, RRO 1990, Reg. 334

¹¹⁹ RRO 1990, Reg. 334, *ibid.*

¹²⁰ Ministry of the Environment, Conservation and Parks, “Environmental assessment requirements for advanced recycling facilities under the Environmental Assessment Act (EAA)” (last updated 14 January 2022), online: *Government of Ontario* <<https://ero.ontario.ca/notice/019-4867>>.

As noted below, projects currently subject to a Class EA will continue to comply with these requirements until a project list designated the project under Part II.4 of the *EAA*.

Although many electricity, waste management and transit projects previously designated by regulation as subject to an “individual” EA will still need to complete a “comprehensive” EA once the amended *EAA* enters into force, the proposed regulation nevertheless adds a number of new project types and modifies thresholds for certain existing project types that currently require an individual EA.

Consultations on the Class EAs and Proposed Class EA Amendments¹²¹

As noted above, as of July 2020 there were ten approved Class EAs, setting out streamlined processes for provincial highways, municipal works, minor transmission facilities, and other projects. These Class EAs continue to apply until the Streamlined EA Regulations begin to replace the various Class EAs in the future.

Following the changes made to the *EAA* through Bill 108, the More Homes, More Choice Act, 2019, Class EA holders were asked to bring forward amendment proposals to their respective Class EAs. Over the last 18 months, the MECP has begun to work closely with the Municipal Engineers Association and other Class EA holders to review areas of duplication and opportunities for process efficiencies to bring projects to implementation sooner.

According to a Registry notice published in August 2020, the MECP was consulting on proposed amendments to eight Class EAs:

- Municipal Class EA (Municipal Engineers Association)
- Waterpower projects (Ontario Waterpower Association)
- Minor Transmission Facilities (Hydro One)
- Remedial Flood and Erosion Control Projects (Conservation Ontario)
- Activities of ENDM under the *Mining Act* (MENDM)
- Resource Stewardship and Facility Development (MNRF)
- Public Work (Ministry of Government and Consumer Services)
- Provincial Transportation Facilities (Ministry of Transportation)

These amendments to the Class EAs are intended to largely focus on aligning the level of assessment for a project with the potential environmental impact.¹²² Some of the proposed changes to the eight Class EAs include:

¹²¹Ministry of the Environment, Conservation and Parks, “Environmental assessment modernization: amendment proposals for Class Environmental Assessments” (last updated 18 August 2020), online: *Government of Ontario*<<https://ero.ontario.ca/notice/019-1712>>.

¹²²Ministry of the Environment, Conservation and Parks, “Environmental assessment modernization: amendment proposals for Class Environmental Assessments” (last updated 18 August 2020), online: *Government of Ontario*<<https://ero.ontario.ca/notice/019-1712>>.

- changing requirements for some projects, including reducing requirements for certain projects, or exempting projects altogether
- establishing or updating screening processes to determine the appropriate categorization for a project
- updating the Class EAs to ensure consistency with the *Environmental Assessment Act* as a result of the passage of the *More Homes, More Choice Act, 2019*
- administrative changes to correct errors; update references to legislation and regulations; clarify the existing text; and update references to bodies, offices, persons, places, names, titles, locations, websites, and addresses

The MECP has indicated they will take into account all comments received during the 45-day consultation conducted in 2020 when making a decision on the proposed Class EA amendments.

Removing Forestry and Parks Planning from the *EAA*

As part of the EA modernization efforts, the MECP also has amended Regulation 334¹²³ and revoked Declaration Order MNR-75¹²⁴ to exempt forestry activities within the boundaries of a vast area that includes portions of central and Northern Ontario between the Quebec and Manitoba borders from *EAA* requirements. The MECP and the Ministry of Northern Development, Mines, Natural Resources and Forestry (MNDMNR) argue that these changes remove duplication between *EAA* requirements and the MNDMNR policies, regulations and guidelines. MNDMNR has four manuals under the *Crown Forest Sustainability Act, 1994* that outline the rules and procedures the Ministry and proponents must follow for forest management planning.¹²⁵ MNDMNR asserts that it has incorporated almost all conditions into its forest management and policy framework, and protection of the environment will continue to be considered as part of the Ministry's forest management planning. In addition, the MNDMNR have stated that key documents such as the Ministry's Forest Management Planning Manual (FMPM) will be updated on an ongoing basis.

MNDMNR also “plans to continue to implement the issues resolution process found in the Forest Management Planning Manual as the single process for addressing issues raised during forest management planning.”¹²⁶ Further, the Ministry is proposing to make clarifications to its issue resolution process as part of its 2020 revisions to the FMPM. MNDMNR also will “continue to monitor and undertake reviews of the issues resolution process to identify the need for potential improvements.”

¹²³See Appendix E, Amendments to RRO 1990 Regulation 334 Related to Forest Management made by O Reg 337/20; *General Requirements*, RRO 1990, Reg 334.

¹²⁴Ministry of the Environment, Conservation and Parks, “Proposed amendments to General Regulation 334 under the Environmental Assessment Act to remove Regulatory Duplication of Forest Management requirements in Ontario”(last updated 30 June 2020), online: <<https://ero.ontario.ca/notice/019-0961>>.

¹²⁵Since the Class EA for Timber Management was issued and the CFSA was enacted in 1994, the Ministry of Energy, Northern Development, Mines and Natural Resources has developed numerous policies, manuals, programs and procedures that ensure oversight and protection of the environment in forest management planning activities. Many of these were developed to fulfil terms and conditions set out in Class Timber Management EA decision issued by the Environmental Assessment Board in 1994.

¹²⁶Ministry of the Environment, Conservation and Parks, “Proposed amendments to General Regulation 334 under the Environmental Assessment Act to remove Regulatory Duplication of Forest Management requirements in Ontario”(last updated 30 June 2020), online: <<https://ero.ontario.ca/notice/019-0961>>.

Projects within provincial parks approved under another MNDMNRF Class EA also will be removed the *EAA* regime altogether.¹²⁷ As a result, these amendments would terminate all *EAA* consultation obligations for applicable projects.¹²⁸

MECP Update on Proposed Amendments to Class EA Documents, Nov. 2021

As noted above, on November 26, 2021, the MECP released four draft regulations and clarified its intentions with respect to further updates on Class EA documents. The MECP advises that to facilitate the transition to a project list-based framework it is proposing to keep in place all but one of the Class EA documents previously approved by the Minister of the Environment, Conservation and Parks until a streamlined project list regulation enters into force.

Consequently, proponents whose projects are subject to an existing Class EA will be able to proceed with their projects by complying with the self-assessment process prescribed by the applicable Class EA document. The Ministry proposes to amend six of the ten existing Class EAs in order to align their requirements with the project descriptions and thresholds set out in the proposed Comprehensive Project List Regulation. In addition, the government plans to amend all Class EAs (other than the GO Transit Class EA, which it proposes to revoke) to both update their terminology and to incorporate references to provisions of the revised *EAA*.

Status of Municipal Class EA

As noted above, the transition to streamlined regulations for the various Class EAs will take place in the coming years. Thus, the existing Class EAs remain in place until the new regulations are passed.

In the interim, the Municipal Engineers Association (MEA) have been working with the MECP and other affected stakeholders on proposed changes to the Municipal Class EA document (the Municipal Class EA or MCEA). The Municipal Class EA sets out the procedure to be followed in order to plan municipal infrastructure projects, including roads, water, wastewater and transit projects, in a way that protects the environment.¹²⁹

The Municipal Class EA currently classifies projects into four categories:

- Schedule A projects generally include normal or emergency operational and maintenance activities. Schedule A projects include snow and de-icing operations, normal operation of

¹²⁷Ministry of the Environment, Conservation and Parks, “Environmental assessment modernization: Projects and activities within provincial parks and conservation reserves” (last updated 18 August 2020), online:<<https://ero.ontario.ca/notice/019-1804>>.

¹²⁸Authors’ note: at the time of writing, we were unable to clarify whether this change to the application of the Class EA on Parks actually has been implemented by the MECP.

¹²⁹Municipal Engineers Association (MEA), “Notice of Proposed Amendments: Municipal Class EA – Proposed 2019 Amendments,” online:<<https://municipalclassea.ca/amendments/notice-of-proposed-amendments.html>>.

sewage treatment plants and reconstruction of transit stations where no land acquisition is required;

- Schedule A+ projects are similar to Schedule A projects, but the public must be advised prior to implementing A+ projects. Schedule A+ projects include construction or removal of sidewalks within existing protected rights of way, retiring water or wastewater facility and new transit stops;
- Schedule B projects generally include improvements and minor expansions to existing facilities. Schedule B projects include expanding existing water treatment plant to existing rated capacity where land acquisition is required and constructing new transit stations in or adjacent to residential land-use or environmentally-sensitive area; and
- Schedule C projects generally includes the construction of new facilities and major expansions to existing facilities. Schedule C projects include constructing a new sewage system and widening an existing road to create new transit lanes for bus or light rail.

Bill 108 amended the *EAA* to exempt Class A and A+ projects from Municipal Class EA requirements, because the MECPC has categorized them as low-impact projects with minimal environmental effects. However, Schedule B and C projects continued to follow the Class EA process and will likely be subject to future streamlining regulations promulgated under the Bill 197 amendments to the *EAA*.

MEA advocates for exempting more projects from Municipal Class EA

The MEA continues to advocate for additional exemptions in its latest round of proposed amendments to the Municipal Class EA by classifying more Schedule B projects as Schedule A and A+ projects.¹³⁰ Accordingly, these projects also would be pre-approved and would not need to follow the Class EA process.

Among the municipal projects that would be exempted is the following type:

- the replacement of a water intake pipe for a surface water source is a Schedule B project in the MCEA that normally are subject to a screening process, including consultation with those who may be affected. Under the proposed changes to the Municipal Class EA, this project would shift from a Schedule B to Schedule A+ project, meaning no Class EA requirements apply to the project, with the exception of notifying adjacent residents. The rationale for exempting this project from a Municipal Class EA is that such a project would be evaluated and approved through other permits, including the Environmental Compliance Approval and Permit to Take Water process.¹³¹

Changes to the Cost Limit that establishes the appropriate MCEA Schedule

¹³⁰Municipal Engineers Association (MEA), “Notice of Proposed Amendments: Municipal Class EA – Proposed 2019 Amendments,” online:<<https://municipalclassea.ca/amendments/notice-of-proposed-amendments.html>>.

¹³¹Lianne Langstaff and Larissa Parker, “Implications Of Bill 197 For Municipal Class Environmental Assessments: Reducing The Application And Scope Of Class EAs For Municipal Infrastructure Projects”(26 August 2020), online: *Gowling WLG*<<https://gowlingwlg.com/en/insights-resources/articles/2020/bill-197-municipal-class-environmental-assessments/>>.

The cost limits have been adjusted for inflation to \$2.7m and \$10.3m in 2019 under the most recent changes to the Municipal Class EA. However, in the future, MEA is planning to amend the MCEA to remove cost as a criterion for determining the schedule of a project.¹³²

MEA Interpretation of the Changes to Part II Order Requests

In their 2020 annual monitoring report for the MECP on the application of the MCEA, the MEA advises that “the MECP has amended the *EAA* to restrict the application of Part II orders. They go on to explain that the PIOR process “will only apply if the concern relates to an aboriginal or treaty rights” and proponents subject to the MCEA “are now responsible to resolve any concerns/objections.”¹³³ Query as to whether this is the correct interpretation of the revisions to section 16 of the *EAA*.

MECP’s Projected Shortened Timelines for Environmental Assessments

Through the Bill 197 legislative amendments passed in July 2020 and future regulatory amendments, the MECP anticipates a reduction in overall timelines for comprehensive environmental assessments and other streamlined projects by approximately 50%.

As an example, the MECP provided timelines for a reference project, in this case the Capital Region Recovery and Recycling Centre. As shown in Table 2, the timeline for the complete EA process for that reference project was approximately six years. In contrast, the MECP has estimated that the process changes and streamlined timelines established by the Bill 197 amendments after various regulations are promulgated should be halved; that is, the total timeline for a similar approval will be reduced from six years to three years, or roughly half its current length.

Implications for Indigenous Communities

As confirmed by numerous Supreme Court of Canada and appellate court decisions, the Ontario government has an obligation to consult and accommodate Indigenous communities in accordance with section 35 of the *Constitution Act, 1982* in the course of approving projects under the *EAA* and other environmental and planning laws and policies. Since Indigenous rights to lands and resources often are affected by environmental, social, economic and cultural impacts of projects, the approval of projects with potential environmental impacts by various ministries and Crown agencies should engage Indigenous consultation rights regardless of what the *EAA* does or does not prescribe. By and large, it is unclear the extent to which Indigenous consultation on *EAA* legislative changes has taken place.

¹³²Municipal Engineers Association, “Frequently Asked Questions and Answers about the MCEA”, (6 July 2020), online (pdf): <[https://municipalclassea.ca/files/FAQ%20\(Jul%206%202020\).pdf](https://municipalclassea.ca/files/FAQ%20(Jul%206%202020).pdf)>

¹³³Municipal Engineers Association, “Municipal Class EA Annual Monitoring Report: Recognizing Over 30 Years of Application” (October 2020), online (pdf): <<https://municipalclassea.ca/files/Annual-Monitoring-Reports/2020/ANNUAL%20MCEA%20MONITORING%20REPORT%202020%20FOR%20POSTING.pdf>>.

Table 3 – Comparison of Estimated Timelines for a Typical EA approval in the late 2010s with Expected Timelines established under the Bill 197 amendments to the EAA after various future regulatory and EA program changes are finalized

EA process	Estimated Timelines for a Typical EA approval in the late 2010s	Timelines established by Bill 197 after Regulations promulgated
Terms of Reference	~ 24 months	6 months
Proponent conducts EA	~23 months	22 months
Ministry reviews EA and consults	~16 months	9 months
Decision making	~13 months	1 month
Total timeline	Approx. 6 years	Approx. 3 years

Exemption for Projects or Activities Related to Land Claim Settlements/Agreements with Indigenous Communities

Bill 197 includes provisions which are intended to exempt from the EAA projects or activities related to land claim settlements and other agreements with Indigenous communities dealing with land.¹³⁴ In the past thirty years, the Ministry of Indigenous Affairs (and predecessor ministries and agencies responsible for Indigenous Affairs) have put in place numerous settlements and agreements that govern how various proponent ministries undertake EAs and Class EAs. These proponent ministries include the Ministry of Natural Resources and Forestry, the Ministry of Energy, the Northern Development and Mines and the Ministry of Government and Consumer Services, and they have various consultation and Indigenous community engagement requirements under various class EAs.¹³⁵

The amendments aim to streamline various EA evaluation and consultation processes with the goals of: 1) eliminating duplication; 2) shortening timelines; and, 3) reducing the overall cost of settling Indigenous land claims. However, the full implications of these changes for Indigenous communities and First Nations organizations are unclear. It seems likely that implementation of these new provisions could result in court challenges and judicial reviews, particularly with

¹³⁴Class EA amendments, exemption regulations for Parks, Indigenous land claims, and MTO exemptions posted on the Environmental Registry for comment until August 22, 2020: Class EA Amendments (<https://ero.ontario.ca/notice/019-1712>); Land claim settlements and other agreements with Indigenous communities(<https://ero.ontario.ca/notice/019-1805>)

¹³⁵*Ibid.*

respect to projects in certain sectors such as forestry, mining and provincial park planning. The changes were implemented in 2021 as part of changes to R.R.O. 1990, Regulation 334 as set out in Appendix D.¹³⁶ A potential compounding problem is that, unlike the federal and B.C. provincial governments, the Ontario government has yet to fully turn its mind to enacting legislation implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

In addition, the amended *EAA* also now includes a "non-derogation provision", which states that nothing in the *EAA* is intended to affect constitutionally protected aboriginal and treaty rights.¹³⁷ Similar provisions appear in various federal and provincial statutes including Ontario's *EBR, 1993* and are intended to reaffirm the existing primacy of Aboriginal and treaty rights. As noted above, the Bill 108 also contains amendments to Part II Orders that are relevant to Indigenous communities.¹³⁸

As Adam Chamberlain and his colleagues have noted,¹³⁹

amending the *EAA* to limit the EA process for projects affecting Indigenous communities may create a risky regulatory landscape for Indigenous communities and proponents alike. In particular, an overly streamlined process risks ignoring effects on Indigenous rights and stifling Indigenous participation, thereby leaving project approvals vulnerable to judicial intervention. While the full practical implications of these amendments to the *EAA* remain to be seen, constitutional obligations to consult Indigenous peoples loom large over all of the Government of Ontario's recent proposed legislative and policy amendments.¹⁴⁰

Numerous Indigenous lawyers and consultants have noted that the truncated timelines outlined in the previous section of this paper has the potential to discourage and undermine genuine consultation and accommodation of Indigenous rights as contemplated by UNDRIP. Furthermore, it has been noted that the timelines of the amendments themselves, being rushed through in an omnibus format, precluded Indigenous consultation at the outset of these proposed changes. Proper consultation may have helped to resolve many of the gaps regarding meaningful consultation that were either created or widened within the *EAA*.

¹³⁶See Appendix D.

¹³⁷The text of the Non-derogation provision reads as follows: Existing aboriginal and treaty rights: 2.1 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*.

¹³⁸The amended *EAA* terminates any undecided requests for the Minister to elevate a project subject to a class EA for an order under section 16 of Part II.1 unless the request "may prevent, mitigate or remedy adverse impacts on the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the *Constitution Act, 1982*."

¹³⁹Adam Chamberlain et al., "Indigenous Consultation And Bill 197: Understanding The Exemptions For Indigenous Communities In Ontario's EA Reforms" (30 July 2020), online: *Gowling WLG* <<https://gowlingwlg.com/en/insights-resources/articles/2020/bill-197-indigenous-communities-ontario-ea-reforms/>>

¹⁴⁰*Ibid.*

MECP's Next Steps for Implementation of the Amended *Environmental Assessment Act* and Related EA Program Changes

There are numerous consequential and post-*EAA* amendment actions and consultations currently underway at the MECP now that the amendments to the *EAA* contained in Bill 108 and Bill 197 have been enacted. In various Environment Registry Proposal notices and Bulletins the Ministry has outlined its plans to develop the regulations and business process improvements needed to implement the changes enabled in the *EAA*. As noted above, new regulations under development include: 1) Project Lists (for comprehensive and streamlined projects); 2) New streamlined assessment processes; 3) Sectoral Terms of Reference; 4) Expiry date exemptions; and 5) Deadlines.

The Ministry has stated it will consult on these regulations with municipalities, stakeholders, the public and Indigenous communities.

In terms of policies, practices and business process improvements, the MECP has stated it will:

- Update its guidelines and business processes;
- Update the Ontario-Canada harmonization agreement with the federal Impact Assessment Agency to strengthen substitution provisions; and
- Improve one-window coordination of EAs and other approvals.

MECP's Consultation Code of Practice

In addition, the MECP has indicated it intends to update its EA Consultation Code of Practice¹⁴¹ a policy document that sets out the expectations of the MECP for consultation in the EA process. The MECP states that the update is intended to ensure that expectations are clearly outlined to promote meaningful consultation with Indigenous communities and engagement with other interested persons. To date, no details have been provided with respect to the scope of the expected changes. Again, meaningful consultation with Indigenous rights-holders seemed relegated to an after thought, alongside general stakeholder engagement and not on a nation-to-nation basis.

MECP Releases Proposed Regulations To Be Promulgated Under Amended *EAA*

On November 26, 2021, the MECP released four draft regulations that offer project proponents greater clarity about whether their projects will need to undergo an EA under the amended *EAA*.

The release of the revised draft regulations is intended to address some of the current uncertainty about implementation of the amended *EAA*, providing more detailed legal text to guide public and private sector entities considering new industrial, infrastructure, electricity and waste

¹⁴¹Government of Ontario, "Consultation in Ontario's environmental assessment process" (last updated 5 July 2021), online: <<https://www.ontario.ca/page/consultation-ontarios-environmental-assessment-process>>.

management projects.¹⁴² The regulations are discussed under the Project List update and Class EA updates above.

A key implication of this suite of regulations is that private sector projects that previously were not subject to the *EAA* unless designated by specific regulations made by Cabinet now may regularly require a comprehensive or streamlined EA. Prior to implementation of the amended *EAA*, a fairly narrow range of private sector projects in the electricity, waste management or transit sectors were specifically designated as requiring assessments. Under the new proposals, a waterfront hotel and marina complex proposed by a private developer on one of the Great Lakes could be subject to the amended *EAA* even if it is built for a private sector entity, a change from the current *EAA*, which would only require such a project to undergo assessment if the proponent was a provincial or municipal government agency or a provincial Crown corporation.

Amendment to the Transit Projects and Metrolinx Undertakings Regulation

The proposed amendments to O. Reg. 231/08, if approved, would revoke Schedule 1 of that regulation, which currently lists the transit projects subject to the *EAA*. The schedule will no longer be required because the Comprehensive Project List Regulation will specify which transit projects will be required to undergo an EA. The Ministry also proposes to make several minor amendments to O. Reg. 231/08 in order to revise the notification requirements when following the TPAP, empower the Minister of the Environment, Conservation and Parks to revoke or amend conditions in a notice conditionally approving a project and allow for certain Ontario Northland Transportation Commission-led projects to follow the TPAP.

What was not Improved and Modernized in the Bill 197 amendments?

Has the Ontario government really delivered on its promises and truly “modernized” the *EAA*? In the eyes of many stakeholders this remains an open question, mainly because the MECP has yet to publish key regulations and policies elaborating on the new EA framework and has yet to implement the various program reforms set out above. For ENGOs and civil society organizations, the amended *EAA* and the suite of changes in their current state, arguably do not address many of the goals and objectives for law and policy reform that have been raised in the past 25 years since the *EAA* was amended in 1996. For Indigenous rights holders and

¹⁴² These proposed regulations include:

1. A “project list” regulation describing the activities that will be “designated projects” under the *EAA* and require a “comprehensive” EA (previously known as an “individual” EA) overseen by the Ministry, as well as approval by the provincial cabinet before proceeding (the Comprehensive Project List Regulation);
2. A regulation amending the Transit Projects and Metrolinx Undertakings regulation (O. Reg. 231/08) to revise which projects can obtain an exemption from the requirement to undergo a comprehensive EA by following the project planning, documentation and public consultation requirements of the streamlined Transit Project Assessment Process (TPAP);
3. A regulation exempting from the application of all or part of the *EAA* certain undertakings and designated projects, including municipal waste pilot projects, municipal zoning orders, undertakings by specific provincial ministries and provincial government undertakings carried out for the purpose of implementing a renewable energy project; and
4. A transitional regulation setting out rules governing how projects currently under assessment will be dealt with once the “project list” amendments to the *EAA* enter into force.

communities, the amended *EAA* fails to ensure meaningful consultation throughout the assessment processes and does not address the longstanding issues present within the *EAA*. In addition, some environmental lawyers have criticized Bills 108 and 197 because they disagree that the new laws and proposed EA program changes actually modernize the *EAA* and address longstanding stakeholder concerns such as the lack of objective criteria and prescribed policies for decision-making available under laws such Ontario's *Planning Act*.¹⁴³

Questions that guided our evaluation of the changes to the EAA and the EA Program implemented between 2019 and 2021

Some questions we considered as we analyzed recent changes under Bill 197 and the EA program, particularly in view of the Greenpeace decision in September 2021,¹⁴⁴ included the following:

- What changes are no brainers that deserve some modest kudos?
- Do the changes ensure public participation mechanisms are safeguarded?
- Do the changes promote enhanced accountability and transparency in decision-making?
- How will the cumulative effects of numerous low and medium risk projects be evaluated? How will synergistic cumulative effects between small, medium-sized and large projects and programs be evaluated by EA Practitioners?
- How will the interests of Indigenous communities be safeguarded?
- What challenges will the limitations on use of Part II Order Requests under section 16 pose to individuals and stakeholders seeking to participate and provide feedback on proposed projects and draft terms and conditions of proposed approvals?
- Do the changes address the financial needs of parties and intervenors in the EA process such as Indigenous organizations and communities by providing for intervenor or participant funding?
- Do the changes address recommendations for reform made by EA experts, practitioners, organizations, stakeholders and associations such as the OAIA?

In our view, a number of the changes that have been made to Ontario's EA program are indeed improvements. Moving EA documents to a digital platform seems like a no brainer, especially considering that the ECO encouraged the MECP to begin posting all draft policy and regulatory documents and many other draft instrument approvals on the Environmental Registry back in 1996, roughly 25 years ago. Developing a system or a registry to accept online submissions of EA studies and related documents will move Ontario's EA program into the 21st century twenty odd years after it started. Similarly, the proposed deadlines and expiry provisions are logical and overdue. Moreover, numerous other changes proposed in various registry notices are worthy of support.

¹⁴³See: Rodney Northey, "What Is and Is Not Modernized in Ontario's Re-Write of its *Environmental Assessment Act*" (22 July 2020), online: *Gowling WLG* <<https://www.lexology.com/library/detail.aspx?g=bbb324cc-29e7-4b13-b130-798b969b34bc>>; Laura Bowman, "Ontario passes sweeping changes to environmental assessment" (17 July 2020), online: *Ecojustice* <<https://ecojustice.ca/ontario-proposes-sweeping-changes-to-environmental-assessment/>>

¹⁴⁴*Greenpeace Canada (2471256 Canada Inc.) v Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521

Other changes, such as the narrowing of Part II Order Requests in section 16, seem highly problematic in their sweeping application to nearly all EA projects, large, medium and small. In other cases, we believe that it is too early to comment one or the other on their future success. This would include the Project Lists and the future “streamlining regulations” for sectoral approvals.

At the same time, there are deeper, structural issues that remain unaddressed by the recent changes to the *EAA* and the various EA program changes that are underway. The following are examples of the remaining problems with and the unresolved issues that characterize Ontario’s EA process.

Cumulative Effects Consideration and Treaty Rights

The lack of a proper mechanism to consider the cumulative effects of small, medium and even larger undertakings approved using EAs was identified as an early weakness of the *EAA*, as noted by Estrin and Swaigen in 1978.¹⁴⁵ This remains a problem in 2021 as highlighted in the recent decision from B.C., *Yahey v. British Columbia*.¹⁴⁶ In *Yahey*, the court held that the Crown’s power to take up lands for large industrial development projects subject to a treaty could result in a violation of a First Nation’s treaty rights if industrial development on the lands resulted in the First Nation no longer being able to meaningfully exercise their treaty rights.¹⁴⁷ Many legal experts expect that the decision could have significant impacts on industrial developments involving forestry, oil and gas, and renewable energy in Canadian provinces. As noted in a recent article, the Court also declared that the parties must act with diligence to consult and negotiate to establish timely enforceable mechanisms to assess and manage the cumulative impact of industrial development on Blueberry First Nations’ treaty rights, and to ensure these constitutional rights are respected.¹⁴⁸

Lack of a Strategic EA Process for Key Policy Decisions

Strategic environmental assessments (SEAs) is an alternative, systematic process that is essential for prioritizing environmental sustainability within the EA process, and considers the cultural,

¹⁴⁵David Estrin and John Swaigen, *Environment on Trial: A Handbook of Ontario Environmental Law*, 2nd ed.(Canadian Environmental Law Research Foundation,1978) at 52.

¹⁴⁶*Yahey v British Columbia*, 2021 BCSC 1287 (CanLII);

¹⁴⁷ For more information, see: Kate Gunn, “Time Is of the Essence: Treaty Rights and Cumulative Impacts in *Yahey v. British Columbia*” (8 July 2021), online: *First Peoples Law* <<https://www.firstpeopleslaw.com/public-education/blog/time-is-of-the-essence-treaty-rights-and-cumulative-impacts-in-yahey-v-british-columbia?fbclid=IwAR0HDRKrK1fWgp8Xf5AoBR6iJoFu18r4JREwrRdcTfSYzpuDsvrp5AhDXWE>>.

¹⁴⁸Denisa Mertiri and Rebecca Murray, “Adding It All Up - Cumulative Impacts Of Industrial Development & First Nations’ Rights” (25 November 2021) online: *OBA Environmental Law Section Newsletter*<<https://www.oba.org/Sections/Environmental-Law/Articles/Articles-2021/November-2021/Adding-it-all-up-Cumulative-Impacts-of-Industry>>.

social, and economic conditions in which the EA decision is being made.¹⁴⁹ SEAs also take into account possible cumulative health and environmental effects, and can identify potential long-term or delayed effects of a project or a large program of activities.¹⁵⁰ The primary phases of an SEA can include: screening projects for their potential for environmental harm; scoping to clarify and identify potential issues within the project; and a SEA study to identify potential impacts and provide both conclusions and recommendations.¹⁵¹

While Ontario's Cabinet Office (and, federally, the Privy Council) functions as a type of sewage control mechanism to prevent bad laws and policies from being developed and approved by ministries and various Cabinet Committees, it only has a certain degree of effectiveness. Thus, a transparent SEA process undertaken by the Auditor General of Ontario or by advisory panels established by the Ontario government could serve as an invaluable tool for preventing the establishment of large projects and programs that escape proper scrutiny under the EBR's truncated and often limited notice and comment process.

In Appendix B below I have set out how something like an SEA process might have influenced the design of two of Ontario most significant environmental programs in the past 40 years, Drive Clean and the Blue Box Program. These counterfactuals are very preliminary and intended to hint at how Strategic Environmental Assessment Might Shape Regional EAs and Comprehensive EAs on large projects.

Lack of Clear Criteria for EA program, Project List Development, etc

One of the key criticisms of Bill 197 and the EA program reforms that was raised by ENGOs in the summer and autumn of 2020 is that the MECP has failed to communicate clear criteria that will be used to designate projects for assessment and provide a draft list of designated projects and develop other reforms to the EA program (see summary of ENGO comments in Appendix D of this paper). According to the Ontario government's 1973 discussion paper on the EAA, EA is supposed to achieve its purpose is through application of objective criteria and planning. However, as practitioners such as Rodney Northey and other critics have frequently observed in the past 40 years Ontario's EA regime has failed to consistently apply established criteria grounded in provincial policies, standards or established science. Instead EAs are frequently "conducted in a subjective way with arbitrary criteria that have no connection to such instruments as Ontario's provincial policy statements."¹⁵² Further, Dr. Robert Gibson notes, that

¹⁴⁹Denis Kirchoff et al., "Strategic environmental assessment and regional infrastructure planning: The case of York Region, Ontario, Canada" (2011) 29:1 Impact Assessment and Project Appraisal 11 <doi.org/10.3152/146155111X12913679730430>; International Association for Impact Management, "Strategic Environmental Assessment" online: <<https://www.iaia.org/wiki-details.php?ID=24>>

¹⁵⁰For more information, see: Environmental and Climate Change Canada, "Strategic environmental assessments" (last modified 10 October 2018), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/sustainable-development/strategic-environmental-assessment.html>>;

¹⁵¹European Commission, "Strategic Environmental Assessment in EU development cooperation" (20 February 2018), online (pdf): <<https://op.europa.eu/en/publication-detail/-/publication/43bd490d-15f1-11e8-9253-01aa75ed71a1/language-en>>

¹⁵²Ontario Association of Impact Assessment (OAIA), History of EA in Ontario and the Path Forward: Webinar 1, November 5, 2020, Facilitators: Charles J. Birchall and Beth Williston Panelists: Robert Gibson, Rod Northey, Caroline Coburn; Quoting Rod Northey. The Report is reproduced in the following submission to the MECP: OAIA, Letter to MECP EA Modernization Team, Re: Follow-up Recommendations on Bill 197 & EAA Amendments

“[i]n as much as Ontario EA has failed to deliver objective planning, it is failing to deliver on the purpose of the *EAA* which is the betterment of the people of Ontario. Ontario EA must be grounded in provincial policy.”

As the MECP rolls out many of the various changes to the EA program, some of the implications of its current approach have become apparent. The amended *EAA* provides broad discretion to the provincial cabinet to prescribe projects for which an EA is required creates the risk that Ontario governments will designate only those projects that have the “most potential to impact the environment,” and thereby exempt medium to smaller-scale projects that may still carry environmental risks.

It remains plausible that this structural weakness could be addressed when the proposed Project List and sectoral project streamlining regulations are finalized. However, it is unclear if these types of reforms will be implemented prior to the June 2022 provincial election.

Because of the dependence of the new *EAA* framework on regulations establishing a Project List and determining which classes of projects may proceed via a streamlined EA process, the extent to which overhaul of the *EAA* will impact project proponents and achieve the government’s stated objectives remains to be determined.

Lack of Regional EA Processes

Just a case to show that there will be significant disputes about the scope of regional EA. i.e. should a regional EA of O&G project include analysis of whether a proposed project is consistent with Canada's 2030 GHG Reduction Plan expected to be released by March 31, 2022?

As noted previously, Ontario’s EA process currently does not provide adequate emphasis on the need for regional environmental and impact assessments. This often is a more serious problem in remote regions and those relatively undeveloped areas which contain environmentally valuable and sensitive areas.¹⁵³ Additionally, there will likely be significant disputes about the appropriate scope of regional EAs. For instance, the Sierra Club, WWF Canada, and Ecology Action Centre are currently appealing a decision that upheld Newfoundland & Labrador’s Regional Assessment legislation, which streamlines the approval process for offshore exploration drilling projects.¹⁵⁴

Dec. 8, 2020; https://oiaa.on.ca/wp-content/uploads/2020/12/Cover-Report-Webinar-Series-December-08-2020_OAIA.pdf; [Hereafter: OAIA, Follow-up Recommendations on Bill 197]

¹⁵³Denis Kirchhoff et al., “Strategic environmental assessment and regional infrastructure planning: The case of York Region, Ontario, Canada” (2011) 29:1 *Impact Assessment and Project Appraisal* 11 <doi.org/10.3152/146155111X12913679730430>; International Association for Impact Management, “Strategic Environmental Assessment” online: <<https://www.iaia.org/wiki-details.php?ID=24>>

¹⁵⁴Iain Esau, “Canadian green groups lodge appeal after losing court case over oil and gas environmental process” (17 January 2022), online: *Upstream* <<https://www.upstreamonline.com/environment/canadian-green-groups-lodge-appeal-after-losing-court-case-over-oil-and-gas-environmental-process/2-1-1146478>>.

Once Canada's 2030 GHG Reduction Plan is released (expected by March 31, 2022),¹⁵⁵ there may be questions about whether approved projects through the regional EA process must be consistent with the Plan.

It also can be very difficult and frustrating for Indigenous communities and ENGOs to participate in EA processes associated with large mega-projects. Since EA studies can be oriented to considering the environmental, social and cultural effects of single projects such as new roads, tree harvesting or a small electricity generating plant they can fail to accurately describe the long-term collective impact of the activities.¹⁵⁶

The complexities of considering the cumulative and synergistic effects of numerous simultaneous or serial projects and/or widespread activities in certain regions such as northern and Arctic regions pose special challenges for proponents, government regulators, EA practitioners, project suppliers on the ground and others involved in the development process.

To improve EA practice, some governments and government agencies have developed and implemented a modified approach to EA called "Regional EA" whereby the cumulative effects of projects can be better taken into account. On the first synthetic, regional EA processes undertaken in Canada was the regional EA undertaken for the Beaufort Sea Hydrocarbon Production Project between 1982 and 1984.¹⁵⁷

In our view, effective and legitimate regional EAs must involve the Indigenous communities that invariably are affected by these mega-projects. We agree with the OAlA that "involvement of Indigenous communities and provincial/territorial/federal governments is critical to facilitating the progression of regional impact assessments that are credible, authoritative, technically-sound, and complete, and [take into account] the perspectives and goals of each jurisdiction given the social-ecological context of the region."¹⁵⁸

At present, the most egregious example of a large development process in Ontario that requires a regional EA is the massive mining and infrastructure development that is underway in the Ring of Fire region of northern Ontario due to amendments to the *Far North Act*. The *Far North Act* provides the joint land use planning process between First Nations and the Government of Ontario in the Far North.¹⁵⁹ One of the key objectives is "The protection of areas of cultural

¹⁵⁵ Environment and Climate Change Canada, "Canada to launch consultations on new climate commitments this month, establish Emissions Reduction Plan by the end of March 2022", online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/news/2021/12/canada-to-launch-consultations-on-new-climate-commitments-this-month-establish-emissions-reduction-plan-by-the-end-of-march-2022.html>>.

¹⁵⁶ Denisa Mertiri and Rebecca Murray, "Adding It All Up - Cumulative Impacts Of Industrial Development & First Nations' Rights" (25 November 2021) online: OBA Environmental Law Section Newsletter <<https://www.oba.org/Sections/Environmental-Law/Articles/Articles-2021/November-2021/Adding-it-all-up-Cumulative-Impacts-of-Industry>>.

¹⁵⁷ David McRobert, *The Ecological and Social Implications of Invasive Alien Ideologies and Technologies: A Case Study of Oil and Gas Development in the Canadian Arctic*. Presented to the Environmental Studies Association of Canada, as part of the annual SSHRC Conference, University of Waterloo, May 2012. https://www.academia.edu/13966434/The_Ecological_and_Social_Implications_of_Invasive_Alien_Ideologies_and_Technologies_A_Case_Study_of_Oil_and_Gas_Development_in_the_Canadian_Arctic

¹⁵⁸ OAlA, *Follow-up Recommendations on Bill 197*, p. 2.

¹⁵⁹ *Far North Act, 2010*, SO 2010, c 18

value in the Far North and the protection of ecological systems in the Far North by including at least 225,000 square kilometres of the Far North in an interconnected network of protected areas designated in community-based land use plans.”¹⁶⁰ In 2019, the MNRF proposed to repeal the *Far North Act*,¹⁶¹ with the comment period closing in May 2019. Based on the negative feedback received,¹⁶² this proposal shifted to refocusing rather than repealing the Act. The Ford government subsequently proposed changes to the *Far North Act* that would remove restrictions on 225,000 km² in Northern Ontario with the purpose of accelerating the building of a road to the Ring of Fire. The chiefs of the Fort Albany and Attawapiskat First Nations sent a letter to Premier Ford in December 2021, “[calling] on the Premier and the government of Ontario to stop pushing ahead unilaterally toward reckless uninformed development in the Ring of Fire, while at the same time seeking to affix to such behaviour the label of ‘First Nation approved.’”¹⁶³

A regional EA approach to the Ring of Fire could help account for the cumulative environmental impacts of mining the Ring of Fire, and help to facilitate meaningful Indigenous consultation. Unfortunately, to date, the Ontario government has refused to implement a regional EA approach despite advocacy for a regional approach by several ENGOs and other experts. However, the federal government stepped in to require a federal regional EA of the proposed Ring of Fire development in 2020.

In October 2021, the MECP approved the Terms of Reference and began the EA for the first segments of the Ring of Fire access road. The Neskantaga First Nation commenced legal action against the Government of Ontario, arguing that the government failed in its duty to consult Indigenous peoples as required by various Supreme Court of Canada cases and appellate decisions further to *Haida Nation v British Columbia Minister of Forests*, SCC 2004. Neskantaga First Nation is asking the Divisional Court to clarify the minimum process requirements under the *EAA* for Indigenous consultation.

How should Traditional Ecological Knowledge(TEK) and Elder Wisdom about the land be integrated into the EAA process?

The importance of Traditional Ecological Knowledge (TEK) and Elder Wisdom about past, current and future land uses was raised in the *Calder* case decided by the SCC in 1973. However, the importance of traditional land use had been percolating away in Indigenous communities and

¹⁶⁰ *Far North Act, 2010*, SO 2010, c 18, s 5

¹⁶¹ “Proposal in support of the province’s review of the Far North Act” (last updated 30 November 2020), online: *Government of Ontario* <<https://ero.ontario.ca/notice/013-4734>>.

¹⁶² David McRobert submitted a comment to the MNRF as part of the consultation period, stating that the *Far North Act* is vital on the grounds of maintaining a coherent planning system. In effect it addresses aspects of strategic planning and strategic EA. Thus, repealing the *Far North Act* would probably have very negative effects. To read the full submission, see:

https://www.academia.edu/68745059/David_McRobert_Comments_on_MNRF_Review_of_the_Far_North_Act_2010_Submitted_to_the_MNRF_May_2019

¹⁶³ Niall McGee & Jeff Gray, “Ontario renews push to develop stalled Ring of Fire, but Indigenous opposition mounts” (8 December 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/business/article-ontario-renews-push-to-develop-stalled-ring-of-fire-but-indigenous/>>.

some federal and provincial departments beginning in the early 20th century.¹⁶⁴ The issue of how to integrate TEK into land use planning and various related EA planning processes became a much larger issue in the mid to late 1970s. The issue took centre-stage during the Mackenzie Valley Pipeline Inquiry headed by Justice Thomas Berger between 1974 and 1977.¹⁶⁵

There is an abundant literature on TEK but, in our view, it is unclear as to the extent to which EA practitioners in Ontario are consistently seeking the input of Indigenous communities when they undertake EA studies. Such involvement is key to the legitimacy and success of the EA planning process in many regions of Ontario, which would be critical to the creation of ethical space in land use decision-making processes, which is essential for meaningful treaty relations.¹⁶⁶

It is important to bear in mind the 2015 recommendation in the Final Report of the Truth and Reconciliation Commission of Canada (2015) that the legal profession to improve its cultural competence with respect to Indigenous peoples. Information for legal professionals (litigation counsel in particular) and those working in the justice system can be found in the 2018 “Guide for Lawyers Working with Indigenous Peoples”.¹⁶⁷ The Guide notes that “[o]ften ... the root culture of law will not be the same as the culture of those individuals that use legal services or engage with legal processes”.¹⁶⁸ Recognizing that the cultural backgrounds of many lawyers and

¹⁶⁴See: Peter J. Usher, “Traditional Ecological Knowledge in Environmental Assessment and Management” (2000) 52:2 Arctic 183 <doi.org/10.14430/arctic849>; Lauren E. Eckert et al., “Indigenous knowledge and federal environmental assessments in Canada: applying past lessons to the 2019 impact assessment act” (2020) 5:1 Facets 67 <doi.org/10.1139/facets-2019-0039>; Denis Kirchoff et al., “Strategic environmental assessment and regional infrastructure planning: The case of York Region, Ontario, Canada” (2011) 29:1 Impact Assessment and Project Appraisal 11 <doi.org/10.3152/14615511X12913679730430>; International Association for Impact Management, “Strategic Environmental Assessment” online: <<https://www.iaia.org/wiki-details.php?ID=24>>

¹⁶⁵David McRobert comments: This was one of the key issues I examined in my Master’s field work, based in Inuvik, NWT, for the Mackenzie Valley Delta Dene and Inuvialuit and the early 1980s. For background, see David McRobert, *The Ecological and Social Implications of Invasive Alien Ideologies and Technologies*, *supra* note 128.

¹⁶⁶See OAI, Follow-up Recommendations on Bill 197, p. 2. According to the OAI, meaningful Indigenous engagement under the EAA and the proposed modernized environmental assessment process is less than ideal. To begin to mitigate this, Indigenous communities must be recognized as equal partners alongside proponents and must be recognized as self-governed communities with the ability to provide or withhold consent as it relates to the approval of a project. To do so, consistent and sufficient resources must be accessible to Indigenous communities to allow for collaboration and meaningful engagement throughout the EA process and allow for well-informed decision making at the end of the project.

¹⁶⁷ The Guide, which is intended as a resource for professionals working with Indigenous peoples in legal proceedings, offers information on Indigenous Peoples’ histories, cultures, laws, and explains the interplay between Indigenous legal orders and the Canadian legal system. The Guide includes a brief historical overview of Indigenous Peoples, practical tools and guidance for legal practitioners, and resources. It also addresses the practical implications to legal professionals of the Final Report of the Truth and Reconciliation Commission of Canada (“TRC Report”) which was released in 2015. Of the 94 Calls to Action issued by the TRC Report was Call to Action 27 which called on the Federation of Law Societies of Canada to: “Ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and antiracism.” See: Advocates Society et al., “Guide for Lawyers Working with Indigenous Peoples” (May 2018), online:

[https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide for Lawyers Working with Indigenous Peoples_may16.pdf](https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide%20for%20Lawyers%20Working%20with%20Indigenous%20Peoples%20May16.pdf) [Hereinafter: Advocates Society et al., Guide for Lawyers Working with Indigenous Peoples.

¹⁶⁸ Advocates Society et al., “Guide for Lawyers Working with Indigenous Peoples,” at page 10.

judges often are not representative of Canadian society, and noting that the devastating consequences of lack of cultural competency by the legal profession form a demonstrable basis for the distrust in the legal system by Indigenous peoples, the Guide explains that “[t]he formal state legal system is a cultural institution that is informed by the dominant cultural behaviour, attitudes and values which are perpetuated by its participants” and “legal professionals, historically, were deliberate in which cultures they sought to promote and which cultures they attempted to eradicate. Whether consciously or unconsciously, within today’s context, lawyers, judges, and others in legal professions still develop, implement and enforce laws drawing from their cultural frames of reference”.¹⁶⁹ Citing legal scholar Tracey Lindberg, the Guide continues “[w]ithout an informed understanding of in/justice written, interpreted, understood and transmitted by Indigenous peoples, understanding of the same is limited to the vision and interpretation of individuals who do not have a history of responding to and living through the attempted/colonization of Indigenous peoples.”¹⁷⁰ The Guide states that “[t]hese unacceptable trends will continue unless lawyers, judges and others in legal professions acknowledge the institutional and systemic cultural biases historically perpetuated through the legal system, and become more culturally competent in Indigenous cultures, with a view to implementing cultural changes within legal systems.”¹⁷¹ The Guide urges that legal professionals must recognize that “[t]he close relationship and proximity between Indigenous Peoples and the land and water means that land and water often play a pivotal role in both the subsistence and commercial economies of Indigenous communities, for example, through the development of natural resources and commercial fisheries.”¹⁷² The Guide also recommends that lawyers understand and appreciate the significance that land and water have for Indigenous communities, and that these may inform the priorities, policies and practices of a given Indigenous community with respect to economic development.¹⁷³

Should the EAA be amended to make its purpose “Sustainability”?

An OIA panel on Bill 197 convened in November 2020 agreed that “it may be best to amend the purpose of *EAA* to replace “betterment” with “sustainability” because it puts emphasis and focus on the long-term impacts of projects. However, the panel concluded that any rational assessment based on “betterment” should be essentially the same as a sustainability-based assessment and perhaps further amendment to the purpose section (s. 2) of the *EAA* is unnecessary.”¹⁷⁴

Lack of Public Consultation Process

In August 2020, Greenpeace, Ecojustice, and the Wilderness Committee launched a lawsuit against the Ontario government for the lack of public consultation on Bill 197 and an alleged

¹⁶⁹ Advocates Society et al., “Guide for Lawyers Working with Indigenous Peoples,” at pages 20-21.

¹⁷⁰ Ibid at pages 20-21.

¹⁷¹ Ibid at page 22.

¹⁷² Ibid at page 22.

¹⁷³ Advocates Society et al., “Guide for Lawyers Working with Indigenous Peoples,” at pages 20-22.

¹⁷⁴ OIA, Follow-up Recommendations on Bill 197

contravention of the *Environmental Bill of Rights*.¹⁷⁵ In September 2021, the Ontario Divisional Court ruled that “the Minister of Municipal Affairs acted unreasonably and unlawfully in failing to post the [Minister’s Zoning Order] proposal.”¹⁷⁶

The court also stated that “these are amendments that manifestly could have a significant impact on the environment, and there is nothing in the record to support the reasonableness of the decision not to post.”¹⁷⁷ However, the court disagreed with the argument that the Ontario government failed to comply with Part II of the *EBR* when it enacted Schedule 6 of Bill 197 on the *EAA*, stating that “it was reasonable for the Minister not to post Schedule 6, given the proposed amendment in s. 33.1 of the *EBR* and its subsequent enactment.”¹⁷⁸ While we understand the court’s reasoning on the issue as to whether the process followed by the Ontario government was appropriate, we are troubled by the potential implications of this decision for future *EBR* practices at prescribed ministries and agencies.

On November 22, 2021, the Auditor General of Ontario released their “Annual Report of Environment Audits.”¹⁷⁹ In her lengthy and detailed report, Auditor General Bonnie Lysyk concludes that the MECP, among other ministries, deliberately avoided public consultation on environmentally-significant decisions and bypassed the *Environmental Bill of Rights* (*EBR*).¹⁸⁰ The *EAA* is cited as an example where the government failed to consult the public, and cited the government’s retroactive exemption from the *EBR* through passing legislation.

In our view, the government’s approach to updating the *EAA* risks significantly weakening its operation of the *EAA*. Under the evolving system, it appears that some subject ministries and proponents will no longer be required by law to fully consider the public’s views and opinions, and the positions of stakeholders, into account before important EA decisions are finalized and implemented. While the early consultation system and the future streamlined project approvals provided by regulations made under the *EAA* may provide for improved participation and input on certain affected environmental decisions, many of the crucial details related to project construction and related mitigation are resolved at the final stages of the approval process. A failure to allow affected stakeholders and the public to participate will likely serve to undermine the accountability of decision-makers and actors in the EA process, including Class EA holders, the Minister, the Ontario Lands Tribunal, engineers, planners and EA practitioners.

¹⁷⁵Reykia Fick, “Groups sue Ford government for unlawful failure to consult public on Bill 197” (10 August 2020), online: *Greenpeace* <<https://www.greenpeace.org/canada/en/press-release/41256/groups-sue-ford-government-for-unlawful-failure-to-consult-bill-197/>>

¹⁷⁶*Greenpeace Canada* (2471256 Canada Inc.) v. Ontario (Minister of the Environment, Conservation and Parks), 2021 ONSC 4521 (Div Ct) [Hereinafter: *Greenpeace*] at para 99.<https://www.canlii.org/en/on/on/sccdc/doc/2021/2021onsc4521/2021onsc4521.html?autocompleteStr=2021%20ONSC%204521&autocompletePos=1>

¹⁷⁷*Greenpeace* at para 69.

¹⁷⁸*Greenpeace* at para 62.

¹⁷⁹Auditor General of Ontario, “Annual Report of Environment Audits” (22 November 2021), online (pdf): <<https://www.auditor.on.ca/en/content/annualreports/arbyyear/ar2021.html>>.

¹⁸⁰*Ibid.*

Conclusions

Upon its election, the Ontario government signalled its intention to “modernize” the Ontario *EAA* to better align the level of review with the degree of potential environmental risk associated with a project and streamline review processes for low-risk projects. With the substantial amendments to the *EAA* enacted by the Legislative Assembly of Ontario in Bill 108 and Bill 197 in 2019 and 2020, the government has taken a significant step towards reforming how projects are assessed in Ontario. The *EAA* as it existed from 1975 until July 21, 2020 established an assessment framework that only applied to “undertakings”, as defined in the *EAA*, and focused primarily on public sector projects.

The removal of forestry activities from EA scrutiny appears to be a response to political pressures from the forest industry, while the exemption of parks planning and development from the *EAA* seems unlikely to provide much in the way of environmental and social benefits. Neither change appears consistent with the purpose of the *EAA* - viz., to promote the betterment of the people of Ontario.

In our view, there are still significant gaps and concerns within the *EAA* that must be addressed to create an effective environmental assessment framework. The MECP identified next steps within their modernization discussion paper, including collaborating with class EA holders on the proposed amendments, and engaging with stakeholders during the transition to the modernized EA framework.¹⁸¹

As noted above, to further “streamline” approvals that previously would have been subject to Class EAs, the formal Part II Order process has been eliminated for Class EAs, unless such an order will prevent, mitigate, or remedy harm to a recognized Aboriginal right or treaty right. Environmental groups, civil society organizations and other commenters have noted that this limitation of requests to elevate a streamlined EA project to a “comprehensive” EA to these limited circumstances is too restrictive and prevents members of the public from raising concerns about environmental or other non-Indigenous impacts that may nevertheless be relevant to the level of scrutiny that should be applied to a project.

The Minister’s authority, on his or her own initiative, to impose conditions or require a comprehensive (individual) EA for streamlined projects is retained but in a time limited manner. We share the concern expressed by some stakeholders that certain previously prescribed ministries and Class EA holders will no longer be required by law to fully take into account the public’s views and opinions before they finalize and implement key environmental decisions.

As noted in this paper, the MECP continues to consult with stakeholders on the development of the Project List and categorization of which projects will be subject to a streamlined or comprehensive process. It seems likely that the Project List regulations will be subject to regular updating as social needs change and new technologies are developed to address ongoing challenges such as climate change.

¹⁸¹Ministry of Environment, Conservation and Parks, “Modernizing Ontario’s Environmental Assessment Program” (2019), online (pdf): <https://oiaa.on.ca/wp-content/uploads/2019/12/Session-1-2_2019-Conference_OAIA.pdf>.

There also is a considerable risk that streamlined EA processes will retain only a few vestiges of the spirit and intent of the EAA as enacted in 1976, even though they are being used as a proxy for the full EA process. Under many of the streamlined processes it appears that: 1) there will no requirement to consider “need” or “alternatives”; 2) some projects will no longer require a formal approval; and 3) proponents likely will begin to seek other project approvals from approval agencies while conducting screening or simplified processes for subject projects. Based on these shortcomings, the revised EA system developed by Bill 197 risks becoming another means of planning out the details of the proposed project, rather than a comprehensive assessment of if (and how) a project should proceed – as intended by the EAA when it was first enacted.

Meaningful Indigenous engagement and consultation, on a nation-to-nation basis, for these substantive changes to the EAA appears to be more of an after-thought than in accordance with UNDRIP, now enshrined into Canadian law through Bill C-15, *United Nations Declaration on the Rights of Indigenous Peoples Act, 2021*.¹⁸² The broader implications of this does indeed loom large over the Government of Ontario and may in fact undermine the attempt to streamline processes in the spirit of timeliness. In the coming years this may impose a higher duty of care on those lawyers interpreting and applying the EAA in the context of Indigenous rights. Fortunately, there is a growing amount of literature and guidance for legal professionals working with Indigenous peoples in legal proceedings, offers information on Indigenous Peoples’ histories, cultures, laws, and explains the interplay between Indigenous legal orders and the Canadian legal system.¹⁸³

In our view, First Nations, municipalities, ENGOs, civil society organizations, ratepayers associations and concerned individuals will need to keep an eye on which new projects may be subject to pre-approval under the new streamlined environmental assessment regime, in order to be certain that streamlining does not undermine environmental protection goals, cause disruptive social and economic impacts, compromise the protection of cultural artifacts and heritage building and circumvent overarching consultation obligations. Lawyers and consultants working with these types of organizations also will need to monitor how the changes are implemented.

To sum up, practitioners currently must grapple with EA laws, regulations and policies related to two EA programs in play in Ontario:

1. the EAA legislation and remnants of the EA Programs that applied before Bill 108 and Bill 197 and related changes were enacted; and
2. the provisions related to Bill 108 and Bill 197 that have been proclaimed and implemented, including changes to the Class EAs, the various MECP proposals for comprehensive EA regulations and other changes described below.

¹⁸² Government of Canada, “Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act” (last modified December 10, 2021), online: <<https://www.justice.gc.ca/eng/declaration/about-afpropos.html>>.

¹⁸³ See, for example: Advocates Society et al., “Guide for Lawyers Working with Indigenous Peoples”. (May 2018)., online: https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf

Eventually, say in 2-4 years, the Modernized EA system will be more fully implemented. We now have a good sense of what the general contours of the new system will be and how the revised EA program will work. However, many of the details likely will be implemented by subsequent Ontario governments. Thus, we may not know exactly how the new Modernized EA system will work until after the next election when we hopefully have a better understanding of the EA priorities of the next government.

Appendix A - Class EA Amendment Proposals, as of August 2020

See: Ministry of the Environment, Conservation and Parks, Environmental assessment modernization: amendment proposals for Class Environmental Assessments, ERO number: 019-1712, Bulletin posted July 8, 2020, Last Updated Aug. 18, 2020; <https://ero.ontario.ca/notice/019-1712>.

Class EA Amendment Proposals:

1. Activities of the Ministry of Northern Development and Mines under the *Mining Act*
 - A. ENDM Amendment Proposal Table
2. Class EA for Minor Transmission Facilities (Hydro One)
 - A. Hydro One Amendment Proposal Table
 - B. Hydro One Clean version of proposed changes
3. Municipal Class Environmental Assessment (Municipal Engineers Association)
 - A. Municipal Class EA Amendment Table 1 Proposed Changes to Road Schedules
 - B. Municipal Class EA Amendment Table 2 Proposed Changes to Water/Wastewater Schedules
 - C. Municipal Class EA Amendment Table 3 Proposed Changes to Municipal Class EA Manual
 - D. Municipal Class EA Amendment Table 4 Proposed Changes to Transit Schedules
4. Remedial flood and erosion control projects (Conservation Ontario)
 - A. Conservation Ontario Amendment Proposal Table
5. Waterpower projects (Ontario Waterpower Association)
 - A. Waterpower Amendment Proposal Table
 - B. Waterpower Amendment, Redline Screening Process Document
6. Resource Stewardship and Facility Development (Ministry of Natural Resources and Forestry)
 - A. MNRFSFD Amendment Proposal Table
 - B. MNRFSFD Clean Class EA
7. Public Work Class EA (Ministry of Government and Consumer Services)
 - A. MGCS Amendment Proposal Table
 - B. MGCS Government Property Class EA
8. Provincial Transportation Facilities (Ministry of Transportation)
 - A. MTO Amendment Proposal Table
 - B. MTO Class EA Document

Links to Supporting materials

[1. ENDM Amendment Proposal Table](#)

[2A. Hydro One Amendment Proposal Table](#)

[2B. Hydro One Clean version of proposed changes](#)

[3A. Municipal Class EA Amendment Table 1 Proposed Changes to Road Schedules](#)

[3B. Municipal Class EA Amendment Table 2 Proposed Changes to Water/Wastewater Schedules](#)

[3C. Municipal Class EA Amendment Table 3 Proposed Changes to Municipal Class EA Manual](#)

[3D. Municipal Class EA Amendment Table 4 Proposed Changes to Transit Schedules](#)

[4. Conservation Ontario Amendment Proposal Table](#)

[5A. Waterpower Amendment Proposal Table](#)

[5B. Waterpower Amendment, Redline Screening Process Document](#)

[6A. MNRF RSFD Amendment Proposal Table](#)

[6B. MNRF RSFD Class EA](#)

[7A. MGCS Amendment Proposal Table](#)

[7B. MGCS Government Property Class EA](#)

[8A. MTO Amendment Proposal Table](#)

[8B. MTO Class EA Document](#)

Appendix B –Counterfactuals hinting at how Strategic Environmental Assessment Might Shape Regional EAs and Comprehensive EAs on large projects

Below we have set out how something like an SEA process might have influenced the design of two of Ontario’s most significant environmental programs in the past 40 years, Drive Clean and the Blue Box Program. These counterfactuals are intended to hint at how Strategic Environmental Assessment Might Shape Regional EAs and Comprehensive EAs on large projects.

Consider the following counterfactuals:

Counterfactual #1 – As noted in numerous reports by the Auditor General of Ontario, the Drive Clean Program (DCP) was poorly designed in 1998 and, as approved by Cabinet, failed to take into account key features of programs in other provinces in Quebec and British Columbia when it was announced.¹⁸⁴ Consequently, the DCP was adjusted several times between 1998 and the late 2010s when the program was restructured to remove the requirement that all owners have their light duty vehicles (LDVs) tested prior to renewal of their vehicle registration. For example, the scope of the program was redesigned to reduce the number of LDVs tested from those that were three-years old (1999) to five-years old (2003) to seven-years old (2006). This meant that for its initial seven years taxpayers were required to get testing done on newer cars that easily passed emissions standards at very high rates (as high as 96 and 99 per cent). By 2011, Drive Clean Facilities (DCF) were testing an estimated 2.5 million LDVs per year at a cost of approximately \$85 to \$95 million per year.¹⁸⁵ However, in prior years much greater numbers of LDVs between three- and seven-years old were likely tested at DCFs with limited discernible benefits in terms of reductions of end of tailpipe pollution discharges and improvements in air quality.¹⁸⁶

If the initial DCP design had undergone an SEA, would the Program have been redesigned to prevent this faulty design? It is interesting to consider how much money was spent by LDV owners on testing cars that easily passed their DCP emissions test and whether this money might have been better re-allocated to other projects such as transit construction across Ontario.

Counterfactual #2 – Infrastructure Investments – Ontario, the other sub-national governments (provinces, territories, regional and Indigenous governments) and the federal government need to be more strategic when planning infrastructure spending

¹⁸⁴Auditor General of Ontario, Annual Report, 2012: Value for Money Audit: Drive Clean.
<https://www.auditor.on.ca/en/content/annualreports/arreports/en12/304en12.pdf>

¹⁸⁵The DCP test cost vehicle owners \$35 per test when the test resulted in a pass. An additional test at the same garage was free.

¹⁸⁶According to a CBC News report in 2019, 16% of LDVs failed in 1999, 5% failed in 2018:
<https://www.cbc.ca/news/canada/toronto/ontario-to-scrap-drive-clean-emissions-test-target-heavy-duty-vehicles-instead-1.4842537>

Text below based on a recent opinion article in the Globe and Mail¹⁸⁷

“Canadian governments have announced tens of billions of dollars in infrastructure investments as part of building back better strategies. The collective goals are to maintain services during the COVID-19 pandemic, then to drive recovery as the pandemic eases, and to spur inclusive growth and address the ravages of climate change. But success depends on the public funds being spent effectively, including on the most beneficial projects. A recent report comparing approaches to infrastructure projects in several countries found the Canadian system stood out as the least rigorous and the most ad hoc.

A new report from, of all places, the European Court of Auditors raises important questions about how prepared Canada actually is to deliver this imminent wave of investments, which are key to national competitiveness and quality of life.

The report provides a rare, detailed comparison of approaches in the European Union, the United States, Australia, Switzerland and Canada, focusing specifically on the planning and delivery of infrastructure projects in major passenger transportation and trade corridors. It shows that the Canadian megaproject system stands out as the least rigorous and the most ad hoc.

Canada is the only country where major transportation projects are not planned as part of a national long-term strategy. There is little effective co-ordination among the different levels of government, which can lead to second-rate projects being chosen and work being undertaken at cross purposes. Furthermore, Canada has no discernable system for monitoring performance to evaluate projects after implementation and learn for next time.

It would be easy to claim these shortcomings are the result of our decentralized federal system, which allocates much responsibility for infrastructure to provinces and territories, which then leave much up to municipalities. There are, indeed, a lot of players involved in Canada, and this can lead to system friction.

But the United States, Australia and Switzerland are also federal countries. They all have developed more rigorous approaches, according to the European study, to planning, selecting and evaluating infrastructure investments.

In the United States, regional transportation plans must be developed to meet specific guidelines set by Washington. Funding only flows once this is done. When the national government approves funding for state or local projects, furthermore, key measures of success are identified and must be reported on over time. This approach creates clearer accountability for the outcomes of public spending, something often lacking in Canada.

In Australia, the federal government sets up an independent agency that produces an evergreen list of priority infrastructure projects, based on assessments of proposals submitted by

¹⁸⁷ Matti Siemiatycki and Drew Fagan, “Canada needs to be more strategic when planning infrastructure spending,” The Globe and Mail (Ontario Edition) 23 Dec 2021, Opinion. Matti Siemiatycki is professor of geography and planning and director of the Infrastructure Institute at the University of Toronto. Drew Fagan is a professor at the Munk School of Global Affairs and Public Policy at the University of Toronto, and a former deputy minister of infrastructure with the Province of Ontario.

governments and the private sector. The agency also evaluates approved projects to identify delivery risks. The agency's role is advisory; it aims to provide confidence to decision makers and the public that tax dollars are well spent.

In Norway and France, which also are scrutinized in the report, reviews are required as a matter of course to compare how construction and operations went vis-à-vis what was promised when projects were approved. These reviews can be embarrassing politically when they show a systemic pattern of underestimated costs and overestimated benefits, but they are an essential learning tool that makes future projects better.

The relatively haphazard way that infrastructure is planned in Canada is a big risk to future prosperity. We risk spending money on projects that shouldn't be at the top of the list, based on the economic, social and environmental benefits they will bring.

In the summer of 2021 the Liberal federal government announced a national infrastructure assessment that is to examine the country's infrastructure needs over the next three decades and set down ideas for how these can best be met. This exercise promises to be an important step toward bringing Canada more in line with its peers.

It's overdue. With the infrastructure funding taps open, Canada needs to be more strategic about where the money goes.”

Counterfactual #3 – The decision in 1985 to implement Ontario's Blue Box Program (BBP) was informed by a controversial multi-stakeholder process that involved a small range of stakeholders. One consequence of the establishment of the program was that regulations requiring minimum levels of refillable bottles for soft drink containers were gradually phased out. Would enforcement of Ontario's Refillable Regulations under the EPA have been phased out in the late 1980s if Ontarians and stakeholders had known that millions of tonnes of aluminum cans and PET bottles for beverage containers would end up in Ontario and Michigan landfills between 1981 and 2021? Further, since it was well known in the 1980s that production of aluminum results in the production of chlorofluorocarbons, a greenhouse gas that is about 8,000 times more powerful than carbon dioxide on a molecular basis, would implementing a Blue Box Program (BBP) based on increased use of these cans have been approved after a systematic review similar to a strategic EA?

Similarly, would Waste Diversion Ontario (WDA, 2002), that agency that oversaw decision-making on the scope of materials that could be collected in the BBP between the mid 2000 and 2018 have supported the collection of a wider array of nearly worthless plastics starting in 2002 if a proper analysis had been done on the lack of markets for these plastics and the likelihood a large portion would be exported to China and developing nations such as the Philippines and Indonesia? Hopefully not.

Appendix C – Revised section 16 of the EAA on Part Order requests (Bump-up Provisions)

Order to comply with Part II

16 (1) The Minister may by order require a proponent to comply with Part II before proceeding with a proposed undertaking referred to in section 15. 2020, c. 18, Sched. 6, s. 25 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 16 (1) of the Act is repealed and the following substituted: (See: 2020, c. 18, Sched. 6, s. 25 (2))

Order to comply with Part II.3

(1) The Minister may make an order declaring a proposed undertaking referred to in section 15 to be a Part II.3 project. 2020, c. 18, Sched. 6, s. 25 (2).

Same

(2) In an order under subsection (1), the Minister may do the following:

1. Set out directions with respect to the terms of reference governing the preparation of an environmental assessment for the undertaking.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 1 of subsection 16 (2) of the Act is amended by striking out “undertaking” at the end and substituting “project”. (See: 2020, c. 18, Sched. 6, s. 25 (3))

2. Declare that the proponent has satisfied such requirements for the preparation of an environmental assessment as are specified in the order. 2020, c. 18, Sched. 6, s. 25 (1).

Order imposing additional conditions

(3) The Minister may by order impose conditions on an undertaking referred to in section 15, in addition to the conditions that were imposed upon the approval of the class environmental assessment. 2020, c. 18, Sched. 6, s. 25 (1).

Same

(4) An order under subsection (1) or (3) may be made on the initiative of the Minister or on the request of a person under subsection (6). 2020, c. 18, Sched. 6, s. 25 (1).

Basis for order

(5) The Minister shall consider the following matters when making an order under subsection (1) or (3):

1. The purpose of this Act.

2. The factors suggesting that the proposed undertaking differs from other undertakings in the class to which the class environmental assessment applies.

3. The significance of the factors and of the differences mentioned in paragraph 2.

4. If a request for the order was made by a person under subsection (6), any ground for making the request that is given by that person and permitted under subsection (6).

5. The mediators’ report, if any, following a referral under subsection (7).

6. Such other matters as may be prescribed.

7. Such other matters as the Minister considers appropriate. 2020, c. 18, Sched. 6, s. 25 (1).

Request for order

(6) A person may request the Minister to make an order under this section only on the grounds that the order may prevent, mitigate or remedy adverse impacts on the existing aboriginal and treaty rights of the aboriginal peoples of Canada as recognized and affirmed in section 35 of the Constitution Act, 1982. 2020, c. 18, Sched. 6, s. 25 (1).

Mediation

(7) The Minister may refer a matter in connection with a request made under subsection (6) to mediation and section 8 applies with necessary modifications. 2020, c. 18, Sched. 6, s. 25 (1).

Order after request

(8) For the purpose of considering a request made by a person under subsection (6), the Director may require the proponent to undertake such consultations and to provide such information as the Director may specify. 2020, c. 18, Sched. 6, s. 25 (1).

Refusal after request

(9) If, after receiving a request under subsection (6), the Minister refuses to make an order, the Minister shall give the person who made the request and the proponent notice of his or her decision together with the reasons for the decision. 2020, c. 18, Sched. 6, s. 25 (1).

Notice of order

(10) The Minister shall give a copy of an order made under this section, together with the reasons for it, to the proponent, to the person who requested the order, if any and to such other persons as the Minister considers advisable. 2020, c. 18, Sched. 6, s. 25 (1).

Change to undertaking

(11) The Minister may make an order under this section with respect to a change to an undertaking and this section shall apply with necessary modifications to such an order. 2020, c. 18, Sched. 6, s. 25 (1).

Conflict

(12) This section prevails over anything to the contrary that may be provided for in an approved class environmental assessment. 2020, c. 18, Sched. 6, s. 25 (1).

Amendment of s. 16 (3) order

(13) The Minister may, in accordance with the regulations, if any, amend any order made under subsection 16 (3), regardless of whether the order was made before or after subsection 25 (1) of Schedule 6 to the COVID-19 Economic Recovery Act, 2020 came into force. 2020, c. 18, Sched. 6, s. 25 (1).

Appendix D – Stakeholder Positions on EAA Law Reforms contained in Bill 108, Bill 197 and the Proposed MECP’s Changes to the EA Program (as set out in various submission to the MECP, the Ontario Government and Class EA Holders)

This list was prepared at the end of this writing project, and is thus intended to provide a general, preliminary summary of some comments on the reforms to the EAA and the proposed EA program changes.

Municipal Engineers’ Association (MEA) - Municipal Class EA Response Table Comments:¹⁸⁸

- In January 2017, the MEA and the RCCAO filed an application for review of the EAA, Ontario Regulation 334, The Classification of Proposals for Instruments Regulation under the EBR, and all policies and guidance documents used in the Municipal Class Environmental Assessment process due to growing delays in core municipal infrastructure projects.¹⁸⁹ This application was supported by other stakeholders, and in April 2017, the Ministry agreed to review the MCEA by the end of 2018.¹⁹⁰ However, this review did not begin until early 2018, and the Ministry responded to the MEA and RCCAO stating that the EA reform discussion paper would be released in spring 2019.¹⁹¹

Specific Comments on Proposals Outlined Related to BILL 197 and EA Program Changes

- “The environmental compliance approval and permit to take water process would be exempt from posting on the Environmental Registry. There would be no Ministry oversight of the planning for these projects. After the amendments in Schedule 6 of Bill 197 there would also be virtually no opportunities for Part II order requests to seek such oversight.”
- “The proposed changes to environmental assessment under Bill 197 and related environmental registry postings would mean that there is effectively no MECP oversight of high level water and wastewater planning in the Greater Golden Horseshoe (GGH), nor effective public scrutiny of municipal plans to expand wastewater treatment facilities and related infrastructure. This will only further entrench the non-compliance of water and wastewater master plans, and will exacerbate the lack of any forum in which to effectively address assimilative capacity of receiving waterways impacted by growth in

¹⁸⁸ “Municipal Class EA Process Annual Monitoring Report” (October 2020), online (pdf): *Municipal Engineers Association* <<https://municipalclassea.ca/files/Annual-Monitoring-Reports/2020/ANNUAL%20MCEA%20MONITORING%20REPORT%202020%20FOR%20POSTING.pdf>>.

¹⁸⁹ Residential and Civil Construction Alliance of Ontario, “Application For Review Re: Municipal Class Environmental Assessments” (31 January 2017), online (pdf): <<https://www.rccao.com/news/files/RCCAO%20and%20MEA%20Signed%20Applic%20and%20Appendics%20Jan%202017.pdf>>.

¹⁹⁰ “Municipal Class EA Process Annual Monitoring Report” (October 2020), online (pdf): *Municipal Engineers Association* <<https://municipalclassea.ca/files/Annual-Monitoring-Reports/2020/ANNUAL%20MCEA%20MONITORING%20REPORT%202020%20FOR%20POSTING.pdf>>.

¹⁹¹ Ministry of the Environment, Conservation and Parks, “Discussion paper: modernizing Ontario’s environmental assessment program” (last updated 31 March 2021), online: *Environmental Registry of Ontario* <<https://ero.ontario.ca/notice/013-5101>>

multiple jurisdictions. Ontario must move to a model of integrated watershed planning and regional strategic environmental assessment that would address the longterm vision for the restoration of Ontario’s watersheds.”

Ontario Waste Management Association (OWMA)

- Waste haulers and processors, legal practitioners and other participants in the waste management industry have expressed concern about the requirement that landfill proponents secure the approval of local municipal councils before proceeding with construction. The Ontario Waste Management Association (“OWMA”), for example, has stated the “municipal veto” will put the economy and environment in jeopardy by “making it virtually impossible to build new landfills in Ontario.”¹⁹² In its recent annual reports and reports on landfill capacity the OWMA estimated that population growth would result in the depletion of landfill capacity by 2032 if no new landfill waste disposal facilities were approved and the rate of waste exports remained at 2018 levels.¹⁹³
- OWMA called on the Ontario government “to amend Bill 197 by removing the landfill approval provisions listed in Schedule 6, and secure economically vital waste management capacity for Ontario residents and businesses.”¹⁹⁴
- The OWMA published a report in January 2021 discussing the State of Waste in Ontario. The OWMA did not comment on Bill 197 in their 2021 State of Waste report, however, they did recommend that “1) The Ontario government must expedite the landfill approval process to ensure adequate waste capacity is available for the future, while meeting provincial environmental protection standards. The environmental assessment process must be modernized and streamlined to reduce unnecessary delays and costs; and 2) The provincial government must retain final decision-making authority over landfill approvals. OWMA supports reviewing the Code of Practice requirements under the environmental assessment process to ensure robust and constructive consultations and engagement with host municipalities.”¹⁹⁵

¹⁹² “Ontario Needs New Landfills (10 July 2020), online: *Ontario Waste Management Association* <<https://www.owma.org/articles/ontario-needs-new-landfills-1>>.

¹⁹³ Mark Buckshon, “Opinion: Ontario needs new landfills –Waste management sector opposes Bill 197, COVID-19 Economic Recovery Act” (4 August 2020), online: *Ontario Construction News* <<https://ontarioconstructionnews.com/opinion-ontario-needs-new-landfills-waste-management-sector-opposes-bill-197-covid-19-economic-recovery-act-2/>>.

¹⁹⁴ Mark Buckshon, “Opinion: Ontario needs new landfills –Waste management sector opposes Bill 197, COVID-19 Economic Recovery Act” (4 August 2020), online: *Ontario Construction News* <<https://ontarioconstructionnews.com/opinion-ontario-needs-new-landfills-waste-management-sector-opposes-bill-197-covid-19-economic-recovery-act-2/>>.

¹⁹⁵ “Landfills”, online: *Ontario Waste Management Association* <<https://www.owma.org/cpages/landfills>>.

- The OWMA also mentioned in their report that “changes in waste legislation [i.e. in the USA] or the economics of waste transport may affect the quantities of waste Ontario can export to other jurisdictions [e.g. Michigan].”¹⁹⁶

Canadian Environmental Law Association (CELA)¹⁹⁷

- “the Ontario government is now proposing a series of regressive and unacceptable amendments to the EAA program”¹⁹⁸
- “CELA further notes that despite the length and complexity of Bill 197, Schedule 6 is not proposing any of the legislative changes recommended in recent years by EA practitioners, academics, non-governmental organizations, the Auditor General of Ontario, and the Environmental Commissioner of Ontario.”¹⁹⁹
- “the bill includes a smorgasbord of environmental deregulation. In particular, the bill removes numerous safeguards to ensure procedural fairness for involvement in environmental decisions that affect the public.”²⁰⁰
- “For the most part, the proposed changes serve to speed up development at the expense of environmental protection and public participation rights”²⁰¹
- “Further, the many procedural and public participation rights could have greater impact in low income and vulnerable communities, the same people that are already disproportionately affected by the pandemic and by existing or proposed activities with environmental impacts”²⁰²

Ontario Home Builders Association²⁰³

- “The legislation through Bill 197 adopts components of OHBA’s recommendations as well as directly addressing a number of OHBA recommendations to the Made in Ontario Environment Plan, Housing Supply Action Plan and submissions with respect to the

¹⁹⁶ “State of Waste in Ontario: Landfill Report” (January 2021), online (pdf): *Ontario Waste Management Association* <https://www.owma.org/download/eJwFwQEKgCAMAMAXqeGmab!ZKynKIDYIen13u!qOxTk5rlOUHrUCIhp9@aZXLpFmPhQjUkbDgNVggs0UzMVA8JI59gF8tGOtP8LsFOU=/OWMA%20Landfill%20Report%202021%20FINA_L_lowres.pdf>.

¹⁹⁷ See also: “Preliminary Analysis of Schedule 4, Bill 197: Proposed Amendments to the Drainage Act” (10 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/preliminary-analysis-of-schedule-4-bill-197-proposed-amendments-to-the-drainage-act/>>.

¹⁹⁸ Richard Lindgren, “EA is Not Red Tape: The Case against Ontario Bill 197” (13 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/ea-is-not-red-tape-the-case-against-ontario-bill-197/>>.

¹⁹⁹ Richard Lindgren, “EA is Not Red Tape: The Case against Ontario Bill 197” (13 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/ea-is-not-red-tape-the-case-against-ontario-bill-197/>>.

²⁰⁰ “Media Release: Ontario’s post-COVID economic recovery bill: a big miss for a green and just recovery” (13 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/ontarios-post-covid-economic-recovery-bill-a-big-miss-for-a-green-and-just-recovery/>>.

²⁰¹ “Media Release: Ontario’s post-COVID economic recovery bill: a big miss for a green and just recovery” (13 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/ontarios-post-covid-economic-recovery-bill-a-big-miss-for-a-green-and-just-recovery/>>.

²⁰² “Media Release: Ontario’s post-COVID economic recovery bill: a big miss for a green and just recovery” (13 July 2020), online: *Canadian Environmental Law Association* <<https://cela.ca/ontarios-post-covid-economic-recovery-bill-a-big-miss-for-a-green-and-just-recovery/>>.

²⁰³ West End Home Builders Association, “COVID-19 Industry Update” (14 July 2020), online: <<https://www.westendhba.ca/covid-19-industry-update-july-14-2020/>>.

Community Benefits Charges framework and Modernizing Ontario’s Environmental Assessments. Overall, the proposed legislation is a positive step towards building more housing supply and creating jobs as part of the post pandemic recovery.”

- “Bill 197 is an important step toward post pandemic recovery and reflects broader provincial objectives in More Homes, More Choice: Ontario’s Housing Supply Action Plan and the Made in Ontario Environment Plan as well as provincial initiatives to support Transit Oriented Communities.”²⁰⁴

Residential and Civil Construction Alliance of Ontario (RCCAO)²⁰⁵

- “The Residential and Civil Construction Alliance of Ontario (RCCAO) congratulates the Ontario government for taking significant steps, through the passage of Schedule 6 of the COVID-19 Economic Recovery Act, 2020 (the Act), to make major changes to the Environmental Assessment Act and improve the environmental assessment process as it relates to municipal infrastructure such as roads, bridges, drinking water supply systems and non-rail public transit.”
- “The Province recognizes that environmental assessments for projects such as replacing a box culvert in a rural community should not bear the same level of scrutiny as wastewater treatment plants and landfills”
- “Eligibility to make request now restricted to Indigenous Persons RCCAO and other stakeholders, including but not limited to the Municipal Engineers Association (MEA) and Ontario Good Roads Association (OGRA), had advocated for streamlining not only the process for submitting Part II Order Requests (PIORs) but more importantly the timeliness and manner in which the Ministry responds to PIORs. RCCAO submits that local residents who have participated in the consultation process for major projects, such as a new arterial road, should still have an opportunity to request additional conditions for the project to proceed.”

Other recommendations include: Post PIORs and outcomes on Ministry website and/or ERO registry; minimize duplication for MCEA Projects which are already included in Official Plans; Confirm that developers can utilize their Planning Act approvals to address their EA Act requirements regarding private on-site water systems; Public Access to EA Documentation; Participation in the EA Processes by Indigenous Stakeholders; Provincially Administered Screening and Information; MECP Indigenous Contacts List; Faster/Simpler processes for emergency projects, etc.

- As noted above, in January 2017, the RCCAO and the MEA filed an application for review of the EAA, Ontario Regulation 334, The Classification of Proposals for Instruments Regulation under the EBR, and all policies and guidance documents used in the Municipal Class Environmental Assessment process due to growing delays in core municipal infrastructure projects.²⁰⁶

²⁰⁴ West End Home Builders Association, “COVID-19 Industry Update” (14 July 2020), online: <<https://www.westendhba.ca/covid-19-industry-update-july-14-2020/>>.

²⁰⁵ Residential and Civil Construction Alliance of Ontario, “NEW Regulation(s) for the Municipal Class EA Process” (21 October 2020), online (pdf): <<https://rccao.com/government/files/Regulatory-Framework-COVID-Econ-Recovery-Act-MCEA-Oct-21-2020.pdf>>

²⁰⁶ Residential and Civil Construction Alliance of Ontario, “Application For Review Re: Municipal Class Environmental Assessments” (31 January 2017), online (pdf): <<https://www.rccao.com/news/files/RCCAO%20and%20MEA%20Signed%20Applic%20and%20Appendics%20Jan%2031%202017.pdf>>.

Ontario Association for Impact Assessment (OAIA)

*OAIA recommendations for Proposed Project List for Comprehensive EAs include:*²⁰⁷

- “include triggers and thresholds for proposed roads that are not freeways/expressways”, consider triggers beyond just length to allow for “unique geographic contexts”
- “The proposed 75 km threshold for municipal expressways is moot as there are currently no municipal expressways of that length. Objective criteria and evidence must be provided to support threshold or trigger values for municipal expressways.”
- Continue to consider complex flood control projects under MCEA procedures, however, “proponents should continue to have the option to choose to incorporate the Comprehensive EA procedures, if it is deemed appropriate for any given Conservation Project.”
- “Amend the Conservation Ontario (CO) Class EA to specifically include Lake Fill alternatives that have the dual objectives of ‘remedial erosion and flood control’ and ‘providing for passive public use of riverine or shoreline areas’.”
- “continue to allow limited Lake Fill in heavily degraded aquatic habitats (due to past industrialization and/or urbanization), for purposes of Municipal Infrastructure retrofits/upgrades under the Municipal Class EA (MCEA), subject to EA commitments for aquatic habitat enhancements as compensation for disturbance of existing highly degraded habitat conditions.”
- “Projects that involve Lake Fill in expansive, relatively undisturbed areas for new industrial, commercial, or urban uses should be subject to Comprehensive EA.”
- provide more objective criteria for railway line thresholds
- include all mining projects with lower thresholds
- create a “federal/provincial accord to avoid duplication and ensure one body of evidence supports two or more processes on mining projects.”
- “expand the Project List to include strategic EAs and regional EAs”

Comment on Bill 197 (embedded in OAIA submission on Proposed Project List)

- 3.5 kilometre distance for landfills “is not based on experience or evidence. Any distance thresholds or triggers should be objective and supported by evidence.”²⁰⁸

Matawa Chiefs²⁰⁹

- “Our rights cannot be swept under the rug by Crown governments passing legislation designed to clear the way for mining and development on our lands without our consent.

²⁰⁷ Ontario Association for Impact Assessment, “OAIA Recommendations on the Proposed Project List for comprehensive environmental assessments under the Environmental Assessment Act (EAA) ERO number: 019-2377”, online (pdf): <https://oia.on.ca/wp-content/uploads/2020/12/Proposed-Project-List-for-Comprehensive-EAs_OAIA.pdf>

²⁰⁸ Ontario Association for Impact Assessment, “OAIA Recommendations on the Proposed Project List for comprehensive environmental assessments under the Environmental Assessment Act (EAA) ERO number: 019-2377”, online (pdf): <https://oia.on.ca/wp-content/uploads/2020/12/Proposed-Project-List-for-Comprehensive-EAs_OAIA.pdf>

²⁰⁹ “Matawa Chiefs Reject Bill 197 Denounce Crown Tactics as Resources Grab” (29 August 2020), online: *NetNewsLedger* <<https://www.netnewsledger.com/2020/08/29/matawa-chiefs-reject-bill-197-denounce-crown-tactics-as-resources-grab/>>.

It's shameful that Ontario is proceeding in this way and attempting to use the COVID-19 global pandemic as a smokescreen to ignore their constitutional duties to First Nations. Nibinamik will not stand for such dishonourable action. Any developments or decisions over our Homelands must be made in deep partnership with us."

- "The Ontario government fails to recognize that the development of the north potentially constitutes a 'taking up of land' which will require significant Crown level discussions with the rights-bearing First Nations. Specifically, Bill 197 accomplishes the introduction into Ontario legislation the new emphasis on 'projects' and 'proponents' and deletes the definition of and hiding the activities of 'undertakings' that impact our interests, rights and future."

Chiefs of Ontario²¹⁰

- "In a virtual meeting on August 20, the Chiefs of Ontario, an organization representing 133 First Nations communities, voted in favour of legal action. Similarly, a coalition of environmental groups, including Ecojustice, Greenpeace Canada and the Wilderness Committee, filed a lawsuit against the Ford government on August 10, alleging the province's lack of public consultation on environmental changes in its economic recovery bill is unlawful."

Mushkegowuk Council²¹¹

- "Mushkegowuk Suggests Changes To Bill 197 Violate Treaty: Mushkegowuk Council is calling on the province to honour the treaty it signed 115 years ago. In an open letter to the Ontario government, Mushkegowuk's Grand Chief Jonathan Solomon expressed the council's "deep concerns" about recent changes that were made to the Environmental Assessment Act in Bill 197. The omnibus bill — dubbed the COVID-19 Recovery Act — which was passed on July 21, enacts changes to 20 pieces of current legislation that govern the province's schools, municipalities, and justice system. Ontario Premier Doug Ford has defended the bill, saying it will speed up the environmental assessment process that has been on the books for decades"

Credit Valley Conservation²¹²

- "CVC staff will continue to work with conservation authority, provincial and municipal staff to assess and coordinate on potential implications of Bill 197 on CVC program delivery – in particular, CVC's Planning and Development Services (PDS) functions including Plan Review, Plan Input and Environmental Assessment Review programs. Currently, there are no significant implications anticipated from Bill 197 on CVC's programs or services – however, CVC staff have provided comments to the province on two (2) recent ERO postings regarding proposals to develop regulations to modernize the

²¹⁰ "Ontario Government is Facing Legal Challenges Over Bill 197" (3 September 2020), online: *Georgian Bay Association* <<https://georgianbay.ca/news/ontario-government-is-facing-legal-challenges-over-bill-197>>.

²¹¹ Elena De Luigi, "Mushkegowuk suggests changes to Bill 197 violate treaty" (10 August 2020), online: *Timmins Daily Press* <<https://www.timminspress.com/news/local-news/mushkegowuk-suggests-changes-to-bill-197-violate-treaty>>.

²¹² Credit Valley Conservation, "Board of Directors Meeting" (11 September 2020), online (pdf): <https://cvc.ca/wp-content/uploads/2021/07/Agenda-Package-BOARD-OF-DIRECTORS-MEETING_Sep11_2020_Redacted.pdf>.

Class EA and GTA West Transportation Corridor EA processes resulting from the Bill 197 EA Act changes”

Ontario Rivers Alliance²¹³

- “The COVID-19 Economic Recovery Act was passed earlier this year, and this legislative amendment is retroactive in its backwards reach to 2013. In spite of the government’s misleading claim that the changes to the EAA “will allow us to build a strong environmental assessment program”, it couldn’t be further from the truth. In fact, there is now no mechanism to request a more rigorous environmental assessment, and public consultation and consideration on these risky projects, as well as the ability to make a Part II Order request, is no longer a possibility. There was also no public or Indigenous consultation before the passing of the Economic Recovery Act.”

Ontario Nature

- “Changes to the EAA severely restrict the grounds on which residents of Ontario (except for Indigenous communities) can seek more robust environmental assessments of contentious projects (i.e., through “bump-up” requests). These changes squash opportunities for the public to bring forward concerns. They also ignore longstanding calls for a more appropriate and transparent approach to dealing with bump-up requests, for example by the Environmental Commissioner of Ontario (Annual Report 2007-2008) and the Auditor General (2016).”²¹⁴
- “Overall, Bill 197 reflects an unrelenting and insidious pattern of environmental deregulation that has brought sweeping changes to Ontario’s environmental laws and policies, reducing or eliminating environmental protections altogether”²¹⁵
- “Bill 197 undermines the democratic process:
 - Timing: Bill 197 was tabled while Ontarians are grappling with a global pandemic, enabling the government to dodge public scrutiny. It was rammed through the Legislature on July 21 only 13 days after it was introduced on July 8, 2020.
 - Lack of transparency: Under the guise of dealing with the pandemic, the title of the new law, COVID-19 Economic Recovery Act, 2020 poorly reflects its content and hides its negative environmental, social and economic implications.
 - Breadth of changes: The new law amends 20 pieces of legislation at once. It’s a 92-page document of complicated legislative amendments that require continual cross-referencing to the laws being amended in order to be understood. There are 36 pages of amendments to the EAA alone, and yet, despite the length and complexity of the changes, they fail to address recommendations in recent years by the Environmental Commissioner and the Auditor General.
 - No opportunity for public consultation: Despite a legal obligation under the Environmental Bill of Rights, 1993 to provide at least at 30-day consultation for

²¹³ Linda Heron, “Trout Lake River Hydroelectric Generating Station, at Big Falls – Update from 2013” (6 October 2020), online: *Ontario Rivers Alliance* <<https://www.ontarioriversalliance.ca/trout-lake-river-hydroelectric-generating-station-at-big-falls-update-from-2013/#more-8979>>.

²¹⁴ “Bill 197 (COVID-19 Economic Recovery Act, 2020) Backgrounder” (21 July 2020), online: *Ontario Nature* <<https://ontarionature.org/bill-197-environmental-deregulation-blog/>>.

²¹⁵ “Bill 197 (COVID-19 Economic Recovery Act, 2020) Backgrounder” (21 July 2020), online: *Ontario Nature* <<https://ontarionature.org/bill-197-environmental-deregulation-blog/>>.

any amendments to the EAA, none was provided. See letter drafted by Ecojustice to Minister Yurek.

- Debate curtailed: The government moved to limit debate at second reading to the minimum 6.5 hours required. It provided no opportunity for members of the Legislature or the public to raise concerns or suggest amendments through a Standing Committee hearing.
 - Regulatory changes will bypass the Legislature: Most of the government's changes to the EAA will be implemented through regulation, which means that they won't go through the Legislature. None of the regulations has been shared with the public.
 - Public participation diminished: As noted above, changes to the Planning Act strengthen the government's power to use Minister's Zoning Orders which enable development projects to proceed without public consultation or the right to appeal. Restricted opportunities for 'bump- up' requests under the EAA likewise undermine public participation.
-
- It is important to note that Bill 197 was the fourth omnibus bill since the government took power two years ago – a modus operandi that mitigates against public scrutiny of and involvement in government decision-making.”²¹⁶
 - “While Ontarians grapple with the social and economic impacts of a global pandemic, the government is fast-tracking a bill that will negatively impact the health of our communities and environment for years to come through changes to the Environmental Assessment Act.”²¹⁷
 - “With scornful disregard, the government is ignoring the legal requirement under the Environmental Bill of Rights (EBR) to provide at least a 30-day public consultation on changes to the Environmental Assessment Act (EAA), one of Ontario's oldest and most important environmental laws. Using Bill 197 to make this unlawful amendment lawful after the fact by retroactively dispensing with the EBR consultation requirement is appallingly cynical.”²¹⁸
 - “Changes to the EAA would mean that no industrial or development projects are automatically subject to an environmental assessment, a measure in place to ensure an upfront public examination of potential impacts before projects proceed. Instead, the Act would cover only projects designated by Cabinet – and Bill 197 is silent on the criteria for determining what might be included.”²¹⁹

Comments by CPAWS and Justina Ray on the proposed amendments to General Regulation 334 under the Environmental Assessment Act to remove Regulatory Duplication of Forest Management requirements in Ontario (ERO: 019-0961)

²¹⁶ “Bill 197 (COVID-19 Economic Recovery Act, 2020) Backgrounder” (21 July 2020), online: *Ontario Nature* <<https://ontarionature.org/bill-197-environmental-deregulation-blog/>>.

²¹⁷ Anne Bell, “Omnibus Bill 197: What you need to know” (26 July 2020), online: <<https://ontarionature.org/omnibus-bill-197-what-you-need-to-know-blog/>>.

²¹⁸ Anne Bell, *Ibid.*

²¹⁹ Anne Bell, *Ibid.*

Ontario continues slashing forestry environmental rules

<https://action.cpaws.org/page/54820/action/1?locale=en-CA>

“The Ontario Government has a plan for the forest industry consistent with the stated priorities of the Ford government to ‘reduce red tape’, ‘create prosperity and ‘ensure Ontario is open for business’.

What we see, however, is the gutting of environmental laws and rules that would steamroll the sustainability of public forests and trample Ontario’s reputation in the marketplace. Ontario has already proposed exempting forestry operations from the Endangered Species Act (ESA) and Environmental Assessment Act. It is also proposing to give away up to 15 million m³ of wood supply without a clear plan that also includes communities, protecting at risk species and ensuring a safe climate.

And to make matters worse, Ontario has already begun implementing the draft strategy without waiting for and responding to comments. It makes a mockery of the public consultation process.

On December 4, 2019, the government posted Ontario’s Forest Sector Strategy draft (the Strategy), on the Environmental Registry of Ontario. Without waiting to receive all the public comments on this proposal before making decisions the MNRF and MECP then posted five additional proposals prior to the winter holidays. These include proposed permanent exemptions for the industry from both the Endangered Species Act and the Environmental Assessment Act, changes to independent forest audits, forest management planning and pest management.

Together these additional proposals begin implementing the vision laid out in the Strategy, while the Strategy itself is supposedly still undergoing public consultation. That they were snuck in before a major holiday adds to my concern that this is not sincere public consultation.

One of the main thrusts of the draft Strategy is the claim that Ontario has an extra 15 million cubic metres of wood volume (representing about 15 million ha of forest) that is not being utilized that could be used to expand the forest industry. There is no convincing evidence that this wood is actually available or that it could be used without impacting forest biodiversity, long term industry prospects or the stability of our climate.

Indeed, this proposal seems to pave the way for increased logging no matter the consequences by removing safeguards under the Environmental Assessment Act (EAA).

Instead of removing EAA assessment oversight, Ontario should be reviewing the environmental assessment program to regain public trust and increase the capacity to administer potential new logging streams, and a next generation forest sector. The EAA does not provide unnecessary duplication. The loss of a “bump-up” request, for example, for an individual environmental assessment is a specific example of removing distinct and un-replicated functions. Under the existing EAA Declaration Order regime, there is a 30-day period for any person to make a written request to the Minister of the Environment for an individual environmental assessment of

specific proposed forest management activities in the plan. This provision allows an existing final oversight provision to Ontarians, and an inter-ministry check-point that would be removed under this proposal. Both of these roles are important, and cannot, and will not be replaced under this proposal.

The proposal also asserts that the full 61 conditions of Declaration Order-75 have been met and incorporated into MNRF's existing requirement but no specific evidence of this claim is provided.

Climate change is an increasingly important societal concern and value, that was not assessed at the time of the original Timber Class EA Hearings, nor at any stage of the Declaration Order history that followed. MECP should not be backing away from its obligations to assess environmental impacts such as climate change which has never been assessed for forest operations. This substantial gap in Ontario's management of its forests in a carbon emergency demonstrates the dangers of exemption from ongoing assessment of environmental risks and values.

We urge you not to go ahead with the draft Strategy in its current form or this specific proposal to exempt forest operations from the Environmental Assessment Act. Instead, we ask that the MECP undertake meaningful consultation opportunities with the public similar to what you offered select forest companies."

Municipal Comments

York Region Comments

- "York Region thanks the Province for continuing modernization efforts on the Environmental Assessment Act under Bill 197 and for consulting with stakeholders on the major update to the Municipal Class Environmental Assessment (EA) process. This letter and attachment outlines key comments and recommendations from York Region staff on the proposed process to help ensure a balance of environmental protection and timely delivery of critical infrastructure. The attachment contains specific recommendations on the proposed schedules and Municipal Engineers Association guidance. Due to the consultation timeframe, these recommendations will be communicated to Regional Council after submission. Should Council have any additional comments, staff will forward them to the Province for consideration. Region staff hopeful Environmental Assessment modernization approach will speed-up approvals and contribute to economic recovery York Region staff appreciate the Province taking action under Bill 197 to address challenges with the EA process. While staff are optimistic about the helpful changes, details of implementation to be set out in the regulation will determine whether this modernization initiative will result in meaningful improvements. York Region staff anticipate challenging times ahead given our current economic slowdown, resulting in similar economic challenges experienced in the Province in years past. From 2000-2008 York Region experienced high levels of growth and the Region invested heavily in infrastructure to accommodate this high growth rate. When growth slowed due to the 2008 recession, development charge forecasts were not realized and the Region took on significant debt. Rising costs to deliver capital projects and delays in

receiving approvals under the EA process were key factors that drove debt to unsustainable levels. The current COVID pandemic has already resulted in an unprecedented economic shock surpassing the 2008 downturn. It will be critical that modernization of EA and Class EA processes result in substantive change that eases economic burden on municipalities so that forecasted targets under the Growth Plan can be achieved.”

- “New requirements for landfills cannot be extended to other projects: Bill 197 introduced a requirement to obtain the support of host municipalities for landfills, which aligned with many municipalities who had requested this. However, this has the potential to create a dangerous precedent for other politically-sensitive infrastructure. It is strongly recommended that these requirements not be extended to other projects as this has the potential to undo many of the benefits provided through EA modernization.”

Municipal Concerns about Veto on New Landfills

- On October 5, 2020, St. Catharines City Council passed a motion relating to municipal autonomy and the principle that municipalities can veto a development outside their municipal boundary in an adjacent municipality.²²⁰ They argue that the provisions establish “a dangerous precedent” that could be expanded to other types of development.
- This motion was endorsed by other municipalities such as Arran-Elderslie,²²¹ Township of Puslinch,²²² Temiskaming,²²³ Chatham-Kent,²²⁴ Norfolk County,²²⁵

²²⁰ The motion read:

- WHEREAS Schedule 6 of Bill 197, COVID-19 Economic Recovery Act, 2020 considers amendments to the Environmental Assessment Act relating to municipal autonomy and the principle that municipalities can veto a development outside their municipal boundary in an adjacent municipality; and
- WHEREAS Bill 197 empowers multiple municipalities to ‘veto’ development of a landfilling site within a 3.5 km zone inside the boundary of an adjacent municipality; and
- WHEREAS Bill 197 establishes a dangerous precedent that could be expanded to other types of development; and
- WHEREAS Bill 197 compromises municipal autonomy and the authority of municipal councils to make informed decisions in the best interest of their communities and municipal taxpayers; and
- WHEREAS amendments in Schedule 6 could cause conflict in the effective management of landfill sites, put significant pressure on existing landfill capacity, and threaten the economic activity associated with these sites;
- THEREFORE BE IT RESOLVED That the City of St. Catharines calls upon the Government of Ontario (Ministry of the Environment, Conservation and Parks (MECP) to amend Bill 197, COVID-19 Economic Recovery Act, 2020, to eliminate the development approval requirement provisions from adjacent municipalities and that the ‘host’ municipality be empowered to render final approval for landfills within their jurisdiction; and
- BE IT FURTHER RESOLVED that a copy of this motion be forwarded to Premier Doug Ford, Jeff Yurek the Minister of Environment, Conservation and Parks, Steve Clark the Minister of Municipal Affairs and Housing, local MPP’s, the Association of Ontario Municipalities (AMO) and Ontario’s Big City Mayors (formerly Large Urban Mayors Caucus of Ontario-LUMCO)
- BE IT FURTHER RESOLVED, that a copy of this resolution be forwarded to all Ontario municipalities with a request for supporting motions to be passed by respective Councils and copies of the supporting motion be forwarded to Premier Doug Ford, Jeff Yurek the Minister of Environment, Conservation and Parks, Steve Clark the Minister of Municipal Affairs and Housing, the local MPP’s, the Association of Ontario Municipalities (AMO).

²²¹ Municipality of Arran-Elderslie, “Agenda” (13 October 2020), online (pdf): <<https://www.arran-elderslie.ca/en/municipal-services/resources/Documents/Agendas-and-Minutes-/October-13-2020-Council-Agenda-Pkg.pdf>>

²²² “Agenda” (3 March 2021), online (pdf): *Township of Puslinch* <<https://puslinch.ca/wp-content/uploads/2020/11/March-3-2021-Council-Agenda.pdf>>.

²²³ “Agenda” (20 October 2020), online (pdf): *Temiskaming Shores* <https://www.temiskamingshores.ca/en/city-hall/resources/Council/Council_Package/00-2020-10-20-Council-Package-C.pdf>.

Welland,²²⁶ Township of Howick,²²⁷ Amherstburg,²²⁸ Brock,²²⁹ Northumberland County²³⁰ and the Township of Essa.²³¹

²²⁴ “Chatham-Kent Council – Electronic Meeting” (1 February 2021), online (pdf): <https://www.chatham-kent.ca/localgovernment/council/meetings/Documents/2021/February/February_1_2021_Minutes.pdf>.

²²⁵ “Information Package” (5 January 2021), online (pdf): *Norfolk County* <norfolkcounty.ca/download/January-05-2021-Special-Council-Information-Package.pdf>.

²²⁶ “Special Meeting of Council” (23 March 2021), online (pdf): *Corporation of Welland* <<https://www.welland.ca/Council/c2021/SCA20210323.pdf>>.

²²⁷ “Council Agenda” (20 October 2020), online (pdf): *Township of Howick* <<https://howick.ca/content/government/agendas-minutes/oct-20-agenda-pkg.pdf>>.

²²⁸ “Council Information Index” (25 December 2020), online (pdf): *Brock* <<https://www.townshipofbrock.ca/en/municipal-office/resources/Documents/Council-Information-Index---Week-of-December-21---December-25-2020.pdf>>.

²²⁹ “Council Information Index” (25 December 2020), online (pdf): *Brock* <<https://www.townshipofbrock.ca/en/municipal-office/resources/Documents/Council-Information-Index---Week-of-December-21---December-25-2020.pdf>>.

²³⁰ Public Works Committee, “Agenda” (1 March 2021), online (pdf): *Northumberland County* <<https://www.northumberland.ca/en/county-government/resources/Documents/Council-Documents/2021-03-01-Public-Works-Committee-Agenda.pdf>>.

²³¹ “Consent Agenda” (20 January 2021), online (pdf): <<https://www.essatownship.on.ca/Shared%20Documents/Council%20Agendas%20and%20Minutes/21-01-20%20Consent%20Agenda.pdf>>.

Appendix E – Amendments to RRO 1990 Reg. 334 Related to Indigenous Land Claims (O Reg 511/21)

14.1 (1) Subject to subsection (3), the following undertakings by or on behalf of the Crown in right of Ontario are exempt from the Act:

1. All undertakings that relate to a settlement agreement involving the Crown in right of Ontario and an Indigenous community with respect to a land claim, including, for greater certainty, an interim agreement.

2. The undertakings listed in subsection (2) that implement an agreement, other than an agreement mentioned in paragraph 1, about land or any interests in land and that include as parties,

i. the Crown in right of Ontario as represented by the Minister of Indigenous Affairs, and

ii. an Indigenous community or a person authorized to hold any interests in land on behalf of an Indigenous community. O. Reg. 511/21, s. 1.

(2) The undertakings listed for the purposes of paragraph 2 of subsection (1) are,

(a) the disposition or release of,

(i) any interests in land,

(ii) reservations or conditions respecting land that benefit the Crown, whether in letters patent, in an agreement or pursuant to an Act, and

(iii) interests in Crown resources other than land that are related to a disposition or release of any interests in land;

(b) the transfer or acceptance of administration and control of land;

(c) the acquisition of any interests in land;

(d) establishing, amending or rescinding boundaries of provincial parks and conservation reserves; and

(e) activities carried out in advance of a disposition of any interests in land or transfer of administration and control of land or to prepare lands for disposition or transfer of administration and control, including authorizing interim uses of lands or related Crown resources by an Indigenous community or by a person with the consent of an Indigenous community. O. Reg. 511/21, s. 1.

(3) Subsection (1) does not apply to,

(a) the class of undertakings that is subject to the order entitled “Declaration – Projects and Activities being considered for inclusion in the Algonquin Land Claim Settlement”, made pursuant to subsection 3.2 (1) of the Act, dated July 23, 2007 and approved by Order in Council 1900/2007, as it may be amended from time to time; or

(b) an undertaking respecting which a process of public consultation pursuant to a class environmental assessment or order under the Act was commenced before July 1, 2021. O. Reg. 511/21, s. 1.

(4) In this section,

“land claim” means,

(a) a claim to an outstanding entitlement with respect to reserve land or the improper use of reserve land by others,

(b) a claim respecting unsold surrendered land, or

(c) an aboriginal rights and title claim. O. Reg. 511/21, s. 1.

Appendix F–Selected List of MECP Notices and Bulletins

- July 8, 2020 – Class EA amendments, exemption regulations for Parks, Indigenous land claims, and MTO exemptions posted on the Environmental Registry for comment until August 22, 2020.
- Class EA Amendments (<https://ero.ontario.ca/notice/019-1712>)
- Land claim settlements and other agreements with Indigenous communities (<https://ero.ontario.ca/notice/019-1805>)
- Projects and activities within provincial parks and conservation reserves (<https://ero.ontario.ca/notice/019-1804>)
- Specific MTO projects (<https://ero.ontario.ca/notice/019-1882> and <https://ero.ontario.ca/notice/019-1883>)
- November 26, 2021 - Moving to a project list approach under the Environmental Assessment Act (<https://ero.ontario.ca/notice/019-4219>)

**Appendix G – Guelph Residents for a Safe Speedvale Avenue, Part II Order Request -
Guelph Emma-Earl Bridge Environmental Assessment, Oct. 29, 2020**

Note: Reprinted with permission of the Guelph Residents for a Safe Speedvale Avenue

Guelph Residents for a Safe Speedvale Avenue



October 29, 2020

Hon. Jeff Yurek
Minister of Environment, Conservation and Parks
Ministry of Environment, Conservation and Parks
777 Bay Street, 5th Floor
Toronto, ON M7A 2J3

RE: Guelph Emma-Earl Bridge Environmental Assessment - Part II Order Request

Dear Minister Yurek:

I'm writing on behalf of the Guelph Residents for a Safe Speedvale Avenue regarding the City of Guelph's Emma-Earl Bridge (EEB) Environmental Assessment (EA). We support sustainable transportation infrastructure where it meets the mobility needs of the most people at the lowest cost but not where it will exacerbate issues related to public safety, our environment and city finances – especially in a COVID world. Since we want to ensure that this relatively pristine section of the Speed

River is protected using evidence-based decisions and tax dollars are used efficiently, we request that you bump- up this Schedule B EA to a Schedule C EA for nine related reasons:

1) EA Schedule and Scope: A recent Schedule B EA to widen Gordon Street in south Guelph [1] was defined as having “some potential for adverse environmental impacts” (i.e. improvements or minor expansions to existing facilities). We reject the notion that the 90-metre EEB infrastructure being built over the Speed River connecting two separate dead end roads and requiring amendments to the Official Plan is a “minor” expansion. Rather, the EEB fits under the Schedule C definition: “Potential for significant environmental impacts (i.e. construction of new facilities and major expansion of existing facilities). It must include evaluation of alternative solutions, evaluation of alternative designs for the preferred solution, and public consultation.” Further, the scope of the EEB EA was too narrow as it limited the focus to the area where the bridge would span the Speed River. Since Speedvale Avenue is constantly referenced (and was the subject of a related 2015 EA), the EEB EA scope should have been extended to Speedvale, Dufferin and Marlborough and include sidewalk and road/hydro realignment on Emma and Earl Streets.

2) Project Need: Despite EA analysis going back to at least 2016, the need for the \$1.7 million EEB has not been established given other city policing, infrastructure, housing, health and financial challenges -- all of which have been strained by the COVID pandemic (yet not mentioned in any EA documents). The EEB will NOT help cyclists and pedestrians get across car-oriented Speedvale Avenue where the real safety issues are and the city’s evaluation (see #7 below) basically admitted to this. (Fortunately, the temporary Speedvale Bridge “pinch point” bollards -- installed in June 2020 as a result of COVID physical distancing requirements -- made this section of the road much safer for all users. More details in #9 below.)

3) Planning and Demand: During the 2015 Speedvale Avenue EA, council and staff suggested the EEB be built 400 metres south instead of having bike lanes included as part of the \$20 million Speedvale road design. This contradicted the city’s 2009 Bike Policy and 2013 Cycling Master Plan which specifies that all newly constructed roads will include bike lanes. The rationale for the EEB is also based on an outdated 2005 Trails Master Plan -- which did not identify the EEB as a priority -- along with the outdated 2007 Local Growth Management Plan. The Trails Master Plan (slated for completion in 2021), should be approved in conjunction with the city-wide Transportation Master Plan (also to be complete in 2021) before moving forward with EEB as there is no hard data to indicate that cycling and walking will increase amongst the majority of Ward 2 residents who have access to an automobile.

During EEB council debates, there have been biased statements that the bridge will “significantly improve active transportation (AT)” yet this has not been substantiated. Since the EA began in 2016 and right up to today, we have asked staff for modelling and cost-benefit data that was used to confirm the need for the bridge and who will actually use it on a regular basis. This necessitates an analysis of mode split/auto ownership, origin-destination data, current vs. projected bike/pedestrian trip numbers, route lengths – to name a few parameters.

Even more than car drivers, people on foot or on bike want to take the most direct route to their destination. We have pored over Google maps to see whether a new bridge would actually be used when multiple direct routes already exist. People who live adjacent to the proposed bridge may use it on occasion – mainly those living between Speedvale and Emma, west of Delhi. But this neighbourhood of 100 residences and a few apartment buildings is designated as low density residential with the majority of people being car owners. As a result, they’ll continue driving most of the time to shops on the east side of the river or go directly downtown via Delhi as they’ve always done. If they are traveling to Riverside Park (the only major destination that is nearby), they will head north on Marlborough and then

west to the fire station crosswalk. Those living further east will take Delhi or Speedvale north. Some relevant examples for those living in other parts of town:

- Cyclists and pedestrians who live in Ward 2's low density northeast quadrant of the city (north of Speedvale) and are headed downtown will still have to zig-zag south across Speedvale by the fire station crosswalk or go south on Delhi. The EEB makes no difference to them.
- Ward 3 residents living in northwest quadrant of city (north of Speedvale) and headed for downtown would not take the bridge whether biking or walking. Instead, they'd go straight down the Trans-Canada Trail (TCT) or Woolwich Avenue (which has bike lanes). If they are headed for the LCBO located at Speedvale/Stevenson, they would cut through the Woodlawn Cemetery, Riverside Park and back streets – which saves them time and 1 km of cycling across Speedvale to use the bridge and then head back north.
- AT citizens who live east of Eramosa Road in Ward 1 would not take the EEB to travel downtown. To get to Riverside Park, they would travel straight up Stevenson or Delhi. In this case, there is no rationale for biking or walking out of their way to the EEB in order to take the TCT just to traverse Speedvale at the fire station crosswalk.

4) Environment and Natural Heritage System Policies: This part of the Speed River is a turtle nesting ground and is heavily used by a range of water animals including beaver, muskrat, minks, herons, kingfishers and at least 6 kinds of ducks (mallards, common mergansers, hooded mergansers, buffleheads, goldeneyes, redheads). This precious wildlife could be extirpated due to EEB construction and their habitat altered for decades to come. Mature trees along the banks of the river would also be cut down to make way for the EEB. The November 2019 EA report by Aquafor Beech Consultants sternly warns: "... none of the three design alternatives fully meet the current development policies of the City of Guelph as defined in the Official Plan. Due to site constraints, all of the bridge designs have a permanent footprint within the Natural Heritage System (NHS)." Specifically:

- The proposed bridge does not fall into one of the general permitted uses for lands within the Natural Heritage System.
- None of the three proposed design alternatives meet the City's policy requirements for Significant Woodlands.
- Alternatives 2 and 3 additionally do not meet the City's policy requirements for Significant Wetlands and Significant Wildlife Habitat.

It should also be noted:

- The Grand River Conservation Authority has concerns about EEB impacts on the Speed River, especially as they relate to flow, erosion and other river functions.
- The nearby Norwich, Speedvale and Riverside Park bridges are used as dumping grounds for garbage of all types, including needles. The EEB would bring more of the same, further compounding the environmental disruption for wildlife (both locally and downstream).

5) Cycling, Pedestrian and Neighbourhood Safety: The level of assaults, vandalism and drug activity on TCT is already causing problems. With the EEB providing a third get-away route, safety issues will increase since the trail isn't being patrolled regularly by police and there are no plans or funding to do so. Further, forklifts and 36-wheeler trucks entering/exiting the Armtec plant by EEB and driving along Earl Street will lead to more accidents as people approach or exit the bridge.

6) Financial Realities: In June 2017, the preliminary ranking carried out by staff and consultants suggested the single-span bridge was the preferred alternative. At the time, the capital cost was estimated to be \$1.8 million but jumped to \$3.23 million (excluding HST) in May 2020. Without requesting any community feedback (and questionable methodology evaluating project benefits and costs), staff has presented an altered \$1.7 million two-span bridge (Alternative 2B – see #7 below). This amount will increase when lighting, guarded sidewalks, road/hydro realignment, possible expropriation, policing and other operating costs are included. These scarce dollars should be invested in Speedvale bike lanes and/or permanent pinchpoint/crosswalk (see #9 below) and a possible bridge underpass (which is under discussion). The balance of funds can be invested in increased police surveillance, river enhancement/clean-up and lighting on the existing TCT. Alternatively, the funds can simply be saved to meet Mayor Guthrie’s goals of dealing with city debt and being “fiscally responsible not just during the response to COVID-19, but to the recovery after COVID-19 and it’s going to take some time... There would be critical decisions that need to be made from both an operating, or a service delivery point of view, and a capital point of view.” [3]

7) Evaluation: Further to comments made under Project Need (#2) and Planning and Demand (#3), the city’s “Evaluation of Alternatives” scoring resulted in only a 2-point spread between the NEW Preferred Alternative 2B and the Null-Do Nothing Alternative. This is well within the margin of error for such an analysis – but was ignored due to the EA scope not including Speedvale “pinch point” options that were first proposed by the community in June 2017. Also, the June 2017 PIC Stakeholder Summary Report and the May 4 2020 Staff Report⁴ states that over half of community feedback was against the bridge (even pre-COVID). It appears that the city staff did not like the PIC #2 results so added a 5th alternative, rescored, and selected the NEW Preferred Alternative 2b – which is an entirely different Preferred Alternative than the one originally recommended by the consulting firm and that was presented to the community during the second PIC on June 7, 2017.

8) Public Consultation: There has been an extreme lack of communication between city staff, First Nations and impacted neighbourhoods (other than two 2-hour PIC meetings, the second in June 2017 being held 6 months later than originally scheduled). [4] For example, those who attended the first meeting in October 2016 were not notified of the June 2017 meeting and the meeting format (with 25 separate display boards) was purposely designed to limit citizen interaction. City advertisements initially included incorrect phone numbers and requests to access public comments was refused by staff. PIC participants who provided their email addresses were not kept informed as to the status of the EA and the city website was not updated between July 16, 2017 and August 27, 2020. Ultimately, this process has taken a total of 4 years to complete – staff told the community on June 7, 2017, that the EA Project file would be filed and agency approvals obtained in September 2017 (as per display board #25). With new information finally posted to the city’s website on August 27, 2020 as summer was ending and people looking forward to Labour Day Weekend, staff gave the community 6 business days to send comments and/or register as a delegation at the Committee of the Whole Meeting that took place on September 8. Staff did not email PIC registrants any information so only those who closely followed the process knew about this meeting and scrambled to make deputations.

9) The Answer: Between June 8 and October 27 of this year, the COVID-inspired Speedvale Avenue “pinch point” provided huge benefits for cyclists and pedestrian safety both in terms of providing a visual buffer from vehicular traffic and enabling physical distancing from other AT citizens.⁵ There were minor costs to eastbound vehicles in terms of time loss (mainly during rush hour) but less need for crosswalk operations at the fire station (which reduced vehicular delay). The total financial cost to the city of \$20,000 max was well worth it and should be made permanent in order to save lives now – not at some point in the future (2024?). If the south side “pinch point” is extended to

Marlborough and a crosswalk added in that location, the city will eliminate the EEB and will:

- save minimum \$1.6 million on EEB construction;
- avoid environmental, policing, lighting and related costs;
- not need to amend official plan; and,
- partially correct itself on its 2015 decision to override bike policy on Speedvale.

Minister, the Guelph Residents for a Safe Speedvale Avenue respectfully requests that you reject the City of Guelph's EEB Schedule B EA and order a Schedule C EA be undertaken – for all the safety, planning, environmental, financial and consultative reasons stated above. It would have been important to have a Schedule C EA before the COVID pandemic struck and it is even more important now. Please contact me if you require further information about this unnecessary project.

Sincerely,

[Personal Information deleted]

Guelph Residents for a Safe Speedvale Avenue

Cc: Director, Environmental Assessment Branch, MECP

Endnotes

1 Page. 11, https://guelph.ca/wp-content/uploads/TTR_Gordon_Street_Class-EA_Project-File-Report_2020-07-17v5.0-accessible.pdf

2 [deleted]

3 <https://www.guelphtoday.com/local-news/city-has-to-buckle-down-to-maintain-affordability-as-it-starts-2021-budget-process-says-mayor-2556089>

4 First Nations' tribes were not made aware of the project and didn't have a chance to respond to EA in terms of critical aboriginal impacts.

5 <https://guelph.ca/2020/10/guelph-making-temporary-sidewalk-and-road-changes-so-people-can-be-active-outdoors-and-remain-2-metres-apart/>

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Update on Bump-up Request Filed by Residents for a Safe Speedvale Avenue
Posted on Facebook, Dec. 16, 2021

<https://www.facebook.com/groups/safespeedvale/permalink/625157902054895/>

A year ago today (Dec 16), the City of Guelph and the Residents for a Safe Speedvale Avenue received letters regarding the Emma-Earl Bridge (EEB) Environmental Assessment (EA) from the Ministry of Environment, Conservation and Parks (MECP).

The Ministry sent the City back to the drawing board to deal with major EEB concerns outlined in our bump-up request dated Oct 29/20 (and which have been discussed in many previous posts on this page).

Other than responding to our Jan 29/21 request to provide us with a copy of MECP's letter addressed to the city, we have yet to receive any communications from staff. MECP's Project Evaluator told us today that he hasn't heard anything either.

We've asked city staff to provide a comprehensive update telling us the status of the EEB as it relates to the city fulfilling MECP EA requirements. This would include estimated timelines for more Public Information Centres, submission of second Notice of Completion and potential construction.

We've also asked for:

- * the latest information pertaining to the status of the EEB Official Plan Amendment and deferred Speedvale Avenue reconstruction;
- * a meeting to discuss all projects.

Initiated in 2014 and 2017 respectively, Speedvale and EEB is a case study on how not to plan transportation infrastructure. We'll see if things get any better in 2022. In the meantime, your comments are welcome!

Appendix H – EA Codes of Practice developed by the MECP between 2005 and 2008

MECP EA Codes of Practice (as summarized by ECO staff in 2008.)

In response to numerous requests from the public and proponents, as well as recommendations by the EA Advisory Panel (made in 2005), MOE committed to developing guidance material on six components of the EA process:

- the preparation and review of terms of reference for individual EAs;
- the public consultation process;
- mediation practices for dispute resolution;
- the preparation and review of individual EAs;
- the preparation, review and processing of class EAs; and
- the coordination of EAs for projects subject to both federal and provincial assessment under the Canada-Ontario Agreement on EA Cooperation.

As of June 2008, approved guidance is available for four aspects and draft guidance is available for the other two aspects of the EA process.

Code of Practice: Preparing and Reviewing Terms of Reference for EAs in Ontario: This Code (Registry Policy Decision # PA06E0009, June 20, 2007) outlines: the roles and responsibilities of the government, proponent and other participants; the mandatory elements of a ToR prepared for a project undergoing an individual EA; and the government's review of the ToR.

Code of Practice: Consultation in Ontario's EA Process: This Code (Registry Policy Decision # PA06E0009, June 20, 2007) applies to consultation on the terms of reference (ToR) and environmental assessments prepared for projects undergoing individual EAs, and to documentation prepared for projects undergoing class EAs or environmental screenings. In this Code, MOE outlines the roles and responsibilities of government, the proponent and other participants, as well as notification requirements, and elements of a successful consultation plan.

Code of Practice: Using Mediation in Ontario's EA Process: This Code (Registry Policy Decision # PA06E0009, June 20, 2007) outlines how mediation may be used to resolve disputes that arise during the EA process. It covers: when mediation is appropriate; the types of mediation that are available; good mediation practices; and the roles and responsibilities of the government, mediator, proponents and the other participants.

Draft Code of Practice: Preparing and Reviewing EAs in Ontario: This draft Code (Registry Policy Proposal # 010-1259, August 17, 2007) sets out MOE's expectations for the content of an

individual EA, and the roles and responsibilities of the government, proponent and other participants.

Draft Code of Practice: Preparing, Reviewing and Using Class EAs in Ontario: This draft Code (Registry Policy Proposal # 010-1259, August 17, 2007) sets out: MOE's expectations for the content of a "parent" class EA; the roles and responsibilities of the government, proponent and other participants; and a description of how to navigate the class EA process for a particular project.

Federal/Provincial EA Coordination: A Guide for Proponents and the Public: This Guide (Registry Policy Decision # PA06E0008, June 20, 2007) supports the Canada-Ontario Agreement on Environmental Assessment Cooperation, signed in 2004, under which the governments agreed to work together on EA projects that are subject to both the federal EA requirements in the Canadian Environmental Assessment Act and the provincial EA requirements in the Environmental Assessment Act. The governments agreed to adopt measures that will allow proponents to draft one set of documentation (on which both governments would base their approvals) and to prepare one consultation plan. The governments also agreed to impose the same or similar timelines for project deadlines and approvals. The Guide outlines the roles and responsibilities of the federal and provincial governments, and an approach to coordinating the preparation of documentation and public consultation.