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WHAT IS AND IS NOT MODERNIZED IN ONTARIO'S RE-WRITE OF ITS *ENVIRONMENTAL ASSESSMENT ACT*

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Articles

On July 21, 2020, Ontario passed Bill 197, the *COVID-19 Economic Recovery Act, 2020*. Through Schedule 6 to this Act, Ontario has made significant amendments to the *Environmental Assessment Act* ("EAA"). The stated purpose of the amendments is to modernize the 1975 Act. This article assesses this re-write of the EAA in three parts

1. Key features of the claimed modernization;
2. Key features of the 1975 Act now eliminated from Ontario EA; and
3. Notable omissions from this modernization.

Overall, the amended Act fails to deliver the vision of modernization set out in this

Government's 2019 discussion paper on environmental assessment ("EA"). Similarly, while the amendments have eliminated many idiosyncratic features of the 1975 Act, they have failed to modernize two of the most problematic features of the EAA- its lack of a clear purpose and foundation for Ontario EA.

1. Assessing the new Act's delivery of EA Modernization

The explanatory note to Bill 197 describes Schedule 6 as an effort to modernize the requirements of the EAA. In this respect, the explanatory note relies on the theme of the Province's 2019 discussion paper, "Modernizing Ontario's Environmental Assessment Program." That paper set out a four-part vision for a modern Ontario EA program:

> (1) Alignment between the level of assessment and the level of environmental risk associated with a project;
>
> (2) Elimination of duplication between EA and other planning and approvals processes;
>
> (3) Process efficiency through shortened timelines; and
>
> (4) Electronic access to environmental assessment information and public participation.

In 2019, through the *More Homes, More Choice Act, 2019*, the Government commenced its implementation of this modernization. In furtherance of its first objective for modernization, the Government amended the EAA to exempt low-risk projects from environmental assessment through amendments to various class environmental assessments.[1]

Bill 197 proposes a second reform to advance this first objective. Schedule 6 proposes to make Ontario EA like federal impact assessment by triggering the requirement to conduct an EA through a project list set out by future regulations. This aligns with the first objective by eliminating the automatic application of the EAA to any project. Instead, the Province will expressly decide what kinds of projects are sufficiently high risk to require a full environmental assessment.

As we await future project list regulations, it will be important to see how long this takes and whether this new list truly reflects the degree of environmental risk (bearing in mind the broad EAA definition of the "environment").

Regarding the second objective, Schedule 6 proposes to amend the EAA to eliminate duplication of federal and provincial environmental assessments. However, these amendments contain no obvious changes or improvements to the existing EAA measures to avoid this duplication. Nor has Ontario improved the decision-making framework to eliminate duplication. Unlike the framework for EAA exemptions, the reformed EAA lacks any statutory test to assess the merits of any order allowing federal assessment to replace an Ontario assessment.[2]

It is also notable that the new Act fails to provide reforms necessary to integrate the government's first and second objectives for a modern EA regime. Contrary to the first objective for a modernized Act, the amended EAA does not prevent the Government from exempting projects that present environmental risks from Ontario EA even where there is no risk of duplicative EAs.

In its discussion paper, the Province identified the relationship between EAs and other provincial approvals as challenging for proponents and the public to navigate. An important example is where a project is subject to an EA exemption but requires other provincial approvals. This issue involves the EAA and provisions in Ontario's *Environmental Bill of Rights Act, 1994* (EBR). The EBR provides (s.32) that a project

exempted from the EAA is also exempt from any public scrutiny under the EBR for other required approvals. The discussion paper suggests that the government would address this problem in ways that would assist applicants and the public. Importantly, Schedule 6 re-writes the relevant provisions of the EBR, but this re-write fails to provide any assistance to the public. Nor does this re-write address the government's other objectives for EA modernization. In particular, the re-write of this provision in the EBR fails to ensure that environmental risk is addressed and duplication avoided by limiting the EBR exemption to projects that have gone through EA or applying the EBR to projects exempt from the EAA. The Province has provided no explanation for this failure to assist the public and advance the objectives of EA modernization.

Turning to the third objective, timelines are a common focus of assessment reform. However, based on longstanding Ontario and federal experience with legal timelines for environmental assessment, the new EAA proposes few changes that will shorten what occurs now for individual EAs. One very obvious change that would shorten Ontario EA is the elimination of the formal terms of reference process requiring ministerial approval. As set out in the 2019 discussion paper, this approval usually requires more than a year of time from proponents, regulators and the public. The discussion paper also referenced provincial experience with existing terms of reference approvals to propose sector-based terms of reference. Yet the amended EAA fails to deliver on this reform. In particular, the amended EAA fails to eliminate the requirement for a terms of reference approval where a proponent seeks to rely on sector-based guidance. For those proponents that seek very specific guidance up-front, the EAA could still make provision for a proponent to apply for terms of reference approval, but at its request.[3] Another way to shorten EA timelines for individual or comprehensive EAs is to take projects out of the hands of government decision-makers and apply the lessons learned from Ontario's renewable energy approval ("REA") process to prescribe an efficient hearings process and timeline for all

projects subject to EA.[4]

As concerns other types of EA, the new Act substantially narrows director and/or ministerial review[5] for all projects subject to class or sectoral assessments. Such reviews may now consider only project impacts on indigenous rights. Perhaps this reform will shorten one kind of timeline, but, based on the experience of federal EA, this change is likely to replace the bump-up process with judicial reviews in Ontario courts. It is unclear why modernizing the EA program did not look to Ontario's modern experience with the Environmental Review Tribunal to reduce class EA timelines due to bump-up requests. Based on this experience, there would likely be considerable timeline efficiency by engaging the Tribunal in a process that encompasses a hybrid of the EBR written leave to appeal process to test a bump-up claim[6] and, where leave is granted, a prescribed hearings process and timeline resembling the REA process summarized above.

The fourth stated objective of EAA modernization was to go digital. Based on federal experience with an electronic EA registry since the early 2000s, this objective has obvious merit and no obvious drawbacks. However, the amended Act fails to deliver on this objective. Digitization is not mentioned in the explanatory note for the EAA amendments. More importantly, the amended Act contains no reference to digital communications, a registry or even use of electronic documents. It does not even amend the regulation-making powers to permit such reforms. Although the EBR notice advises that the EAA was to be amended to make provision for online submissions to a digital platform for EA, it is not clear where this amendment may be found.

2. What the new Act eliminates from Ontario EA

Bill 197 also seeks to address Ontario's modernization objectives by eliminating key features of the 1975 Act.

The most important example of this change is the amended Act's elimination of all aspects of the 1975 Act's principles of application. These principles were embedded in the Act's definition of "undertaking" and section 3 of that Act. For their time, these features had a clear tie to the world's ground-breaking impact assessment legislation in the United States.[7] Yet, within Canada, these features of Ontario EA were unique to Ontario. No other Canadian jurisdiction chose to follow Ontario's lead.

Ontario's 1975 vision of what should trigger EA had three main components. First, Ontario used the term, "undertaking," to describe what triggered environmental assessment. Second, Ontario defined "undertaking" to distinguish between public and private sector undertakings and provide automatic application to public sector undertakings only. Third, Ontario defined "undertaking" to include a two-tier approach to what required EA by including not just *projects* (termed, "enterprises or activities"), but also to "*proposals, plans, and programs*" in respect of projects.

No Canadian jurisdiction outside Ontario before or since the 1975 Act has provided any similar approach to environmental assessment. Within Ontario, several tribunals used unwieldly logic to reject any novel application of the third component of Ontario EA regarding application to proposals, plans or programs.[8] Similarly, since the early 1990s, the Government itself has used several regulations to reject the second component of Ontario EA for municipal infrastructure, electricity projects, waste projects, and transit projects. Thus, though regrettable, the new Act's narrowing of the application of EA reflects longstanding practice.

A further idiosyncrasy of Ontario EA developed long after 1975. Since 2001, Ontario EA has distinguished between "class" environmental assessments and "sectoral" environmental assessments. The amended EAA seeks to end this distinction. A new

Part II.4 to the Act will address both under the heading of "Streamlined Environmental Assessments." This reform will take some time to implement because of the number and range of legal instruments and affected projects. The amended Act contains detailed provisions to address the years of transition to the new Part II.4. Overall, there is little to question about ending this odd distinction within Ontario EA; however, as discussed below, it is unfortunate that the amended EAA fails to provide a clear foundation for what constitutes a streamlined EA.

3. Notable Omissions from the Schedule 6 EA Reforms

The amendments to the Act followed less than two weeks of public review.

This is unfortunate. Although the reform eliminates many core aspects of the 1975 Act in the name of modernization, it fails to address two longstanding problems with the EAA and its guidance of the Ontario EA program. In particular, the amended Act fails to clarify the purpose or foundation of Ontario environmental assessment.

Failure to clarify the purpose section

The purpose of legislation has fundamental importance to its interpretation. Today's courts attach even greater importance to using legislative purpose sections to guide their interpretation of all legislation than did courts in the 1970s.

Since 1975, section 2 of the EAA has set out its purpose as follows:

> The purpose of this Act 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.

Two important principles about Ontario EA come from this purpose. One principle is that Ontario EA is about "betterment." This differs from many other EA regimes that focus on avoiding what is bad (e.g., significant adverse environmental effects). The second important principle is that the focus of betterment is on "people." This differs from many EA regimes that focus on the biophysical environment.

Unfortunately, the clarity of these two principles is muddled by the rest of the purpose section. The first problem is the phrase, "the whole or any part of Ontario." If the role of a purpose section is to guide a decision maker, this phrase provides no guidance since betterment of a part of Ontario has identical value to betterment of the whole of Ontario. It is difficult to conceive of any project or undertaking that does not meet at least one aspect of this broad test of betterment.

The second problem is the phrase, "protection, conservation and wise management in Ontario of the environment." The basic problem is that "protection" means something different from "conservation" and something different from "wise management." It may also be observed that the three terms represent a hierarchy of values with the highest value being "protection" (i.e., no degradation or use), followed by conservation (i.e., use that is sustainable over the long-term), and concluding with wise management (not defined and having no established meaning). Because the purpose section advises that any of these objectives satisfies the test of betterment, the Act demands no hierarchy of treatment. As such, anything goes so long as it meets the test of wise management – a term that has no clear meaning. In short, this second phrase is also so broad as to provide no guidance.

Overall, absent the development of new Ministry instruments or policies to bind or guide EA decision makers, the EAA purpose section is so broad as to provide virtually no guidance on how to interpret the Act or make project decisions.

It is also questionable how this purpose section fits together with the proposed reform of the Act to align assessment with environmental risk. Consider the example of high-risk projects triggering assessment under the new Part II.3, "Comprehensive Environmental Assessments." The components of the purpose section provide only limited guidance to assessing whether to approve or refuse approval of a high-risk project.

Over the long history of this Act, the weakness of this purpose section was initially masked by decision makers finding a foundational test for assessments elsewhere in the Act. In particular, under the 1975 Act, decision makers found that the Act's requirements concerning alternatives set out in s.5(3) mandated that an environmental assessment objectively describe and evaluate reasonable alternatives to identify a preferred alternative. This resulted in the rejection of assessments that failed to carry out this process and decisions refusing approval of any undertaking that relied on a flawed assessment. It is therefore important to assess whether and how the proposed reforms clarify the foundation of Ontario EA, as discussed below.

Failure to clarify the foundation of Ontario EA

Prior to the 1996 reforms to the EAA, the foundation of Ontario EA was set out in s.5(3) of the Act. This section demanded that an Ontario EA describe and evaluate alternatives to identify a preferred alternative.

The 1996 reforms changed this foundation in two ways. First, the 1996 reforms created a new form of assessment – class environmental assessments – that were subject to the requirements of a new Part II.1 of the Act that contained no section analogous to s.5(3) of the 1975 Act. Second, the 1996 reforms ended the foundational status of s.5(3) for other assessments (now termed "individual"

assessments and subject to Part II of the Act). The 1996 reforms demanded that an individual assessment adhere to an approved terms of reference provided by the Minister, but authorized the Minister to vary all requirements of s.5(3). As a result of these 1996 reforms, s.5(3) no longer provided the foundation for all Ontario EAs. Instead, the 1996 amendments authorized many individual and class EAs that varied the requirements of s.5(3), including requirements regarding alternatives.[9]

When one couples the 1996 reforms that allowed an Ontario EA to avoid consideration of alternatives with the weaknesses of the EAA purpose section, Ontario EA became a regime without a clear purpose or foundation or thus any clear test for approval.

In this context, the 2019 Ontario discussion paper on modernizing Ontario EA created an expectation that this modernization would strengthen the role of alternatives. It did so by giving prominence to five core principles of Ontario EA, including principles that demand the consideration and evaluation of alternatives.[10]

However, without explanation, the new Act fails to make these five core principles central to a modernized EAA. Nor does the amended EAA even ensure that the consideration and evaluation of alternatives is foundational to all Ontario EAs – comprehensive or streamlined.

Clearly, there are many forms of EA in existence today – in Canada and internationally – that do not make consideration of alternatives central or even essential.[11] However, where an EA regime provides no foundation around alternatives, it is essential that the regime contain a clear test of environmental assessment approval.

[1] See sections 3-7 in Schedule 6 to S.O.2019, c. 9. Notably, through s.10(2), the government did not proclaim in force the amendments to section 16 of the EAA

regarding bump-up requests for class environmental assessments.

[2] This test exists for exemption orders issued under s.3.2 of the old and reformed Acts: see s.3.2(1.1) of the reformed Act.

[3] Importantly, re-writing the EAA to provide this combination of core guidance and flexibility to proponents would appear to improve timelines for most projects, but also minimize the pre-1996 risk that a proponent would find itself at the end of the EA process being confronted by the possibility that the EA would not be approved because of a problem with the design of the EA.

[4] Under the *Green Energy and Green Economy Act, 2009*, the Province amended the *Environmental Protection Act* to create Part V.0.1 and a new renewable energy approval for facilities like wind farms. The Province also amended Part XIII regarding appeals to the Environmental Review Tribunal (ERT) by providing a special set of processes and timelines for REA appeals through, for example, ss.142.1, 142.2, 145.2.1, and 145.2.2 of the Act and O.Reg.359/09. Section 59(1) of this regulation prescribes a 6-month hearing process, including the Tribunal decision.

[5] Informally, these reviews have been called "bump-ups" as the review determines whether the project should be bumped-up to individual EA.

[6] It is not evident in any current documents that the Province will soon amend the sectoral processes applicable to electricity and waste management projects to limit the scope of these requests. Further, although the Province amended the regulation governing transit projects, it did not amend this regulation to limit elevation requests to impacts on Indigenous rights: see O.Reg.342/20.

[7] Modifying the EBR test for granting leave to address projects, not decisions, leave could be limited to the Tribunal finding there is good reason to believe the project does not comply with applicable law or policy and the project could cause significant harm to the environment. Decades of experience with this test suggests that, for the vast majority of matters subject to leave, this process will be more expeditious than any judicial review in the courts.

[8] See section 102 of the *National Environmental Policy Act*, in force January 1, 1970, which applies to "major Federal actions." For decades, this law has resulted in environmental impact assessments of federal actions regarding public and private sector projects, but also a vast array of federal proposals, plans and programs.
[9] This includes decisions of the then-Ontario Municipal Board regarding official plans, the then-Environmental Assessment Board regarding energy demand management programs, and a hearings officer regarding review of the Niagara Escarpment Plan.
[10] This is not to say "alternatives" were eliminated from all consideration in Ontario EA. Instead, the requirements around alternatives shifted from s.5(3) to the approved terms of reference for individual EAs and the approved class environmental assessment for projects subject to class EAs.
[11] Summarizing what is set out at page 3 of the Discussion Paper, the five core principles are: (1) Consultation to involve interested persons, (2) Considering a reasonable range of alternatives; (3) Considering all aspects of the environment; (4) Systematically evaluating net environmental effects of alternatives, and (5) Providing clear complete documentation.
[12] For example, although federal impact assessment law also references consideration of alternatives, there is no federal legal requirement or practice of assessing alternatives through the objective narrowing down approach required by Ontario guidance and practice and several class environmental assessment approvals.

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Author

Rodney Northey

Partner - Certified Specialist (Environmental Law), Toronto

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