

## History of EA in Ontario and the Path Forward: Webinar 1<sup>1</sup>

***Thursday, November 5, 2020 at 12:00 pm to 2:00 pm EST***

***Facilitators: Charles J. Birchall and Beth Williston***

***Panelists: Robert Gibson, Rod Northey, Caroline Coburn***

***Rapporteur: Rebecca D’Onofrio***

### ***Webinar Highlights:***

The OAI is pleased to welcome three eminent panelists to the first webinar of the 2020 webinar series: Bob Gibson, Rod Northey, and Caroline Coburn. The webinar discussion centered on Bill 197, setting out amendments to Ontario’s *Environmental Assessment Act* (EAA), and a retrospective of EA in Ontario. The three panelists presented their views on the following five key themes: (i) purpose of the EAA; (ii) the need to maintain alternatives assessment as a component of EA; (iii) the importance of public and Indigenous engagement in EA; (iv) Indigenous-led EA; and (v) the Project List. Recommendations on the path forward for EA in Ontario were made.

#### **Purpose of EAA**

Dr. Gibson noted that the purpose of EAA is for “the betterment of the people ... of Ontario by providing for the protection, conservation and wise management in Ontario of the environment”, which encompasses biophysical aspects of the environment along with social, economic and cultural aspects, and their interrelationships. Though the concept of sustainability has not been expressly written into the EAA, the purpose of EA encompasses it with the goal of the betterment of the people of Ontario.

EA was not intended to be a glorified licensing/permitting process, but is intended to lead to better planning and decision-making with three key components – attention to broadly defined environmental considerations, alternative ways of serving the purposes of the project, and transparent decision-making with public scrutiny. Regrettably, over the years, EA has been reduced to a routine box-checking exercise that is haphazardly applied. Improving EA in Ontario does not require further amendments to the EAA, but rather should be focused on consistent application of the EAA’s purpose as noted above.

Mr. Northey noted that the government’s stated purpose of EA modernization was as follows: (i) aligning the degree of project risk with the scope and scale of the EA; (ii) eliminating duplication between regulatory processes; (iii) improving EA timelines; and (iv) going digital.

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<sup>1</sup> <https://oia.on.ca/history-of-ea-in-ontario-and-the-path-forward/>

However, the method by which EA is supposed to achieve its purpose is through application of objective criteria and planning. Mr. Northey commented that instead of applying established criteria under Ontario provincial policy, EA is frequently conducted in a subjective way with arbitrary criteria that have no connection to such instruments as Ontario's provincial policy statements. In as much as Ontario EA has failed to deliver objective planning, it is failing to deliver on the purpose of the EAA which, as Dr. Gibson stated, is the betterment of the people of Ontario. Ontario EA must be grounded in provincial policy.

Ms. Coburn reminded registrants that coming out of 2015 OAIA conference, working groups were struck to develop recommendations for modernizing EA<sup>2</sup>. The main outcome of the work was that while reforms were needed in how EA is practiced in Ontario, there was no need to significantly overhaul the EAA. Five key themes for enhancement and improvement of EA were identified together with a number of recommendations. These were sent to the Ministry of the Environment and Climate Change (as it then was called) for consideration. While a few of the recommendations were included in Bill 197, others were not picked up, such as the need to improve involvement of Indigenous peoples in EA as well as the need for more regional and strategic assessments, and assessment of cumulative effects.

The panel agreed that 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, any rational assessment based on "betterment" should be essentially the same as a sustainability-based assessment. The main problem is in the way the EAA is interpreted and practiced, and not in the wording of the legislation.

### **Bill 197 and Increased Efficiency and Effectiveness in EA regime**

One of the stated purposes of Bill 197 is to increase the efficiency and effectiveness of EA in a post-Covid-19 recovery. The challenge remains as to how to ensure efficiency serves the effectiveness of EA in achieving the purpose of EA, including alternatives assessment. The panel agreed that while the need for efficiency in EA is important, the test of efficiency should not be how quickly a regrettable project can receive approval. There should be sensible planning at the outset so that projects can then progress in a timely fashion through the EA process. Projects that would not be approved under a rigorous EA regime should not be fast-tracked to "yes" in the name of increased efficiency. The objective of the EA process should be proper planning leading to the approval of good projects that have been chosen from a range of well-considered alternatives.

Ms. Coburn reminded participants that meaningful consultation with Indigenous communities cannot be ignored in the name of efficiency. To do so will inevitably result in court cases and lost time.

### **The Case of Ontario Hydro's 25 Year Demand/Supply Plan**

In order to highlight some of the key points being raised, the panel briefly discussed the Ontario Hydro 25 Year Demand/Supply Plan (DSP) issued in 1989. At the time, Ontario Hydro agreed to undergo a Planning Level Assessment that resulted in an EA panel hearing. Following extensive examination of the DSP including evidence and witnesses from Ontario Hydro and registered parties, Ontario Hydro elected to withdraw the DSP from further consideration by the panel. While there are differing views on the matter,

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<sup>2</sup> [https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Environmental-Assessment-Program-in-Ontario-Is-it-Time-to-Hit-the-Reset-Button\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Environmental-Assessment-Program-in-Ontario-Is-it-Time-to-Hit-the-Reset-Button_Webinar-I-2020_OAIA.pdf)

Dr. Gibson noted that the hearing represented a positive outcome of a strategic level assessment, which resulted in tens of \$billions in taxpayer savings.

It was noted that parties were able to properly prepare for and participate meaningfully in the hearing due to the allocation of funding under the then *Intervenor Funding Project Act*. Parties were able to retain experts to review and comment on the DSP. The panelists agreed that the failure of Bill 197 to provide for a similar funding regime is significant omission.

Mr. Northey reiterated the importance of needing objective planning criteria in EA, and pointed out that though the DSP EA was a success, Ontario Hydro used subjective criteria with no planning framework in the preparation of the DSP. The panel agreed that the development of provincial policies is critical, and to be effective they must be in place prior to EA. The panel also indicated that lack of clear planning policy is a problem at all levels of EA, not just at the provincial level.

Regarding provincial policy, the panel discussed the history of land-use planning and provincial policy in Ontario. In the 1980s a system of provincial policy was developed, but it was not a comprehensive system. In the early 1990s, a framework of comprehensive provincial policy was developed and it became a requirement that decisions in planning and EA needed to be consistent with the policy framework. By the mid to late 1990s, the requirement that decision makers had to make decisions consistent with provincial policy was lost. The current system allows for poorly guided EAs and EA decision making, with no need for consistency with provincial policy. The GTA West EA was cited as an example of this issue.

The panel further discussed the inadequacy of planning policy in respect of Northern Ontario. Ms. Coburn pointed out that even though the Growth Plan for Northern Ontario was designed as a strategic framework to guide decision-making and investment planning in Northern Ontario, it was developed without meaningful consultation with and engagement of Indigenous groups and communities.

### **Indigenous Led EA**

Ms. Coburn stated that there is an increasing desire from Indigenous groups to develop their own EA processes, and these are increasingly being conducted in various ways by Indigenous groups in other jurisdictions in Canada. EA is a rare opportunity to start a dialogue about co-decision-making and co-management of lands and resources. Bill 197 failed to capitalize on the opportunity and bring to ground Canada's commitment to operationalize the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>3</sup> as has been done in recent amendments to the federal Impact Assessment Act<sup>4</sup> and the BC Environmental Assessment Act<sup>5</sup>. The recent amendments to the Ontario EA Act do little to facilitate the meaningful involvement of Indigenous Peoples and do not recognize UNDRIP. Further changes are anticipated to the Consultation Code of Practice, which must be done with the full participation of Indigenous groups in Ontario. The lack of required consultation on Bill 197 has resulted in court challenges from Indigenous groups and has set back any progress on reconciliation on the part of the Ontario government. More needs to be done to recognize the future of EA with full Indigenous involvement in decisions and management, to move reconciliation forward, to provide for better social and economic outcomes for affected Indigenous Peoples, and to deliver greater clarity of expectations for project proponents.

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<sup>3</sup> <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

<sup>4</sup> <https://laws.justice.gc.ca/eng/acts/l-2.75/index.html>

<sup>5</sup> <https://www.bclaws.ca/civix/document/id/complete/statreg/18051>

The panel also briefly discussed the UNDRIP, and how it should be a source of policy reform for Ontario EA.

### **Project List**

With regards to the Project List, opinions of the panel members varied. Mr. Northey reiterated that the Project List appears to have been amended using subjective criteria, and that the changes were not grounded in Ontario policy. For example, despite the theme of modernization and elimination of duplication between the Federal and Provincial EA, mining was included as a possible addition to the Project List.

Dr. Gibson noted that one apparent aim of the EA Act changes is to limit major project assessments to a select number of chosen areas, and to enable reduced application to smaller undertakings under the class assessment processes. However, it is not clear that the changes are based on careful analysis of applications most likely to serve “betterment” for the people of Ontario. For example, there is no evident attention to applications at the strategic and regional level. At a minimum, the application of the Act should be expanded to include strategic environmental assessments, regional environmental assessments as well as to projects and the smaller classes of undertakings that may have significant sustainability effects.

Ms. Coburn noted that OAIA members provided input on what types of undertakings should be subjected to EA in the workshop held in 2015 and encouraged OAIA members, if they intend on commenting on the Project List, to review these suggestions for guidance.

### ***Question and Answer Session***

#### **Question: What in your opinion is a “good” project?**

The panel’s response was that a “good” project is one that is consistent with provincial policy including provincial policy statements. However, the policy suite that we currently have is inadequate. For example, we must be clearer about what “betterment” means. In addition, comparative evaluation of alternatives with explicit criteria would lead to much better undertakings. In addition, a “good” project is one that takes into account sustainability – that will serve the needs of people today as well as future generations.

#### **Question: MECP is currently asking for comments on the inclusion of mining on the proposed Project List. How would you respond to this request? What are the good and bad implications of simply copying the federal Project List into the Ontario context?**

Mr. Northey commented that mining is complicated, in that under the resource provisions of the Constitution mining should be a provincial responsibility. Therefore, it is odd that Ontario has never required mining projects to be provincially assessed. However, mining is on the federal Project List because of the potential impacts to fisheries among others. The panel was in agreement that mining should also be on the provincial Project List given its environmental implications, but there should be a federal/provincial accord to avoid duplication of EAs.

Dr. Gibson added that in many mining cases, there is also Indigenous jurisdiction that must be considered. The problem is not really jurisdictional duplication, but inconsistency of requirements placed on proponents by different jurisdictions, and the historical failure of jurisdictions to cooperate as they should.

There needs to be discussion about how to jointly ensure adequate assessments of mining. Ms. Coburn reinforced the need to have one body of evidence that supports two or more processes, and that there should be harmonization between the processes to remove duplication.

**Question: I appreciate the emphasis on subjective and objective planning for IA. What in your opinion are the relevant policy mechanisms for the far north in Ontario? Are there different tests for the northern part of the province in terms of objective vs. subjective in the north vs. near north vs. south of the province? More broadly, should IA look differently in the provincial north?**

Mr. Northey reiterated Ms. Coburn's point that the distinguishing feature of the north is the Indigenous population. There continues to be a failure to adequately engage Indigenous communities in land use planning processes and EA. There is an expectation that in the North, Indigenous communities will garner greater engagement and control through co-management mechanisms. Ms. Coburn also pointed out that there are similar Indigenous concerns in Southern Ontario and that land use planning and EA practice need to recognize the existence of treaties, Aboriginal and inherent rights throughout all of Ontario.

**How can we as practitioners and regulators ensure that EA is applied to its highest power despite the changes to the legislation?**

Planning is not affected by this new legislation. Reforms in planning should have begun long before now. Hopefully, there will be guidance on the EAA that will lead to improvements in how EA is being practiced every day, without the need for further changes to the EAA.

Dr. Gibson repeated that there is no reason that responsible authorities can't insist on an assessment of a proper range of alternatives under the current legislation. Evaluation of alternatives is the core of better decision-making.

Mr. Northey commented that in relation to the new EAA, one of the important omissions is that there are no minimum standards as to what constitutes a streamlined assessment. All such requirements for a streamlined EA have been deferred to regulations.

**The Bill has been passed. What advice do panelists have on implementing it to achieve the objectives they are discussing?**

The panel agreed that this has been answered during the earlier discussion, with the emphasis on alternatives. Dr. Gibson reiterated that there is nothing in the legislation that precludes doing more strategic assessment, though it is not clearly mandated. In addition, the law doesn't preclude intervenor funding. Many of the most valuable participants are those that require funding and capacity building. These items have been made more difficult, but have not been precluded by changes to the EAA. Ensuring that alternatives assessment remains during any new streamlined approach is critical. It was reiterated that streamlining is meant to add to the overall effectiveness of the law, it is not meant purely as an efficiency exercise. Ms. Coburn also indicated that there will be revisions to the code of practice on consultation, so there remains an opportunity to improve Indigenous consultation requirements.

**Question: Why is strategic IA so difficult to bring to the policy and planning practice in Ontario? Are other jurisdictions using SIA or SIA like approaches?**

Strategic EA is difficult because it is at a level of broad policy that the decision-makers think is their realm. Assessment's role is to have better substantive decisions but also to inform people about what alternatives were assessed and why the chosen alternative was better than the others. The learning function of EA is therefore important. The panel touched on the importance of data collection, including traditional knowledge. Good baseline data collected over a long period of time will lead to better policies and decisions. It was also noted that other jurisdictions have already adopted Strategic EAs and regional planning frameworks. Ontario is late to the game. There is a requirement for strategic EAs focused on alternatives in the United States and EU regimes.

**Question: We've had broad policy commitments to reverse climate change and biodiversity loss for many years, but despite EAs becoming more sophisticated, we haven't reversed those trends. How can we do better?**

The panel responded that many of the biodiversity problems are cumulative, and that project-by-project assessment is rarely adequate to identify and mitigate the severity of additional negative effects. Cumulative impacts are not addressed by this type of assessment. Regional and strategic attention is needed to address impacts to biodiversity. There is a need for very clear policy guidance and a framework on these matters. There seems to be no sustained political will to tackle biodiversity issues in this manner and to set thresholds.

**Question: What constitutes a good EA that encompasses betterment plus sustainability considerations?**

The assessment has to consider impacts to people who will be affected. The alternatives analysis must be clear, and must be presented for public scrutiny.

## ***Recommendations***

1. Apply current planning law – in particular, section 3 of the Planning Act - to all Ontario EAs
2. Alternatives assessment should be maintained in individual as well as strategic EAs
3. Build in meaningful Indigenous consultation and engagement provisions into the EAA
4. Allow for Indigenous led EAs in the EAA (they will come regardless) and ensure they are considered in decisions.
5. Provide a participant funding regime comparable to the one established under the Intervenor Funding Project Act in the late 1980s
6. Expand the Project List to include strategic EAs, regional EAs as well as classes of smaller undertakings that may have significant adverse sustainability effects
7. Add mining projects to the provincial Project List along the lines of the federal Project List
8. Provide for greater coordination/harmonization both within the provincial government and between the provincial, federal and Indigenous governments to avoid duplication of environmental assessment processes.

## Webinar Resources:

Environmental Assessment Program in Ontario: Is It Time to Hit the Reset Button?

[https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Environmental-Assessment-Program-in-Ontario-Is-it-Time-to-Hit-the-Reset-Button\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Environmental-Assessment-Program-in-Ontario-Is-it-Time-to-Hit-the-Reset-Button_Webinar-I-2020_OAIA.pdf)

Minister's Challenge: Improve EA Planning in Ontario.

[https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Ministers-Challenge-Improve-EA-Planning-in-Ontario\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Ministers-Challenge-Improve-EA-Planning-in-Ontario_Webinar-I-2020_OAIA.pdf)

What is and is Not Modernized in Ontario's Re-write of its EA Act

[https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/What-is-and-is-not-Modernized-in-Ontarios-Re-write-of-its-EA-Act\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/What-is-and-is-not-Modernized-in-Ontarios-Re-write-of-its-EA-Act_Webinar-I-2020_OAIA.pdf)

Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment

[https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Fulfilling-the-Promise-Basic-Components-of-Next-Generation-Environmental\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Fulfilling-the-Promise-Basic-Components-of-Next-Generation-Environmental_Webinar-I-2020_OAIA.pdf)

Recent Experience with Indigenous-led Assessments: A BC Perspective

[https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Recent-Experience-With-Indigenous-Led-Assessments-A-BC-Perspective\\_Webinar-I-2020\\_OAIA.pdf](https://3dh9gq1j5l8d3wypaz220tin-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/Recent-Experience-With-Indigenous-Led-Assessments-A-BC-Perspective_Webinar-I-2020_OAIA.pdf)

### 2020 Webinar Series

The 2020 Ontario Association for Impact Assessment (OAIA) conference was being replaced with a series of webinars on **Modernizing Ontario's Environmental Assessment Legislation – The Past, Present and Future**. The webinar series is in response to Ontario's recent proposals to modernize its *Environmental Assessment Act* (EAA). The series examined Ontario's assessment laws and policies through time, lessons learned, and recommendations for the future. Expert panelists focused on EAA, specifically, history and trends, what is enacted, what is missing and needed, and what is next.

Webinars were held from **noon to 2 pm on November 5, 12, and 19, 2020**

For more information visit the OAIA website at <https://oia.on.ca>. If you have any suggestions for next year's conference theme, please contact us at [info@oia.on.ca](mailto:info@oia.on.ca).

