

## What is Missing and Needed Based on Bill 197 Amendments?<sup>1</sup>

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

**Facilitators: Cheryl Chetkiewicz and Tomasz Wlodarczyk**

**Panelists: Jordan Bean, Dayna Scott, Lorne Greig**

**Rapporteurs: Sandy Nairn, Nadia Dabagh**

### **Webinar Highlights:**

The OAIA welcomed three panelists to the second webinar of the 2020 webinar series: Jordan Bean, Professor Dayna Scott, and Lorne Greig. This webinar was focused on what is missing and needed in Impact Assessment (IA) based on Bill 197 Amendments. The three panelists presented their views on following themes: (i) Role of Indigenous communities in IA; (ii) Regional Impact Assessments (e.g., Ring of Fire); and (iii) Cumulative Effects Assessment and Climate Change. Tomasz Wlodarczyk presented the OAIA's recommendations in 2016 and 2017 on these issues.

### **Role of Indigenous Communities in IA**

Ms. Bean described collaborative impact assessment with Indigenous Peoples and the concept of braided collaboration. She highlighted the evolution of Indigenous engagement in impact assessment in Canada, the rise of collaborative environmental assessment, elements of braided collaboration, and implications for Ontario's Environmental Assessment Act (EAA). She had the following reflections on Indigenous collaboration:

- Indigenous engagement and Indigenous collaboration are not explored in the new amendments
- Streamlining and exemptions will limit Indigenous participation
- The amendments are not an ideal foundation for collaborative impact assessment
- Ontario is updating its consultation guidance and this could include Indigenous partnerships, binding agreement, funding, considering Indigenous knowledge, and address consent

### **Regional Impact Assessment**

Professor Scott described her research with partners, including Neskantaga First Nation and the regional and strategic assessment under the federal Impact Assessment Act (IAA) and the regional assessment for the Ring of Fire. She used this case study to highlight what the current situation is around the road projects as well as reflect on how Ontario could be engaged. Professor Scott had the following reflections on regional assessment as it relates to the Ring of Fire:

- Addressing cumulative impacts in the Ring of Fire needs to consider watersheds

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<sup>1</sup> <https://oaia.on.ca/what-is-missing-and-needed-based-on-bill-197-amendments/>

- Ongoing social emergencies and the lack of commitment by governments to addressing basic services and rights in communities, including as a result of COVID-19
- Individual projects need to be tiered with regional assessment to support planning and governance in the region
- Proposed model for the Ring of Fire regional assessment would be more effective and credible if Ontario was included in a tripartite structure and agreement
- Enabling communities to come together to identify an Indigenous Governing Authority and encouraging agreements outside of legislation for an Indigenous Governing Authority as partner jurisdiction in the regional assessment
- IAA enables opportunities for joint decision making, tiering with project-level assessments, and positive contribution to sustainability and climate test; all would enable best practice with Ontario on these issues

### **Cumulative Effects Assessment and Climate Change**

Mr. Greig's presentation focused on expanding the capacity of IA to protect the environment while advancing development. He noted that the two functions of IA have been in opposition and provided an example in the form of the Mackenzie Gas Project across the Northwest Territories which included 3 natural gas anchor field, a 1,196 km pipeline, and an Indigenous development opportunity near Colville Lake and shared the scenario submitted by the proponent against the scenario developed by the Canadian Arctic Resources Committee (CARC). Mr. Greig made the following points in his presentation:

- There are four major threats in which IA should play a role (e.g., biodiversity, climate change, resource depletion, population growth) and suggested these should guide how we should be thinking about IA
- Cumulative Effects Assessment (CEA) follows a set of processes including analysis of past conditions, detailed analyses (modeling) of current human activities and their effects, peer review of analyses and models, and publication and data-sharing. He noted that there is rarely any data-sharing and peer review needs to be by scientists.
- If you really want to understand what is going to happen to the system, you need to consider all human activities and natural processes that affect that affect an ecological end point not just the projects under review. Climate change is an excellent example of the need to consider all human activities and natural feedback processes. The response to climate change in terms of modeling, data sharing, and peer-review is a good example for how we should be considering cumulative effects assessment in IA.
- There is a role for IA assessors to incorporate predictions of climate change, made by climate scientists, in future scenarios of cumulative effects on environmental end points and on the project itself.
- That said, CEA is rarely done and if done, rarely done well! Regional assessments offer the potential to present information on the condition of the region that could enable CEA. The lack of information available to project assessors, is also due to the lack of sharing data and models among project assessors.

### **OAIA previous recommendations (2016, 2017)**

- Mr. Wlodarczyk presented the history of OAIA's previous engagement and recommendations regarding the process of modernizing Ontario's *Environmental Assessment Act* (EAA).

- A number of improvements could be undertaken by the MECP that do not necessarily require amendments to the EAA, including promotion and enforcement of MECP adherence to timelines, reduction or elimination of insincere or unwarranted objections through well-developed provisions, ensure there are adequate resources available to MECP, Indigenous Peoples, proponents, review agencies, and practitioners (i.e. funding, seasoned staff with relevant, hands-on IA experience, etc.) in order to effectively participate in the IA process.
- Many issues, including sustainability, climate change, cumulative effects assessment, participant funding, and strategic environmental assessment, are no longer considered emerging issues, as they were considered in OAIA reports in 2016 and 2017, and need to be incorporated into IA practice and MECP guidance. Following this thinking, the panelists' presentations provide reasoning for the importance of Indigenous partnerships, regional impact assessments and cumulative impact assessments as it relates to the progression of climate change.

## **Common themes discussed in Webinar 2**

- IA processes in Canada and Bill 197 being less than ideal for Indigenous community partnerships, collaboration and engagement. The impacts of the changes to Bill 197 on Indigenous Peoples will not be known until its implemented, however, streamlining the IA process will limit Indigenous participation and will likely result in conflict or judicial intervention.
- Consistent and sufficient resources to Indigenous communities and stakeholders, as well as the MECP to allow for a more comprehensive and environmentally- and sustainability-focused project IA process.
- Federal regional impact assessment process as it relates to the Ring of Fire region (located in Ontario's Far North that contains a significant deposit of minerals) and its implications on Indigenous community collaboration and engagement, cumulative impacts on the environment, and the ongoing social emergencies in the region (e.g. lack of basic community focused infrastructure such as safe drinking water and adequate housing).
- Collaborative work (i.e. analysis of past conditions, detailed analysis (modelling) of current cumulative effects, peer review of analyses and models, and publication/sharing of data and models) being conducted to investigate climate change threats and determine how they can be decreased sets an example for how environmental impact assessment should be conducted to preserve the environment while advancing development.

## **Question and Answer Session**

**Question: Are there any good examples of IA in Ontario that have addressed any of the visionary guidance you've outlined in your presentation?**

Ms. Bean noted that there weren't any Ontario examples that came to mind. She provided other examples including the Voisey's Bay Mine and Mill Environmental Assessment in Newfoundland in the early 2000s. In this example, a Memorandum of Understanding (MOU) between the provincial and federal governments as well as the Innu Nation and the Inuit of Labrador was developed. The federal Review Panel stressed the importance of the community's consent and deliberately considered the mine's positive contributions to sustainability throughout the IA. On the other hand, the Panel only had the power to make recommendations and not all the recommendations were accepted by the federal government which had the authority to approve or reject the project. Another example is the NICO Project completed in the Northwest Territories within *Tłı̄chq* territory as part of the lands co-managed by the *Wek'èezhìi* Land and Water Board. This project was completed under the *Mackenzie Valley Resource Management Act* (MVRMA). The *Tłı̄chq* had the legal authority to approve or reject the project and they also used their

influence to modify to the process to benefit their communities. This is one example of a braided assessment.

**Question: In your presentation you mentioned “consistent and sufficient resources”, can you explain how “consistent and sufficient resources” relates to the effectiveness of EA in Ontario?**

Ms. Bean explained that capacity was such an important aspect in the *Tłchq* during the NICO Project. Having sufficient capacity afforded them the ability to participate consistently and meaningfully and allowed them to ultimately make informed decisions at the end of the project. Having human and financial resources is a core component of being able to collaborate effectively.

**Question: There are lots of reasons why the regional assessment and the project level assessments need to communicate with each other and you present a compelling case around a potential model for governance for a regional assessment process; what do you think the key benefits would be for Ontario to become engaged in the regional assessment right now?**

Professor Scott reiterated that it is critical to have a process that is credible and authoritative and that the communities and the region buy in to. This is the only way to get past the division and the threat of litigation and delay that has characterized the past decade of deliberation over the Ring of Fire. Ontario should be a partner jurisdiction in a regional assessment, however, there also needs to be an Indigenous governing authority as partner jurisdiction as well. Overall, a strong regional assessment process may take time, but it would allow for better planning, better decision making, and for the consideration of the longer term interests and betterment for all Ontarians.

**Question: You discussed “the trajectory of the jurisprudence”. Can you describe what that trajectory is in your opinion and what the MECP should be paying attention to that needs to be incorporated into the modernization of impact assessment in Ontario?**

Professor Scott identified the trajectory of the jurisprudence as the courts putting more definition on the scope of Indigenous governing authority and the rights are being expanded, which is only going to increase the possibility for communities to offer or withhold their consent to certain projects in their territories. For example, Bill 197 did not include greater flexibility on the part of MECP to extend timelines, for example, for communities that are unable to participate in consultation because of the pandemic. Some communities (e.g., Neskantaga First Nation) in the Ring of Fire region are unable to participate in the proposed road projects because there are social emergencies in addition to the pandemic. MECP’s response is that the timelines are legislated in the Act and because it’s proponent-driven they are unable to stop the process. However, Bill 197 amended the EAA and this could have included amending the deadline regulations towards more flexibility given COVID-19. From a constitutional perspective, MECP needs to revise timelines because the Crown holds the constitutional duty to consultation. If it can’t be fulfilled by the current regulations and the proponent-driven process, then those laws are unconstitutional.

**Question: If you were across the table from the Minister and staff at MECP, what would you offer in terms of what needs to be considered as guidance for cumulative impacts in Ontario? Would that look different in the far north of Ontario versus the south?**

Mr. Greig commented that what is needed to be done for cumulative effects assessment is not exclusive to Ontario, rather it is universal. There is cumulative effects assessment in Ontario but it doesn’t necessarily show up in IA practice. He mentioned assessment of projects associated with quarries and aggregates and their cumulative impacts on the water table had to be addressed in a collective way so it was a cumulative effects assessment. In terms of the northern Ontario and southern Ontario, the south has a larger human

footprint whereas the north hasn't had as much of an impact yet. When you're looking at cumulative effects assessment, you want to be doing exactly the same things, that is, looking at all of the potential pressures that would operate on the environment to assess what the potential impacts will be there. People often think of IA as being related specifically to projects, however, the ultimate focus of IA needs to be on the environmental endpoints that will be impacted by those projects (whether they are positive or negative and how they interact with each other). Cumulative effects analysis requires one to do an ecological assessment of the region, meaning what it is now and what it once was, and our Indigenous partners have a good sense of what the past conditions were because they are so close to the land; thus, Indigenous community collaboration is essential.

**Question: You mentioned a model/tool used by the Canadian Arctic Resources Committee in the north for predicting and modelling cumulative effects. Can we get your opinion on the role of a quantitative, geographic, GIS-based models in the context of a northern Ontario regional assessment and as it relates to Indigenous knowledge?**

Mr. Greig noted that each individual has a conceptual model of the environment that causes us to think of the environment in different ways (e.g. the environment is almost limitless or the environment is under pressure). However, when you take the data and try to build a simulation model to show how the system works, that's when you learn whether your conceptual model is accurate. If you can't build a model that simulates the way the system works, there is something in the system that you don't understand. Models that are wrong are incredibly useful because they tell you don't have it right.

Professor Scott offered that models are only as good as their inputs and assumptions. That is why the governance question is critical. If those inputs and assumptions are only based on Western world views of what matters, then they won't do anything for the people being impacted by the decision making in the region.

Ms. Bean added that exercise caution when considering Indigenous knowledge in things like models because that is where the failings of knowledge integration may arise; for example, using Indigenous knowledge to validate Western science or selecting the most convenient elements. Indigenous knowledge needs to be considered separate from Western science and considered as it is presented (e.g. orally, report, story, etc.).

**Question: Using the example of braiding, how do you provide Indigenous communities with the ability to consent but not extend the same to other communities?**

Ms. Bean commented that the concept of braiding stems from the history of colonialism in Canada and that Indigenous communities are distinct nations within Canada. Canada does have a legal fiduciary duty to Indigenous Peoples and so they have special rights that are both inherent and protected within the Canadian constitution. Recognizing Indigenous Peoples' right to consent is really recognizing their inherent right to self-determination and self-governance upon their traditional lands. In addition, this recognizes the special fiduciary relationship between the Crown and Indigenous Peoples, a relationship that is very distinct from the Crown's relationship with Canadians.

Professor Scott added that a community's ability to consent is a demand that the Environmental Justice Movement has been making for a long time. Now we're seeing it in the deep geological repositories. The nuclear waste management organization said the community has to be a willing and informed host.

Morally, if communities come to a full understanding of the cost and benefits associated with hosting a project, why is that not the case everywhere?

**Question: Is there a proponent or writer of the regional impact assessment in the Ring of Fire now?**

Professor Scott noted that the regional impact assessment is being conducted under the federal IAA. Therefore, the regional impact assessment will likely either be conducted by the Impact Assessment Agency of Canada (IAAC) by creating a committee to conduct the regional impact assessment, or, as some of us are hoping, the IAAC will enter into an agreement with partner jurisdictions and those will together form the proponents. These agreements are still under discussion.

**Question: Does the current IAA allow for the government to pause IAs by proponents? Or is this being done in other ways?**

Professor Scott commented that neither the federal nor the provincial acts allow for anyone but the proponent to pause an environmental assessment. As I said in my presentation, I'm questioning the constitutionality of these provisions. The duty to consult and accommodate is with the Crown and the Crown is supposed to uphold its honour in its dealings with Indigenous communities. If Indigenous communities are saying they need to stop because of crisis or pandemic, I don't see how they can use their legislation as a reasoning to continue because it would clearly be unconstitutional.

**Question: What can we do as practitioners to advocate for having the project level assessments paused until the regional strategic environmental assessment is completed for Ring of Fire?**

Professor Scott offered that we all may try to put our input into our law reform processes and that the more people we have continuing to say that 'it doesn't make sense to be proceeding with these individual assessments on these roads when a regional assessment has already been announced' the better. Mr. Wlodarczyk noted that the proponents for the road impact assessments are the First Nations themselves.

Mr. Wlodarczyk added that the OAIA is a mechanism for allowing people to speak and question these issues. As practitioners and members of the OAIA, we have a responsibility to make these types of views and diversity of views known to governments.

**Question: Whose responsibility should it be to consider the broad GHG implications of many projects that each consider their own GHG impacts?**

Mr. Greig commented that as a part of IA we need to think about potential effects of climate change (emissions analysis), all of the other stresses that arise from the project, and all the stresses that are also affecting other parts of the natural environment. We have to be looking at the consequences of climate change. The problem that we have is that we assume the future will be like the past, but that's not true. The past is no longer a predictor the future. We also need to be taking into account the impacts of climate change on the project itself. It's important to look at the prediction of what the emissions will be of a project. This data can be brought together with all of the other emissions data in order to get the big picture in terms of what we should do going forward.

Dr. Chetkiewicz added that we have a federal strategic environmental assessment for climate change that considers more broadly the question of climate change, that is, the ultimate cumulative effect. We need to ask the proponent to consider it within their project and the effect of climate change on their project. But we also need the broader picture, such as nationally how are we actually addressing our agreement to the Paris Agreement and the implications of decisions being made provincially, territorially and through

Indigenous governments about certain land uses and sectors that we know are contributing to climate change moving forward. I think the government has a really clear organizing and facilitating role, both nationally and provincially/territorially. Impact assessment has to be part of the solution in a very critical way and I would argue that we have some guidance in Ontario that is useful, but we can do better, including having a better understanding of what all the land uses in the different sectors are contributing to climate change and what decision are going to be made regarding proposed projects in these sectors (e.g. mines in the far north that are in intact peatland complexes that are important for carbon storage and sequestration).

**Question: Given your point about need for increased mining, does Canada have the innovation pressures strong enough to lessen ecological impacts of mining?**

Dr. Chetkiewicz commented that within Ontario there is a proposal to consider adding mining in our project list. Typically mining has been private sector and subject to voluntary agreements and it is the federal process that ensures mining goes through some approach, whether its cumulative effects or effects as it relates to the mine itself. The challenge continues to be who creates the threshold and what types of mines are to be included, however, all of these projects have impacts. Determining why something is included or excluded requires more critical thinking beyond the political conversation going on. I would put it back on communities to say what kinds of things need to be considered in an impact assessment before inviting this type of project in.

Professor Scott added that we need to figure out how these communities want to benefit from having these mines. In particular, Indigenous communities (and more specifically remote Indigenous communities), perhaps the innovation should come from a social/governance perspective rather than in a technical way.

Mr. Wlodarczyk added that the mining industry is becoming more innovative in how they power their facilities through renewable energy and a greater emphasis on electrification of their fleets and operations.

**Question: How do you see EA process with respect to a 'positive contribution to sustainability'?**

Mr. Wlodarczyk commented that all of us as IA practitioners need to make the IA process a positive contribution to sustainability. We need to make it our mission to that projects bring the best science and Indigenous Knowledge to bear on IA and make sure that projects that make a positive contribution to sustainability are approved.

**Question: Why has the early phases of IA moved away from constraint mapping with direction from Indigenous communities?**

Mr. Wlodarczyk commented that this is an evolution of IA; we are getting away from the technical and going towards a collaborative model. The more we work with Indigenous communities and stakeholders in developing collaborative decision making models, the better.

Mr. Greig added that if we are trying to balance both future developments and maintaining the environment in a sustainable condition, one of the most important things we can do is begin the environmental assessment process as part of the design of the project (i.e. concurrently beginning the environmental assessment and design process).

## Conclusions

- Indigenous engagement under the current Ontario *Environmental Assessment Act* 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 IA process and allow for well-informed decision making at the end of the project.
- The environment assessment process currently does not provide adequate emphasis on the need for regional impact assessments in environmentally valuable and sensitive areas and thus is not comprehensive. The involvement of major stakeholders (i.e. Indigenous communities and provincial/territorial/federal governments) is critical to facilitating the progression regional impact assessments that are credible and authoritative, technically sound and complete, and have the perspectives and goals of each party in mind.
- The current and proposed IA process excludes the importance of cumulative impact assessments as it relates to climate change. Currently, projects are viewed exclusively on their individual environmental, often biophysical, impacts to an area; when in actuality, this is not a true representation of the environmental impacts and climate change impacts.
- There is an important role for IA assessors to determine the positive or negative emissions that will result from a project and to provide that data to the scientists responsible for federal climate assessment and emissions reporting.

## Recommendations

1. MECP should revise timeline regulations if the Crown cannot meet the duty to consult. This could include being able to pause individual project assessments to align with the regional assessment timing.
2. CEA requires a regional approach and a long temporal perspective, giving consideration to past, current, and future conditions, including climate change and human activities. Collaboration with Indigenous communities is an important way to better understand current baselines and past conditions.
3. CEA must encompass the range of the ecological end points (ecosystem component) affected by the project. Some species may have ranges beyond a particular watershed. Good examples of this are migratory caribou and fish species.
4. Adequate resources (e.g. funding, training, etc.) for Indigenous communities, the public, and stakeholders is needed to allow for collaboration and meaningful engagement and a fulsome understanding of the costs and benefits of a project in their region.
5. Build in flexible timelines/deadlines as it relates Indigenous community engagement in the IA process.
6. Recognize Indigenous rights to self-determination and endorse the right to Free, Prior and Informed Consent (FPIC).
7. Recognize Indigenous knowledge as inherent and not supplementary to Western science.
8. For the regional assessment to be credible and authoritative in the Ring of Fire it needs to be implemented in partnership with Ontario and First Nations.
9. Ensure positive sustainability contributions to the all aspects of the environment (i.e. social, cultural, environmental) are integrated in the IA process.



10. Governance is critical for impact assessment. Allow for Indigenous Knowledge and science in CEA analyses (e.g. quantitative modelling) to exist alongside each other to better inform the IA decision making process.

## Webinar Resources:

- *Climate Change and Project EA: What's Useful?* A presentation by Lorne Greig <https://bit.ly/39RJdei>
- *Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire* <https://bit.ly/3qEfMSA>
- *Synthesis at the Nexus of Sustainability Assessment, Regional/Strategic Assessment and Indigenous Partnerships* <https://bit.ly/3qAmnOO>
- *The Art and Science of Cumulative Effects Assessment. A 2017 OAIA presentation by Lorne Greig* <https://bit.ly/3qyH74I>
- *The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment* <https://bit.ly/36QcmVc>
- *Collaborative Impact Assessment: Towards Braiding* <https://bit.ly/36U4u4M>

### 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://oaia.on.ca>. If you have any suggestions for next year's conference theme, please contact us at [info@oaia.on.ca](mailto:info@oaia.on.ca).

We look forward to welcoming your participation in this year's OAIA webinar series.

