

**EA-BACK TO THE FUTURE
A JOINT OAIA/OSEM FORUM**

**A Review of EA in Ontario
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Introduction: What does Environmental Assessment in Ontario look like today?

- Do we routinely evaluate alternatives?
- Do we consider need for a project?
- Do we evaluate all or even most of the likely environmental impacts from projects?
- Is there adequate public consultation and participation?
- Are projects often exempted from application of the Act?
- What sectors are covered by EA requirements?
- Are there hearings for contentious projects where significant impact to the environment may occur?
- Is there a legitimate “bump-up” procedure for class environmental assessments?

- The answers to these questions are very discouraging.

- Our clients and others contacting us are routinely shocked to find that environmental assessment means so little in Ontario today.

- Even worse, many of our clients and other members of the public invest enormous amounts of time and effort, taking time away from families and other interests, on the basis that they believe that their efforts will result in better environmental decision making. Often this is sadly untrue, leaving them wondering why they participated in EA processes in good faith.

- Legal assistance to members of the public with serious, legitimate concerns about projects that will affect them is often reduced to going through the motions of asking for expanded terms of reference, asking for consideration of alternatives, asking for evaluation of additional impacts, asking for participant funding, asking for bump-ups, and asking for hearings; in almost every case, with the result being negative.

- Proponents today know that they will almost certainly not have to engage in a hearing process. The incentives to provide up front, full disclosure, participant funding so that the public can engage in meaningful discussion with their own experts and advice, and to arrive at constructive, negotiated resolution of serious environmental issues have thus also been practically eliminated. Only those proponents who have other reasons to engage in these processes now do so.

CELA’s Study: A Review of Environmental Assessment in Ontario

- Concerned with these experiences, in 2000 CELA and the Resource Library for the Environment and the Law undertook a project titled, “Improving Environmental Assessment in Ontario.”

- We retained Alan Levy to conduct a review of Environmental Assessment in Ontario, particularly to evaluate the changes made to Ontario's environmental assessment legislation in 1996.
- The methodology for the study included establishment of an advisory committee and public consultation. In particular, input through a survey form, followed by interviews and meetings, both informal and formal, was sought from provincial staff, current and former tribunal members, members of the public who had participated in EA processes, municipalities, conservation authorities, planners, lawyers, EA consultants, environmental organizations, academics and industry and professional associations. CELA wanted the review based on the actual case experience under the Act and the review is current to the summer of 2002, five years after the major changes to the Environmental Assessment Act. (The Class EA system was not the focus of this review.)
- CELA's study found that the Ontario EA system is and environmental assessment in name only. It has reverted to a narrow effects identification and mitigation process as opposed to proper environmental assessment planning with evaluation of need and alternatives. Not only has the process been gutted, but public participation and transparency has also fallen victim to the changed approach.
- Of course the EA Act still theoretically provides for an assessment of alternative methods of carrying out the undertaking, and alternatives to the undertaking, the effects of each on the environment, and the advantages and disadvantages of each.
- However, the 1996 changes that put a great deal of discretion in the hands of the Minister of the Environment were found in the study to be at the heart of the effective dismantling of the environmental assessment regime. In addition to the pre-existing power of exemptions (now declaration orders) is the Ministry of Environment's interpretation that the legislation allows the Minister to vary or eliminate the core requirements found in section 6.1 of the Act by way of approval of Terms of Reference.
- It should be noted that this interpretation by the Ministry of the Environment is presently under consideration by the Divisional Court which has heard an application for judicial review in the Richmond Landfill case, brought by CELA lawyer Rick Lindgren. The Divisional Court's decision is reserved. CELA argued that the Act requires consideration of alternative methods and alternatives to, as well as evaluation of impacts, and that the discretion granted by the Act is only as to what *additional* requirements may be imposed in the Terms of Reference.

- However, over the last five to six years, the Ministry interpretation has prevailed and accordingly proponents' practice has altered considerably with the effects that we found in our study.
- In addition, the Minister now has discretion to "scope" applications referred for hearing, sending only some or parts of some issues to the Board for determination. In doing so, the Minister must inform the Board as to how he or she intends to decide the rest of the issues that the Minister did not refer to the Board.
- The actual change in practice and the impacts on environmental assessment planning belie the many changes to the legislation that were, on their face, positive improvements to the legislation. These included more precise time lines, the requirement for written reasons for many of the Minister's decisions, the opportunity for remediation of deficiencies in an EA, explicit statutory authority for refusal of an EA, repeated reference to mediation, the power to order mandatory mediation, and explicit references to public consultation requirements that were previously required in practice but not included in the Act.
- In addition to the issue of increased Ministerial control and discretion, CELA's study discussed eleven other particular changes in operation and administration of the Act, including changes made possible by the amendments to the legislation that increased the Minister's discretion in the administration of the Act, that in our view have resulted in the disappointing EA regime we now have.

1. Decreased Scope of EA's

- The major concern in this regard is that terms of reference are routinely approved with no requirement for examination of alternative methods or alternatives to the undertaking. A few examples dealt with by CELA lawyers include the Bennett and Brampton incinerator EA's, and the Richmond and Eastview landfill EA's.
- In addition, there have been no EA's of plans, policies or programs in Ontario since 1995, thus limiting EA's to individual projects.

2. Expansion of Class EA's

- Class EA's are being used instead of individual EA's, and the categories of activities covered under Class EA's are increasing.
- Cumulative effects are poorly considered under Class EA processes, and evaluation of alternatives is generally absent.

3. Relaxed Standards for Approval

- With one exception, no applications for Environmental Assessment approval were refused in the study period. Similarly, no terms of reference were rejected.
- Despite receiving 271 requests for bump-ups to individual EA's between 1995 and 2001, none of these requests were granted.

4. Reduced Technical Scrutiny

- CELA's study found that current practice is now to provide only limited technical design and operations plans until after the EA process is completed, thus limiting the opportunity for public review of these issues during the EA process.
- Apart from two matters referred to hearing that had begun under the prior version of the Act (Adams Mine and Quinte Landfill), no matters have been referred for hearing under the EAA since 1995.
- Strange regulations passed after Bill 76 also provide that certain matters such as EPA landfill approvals that normally would face mandatory hearings under their legislation are now exempted from those hearings if they have EA approval or even were exempted from EA application! This is true, even where there was no EA hearing.
- As a result, not only have there been no EA hearings since 1995, there have been very few EPA or OWRA hearings either.
- Accordingly, public scrutiny of technical design and operations issues – often critical to the issue of whether there will be impacts or not – has been even more dramatically eliminated.

5. Reduced public participation

- Ironically, even though the legislation now makes public participation mandatory as a matter of statute, not just in practice, public participation opportunities have been dramatically reduced.
- Among the reasons are the lack of participant funding programs, the lack of hearings and thus no opportunity to receive cost awards at a hearing, and of course, the elimination of the Intervenor Funding Project Act.
- Now, not only is there no funding for meaningful participation at the terms of reference and development of the EA stages, but as noted, there are no hearings either, so the public is shortchanged throughout the process, with inadequate opportunity early in the process and *de fact* no

opportunity late in the process for meaningful participation that will influence the decision making.

6. Refusal of Hearing Requests

- **With two exceptions, every Minister of the Environment since 1995 has refused all hearing requests.**
- **Even considering the two exceptions, one involved a process begun under the old Act (Quinte Landfill) and was an ill-advised application that the proponent withdrew during the course of the hearing, and the other (Adams Mine) was so severely scoped as to call into question the meaningfulness of holding the hearing at all.**
- **Hearings have been refused even with huge public concern, and hundreds of requests for hearings, including from affected municipalities.**
- **It is disappointing furthermore that many of the written decisions outlining reasons for refusing these hearings make generic statements that shed no light on the Minister's consideration of the specific issues at hand, instead making statements such as, "The Minister does not consider it advisable to hold a hearing."**

7. Monitoring, Enforcement and Compliance

- **The absence of mandatory follow up provisions, the lack of a post-approval program for EA approvals, and the general lack of attention to monitoring, follow up, compliance and enforcement of EA terms and conditions has resulted in unfortunate situations where citizens thought issues would be dealt with because of terms and conditions imposed during the approval process, but no enforcement or follow up has occurred.**
- **This situation seriously jeopardizes the little remaining credibility of the EA system in Ontario**

8. Reduced Independence of the Tribunal

- **The CELA study also reviewed the hallmarks of an independent decision making body and found them wanting in the case of the Environmental Review Tribunal**
- **Independence is also very important to the credibility of the tribunal and for its role in the EA system.**
- **Among the issues identified were the appointment of long-time government employees to the Board, appointments generally only for a short term, general refusal to reappoint members appointed by previous governments, pressure to meet arbitrary scheduling goals without regard to the implications of the scheduling decisions, and limiting the scope of the**

Board's decisions by the limited hearing referrals, scoped hearings, and limited terms of reference.

9. Budgetary Restrictions

- **Environmental Assessment and Approvals Branch was not spared in the extreme downsizing that occurred in the Ministry of the Environment in the period 1990 to 2000. 1990 to 1995 saw 25% reduction of dollars in the Ministry; 1996 to 2000 saw another 36% reduction of dollars and 38% reduction of staff.**
- **In addition, the Environmental Review Tribunal has a statutory authority to call experts on its own initiative, but no budget to do so.**

10. Reduced opportunity for Judicial Review

- **In 2000 an amendment to the Act further restricted judicial review opportunities by changing the privative clause to require applications for judicial review to pass the “patently unreasonable” test before being considered by the Court.**
- **With no other rights of appeal, Environmental Review Tribunal, Cabinet, Ministerial and Directors' decision making concerning EA is effectively shielded in most cases from any independent review, thus losing an important check on the system.**

CONCLUSION

- **CELA's review of EA in Ontario concluded that solutions to these issues are possible, even without legislative amendment, given the willingness to pursue them.**
- **Future directions will be the subject of an entire discussion tomorrow, but the study made preliminary recommendations including: Government should immediately shift its approach so as to improve the EA process even under the current legislation, provide for and require enhanced consultation, better exercise its discretion, provide adequate funding to its own staff, re-establish the Environmental Assessment Advisory Committee, provide resources for public participation, require consideration of alternatives, cumulative effects and sustainability in EA's, improve the approach to EA scoping, allow for bump-ups, send matters to public hearings, add private sector undertakings to the scope of the Act, establish rigorous post-approval monitoring, enforce approval conditions and improve the independence of the Environmental Review Tribunal.**

Thank you.