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# PRELIMINARY ANALYSIS OF SCHEDULE 6 OF BILL 197: PROPOSED AMENDMENTS TO THE *ENVIRONMENTAL ASSESSMENT ACT*

**Prepared by**
**Richard D. Lindgren, CELA Counsel**

## OVERVIEW

On July 8, 2020, the Ontario government tabled omnibus Bill 197 (*COVID-19 Economic Recovery Act, 2020*) for First Reading in the Ontario Legislature.[1] Schedule 6 of Bill 197 proposes fundamental changes to the *Environmental Assessment Act*[2] (*EAA*), many of which were previously described in Ontario's 2019 discussion paper on "modernizing" the current *EAA* program.[3]

Over the past five decades, the Canadian Environmental Law Association (CELA) has been involved in various law reform initiatives, court cases, public hearings and other administrative proceedings under the *EAA* on behalf of low-income individuals and disadvantaged or vulnerable communities. On the basis of this extensive experience, CELA has carefully considered the legislative amendments contained in Schedule 6 from our public interest perspective.

CELA's overall conclusion is that while a small number of the proposed changes may be supportable in principle, most of the Schedule 6 amendments are unjustified, regressive in nature, and do not implement the long overdue improvements that are actually needed within the *EAA* program. Accordingly, CELA recommends that Schedule 6 should not be enacted in its present form, and should instead be withdrawn in its entirety from Bill 197.

## BACKGROUND

The *EAA* is one of the oldest and most important environmental laws in Ontario. This ground-breaking legislation was first enacted in 1975, but it was substantially amended by controversial reforms implemented by the provincial government in 1996.

The purpose of the *EAA* is to ensure the "betterment" of Ontarians "by providing for the protection, conservation and wise management" of the environment.[4] To achieve this public interest purpose, the *EAA* establishes different types of information-gathering and decision-making processes (i.e.

[1] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-197. See also the information bulletin that has been posted on the Environmental Registry of Ontario: https://ero.ontario.ca/notice/019-2051.
[2] See https://www.ontario.ca/laws/statute/90e18.
[3] See https://ero.ontario.ca/notice/013-5101. CELA's response to Ontario's discussion paper is posted at https://cela.ca/modernizing-ontarios-environmental-assessment-program/ and https://cela.ca/proposed-changes-to-the-environmental-assessment-act-response-to-environmental-registry-no-013-5102/.
[4] *EAA*, section 2.

individual EAs, Class EAs, sectoral screening processes) that include opportunities for public and Indigenous engagement at key stages.

In essence, the *EAA* is a "look before you leap" statute since the legislation generally requires an intensive examination of the ecological, social, economic, and cultural impacts of an environmentally significant undertaking (and its alternatives) in order to make an informed decision on whether the undertaking should be approved (or not), and to determine which terms or conditions should be imposed to safeguard the public interest. In short, the *EAA* is intended to anticipate and prevent environmental harm arising from projects, facilities and activities that are subject to the Act.

CELA notes that the Ontario government's primary reason for including Schedule 6 in Bill 197 is that the *EAA* is now almost 50 years-old and therefore needs to be "modernized."[5] CELA finds that this simplistic rationale is unpersuasive and unsubstantiated. In our view, the *EAA* should not be reformed simply because of its age, but because the 1996 amendments have resulted in a broken and dysfunctional *EAA* program.

In fact, over the past 20 years, many other commentators, stakeholders and independent officers of the Ontario Legislature (i.e. Auditor General of Ontario and Environmental Commissioner of Ontario) have identified numerous improvements that are needed in the *EAA* program in order to face the environmental issues and opportunities of the 21st century.

Unfortunately, Schedule 6 of Bill 197 does not address or implement these much-needed reforms, and instead focuses on quick-fixes that will make the *EAA* program considerably less robust, predictable, participatory and accountable to the people of Ontario, as discussed below.

## ANALYSIS OF THE KEY "REFORMS" IN SCHEDULE 6

The following preliminary analysis is not intended to serve as an exhaustive review of all of the *EAA* amendments being proposed in Schedule 6. Instead, CELA has identified the most significant reforms that warrant close public scrutiny and governmental reconsideration at this time. CELA's more detailed and comprehensive analysis of Schedule 6 will be prepared and provided to the Ontario government under separate cover as Bill 197 continues through the legislative process.

### 1. Using a Regulatory Projects List under the *EAA*

*PROPOSAL*: The Ontario proposes to change the *EAA* as follows:

> Amend the *EAA* to allow the development of a Project List through future regulation that would clearly identify the projects that are subject to EA… The Project List regulation would clearly identify projects subject to EA requirements with a focus on projects that have the most potential to impact the environment.[6]

*CELA RESPONSE*: By fundamentally changing how the Act is applied, this proposal is arguably the most significant and objectionable amendment within Schedule 6. At present, section 3 of the

[5] See https://ero.ontario.ca/notice/019-2051.
[6] *Ibid*.

*EAA* generally applies the Act's requirements to undertakings proposed by the public sector (i.e. provincial ministries, public bodies or municipalities), unless they have been exempted by regulations, Ministerial declaration orders, or other legislative means. Conversely, undertakings proposed by private sector proponents (i.e. factories, mines, quarries, residential subdivisions, etc.) are generally not subject to the *EAA*, unless they have been specifically designated by Ministerial orders (or sectoral regulations) as undertakings to which the Act applies.

Over the years, CELA and other commentators have frequently noted that the *EAA*'s curious distinction between public and private sector undertakings makes no environmental sense. In our view, the preferable approach is to ensure that all environmentally significant undertakings are reviewed in an appropriate and efficient EA process that is open, fair, evidence-based and accessible, regardless of whether the proponent is public or private. At the same time, CELA has long maintained that EA requirements should apply not only to physical works and activities, but also to governmental plans, programs or proposals[7] that often drive or facilitate individual projects.

Schedule 6 proposes a radical departure from the current application of the *EAA* by inserting a new section 3 that authorizes the passage of regulations that prescribe which types of undertakings will be subject to *EAA* program. However, new section 3 is permissive rather than mandatory in nature, contains no deadline for the promulgation of the Project List regulations, and contains no specific criteria (or thresholds) for identifying which undertakings should (or should not) be included on the Projects List. Similarly, the provincial government has not provided a draft list of candidates for inclusion on the Projects List.

CELA also notes that the designation of projects is intended to include related or "ancillary" projects. However, this key phrase has not been defined in Schedule 6, and instead has been deferred to a future regulation (see new section 39(c)). For the purposes of greater certainty, CELA submits that this phrase should be statutorily defined in the amended *EAA*.

This vague approach under Schedule 6 leaves the provincial Cabinet with open-ended discretion when prescribing projects for the purposes of the *EAA*, and creates considerable uncertainty about precisely which projects will actually trigger an EA process under the new regime. It further appears to CELA that this Project List will likely be confined to physical works and activities, and will not prescribe higher-order governmental "proposals, plans or programs" in relation to physical works and undertakings. We take this position in light of the recent track record in which there has been an overwhelming tendency for the Ontario government to exempt its own broader "proposals, plans or programs" from *EAA* requirements. Accordingly, we do not anticipate that the regulatory Project List will prescribe many (or any) provincial proposals, plans or programs.

Instead, as noted above, the government's apparent intention is to "focus" the *EAA* on those projects that "have the most potential to impact the environment." This objective is not found in new section 3 of Schedule 6. However, this statement signals that while some as-yet unidentified mega-projects may get prescribed by regulation under the *EAA*, medium-sized or smaller projects that nevertheless pose environmental risks will likely not be subject to EA requirements. Not only

[7] Section 1(1) of the EAA currently defines "undertaking" as including not only "an enterprises or activity", but also "a proposal, plan or program in respect of an enterprise or activity" by the Ontario government, public bodies or municipalities.

will this result in far fewer projects undergoing *EAA* processes, but it also ignores the fact that the nature, extent, frequency, magnitude and duration of environmental impacts is greatly dependent on the site-specific location, technology choice(s), design and operation specifications, and efficacy of mitigation and monitoring measures for the particular project.

In short, until an individual project is proposed at an actual location (and until the requisite studies are completed), it is often difficult to pre-determine the significance of the potential impacts in advance on a purely hypothetical basis. In CELA's view, this potentially variable range of environmental impacts is precisely why a precautionary approach to triggering EA requirements is needed to ensure that so-called moderate- or lower-risk projects are still subject to an appropriate type of *EAA* scrutiny.

CELA further notes that unlike the federal *Impact Assessment Act*,[8] Schedule 6 contains no express provisions that would allow the Minister designate non-listed projects as undertakings to which the *EAA* applies on a case-by-case basis. Given that Ontarians can currently file designation requests with the Minister, this omission in Schedule 6 represents an undesirable rollback of existing public rights under the *EAA*.

2. Creating and Standardizing "Comprehensive" EAs

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> Amend the *EAA* to clarify the authority for standardized workplan regulations for certain sectors to save time and ensure consistency among workplans for proponents in a sector. Standardized workplans are expected to save eligible proponents up to 1.5 years in the overall EA process, as they will be able to use the sectoral Terms of Reference (ToR) as the basis for their assessment allowing proponents to streamline workplans that do not vary significantly from project-to-project within a sector.[9]

*CELA RESPONSE:* The Ontario government proposes to retain the individual EA process, but intends to re-name it as a "Comprehensive" EA under new Part II.3 of the *EAA*. For the most part, the existing provisions regarding the content and conduct of individual EAs will essentially remain unchanged, including the Ministerial power to approve EA Terms of Reference that exclude (or "scope") any of the important EA planning considerations listed in new section 17.6(2). In light of this scoping power, and given the well-documented systemic problems that continue to militate against meaningful public or Indigenous participation in individual EA processes, CELA remains highly concerned that new EAs under Part II.3 will be anything but "Comprehensive."

On this point, CELA is aware that the Minister is empowered by new section 17.4(11) in Schedule 6 to amend proposed Terms of Reference to include requirements "greater than" those prescribed by regulation (see below). CELA draws no comfort in this new provision since the overwhelming trend since 1996 has been to approve Terms of Reference that exclude key matters from individual EAs (e.g. "need", "alternatives to" and alternative sites), and we see nothing in Schedule 6 that

[8] S.C. 2019, c 28, section 9.
[9] See https://ero.ontario.ca/notice/019-2051.

would prevent this disturbing trend from continuing unabated under the amended *EAA* or new regulations.

As noted above, the Ontario government is proposing to expedite the preparation and approval of Terms of Reference by making regulations which set out standardized requirements that proponents may follow in certain sectors. However, Schedule 6 fails to identify which sectors will be subject to this standardized approach, and provides no prescriptive detail on the likely content of generic Terms of Reference or workplans in prescribed sectors. In the absence of such information, CELA is unable to conclude that "standardized" Terms of Reference will be an improvement over project-specific Terms of Reference that are tailored to meet the potential environmental impacts or planning considerations raised by local residents, communities or other stakeholders.

In addition, Schedule 6 does nothing to strengthen or clarify the current (and highly ambiguous) *EAA* requirement for proponents to "consult such persons as may be interested" in the EA matter.[10] In our view, clearer and more prescriptive legislative language is needed in order to ensure that meaningful public and Indigenous consultation is conducted under the *EAA*. Similarly, Schedule 6 fails to remedy the long-standing Ministerial practice of not referring any individual EAs to public hearings before the independent Environmental Review Tribunal (ERT). In fact, to our knowledge, no *EAA* hearings have been held by the ERT since the late 1990s, which renders hollow the current public right to request referrals to the specialized ERT for a public hearing and legally binding decision.

3. Creating "Streamlined" EAs and Eliminating Class EAs

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> Amend the *EAA* to enable new streamlined environmental assessment regulations that set out consistent requirements (consultation, documentation, scope of assessment, etc.) across project types to replace the differing and inconsistent Class EA system. The existing Class EAs would remain in place until the new regulations are made.[11]

*CELA RESPONSE:* The legal basis for Class EAs was established in the 1996 amendments to the *EAA*, and various Class EAs have been developed since that time to provide planning, notification, and documentation requirements for certain infrastructure projects that are small-scale, recur frequently, and have predictable impacts that may be amenable to known mitigation measures.

In essence, the current suite of approved Class EAs establishes streamlined "self-assessment" procedures, which are typically less extensive than those required in the individual EA process. Moreover, these Class EAs usually delineate different categories or levels of assessment for projects within the class of undertakings, depending upon the nature of the project and the potential for environmental impacts.

[10] *EAA*, section 5.1, which has now been re-numbered as new section 17.3 in Schedule 6 of Bill 197.
[11] See https://ero.ontario.ca/notice/019-2051.

It is important to note that projects subject to a Class EA are effectively "pre-approved," which means that proponents may proceed directly with the project (without review or approval by the Minister), provided that the proponent has fully complied with the prescribed Class EA requirements, and has otherwise obtained all other necessary approvals required by law. However, Class EAs generally include provisions which confer residual discretion upon the Minister to issue a Part II order (also known as a "bump up" or elevation order) to require the project to undergo an individual EA if warranted in the circumstances (see below).

CELA acknowledges that the day-to-day implementation of Class EA procedures has sometimes proven to be problematic across Ontario, thereby prompting numerous elevation (or bump-up) requests. However, CELA submits that the existing Class EA procedures should be amended and improved (with input from proponents and stakeholders alike), rather than be phased out entirely under Schedule 6 in Bill 197.

In particular, we have carefully reviewed new Part II.4 of Schedule 6, and we see no statutory assurances that essential Class EA requirements will be fully replicated in the as-yet unreleased regulations under the amended *EAA*. If it is the government's intention to simply codify Class EA requirements into regulatory form, then we see no particular benefit or advantage in simply jettisoning the approved (and well-used) Class EAs that have evolved in recent years. On the other hand, if it is the government's intention to reduce or eliminate safeguards that presently exist in the approved Class EAs, then CELA can only conclude that Part II.4 will be inappropriately used to rollback current requirements in Class EAs. In our view, this constitutes a step backward that is inconsistent with the public interest purpose of the *EAA*.

4. Constraining the "Bump-Up" or Elevation Request Process

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> Amend the *EAA* to focus the Part II Order request process on potential adverse impacts of a project on existing aboriginal and treaty rights to help reduce uncertainty and undue delays to critical infrastructure and development projects.[12]

*CELA RESPONSE:* CELA has no objection to the proposal in new sections 16(6) and 17.31(7) to permit Indigenous communities to seek elevations of Class EA or Part II.4 projects to the more stringent Part II.3 process on the grounds that the project may adversely affect treaty or aboriginal rights which are protected by section 35 of the *Constitution Act, 1982*. However, CELA strongly objects to Schedule 6's ill-conceived attempt to prevent or disallow all other residents of Ontario from filing elevation requests on environmental or non-constitutional grounds.

Based on our experience, CELA acknowledges that elevation requests often take too long for the Minister to decide, and we note that most of the time, the requests are refused by the Minister. More generally, CELA concludes that the numerous Part II order requests filed every year by concerned citizens suggests that there is a high level of public dissatisfaction with the current state of Class EA planning processes. In CELA's view, the existing Part II order process has become

[12] See https://ero.ontario.ca/notice/019-2051.

non-credible and over-politicized, largely because the requests are determined behind closed doors by the Environment Minister, not independent experts.

To remedy this situation, the Environment Minister's EA Advisory Panel recommended years ago that in order to restore public trust and credibility in the Class EA process, two key reforms are necessary:

- during the Class EA planning process, there should be an expedited mechanism to allow the parties to seek rulings or directions from the ERT; and

- if there are any outstanding disputes at the end of the Class EA planning process, then Part II order requests should be adjudicated in writing by the ERT, not the Minister.

Unfortunately, these sound recommendations have not been adopted by the Ontario government to date, and are not reflected in Schedule 6. This continuing inaction will leave Ministerial decision-making on elevation requests (even if confined to treaty/aboriginal rights) as a contentious "black box" in which legitimate and well-founded concerns are presented by requesters, but they are almost always rejected, often for specious reasons by the Minister. Accordingly, CELA submits that the EA Advisory Panel's above-noted recommendations should be developed and implemented forthwith by the Ontario government.

5. Setting Timelines and Expiry Dates

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> Amend the *EAA* to:
>
> - Enable setting timelines for proponents completing an EA and for extension of these timelines. The EA process would need to be restarted by proponents who do not meet the established timeline...;
> - Require the minister to provide reasons if decision timelines are not met…;
> - Provide expiry dates for all individual (comprehensive) EAs that do not have an expiry date and that are not listed by regulation… In addition, the Minister would be able to amend an approval for projects listed in the exemption regulation to include a date on which the approval for the project will expire. If the amendments to the Act are passed, the ministry intends to consult on a list of projects to be exempted from the expiry date provisions before the provision establishing the expiry date is proclaimed into force.[13]

*CELA RESPONSE:* In principle, CELA has no objection to establishing legislative timelines for various steps under the *EAA*, provided that there is some flexibility to extend, suspend or amend the timelines if warranted on a case-by-case basis (i.e. if new information comes to light or if there is a material change in circumstances). We are particularly supportive of imposing expiry dates on EA approvals, but CELA submits that the proposed 10 year limit is far too long. In our view, a proponent should be required to start implementing the project within three years of receiving approval under Part II.3 of the amended EA. If a decade is allowed to elapse before construction,

[13] See https://ero.ontario.ca/notice/019-2051.

it is likely that baseline conditions may have significantly changed since the EA documentation was completed, which means the impact predictions are likely stale-dated or inaccurate, and should therefore be re-examined in a fresh EA.

CELA also notes that the key phrase "substantially commenced" has not been defined in Schedule 6, and instead has been deferred to a future regulation (see new section 39(d)). For the purposes of greater certainty, CELA submits that this phrase should be statutorily defined in the amended *EAA*.

6. Reducing Alleged "Duplication" between Provincial and Federal EA Processes

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> [A]mend… the harmonization provision of the *EAA* to align with the federal *Impact Assessment Act* [and] strengthen and clarify existing provisions of the *EAA* that provide for harmonization and substitution where both Ontario and other jurisdictions' EA requirements apply, including federal ones to reduce duplication by having one process but still maintain having two decisions.[14]

*CELA RESPONSE:* CELA strongly agrees with the "one project, one assessment" approach, and we support greater use of the *EAA*'s harmonization provisions to facilitate joint assessments with other jurisdictions. However, it has been our experience that this mechanism has been underutilized by Ontario in recent years, and we see nothing in new section 3.1 that will trigger more frequent joint assessments. In addition, CELA finds that is ironic that new section 3.1 is being justified by the provincial government on the basis of aligning the *EAA* with the federal *Impact Assessment Act* when, in fact, Ontario is supporting Alberta's attempt to strike down the federal law in a constitutional reference currently being held by the Alberta Court of Appeal.

7. Requiring Municipal Support for Large Landfill Proposals

*PROPOSAL*: The Ontario government proposes to amend the *EAA* as follows:

> Amend the *EAA* to require proponents of new, large landfills (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 set distance from the proposed new landfill site property boundary (that is within a 3.5 km distance or such distance as may otherwise be prescribed). This requirement would apply to single tier and lower tier municipalities.[15]

*CELA RESPONSE:* CELA supports giving municipalities a greater say in landfill siting cases, and we generally agree with new sections 6.0.1 and 17.5 in Schedule 6 that require landfill proponents to obtain proof of municipal support for proposed landfills. However, it should be recalled that only the largest landfills are actually required to undergo an individual EA, and smaller landfills

[14] See https://ero.ontario.ca/notice/019-2051.
[15] *Ibid*.

generally remain subject to the streamlined screening procedures set out in Ontario Regulation 101/07 under the *EAA*, which does not include this municipal support provision.

More importantly, CELA notes that Schedule 6 proposes to authorize regulations that exempt any proponent from any requirement under the *EAA*, which presumably includes the municipal support provision. Indeed, the Environmental Registry posting suggests that such exempting regulations may be passed in situations where there are "severe landfill constraints" or "public health concerns."[16] In our view, demonstrating proof of municipal support should be mandatory in all instances, and there are, to our knowledge, no compelling circumstances that would justify overriding local municipal opposition to a proposed landfill.

8. Necessary *EAA* Reforms that are Absent in Schedule 6

Despite the length and complexity of Schedule 6 in Bill 197, it is readily apparent that the Ontario government is not proposing any legislative changes to address the overdue reforms recommended in recent years by EA practitioners, academics, non-governmental organizations, the Auditor General of Ontario, and the Environmental Commissioner of Ontario. These reforms include, but are not necessarily limited to, the following matters:

- updating and improving the purpose of the *EAA* to reflect a sustainability focus and to include environmental justice principles to guide decision-making;
- upgrading statutory provisions to ensure meaningful opportunities for public participation in all types of *EAA* processes;
- enhancing consultation requirements for engaging Indigenous communities in a manner that aligns with the United Nations Declaration on the Rights of Indigenous Peoples, including the right to free, prior and informed consent;
- reinstating "proponent pays" intervenor funding legislation to facilitate public participation and Indigenous engagement;
- entrenching a statutory climate change test to help *EAA* decision-makers to determine whether particular undertakings should be approved or rejected in light of their greenhouse gas emissions or carbon storage implications;
- curtailing the ability of the Minister to approve Terms of Reference that narrow or exclude the consideration of an undertaking's purpose, need, alternatives or other key factors in "Comprehensive" (individual) EAs;
- extending the application of the *EAA* to environmentally significant projects within the private sector (e.g. mines);
- requiring mandatory and robust assessment of cumulative effects;

[16] *Ibid.*

- facilitating regional assessments for sensitive or vulnerable geographic areas;
- ensuring strategic assessments of governmental plans, policies and programs;
- referring "Comprehensive" (individual) EA applications, in whole or in part, to the ERT for a hearing and decision upon request from members of the public;
- reviewing and reducing the lengthy list of environmentally significant undertakings that have been exempted from the *EAA* by regulation, declaration orders, or legislative means;
- enhancing investigation, enforcement and penalty provisions under the *EAA*; and
- removing or restricting section 32 of the *Environmental Bill of Rights* (*EBR*), which currently exempts from the *EBR*'s public participation regime any licences, permits or approvals that implement undertakings that have been approved or exempted under the *EAA*.

On this latter point, CELA notes that Schedule 6 of Bill 197 proposes to broaden – not contract – the controversial EA-related exception to public participation rights under Part II of the *EBR* in relation to instruments.[17] In our view, Schedule 6's consequential amendments to section 32 of the *EBR* are overbroad and unjustifiable.

In conclusion, CELA submits that unless Schedule 6 includes the above-noted list of missing reforms, the Ontario government's current legislative proposals regarding the *EAA* can only be viewed as incomplete, misguided and unacceptable.

July 10, 2020

[17] See new section 51 of Schedule 6 of Bill 197.