Environmental Assessment – The (Dead) Letter of the Law

Presentation for Legal Toolkit Workshop

October 1, 2019

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Introduction

- Ontario & Federal environmental assessment regimes originated in Canada in the 1970s
- Designed to identify environmental problems from development (logging, mining, energy, etc) proposals through a comprehensive “look before you leap” approach
- Both Ontario and federal EA laws have seen better days

Background

- Supreme Court of Canada has described EA as a planning tool that is now generally regarded as an integral component of sound-decision making that has both an information-gathering and decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a development proposal – *Oldman River* (1992); *Mining Watch* (2010)

Overview of Ontario's EAA

- Proponents subject to EAA must examine environmental advantages and disadvantages of proposals and reasonable range of alternatives in open, transparent manner
- Proponents cannot proceed with undertakings unless comparative assessments of options carried out and they demonstrate selected alternative is environmentally preferable and needed to address problem identified in EA documentation

Purpose of EAA

- Purpose of EAA: “betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment” – s. 2

Definition of “environment” in EAA

- Includes biophysical, socio-economic, and cultural considerations and their various inter-relationships
- Consequently, proponents subject to Act must consider more than potential impacts to natural environment

Application of EAA

- Part I of Act - Act applies to:
  - Undertakings (projects) proposed by public sector proponents (e.g. municipalities, public bodies, provincial ministries), unless such undertakings or proponents have been exempted by order or regulation from EAA;

  and does not apply to:
  - Private sector undertakings, unless such undertakings have been specifically designated by regulation as subject to EAA

Individual EAs

- Part II of Act – establishes requirements for preparation, review, approval of "individual EA" for specific undertakings subject to Act
- Public consultation/comment opportunities apply to following four steps in process:
  - terms of reference for EA content
  - EA documentation consistency with TOR
  - Government/public review of EA material
  - Decision by Minister or ERT

Class EAs

- Part II.1 of Act – establishes requirements for preparation, review, approval of "class EAs", which are streamlined self-assessment procedures for certain classes of undertakings subject to EAA
- Where undertaking subject to class EA requirements, not subject to individual EA requirements unless "bumped up" (rarely happens)
- Theory behind class EA projects: minor, predictable, manageable environmental impacts (e.g. municipal roads, minor transmission facility)
- In practice, impacts of class EA projects not minor (e.g. forest management on Crown lands)

EAA Evolution

- In early 1970s when EAA proposed, Ontario government described it as the establishment of a new environmental planning process to ensure integrated consideration at an early stage of the entire complex of environmental effects a project might generate
- However, mid-1990s amendments (what we have now) dramatically changed law to one focused on getting a “faster yes”

Concerns with EAA: CELA's Application for Review

- In 2013, CELA filed an EBR request with MOE to review the EAA arguing that the current legislative and regulatory regime governing EA in Ontario is incomplete, outdated, and inadequate to protect the environment
- Next 10 slides set out CELA's key concerns

Concerns with EAA: General Regulatory Exemptions

- 12 provincial ministries
- Municipal projects less than $3.5 million
- Certain waste disposal projects (mobile PCB destruction facilities)
- Subdivision agreements
- Province’s long-term electricity supply plan

Concerns with EAA: Sectoral Regulatory Exemptions

- Electricity projects
- Waste management projects
- Transportation authority undertakings
- Removal of many projects under these categories from individual EAs to class EAs raises compliance and enforcement issues

Concerns with EAA: Inadequate Monitoring/Enforcement

- Throughout the 2000s, MOE criticized by ECO for inadequate monitoring of compliance with individual EA or class EA approval conditions
- MOE reliance on complaints-based compliance model not effective
- As a result, enforcement also has suffered

Concerns with EAA: No Public Hearings

- 2005 EA Panel Review praised past public hearings as important for gathering information, testing evidence, weighing competing interests, and making informed decisions in areas such as landfills, incinerators, highways, transmission lines, hazardous waste facilities, timber management on Crown lands, energy demand-supply projects
- EAA hearings now “extinct species” in Ontario
- Minister now decides everything w/o hearings

Concerns with EAA: Scoped Individual EAs

- Act still contains provisions that allow proponents to describe rationale for undertaking, alternatives to, and alternative methods of carrying out undertaking (UAAM)
- Environmental impacts of UAAM
- Environmental advantages/disadvantages of UAAM
- But 1996 EAA amendments granting Minister terms of reference authority eviscerated obligation to examine need/alternatives – legality of Minister's authority upheld by Ontario C.A. in *Sutcliffe* (2004)

Concerns with EAA: Extensive Use of Class EAs

- Class EAs now the dominant approach to EA in Ontario
- Since early 1990s [i.e. even before 1996 amendments], 90% of undertakings subject to EAA obtained streamlined approvals under class EA process – ECO (2007-2008)
- Bump-up requests (to individual EA) rarely granted by MOE (EA Advisory Panel – 2005; ECO 2008, 2009-2010)
- Courts reluctant to judicially review MOE refusals to bump-up class EAs to individual EAs - *Hollinger Farms* (Div. Ct. 2007)

Concerns with EAA: Inadequate Consideration of Cumulative Effects

- Despite MOE SEV identifying cumulative effects as matters to be considered in decisions respecting proposed laws, regulations, policies, little evidence this occurring
- 2005 EA Advisory Panel questioned whether cumulative effects being considered in thousands of projects under Class EA process due to inadequate collection/reporting of data under program
- MOE has argued EAA not require consideration of cumulative effects unlike CEAA

Concerns with EAA: Barriers to Meaningful Public Participation

- Proponents required to consult with interested persons during preparation of terms of reference and EA – s. 5.1 EAA
- Problems ensuring this requirement met:
  - Comment period too short
  - Relevant documents flawed/not accessible
  - Consultation superficial
  - No funding for public to retain technical help
  - Key questions of need/alternatives off table

Concerns with EAA: EA Exception under EBR

- S. 32 EBR says mandatory public participation rights under EBR (notice, comment, third party appeals) do not apply to approvals that implement undertakings approved/exempted under EAA
- ECO and EA Advisory Panel critical of s. 32 because it shields environmentally significant decisions from public scrutiny

Concerns with EAA: No Integration of EA and Land Use

- Projects subject to EAA also may require official plan or zoning approval under Planning Act
- But no integration between EA program and municipal master planning
- Result is fragmented decision-making (i.e. specific projects under a master plan may be subject to EA but master plan that triggered projects is not – e.g. York Durham Sewer)

Concerns with EAA: MOE Response to CELA

- In March 2014, MOE denied CELA request for review concluding that it was not warranted because:
  - EA process "robust"
  - Public was consulted when EAA amended in 1990s
  - EAA was reviewed in 2005 by EA Advisory Panel
  - MOE's SEV already includes consideration of environmental principles

Concerns with EAA: ECO Views on MOE Decision

- Disagreed with MOE decision to deny request
- Applicants raised valid concerns with existing EA process many of which raised by ECO and EA Advisory Panel years ago
- EAA not amended significantly in 20 years
- Comprehensive and public review of EAA long overdue (ECO, 2013-2014)

Events Since Last ECO Report

- Minister Murray speech inviting OAIA members to (1) help him better understand EA regime, and (2) offer advice on how to make it work better (2015)
- Environmental groups urged Minister to conduct comprehensive review of EAA in 2016 addressing TOR, bump-ups, cumulative effects, strategic EAs, private activities on public lands, role of public, etc.

Auditor General Weighs In

- 2016 audit of 40-year old EAA found Act falls short in achieving intended purpose and needs to be modernized
- EAA not being applied to private sector (e.g. mining projects)
- EAs not being completed for many significant government plans/programs
- 1 out of 178 bump-ups granted in last 5 yrs

Auditor General Weighs In (Continued)

- Public receives little information about class EA projects after initial 30-day consultation
- MOECC knows little about many projects subject to class EA and does not have effective processes to ensure projects implemented as planned
- Cumulative effects of multiple projects not assessed

Latest EAA Amendments - Bill 108

- Introduced as Schedule 6 of More Homes, More Choice Act, 2019 (Bill 108) allows Minister to reconsider old EA approvals
- Amendments would wholly exempt certain undertakings from the class EA process – essentially removing them from EAA purview altogether and further constrain bump-up request grounds

Concerns with EAA: Final Thoughts

- Evolution of EAA “reform” in Ontario has seen loss of examination of need and alternatives, intervenor funding, public hearings, and rise of class EAs at the expense of individual EAs
- Goal has been to get a faster “yes”
- “Look before you leap” now “Don’t look”

Overview of CEAA 2012

- CEAA 2012 brought about key and largely negative changes to federal EA law
- Changes made were counter to improvements the literature recommended for predecessor law CEAA
- Some areas of concern briefly examined below

CEAA 2012: Who is Responsible for Federal EAs?

- Under CEAA, all federal decision-makers were responsible for considering environmental impacts of their project proposals
- Under CEAA 2012, three agencies responsible for federal EAs (Can. EA Agency, NEB, CNSC)

CEAA 2012: Application of the Process

- New regulation lists designated projects but Agency has broad discretion to determine if designated project listed in regulations should be subject to EA
- For projects not listed as designated projects, discretion with Minister whether subject to EA
- Result: considerable uncertainty about which projects will trigger application of EA process

CEAA 2012: Process Options

- Under CEAA, there were 4 process options: screenings, comprehensive studies, mediation, and panel reviews (first two were forms of self-assessment; latter two could follow first two)
- Under CEAA 2012, just 2 options: standard EA, or panel review
- Standard EA process imposes deadlines on EA completion on NEB, CNSC, or Agency, not on proponent
- Panel reviews subject to 2-year deadline after which Minister can terminate process & give to Agency to complete (not apply to NEB/CNSC)

CEAA 2012: Scope of EA-Project

- SCC decision in *MiningWatch* (2010) determined that scope of the project to be assessed quite broad; i.e. at least full project as proposed by proponent (but see *Greenpeace* (FCA 2016)
- CEAA 2012 significantly narrows scope – definition of "designated project" includes "any physical activities incidental" to physical activity that triggered EA – s. 2(1) (but see *TMX* – FCA 2018 quashing of OC for project splitting)
- Interpretation of "incidental" could limit project scope to specific component of project listed on designated project list

CEAA 2012: Scope of EA-Environmental Effects

- Under CEAA, environ. effects included any effect project had on biophysical environment, including social, economic, cultural effects arising from biophysical effects; courts defer to decision-maker on how effects to be considered - *Greenpeace* (FCA 2015)
- CEAA 2012 narrows effects definition to short-list of matters within federal jurisdiction (fisheries, aquatic species, migratory birds, aboriginal peoples) – “Need” & “alternatives to” removed

CEAA 2012: Harmonization with Provincial EAs

- CEAA designed to harmonize federal & provincial processes to produce one comprehensive EA process as basis for decisions at all government levels
- CEAA 2012 rejects this in favour of picking (substituting) one government level to carry out EA process, with no direct involvement by other government levels
- CEAA 2012 rationale: avoid duplication with provincial EAs; but this produces federal EA duplication with other federal laws in terms of information gathering

CEAA 2012: Role of the Public

- CEAA 2012 standard EA process has few requirements for public participation compared to comprehensive study process under CEAA
- Strict timelines place public at disadvantage; may allow review panels to limit participation so as not to have panel process terminated by Minister
- Definition of “interested party” in CEAA 2012 linked to designated projects will leave determination of who is interested party to NEB discretion, or review panels & further limit public participation in EA process

Mandate For EA Reform?

- November 2015 Prime Minister Trudeau's mandate letter to federal environment minister called for reviewing EA process to regain public trust and get resources to market and introduce new, fair process that will restore robust oversight and thorough EAs under federal jurisdiction, based on science, facts, and evidence, and provide ways for public to meaningfully participate

Review of CEAA 2012

- In January 2016, new federal government proposed review of CEAA 2012 to address rebuilding trust in EA processes, modernizing NEB, and restoring lost protections & introducing new safeguards in Fisheries Act and Navigation Protection Act
- To conduct process, federal government established expert panel

CELA Views

- Terms of reference intended to guide Expert Panel's work too narrow: need strategic EAs; assessment of cumulative effects; broader application to projects; better consideration, and avoidance, of potential for severe accidents and adverse environmental effects; greater judicial scrutiny; suitability assessments; longer timeframe for expert panel to report, etc.

Expert Panel Report

- April 2017 Expert Panel released final report which summarized fundamental problems with CEAA 2012 and made significant recommendations for reform

Fed. Gov't Discussion Paper

- June 2017 federal government released 22-page discussion paper
- Civil society groups critical of paper due to its limited vision, lack of detail, and inadequate reforms
- CELA described paper as vague and unlikely to achieve government's declared intention to remedy existing EA problems

Bill C-69: Impact Assessment Act

- February 2018 - Introduced in House of Commons to repeal & replace CEAA 2012
- June 2018 - Bill passed by HC
- Fall 2018/Spring 2019 - Senate review
- May/June 2019 – Parliament reconsideration of Senate amendments and final passage
- August 28, 2019 – came into force

Problems with IAA

- IAA does not incorporate key recommendations from Expert Panel Report
- Federal Cabinet will make final decisions not an independent assessment authority as recommended by Expert Panel
- IAA will only apply to certain large-scale projects designated by regulation; not triggered by permits, funding, or land sales

Problems with IAA (continued)

- Even projects listed by regulation will not necessarily undergo IA because IA Agency of Canada empowered to dispense with project assessments on case-by-case basis
- Not mandatory for feds to conduct/complete regional/strategic assessments so cumulative effects likely will still be assessed inadequately, if at all, in project level IAs

Problems with IAA (continued)

- IAA requires Minister to appoint regulators (e.g. CNSC) to review panels that will conduct assessments and prepare reports on designated energy projects, contrary to Expert Panel recommendation that they should not lead or co-lead assessment process

Problems with IAA (continued)

- IAA provides no details or criteria on how sustainability is to be evaluated, and contains no explicit rules for making trade-offs between “sustainability” and short-term economic considerations
- Briefly refers to UNDRIP in preamble, rest of statute ambiguous or discretionary on engaging Indigenous communities in information-gathering, or decision-making

Problems with IAA (continued)

- IAA not “better” than CEAA 2012
- Both contain substantially similar provisions
- Both share same basic assessment model (focus on mega-projects, broad discretion to narrow assessments, over-reliance on proponents’ impact statements, politicized decision-making)

Senate Amendments

- May 2019 – numerous amendments proposed by energy industry approved by Senate Committee would have further watered-down Bill C-69
- June 2019 – most but not all of Senate amendments rejected by Parliament and Bill finally enacted

Bill C-69 as Enacted – First Impressions – The Good

- Establishes new Impact Assessment Agency of Canada to conduct /coordinate impact assessments of designated projects
- Mandates early planning phase to engage public, stakeholders, Indigenous community
- Broadens scope of assessment process requiring evidence-based review of impacts

Bill C-69 – as Enacted – First Impressions – The Good (cont)

- Sets out factors for decision-making, including whether project makes "contribution to sustainability"; whether it helps / hinders Canada's environmental obligations and climate change commitments
- Requires detailed reasons for impact assessment decisions

Bill C-69 – as Enacted – First Impressions – The Bad

- Only applies to small number of large-scale projects designated by regulation or Ministerial order
- Enables Agency to dispense with need for impact assessment of designated projects on case-by-case basis
- Empowers Minister / Agency to scope (narrow) factors to be considered in IAs

Bill C-69 – as Enacted – First Impressions – The Bad (cont)

- Imposes fixed timelines on IAs that are shorter than those under CEAA 2012
- Provides insufficient details on how "meaningful" public participation will be ensured at all project, regional, and strategic assessment stages
- Continues use of ad hoc review panels contrary to 2017 Expert Panel recommendations

Bill C-69 – as Enacted – First Impressions – The Bad (cont)

- Allows CNSC, NEB (now Canadian Energy Regulator) to be appointed as review panel members for designated projects contrary to 2017 Expert Panel recommendation against having regulators conduct IAs
- Allows Minister to substitute “equivalent” provincial EA processes for federal IA process

Bill C-69 – as Enacted – First Impressions – The Ugly

- The regulation that triggers application of IAA is not sufficiently broad; thus IAA will not meet government promise to regain public trust in EA process
- Federal proposal to exclude certain nuclear project types from IAA coverage (e.g. refurbishment/life extension of nuclear power plants) a problem notwithstanding NSCA coverage

Bill C-69 – as Enacted – Uncertain Future

- In addition to problems with IAA, it also faces an uncertain future:
  - Alberta is constitutionally challenging law before Alberta Court of Appeal
  - Leader of Official Opposition has vowed to repeal Bill C-69 if elected

Concerns with Federal EA: Final Thoughts

- As a result of CEAA 2012, federal EA process took 40-year step backwards
- Process less fair, more discretionary, more uncertain, has narrowed scope, imposes greater burden on provinces, & reduces public role -
- Despite all the fanfare, IAA may turn out to be no better and faces an uncertain future

Further Reading

- CELA: Application for Review of EAA (2013); Critiques of federal regime & Bill C-69 (2016-2019) http://www.cela.ca
- ECO Annual Report 2013/2014: Managing New Challenges, pages 132-135

  < www.eco.on.ca >
- CEAA 2012: The End of Federal EA As We Know It? (Meinhard Doelle)

  < (2013), 24 JELP 1 >

Further Reading (Continued)

- Ontario Auditor General: Annual Report (2016) Chapter 3 Section 3.06 – Environmental Assessments www.auditor.on.ca ; Bill 108
- Canadian Environmental Assessment Agency: Reviews of EA Processes (2016-2017) www.canada.ca
- Bill C-69: Impact Assessment Act