

Environmental Assessment is Not Red Tape

A Primer on Bill 197 & Recent EA Changes in Ontario

Canadian Environmental Law Association

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This presentation contains legal information about environmental assessment law and policy

The contents do not constitute legal advice or other professional advice and must not be relied on as such

If legal advice related to specific circumstances is required, please seek competent legal counsel

Outline

1. Overview of Bill 197 & *Environmental Assessment Act*
2. Key Changes – Before and After Bill 197
3. Law Reform – Opportunity and Next Steps

What is Bill 197?

- ▶ Bill 197 – *COVID-19 Economic Recovery Act, 2020*
- ▶ Despite name, Bill ignored worldwide calls to action for green and just recovery
- ▶ Passed on July 21, 2020
- ▶ Includes 20 Schedules with provisions that weaken many environment & public health protections
 - i.e. *Environmental Assessment Act, Planning Act, Drainage Act, Building Code Act*

Why are we holding this webinar?

Bill 197 includes regressive changes to environmental assessment and environmental rights in Ontario:

1. No public consultation occurred as required by the public participation requirements set out in the *Environmental Bill of Rights (Part II)*
2. The amendments pose serious and alarming impacts as they:
 - ▶ Restrict the applicability of EA
 - ▶ Rollback existing public rights under the *EAA*
 - ▶ Increase uncertainty about the way projects will be reviewed

What is Schedule 6 of Bill 197?

- ▶ Schedule 6 of Bill 197 amended Ontario's *Environmental Assessment Act (EAA)*
 - ▶ *EAA* is one of Ontario's older and most important environmental laws; enacted in [1975](#) and substantially amended in 1996
- ▶ The changes result from Ontario seeking to “modernize” the along 50-year old Act
 - ▶ Amendments do not align with best practices and much needed reforms – rather make the *EAA* less robust, predictable and participatory
- ▶ Ontario intends to bring the amendments into force over three phases

1. *EAA* in Ontario

Aim & Purpose

- ▶ Environmental assessments canvas fundamental ecological, socio-economic and cultural implications of a project
- ▶ Requires a more holistic or comprehensive review of key matters (e.g. need & alternatives to the undertaking) that are not part of other regulatory environmental laws
- ▶ Provides the public & directly affected communities an opportunity to weigh in on project, its purpose, need, potential alternatives etc.
- ▶ *EAA* has a broad public interest focus, with the purposes of ensuring the “betterment” of Ontarians “by providing for the protection, conservation and wise management” of the environment (s. 2)

1. *EAA* in Ontario

Prior to Bill 197 Amendments

- ▶ *EAA* was applicable to all public sector undertakings (activities, programs, proposals, plans) unless exempted; applicable to private sector undertakings designated as “major”
- ▶ Set out whether, and if so how, classes of activities may be subject to a specific environmental assessment regime (“Class EA”)
- ▶ Set out how a Class EA may become subject to an individual or full environmental assessment (ie. “bump up” request, Part II order)



2. Key Changes to *EAA* Introduction of Project Listing

Removes automatic application of the *EAA* to public sector undertakings → replaced by Cabinet having unfettered discretion to pass new regulation listing what projects will (or will not) be subject to Act (s 3)

- ▶ Fewer projects will undergo EA
- ▶ Fails to recognize that the nature, extent, frequency, magnitude of environmental impacts is greatly dependent on the site-specific location, technology choice(s), design and efficacy of mitigation/monitoring measures for a project
- ▶ No prescribed criteria/thresholds setting out how projects will be determined
- ▶ For listed projects, “any enterprise or activity that it is ancillary to” is included review (see new section 39(c))

2. Key Changes to *EAA* Naming and Standardization

- ▶ **Renames individual EAs as “comprehensive” EAs**
 - ▶ Content and process remains largely the same
 - ▶ Act retains problematic Ministerial power to approve EA Terms of Reference (i.e. scope of review)
- ▶ **Introduces plan to standardize requirements for proponents to follow; create sector-specific workplans**
 - ▶ No clarity regarding which sectors will have ‘standardized’ approach
 - ▶ No prescriptive detail regarding content which will be required in standardized Terms of Reference

2. Key Changes to *EAA*

Replacement of Class EAs

- ▶ Terminates the 10 currently approved Class EAs → to be replaced with yet to be determined “streamlined” EA requirements by regulation
 - ▶ Projects subject to a Class EA are effectively pre-approved, but Minister retains discretion to elevate project to undergo an individual EA
 - ▶ Despite limits of existing Class EA process, no clarity in Act that even existing requirements will be fully replicated
 - ▶ Details to be set out in yet to be determined regulation

2. Key Changes to *EAA*

Elevation or “bump-up” requests

Significantly restricts the grounds upon which Ontarians can request “bump-up” or “elevation” of contentious infrastructure projects from a streamlined EA to comprehensive EA.

- ▶ New sections (16(6) and 17.31(7)) permit Indigenous communities to seek elevations of Class EA if project may adversely affect treaty or s. 35 Aboriginal rights
 - ▶ Otherwise, amendments disallow all others from filing elevation request
- ▶ Minister retains discretion to grant/deny requests for elevation; no improvements to this ‘black box’ decision making
- ▶ Still no formal process (or criteria) for members of the public to ask for designation

2. Key Changes to *EAA* Landfills and Municipal Support

Proponent of new large landfills required to obtain support from (1) host municipality and (2) adjacent municipalities with 3.5 km

- ▶ While CELA supports proof of municipal support for landfill, only the largest of landfills undergo EA:
 - ▶ Per proposed Project List, only landfills greater than 100,000 cubic metres of disposal capacity trigger EA
- ▶ However, Minister and/or Cabinet can dispense with this requirement on a case-by-case basis
 - ▶ i.e. where the MECP believes that a particular landfill proposal should proceed expeditiously due to perceived environment or public health issues)

2. Key Changes to *EAA* Related Amendments

- ▶ **Changes in Schedule 6 of Bill 197 follow other recent rollbacks that have been passed or proposed in relation to Ontario's EA program, including (but not limited to):**
 - ▶ Removing *EAA* requirements from forest management planning;
 - ▶ Exempting projects in all provincial parks and conservation reserves from any EA
 - ▶ Streamlining *EAA* requirements for certain provincial highways and transportation corridors; and
 - ▶ Modifying *EAA* requirements for proposed transit projects in the Greater Toronto Area.

3. EA Reform

A Missed Opportunity

- ▶ **In place of project list** ensure *all* environmentally significant undertakings are reviewed in open, fair, evidence-based process regardless of private/public distinction
- ▶ **To remedy the shortfalls of the ‘bump up’ process**, implement the Environment Minister’s EA Advisory Panel (2005) recommendation:
 1. During the Class EA planning process, have expedited mechanism to seek rulings or directions from the ERT; and
 2. IF outstanding disputes at the end of the Class EA planning process, bump up requests should be adjudicated in writing by the ERT (*not* the Minister)
- ▶ **Limit the Minister’s ability to approve project scope** (ie. Terms of Reference) which historically, has unduly narrowed or excluded considerations of project’s purpose, need, alternatives etc.

3. EA Reform

Looking Ahead

- ▶ In the coming months, a second list of proposed projects that will undergo Streamlined EAs (formerly Class EAs) will be developed
- ▶ A host of regulations in Bill 197 not yet in place for:
 - ▶ Standardized ‘workplan’ regulations with sectoral-based Terms of Reference requirements
 - ▶ Treatment of “ancillary” projects in EA review
 - ▶ Exempting proponents from any requirement under *EAA*
- ▶ Projects currently exempt (ie. By Declaration Orders) will be revoked and replaced by Project List (no guarantee these projects will instead appear on Project List)

Thank you!

Contact Us

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