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PRELIMINARY REVIEW OF ONTARIO'S PROPOSED PROJECT LIST UNDER THE *ENVIRONMENTAL ASSESSMENT ACT*

Prepared by
Richard D. Lindgren, CELA Counsel

PART I - INTRODUCTION

(a) Overview

In July 2020, the Ontario Legislature enacted Bill 197,[1] which made numerous amendments to the *Environmental Assessment Act* (*EAA*). The Ontario government is now proposing steps to implement the revised *EAA* regime, including new measures that fundamentally change how the *EAA* will apply to new or expanded undertakings throughout the province.

Since its inception decades ago, the *EAA* has automatically applied to all public sector undertakings (unless exempted), but has not generally been applied to private sector undertakings (unless designated by regulation).

This long-standing approach has been radically altered by Bill 197, which provides that Part II.3 of the *EAA* will only apply to specific types of public or private projects that are prescribed on a regulatory list passed by the Ontario Cabinet.

Accordingly, a recent Environmental Registry notice[2] is soliciting public feedback on the province's proposed short list of projects that will trigger "comprehensive" EAs under the amended *EAA*. The public comment period for this proposal ends on November 10, 2020.

The Canadian Environmental Law Association (CELA) has undertaken a preliminary review of Ontario's proposed list of projects that will be subject to Part II.3 of the *EAA*. Based on our review, CELA has identified a number of serious concerns regarding:

- the overall intent of the proposed project list;
- the factors used to identify candidates for inclusion on the list; and
- the nature and number of projects currently being proposed on the list.

Each of these matters is addressed in more detail below in Part II of this review. CELA's overall conclusion is that the proposed project list – and the process used by the Ontario government to select the categories/thresholds on the proposed list – is evidence-free, non-transparent, and inconsistent with the purpose of the *EAA*.

[1] See https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-197
[2] See https://ero.ontario.ca/notice/019-2377

(b) CELA's Background

Over the past five decades, CELA has been involved in court cases, public hearings and other administrative proceedings under the *EAA* on behalf of low-income individuals and disadvantaged or vulnerable communities in southern and northern Ontario. CELA has also initiated or participated in various law reform activities under the *EAA*, including serving as a member of the Environment Minister's EA Advisory Panel in 2004-05. In light of our extensive engagement in EA matters, CELA has carefully considered Ontario's proposed project list from our public interest perspective and on the basis of our overarching objective of ensuring access to environmental justice.

PART II – ANALYSIS OF THE PROPOSED PROJECT LIST

(a) The Overall Intent of the Proposed List

The Registry notice states that the government's intention is to restrict the "comprehensive" EA process under Part II.3 of the *EAA* to only those projects that are adjudged by Ontario to have the greatest potential to significantly impact the environment. A similar statement is found in a public consultation slidedeck[3] prepared by the Ministry of the Environment, Conservation and Parks (MECP), which confirms the governmental intent to confine the new *EAA* list to "projects which demonstrate the potential for the highest degree of environmental impact."[4]

However, CELA notes that this self-imposed policy constraint is neither mentioned nor mandated by the Bill 197 amendments to the *EAA*. Moreover, this questionable attempt to restrict Part II.3 of the *EAA* to the "worst" projects is inconsistent with the broad purpose of the *EAA*, which is the betterment of Ontarians by providing for the protection, conservation and wise management of the environment. In CELA's view, there is nothing in this purpose statement that compels Ontario to limit the application of Part II.3 of the *EAA* to a small number of projects, as described below. In short, Ontario's project-listing exercise should not be undertaken in a narrow manner that thwarts or frustrates the purpose of the *EAA*.

CELA further notes that Ontario's consultation materials do not precisely define the actual comparator or ranking system that was used to determine which project types satisfied (or did not satisfy) the "greatest potential" criterion.

For example, it is unclear whether a project type's potential effect upon local or regional air quality was perceived to be more (or less) harmful than another project type's potential effects upon water quality or quantity, wildlife habitat, species at risk, or other natural heritage features or functions. Similarly, Ontario's consultation materials do not indicate whether a project's potentially adverse impact on the natural environment was deemed to be worse (or less acceptable) than an adverse impact on the social, economic, cultural, or built environment. At the same time, Ontario's consultation materials do not include any formal risk/benefit assessments (or probabilistic risk

[3] CELA participated in the project list webinar held by the MECP on October 6, 2020.
[4] MECP, *Modernizing the Environmental Assessment Program: Proposed Comprehensive Environmental Assessment Project List* (Stakeholder Engagement Sessions: October 2020), page 4.

analyses) that were conducted by provincial staff in order to review or screen out project types/thresholds.

Accordingly, CELA submits that there is no air of reality to Ontario's claims that only the handful of projects on the proposed list have the "greatest potential" to cause significant environmental effects, having regard for the broad definition of "environment" in the *EAA*. Conversely, little or no credence can be given to Ontario's implicit position that non-listed projects are environmentally benign undertakings that pose low (or no) risk to the environment, human health, or socio-economic and cultural conditions.

Similarly, the Registry notice asserts that the content of the proposed project list was guided by the government's desire to eliminate "duplication with other legislation, policies and processes." However, CELA notes that Ontario's consultation materials have not identified any actual instances of unnecessary overlap or duplication between the *EAA* and other statutory regimes.

In addition, unlike other provincial environmental laws, only the *EAA* requires an evidence-based analysis of: (a) the purpose/rationale (i.e. "need") for the undertaking; (b) "alternatives to" the undertaking; (c) "alternative methods" of carrying out the undertaking; and (d) the environmental, social, cultural, economic, and other effects of the undertaking and its alternatives. In these circumstances, it cannot be seriously contended that *EAA* requirements are fully replicated in other regulatory regimes in Ontario.

Similarly, the Auditor General of Ontario has correctly pointed out that "while many other regulatory approvals for private-sector projects – such as mines, quarries, manufacturing plants and refineries – consider the natural environment, they do not include all key elements of an environmental assessment."[5]

For this reason, CELA concludes that Ontario's consultation materials improperly conflate EA processes with regulatory requirements established under other provincial laws. In general terms, EA is an environmental planning process that is intended to gather information and make decisions about an undertaking's larger policy, ecological, socio-economic and sustainability implications, while regulatory processes are more narrowly focused on the technical details of proposed facilities, equipment or activities. Ontario's unfortunate blurring of these two distinct legislative processes undoubtedly goes a long way in explaining the fundamental inadequacy of the proposed project list.

CELA further notes that Ontario's consultation materials fail to provide any particulars that demonstrate why other regulatory regimes should be relied upon instead of the *EAA* process for non-designated projects. For example, Ontario has not disclosed any indicia, benchmarks or analysis used to evaluate the robustness of regulatory regimes that may be applicable to potential candidates for inclusion on the *EAA* project list.

[5] See https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf

(b) Environmental Factors Used to Prepare the Proposed List

The Registry notice suggests that in determining the project categories and thresholds in the proposed list, the MECP considered a number of factors to determine environmental significance (e.g. the magnitude, duration, frequency and geographic extent of potential impacts). Again, CELA notes that these specific factors do not actually exist in the *EAA* as amended by Bill 197, which gives the government virtually unfettered discretion under the Act when determining which projects should – or should not – be added to the list. Similarly, it is unclear whether these factors were all given equal weight by the MECP, or whether some were deemed to be more important than others.

In addition, Ontario's purported application of these factors during the listing exercise was solely based on the government's self-proclaimed "experience," rather than any rigorous and evidence-based scientific or technical review. In short, Ontario's consultation materials do not disclose how each of the proposed project types (or thresholds) on the list meet the above-noted factors, or why other potential candidates (e.g. sewage treatment plants, quarries, fracking, oil/gas refineries, intra-provincial pipelines, forestry operations, pulp mills, smelters, etc.) were excluded from the list.

CELA further notes that these factors do not appear to expressly include climate change considerations (e.g. greenhouse gas emissions), the potential for transboundary impacts in other jurisdictions, the risk of accidents or malfunctions, or the claimed efficacy of mitigation measures used by proponents.

In any event, since the evidentiary basis for the proposed project list has not been disclosed by the MECP to date, CELA remains concerned that the proposed categories/thresholds simply reflect the value judgments of (or political directions received by) the provincial officials who drafted the project list proposal under the *EAA*.

In CELA's view, the MECP's closed-door deliberation (and reliance upon its "experience") is not transparent or persuasive, and the resulting project list proposal has not been accompanied by any compelling evidence or analysis to justify the proposed categories/thresholds. Put another way, assertions of provincial expertise, or purported exercises of professional judgment by MECP staff, are no substitute for robust, transparent, participatory and evidence-based decision-making about project categories/thresholds.

Furthermore, CELA maintains that if the environmental factors identified by the MECP had been applied in a traceable and objective manner, then mines should have been clearly proposed at the outset for inclusion on the project list. Instead, Ontario's consultation materials contain no firm commitment to designate certain types of mines (or production thresholds) under Part II.3 of the *EAA*. Instead, the MECP merely invites public input on the long overdue need to extend the *EAA* to the mining sector in this province. CELA's additional comments about mines are set out below.

At the same time, the MECP's Statement of Environmental Values (SEV) under the *EBR* contains a number of important principles and commitments (e.g. precautionary, science-based approach; cumulative effects analysis; ecosystem approach, etc.) that the Ministry is supposed to consider when developing new regulatory proposals. However, the SEV is not discussed or even mentioned

in the MECP's consultation materials, and there is no evidence demonstrating that the SEV principles were duly taken into account when the proposed project list was being developed by the MECP.

(c) The Nature and Number of Projects on the Proposed List

(i) Exclusion of Governmental Plans and Programs

Schedule 6 of Bill 197 amends the *EAA* by adding a new definition of "project" that includes some of the elements of the Act's former definition of "undertaking":

> "project" means one or more enterprises or activities or a proposal, plan or program in respect of an enterprise or activity (emphasis added).

However, no "proposals, plans or programs" have been included in the proposed project list. Instead, only a relatively small number of physical works or activities have been tentatively prescribed on the draft list as "projects" for the purposes of Part II.3 of the *EAA*.

On this point, the Registry notice claims that the former Act's automatic inclusion of governmental plans under the *EAA* resulted in the "need" to exempt such plans from EA coverage. A similar claim is made in the MECP's consultation materials.[6]

In response, CELA submits that there is no compelling legal "need" to exempt environmentally significant public sector plans (i.e. provincial land use plans) from the *EAA*. Instead, these contentious exemptions were primarily made for reasons of political expediency, and they simply reflect policy choices made by the Ontario government rather than any binding legal or jurisdictional constraints.

In CELA's view, the proposed list's deliberate omission of environmentally significant proposals, plans or programs is a significant rollback that substantially narrows (if not undermines) the application, value and utility of the Act. More importantly, this exclusion is inconsistent with the widely held consensus among EA practitioners that higher-order governmental plans and programs which drive individual projects at the local level should themselves be subject to EA requirements.

As noted in a leading environmental law text, an advanced EA law should "ensure assessment of all undertakings – including strategic-level policies, programs, plans, and projects – that might have significant environmental effects, individually or cumulatively (emphasis added)."[7] Accordingly, CELA submits that Ontario's proposal to limit the application of Part II.3 of the *EAA* to a few types of physical projects cannot be construed as "modernization"; instead, this regressive approach sets back EA practice and policy in the province by at least several decades.

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[6] MECP, *Modernizing the Environmental Assessment Program: Proposed Comprehensive Environmental Assessment Project List* (Stakeholder Engagement Sessions: October 2020), page 8.

[7] P. Muldoon et al., *An Introduction to Environmental Law and Policy in Canada, 3rd ed.* (Toronto: Emond, 2020), page 162.

Similarly, the Auditor General of Ontario has correctly reported that "the impact of government plans and programs can have a broader and longer-term impact compared to individual projects, and therefore warrant a thorough assessment beyond that which is possible for individual projects."[8] The Auditor General's report further noted:

> Best practices highlight the need to carry out environmental assessments of government plans and programs. The International Association for Impact Assessment – a leading organization in best practices related to environmental assessments – calls for strategic assessments of energy plans, transportation plans, urban expansion plans, climate change strategies, and "actions that will affect large numbers of people."[9]

For example, the environmental and socio-economic pros/cons of Ontario Hydro's province-wide "demand-supply plan" in the early 1990s (which, if approved, would have resulted in new/expanded power generation and transmission facilities throughout Ontario) was properly subject to public scrutiny in a hearing under the *EAA*. Unfortunately, subsequent provincial long-term energy plans (i.e. Integrated Power System Plan) have been unjustifiably exempted by the Ontario government from the *EAA* despite their profound environmental, social, economic and cultural implications for all Ontarians.

Similarly, provincial laws that govern other transportation, land use, or environmental sectors have also declared that significant plans, policy statements, strategies or directives are not "undertakings" as defined by the *EAA* (e.g. climate change plan under Bill 4, Greenbelt Plan, Growth Plans under the *Places to Grow Act*, etc.). The legal effect of such declarations is to exempt these proposals from the *EAA*. If the MECP's project list is finalized as currently proposed, then these provincial- or regional-scale plans and programs will continue to evade *EAA* coverage despite the above-noted recognition of the public interest need to apply EA methodology to such matters.

In fact, this is the precise outcome that is being inappropriately advanced by Ontario's consultation materials:

> In many cases, provisions have been included in other pieces of legislation to clarify that a plan or program under that legislation was not subject to the *EAA*. In the future, these provisions will no longer be necessary as it is not proposed that these plans be on the project list.[10]

Accordingly, CELA concludes that if the Ontario government was truly committed to applying Part II.3 of the *EAA* to the most significant undertakings that affect the greatest number of people, then governmental plans and programs should be at the top of the proposed project list, not omitted entirely.

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[8] See https://www.auditor.on.ca/en/content/annualreports/arreports/en16/v1_306en16.pdf

[9] *Ibid.*

[10] MECP, *Modernizing the Environmental Assessment Program: Proposed Comprehensive Environmental Assessment Project List* (Stakeholder Engagement Sessions: October 2020), page 8.

(ii) Designated Projects and Prescribed Thresholds

Aside from the wholesale exclusion of proposals, plans and programs from the proposed project list, CELA is also concerned about the arbitrary – and stale-dated – thresholds used to delineate the size, scale or capacity of project types that are to be designated under Part II.3 of the *EAA*.

For example, the proposed project list simply brings forward several types of electricity infrastructure projects that have been traditionally subject to *EAA* requirements. At the same time, the MECP is proposing to maintain the "existing thresholds" for such projects (e.g. new 115 to 500 kilovolt transmission lines longer than 50 km; new transmission lines carrying greater than 500 kilovolts and longer than 2 km; etc.).

In response, CELA notes that the MECP's consultation materials do not include any empirical evidence that justify these thresholds or explain how these were derived. Moreover, CELA notes that these thresholds were first established almost 20 years ago when the Electricity Projects Regulation[11] was first made under the *EAA*, and the MECP's current consultation materials contain no information or analysis indicating that these decades-old thresholds should be left intact.

In addition, CELA submits that the potential for adverse effects does not necessarily depend on the specific length of a transmission line or its notional voltage capacity. Instead, the environmental significance is far more dependent upon the location-specific corridor route of the proposed project, and its associated design, construction, operation and decommissioning details.

CELA has similar concerns about the waste management projects that are proposed for inclusion on the designated projects list under the *EAA*. In particular, the MECP is proposing to simply maintain the application of Part II.3 of the *EAA* to large-scale waste disposal facilities (e.g. landfills, certain thermal treatment sites, etc.), and to utilize the same thresholds or triggers for such projects (e.g. landfills with total waste disposal volume greater than 100,000 cubic metres).

Again, CELA submits that these thresholds *per se* – which were developed over 13 years ago when the Waste Management Projects Regulation[12] was first issued – have little or no bearing on a waste facility's potential to create adverse effects, which typically depend more on the proposed location, design and operation. In addition, CELA notes that the waste thresholds are unduly convoluted and difficult to interpret, and submits that the proposed project list must clearly designate all forms of thermal treatment (including all energy-from-waste facilities) in light of their environmental and human health significance.

In relation to transportation projects, the MECP is proposing to only apply Part II.3 of the *EAA* to intra-provincial railways greater than 50 km, and to new/extended provincial freeways or municipal expressways that are greater than 75 km. No environmental rationale has been offered to justify either of these linear thresholds, although the MECP's consultation materials state that both the 50 and 75 km distances are intended to "align" the *EAA* with the federal *Impact Assessment Act*. CELA acknowledges that the federal project list now prescribes the 75 km

[11] O.Reg. 116/01.
[12] O.Reg. 101/07.

roadway length and the 50 km railway length, both of which represent a significant increase in the thresholds previously prescribed for such projects under the former *Canadian Environmental Assessment Act, 2012*.

More importantly, CELA was extensively involved in the 2018-19 development of the current federal project list and, to our knowledge, federal officials did not publicly produce any evidence-based studies demonstrating that significant adverse environment impacts are only generated by roadways greater than 75 km in length, or by railways greater than 50 km. In our view, the MECP has similarly failed to provide any cogent proof that only 75+ km roadways and 50+ km railways have the potential to produce adverse effects in Ontario.

The MECP's proposed project list also suggests that "major flood, erosion control and associated conservation projects" will be subject to Part II.3 of the *EAA*. In principle, this appears to be a step in the right direction, except that the MECP has failed to define the term "major" and has only proposed some vague "criteria" that may (or may not) be used to identify such major projects in the future. CELA further notes that this category appears to be limited to just those projects "that facilitate or anticipate development." Accordingly, CELA submits that there is an alarming lack of clarity, predictability or certainty about which conservation projects are – or are not – caught by this proposed category, and CELA is unable to comment further on this project type at this time.

Surprisingly, during the current round of public consultation, the MECP has not actually specified any particular types (or sizes) of mines that will be included on the project list and made subject to the requirements of Part II.3 of the *EAA*. However, the MECP is soliciting public input on whether mines should be subject to the *EAA* at all, and if so, which mines should be designated. On this point, CELA and other non-governmental organizations[13] have long supported the long-overdue application of the *EAA* to the mining sector in Ontario.

This view has also been expressed by other commentators, including the Auditor General of Ontario, whose 2015 annual report[14] observed that "Ontario is the only province in Canada that does not require a provincial environmental assessment to be performed for mining projects." Accordingly, the Auditor General recommended that the "Ministry of Northern Development and Mines should work with the Ministry of Environment and Climate Change to assess the benefits of larger mining projects in Ontario undergoing a provincial environmental assessment similar to the environmental assessments conducted in other Canadian provinces."[15] Five years after this recommendation was made, the Ontario government still has not specified which mines should be subject to the *EAA*.

However, if Ontario now decides to designate mining projects under the *EAA*, CELA notes that the province does not have to slavishly adopt the numerical thresholds prescribed under the federal project list. This is particularly true since the *Impact Assessment Act* thresholds were designed to capture mining projects that may impact areas of federal jurisdiction (e.g. fish, migratory birds, aquatic species at risk, etc.). Therefore, it is open to Ontario to prescribe lower production

[13] See https://cela.ca/need-for-environmental-assessment-reform-for-ontario/
[14] See https://www.auditor.on.ca/en/content/annualreports/arreports/en15/3.11en15.pdf
[15] *Ibid.*

thresholds that designate a wider range of mining projects (and ancillary infrastructure or activities) that may affect areas of provincial interest (e.g. natural resources with the province, property and civil rights, etc.).

PART III - CONCLUSIONS

For the foregoing reasons, CELA concludes that Ontario's proposed project list under the *EAA* is inadequate, unacceptable and unjustifiably excludes too many environmentally significant undertakings. The incomplete and underwhelming nature of the proposed list (which contains 13 categories of designated projects) is amply demonstrated by comparing it to the federal project list under the *Impact Assessment Act* (which contains 61 categories of projects subject to the federal law).

Moreover, the majority of projects that are now being proposed for inclusion on the *EAA* list are already subject to individual EA requirements. In our view, merely continuing the status quo for electricity and waste management projects – while at the same time equivocating on whether mines should be designated and deliberately excluding environmentally significant governmental plans and programs – cannot be fairly characterized as "modernizing" Ontario's *EAA* regime.

Accordingly, CELA recommends that the Ontario government should immediately re-consider and substantially revise its proposed project list to not only include a broader range of project types under Part II.3 of the *EAA*, but also to ensure that environmentally significant proposals, plans and programs are also designated on the list. This re-consideration process should involve meaningful public participation (not just another one-hour webinar or sparse discussion paper), and must precede the preparation of a draft *EAA* regulation for public review and comment.

October 14, 2020