



ENVIRONMENTAL LAW YEAR IN REVIEW: HOT TOPICS

OCTOBER 29, 2020

COVID-19: LEGAL IMPLICATIONS FOR LOCAL GOVERNMENT

JODY JOHNSON – DIRECTOR, LEGAL SERVICES AT HALTON REGION

JENNIFER KING – PARTNER, GOWLING WLG



ENVIRONMENTAL LAW ISSUES IN INSOLVENCY: REACTING POST- *REDWATER*

NATALIE MULLINS, HADDON MURRAY AND JESSICA BOILY, GOWLING WLG

Environmental Law Year-in-Review, October 29, 2020



SUPREME COURT OF CANADA'S DECISION IN *ORPHAN WELL ASSOCIATION V GRANT THORNTON LTD.*

- **Redwater was an energy company in Alberta**
- **Regulated by Alberta Energy Regulator**
- **At time of insolvency, owned producing and non-producing oil wells**
 - Liability of non-producing wells > assets
- **Receiver (Grant Thornton) attempted to disclaim the non-producing wells**
- **Regulator ordered Redwater to remediate non-producing wells**
- **SCC found:**
 - Regulator's order was a "regulatory obligation" not a provable claim in bankruptcy
 - Regulatory order had to be performed prior to distribution to creditors = super priority

NO FAULT ORDERS - WHEN THERE IS NO POLLUTER WHO PAYS?

Remedial Orders

17 Where **any person causes or permits the discharge of a contaminant** into the natural environment ...the Director may order the person to,...

Order by Director re preventive measures

18 (1) The Director, in the circumstances mentioned in subsection (2), by a written order may require **a person who owns or owned or who has or had management or control** of an undertaking or property to do any one or more of the following: ...

Innocent ...

- Owners, Tenants, Property Managers
- Directors and Officers
- Parent companies
- Municipalities
- Accountants
- Real estate agents
- Lenders
- **The List GOES ON**

FAIRNESS AND FAULT = IRRELEVANT

Baker (2013)

Former and current directors and officers of a bankrupt company (Northstar) held liable for **failing to set aside sufficient corporate funds** to address existing environmental issues and continue remedial efforts of the company. In “management and control”.

Kawartha Lakes (ERT)

Polluter was no longer able to pay. Flow through property was on the hook. “The naming of an **innocent landowner** in appropriate circumstances can contribute to the purpose of the EPA”.

Hamilton Beach (Div Court)

“We should be giving the Director latitude and flexibility to issue an order to any person with a **nexus** to the contaminated property because that furthers the purpose of the EPA and s. 18.”

PARTIES AT RISK DUE TO *REDWATER*

- **Secured Creditors**
- **Unsecured Lenders**
- **Trades, suppliers and landlords**
- **Unintentional creditors**
 - **Employees** for unpaid wages, vacation pay, commissions
 - **Pensioners** in respect of any pension shortfall
 - **Judgment creditors**

RED FLAGS AND RISK MITIGATION

- Debtor's **industry**
- Industries operating at property owned or leased by debtor
- History of **environmental orders** or **involvement with regulators**
 - Reporting
 - Spills
 - Other-non-compliance
- History of **environmental investigations/testing** at properties owned or leased by debtor

ONTARIO RE-WRITES ITS ENVIRONMENTAL ASSESSMENT ACT – WHAT ARE THE BIG CHANGES?

ENVIRONMENTAL YEAR IN REVIEW 2020
(WEBINAR, OCTOBER 29, 2020)

ROD NORTHEY LL.M., M.A.

PARTNER, PRACTICE GROUP LEADER FOR ENVIRONMENTAL LAW CERTIFIED
SPECIALIST (ENVIRONMENTAL LAW)



OPENING REMARKS

On July 21, 2020, Ontario passed Bill 197, the *COVID Economic Recovery Act, 2020*. Through Schedule 6 to this Act, Ontario re-wrote its *Environmental Assessment Act*.

This EA reform process started many years ago, but owes most to an Ontario government 2019 Discussion Paper, “Modernizing Ontario’s Environmental Assessment Program”.

This Discussion Paper identified a four-part vision:

1. Alignment between the level of assessment and the level of environmental risk;
2. Elimination of duplication between EA and other planning and approvals processes;
3. Process efficiency through shortened timelines; and
4. Electronic access to environmental assessment information and public participation.

In 2019, the Province started implementing this vision with amendments to various class environmental assessment approvals.

Bill 197 provides major changes to implement the first two parts of this vision.

TOPICS FOR DISCUSSION

- 1. Ontario's stated purposes for EA reform: COVID and Modernization**
- 2. Changes to Individual EA – the move to « Comprehensive EA »**
- 3. Changes to Class/ Sectoral EA – the move to « Streamlined EA »**
- 4. Changes specific to Waste Management & Transportation**

TOPIC 1: ONTARIO'S STATED PURPOSE FOR EA REFORM

- Reforms were included as part of Bill 197: COVID Omnibus Bill
 - First point to clarify: EA reforms have nothing to do with addressing COVID
- Reforms follow the 2019 Discussion Paper on EA Modernization
 - Second point to clarify: EA reforms have very little to do with modernizing EA – no effort to make process digital
- Real effect of these reforms is to narrow what EA applies to and reduce regulatory oversight
- Several major changes are now in progress

TOPIC 2: CHANGES TO INDIVIDUAL EA

2A – MOVE TO « COMPREHENSIVE EA »

Initially, Ontario EA had one approach - everything in was subject to the requirements of s.5(3)

In early 1980s, Ontario began to approve “Class EAs”; thereafter, Ontario EA was considered to trigger “individual EAs” and “Class EAs”

In 1996, Ontario amended the EAA to formally recognize a distinction between Part II EAs and Part II.1 Class EAs

In 2001, Ontario created a new EA - sectoral EAs – which arose entirely through EAA regulations

Now, Ontario wants a change: out goes any reference to “individual EA” – now, major projects are subject to “comprehensive EA” (Part II.3)

VERY PUZZLING TERM – “Comprehensive” – They are not comprehensive; by virtue of 1996 reforms, all such EAs must obtain approval for a terms of reference which is mandated precisely to remove various statutory requirements and not require comprehensive EA

TOPIC 2: CHANGES TO INDIVIDUAL EA

2B. NEW APPROACH TO TRIGGERING EA

The new package of reforms seeks an end to the old approach of “everything in, unless exempted” – now, no ambiguity: if you are on the appropriate list, you’re in; BUT even if not on, may be designated in, OR volunteer to be in

On September 11, 2020, the ERO posted for public comment its proposed list of projects subject to the new “comprehensive EA” in Part II.3 of the Act

The ERO posting suggests that the list is based (a) on a project’s level of risk, as judged by its potential for causing significant adverse environmental effects, understood through six criteria (i.e., magnitude, geographic extent, duration, frequency, reversibility, and possibility of occurrence (“likelihood)), (b) eliminating duplication with other legislation, policies or processes, and (c) alignment of thresholds with federal IA

The list will be enacted through a new project list regulation

TOPIC 2: CHANGES TO INDIVIDUAL EA

2B. NEW APPROACH TO TRIGGERING EA (CONT'D)

The proposed list involves

(1) Projects that are already designated for individual EA

- Projects in now – electricity, waste management and transit projects;
- Projects referenced but not covered by MTO class EA (freeways, expressways greater than 75 km)
- Projects related to “conservation” - flood, erosion control and conservation

(2) Project gaps related to aligning with Federal IA

- Intraprovincial railways

Also, Ontario requests feedback on:

- Mining projects (subject to federal IA, to implement “one project, one assessment”)

TOPIC 3: CHANGES TO CLASS / SECTORAL EA

3A. CONSOLIDATION OF CLASS / SECTORAL EAS INTO « STREAMLINED EA »

- Bill 197 amends the EAA to add Part II.4 regarding “Streamlined EA”
- This Part will apply to all projects now subject to class EAs (10) or sectoral EAs (3)
- What is “streamlined”? By comparison to “comprehensive EA,” the process does not allow for Ministerial approval for a terms of reference or a decision, and makes no provision for a hearing
- Nor is there any minimum statutory standard for what constitutes a streamlined EA: future regulations will prescribe the process

TOPIC 3 (CONT'D)

3B. CHANGES TO TRIGGER AND SCOPE OF MINISTERIAL REVIEW

- From outset of Class EAs in early 1980s, there has always been provision for the public to request that the Minister review the result of the EA – initially called “bump-ups”
- In 1996, EAA amended to formalize Class EA into Part II.1, including amendments to reframe “bump-ups” into Part II orders (i.e., an order for individual EA under Part II of the EAA)
- Under sectoral EAs, the Province started to limit the grounds for a bump-up or Part II order to limit the grounds, starting with sectoral EA for transit
- Bill 197 now limits all class EA elevation requests to alleged impact on Indigenous rights

TOPIC 4: CHANGES TO SPECIFIC SECTORS

4A. CHANGES TO WASTE MANAGEMENT EAS

- Section 6.0.1 (Part II) and Section 17.5 (Part II.3, not in force) now include new restrictions on landfilling waste management projects subject to comprehensive EA
- These amendments require that the proponent obtain municipal support from the municipality in which the landfill is proposed where the proposed site is within 3.5 km of approved “residential uses” within a settlement area
- Municipal support means a council resolution

TOPIC 4: CHANGES TO SPECIFIC SECTORS (CONT'D)

4B. CHANGES TO TRANSPORTATION EAS

- Alongside Bill 197, on the same day (July 8, 2020), the Province made a number of announcements to exempt various transportation projects across Ontario from EA or Class EA
- Two major projects exempted from further EA were projects initially subject to individual EA, namely the Bradford Bypass & GTA West
- Multiple projects subject to the MTO Class EA were exempted from the requirement for any “addendum” for projects subject to changes after the EA

DON'T MISS OUR NEXT WEBINARS!

**NOVEMBER 5: RESOURCE DEVELOPMENT IN NUNAVUT –
INDIGENOUS AND REGULATORY ISSUES**

**NOVEMBER 12: CURRENT TRENDS IN CLIMATE CHANGE
REGULATION AND MITIGATION**