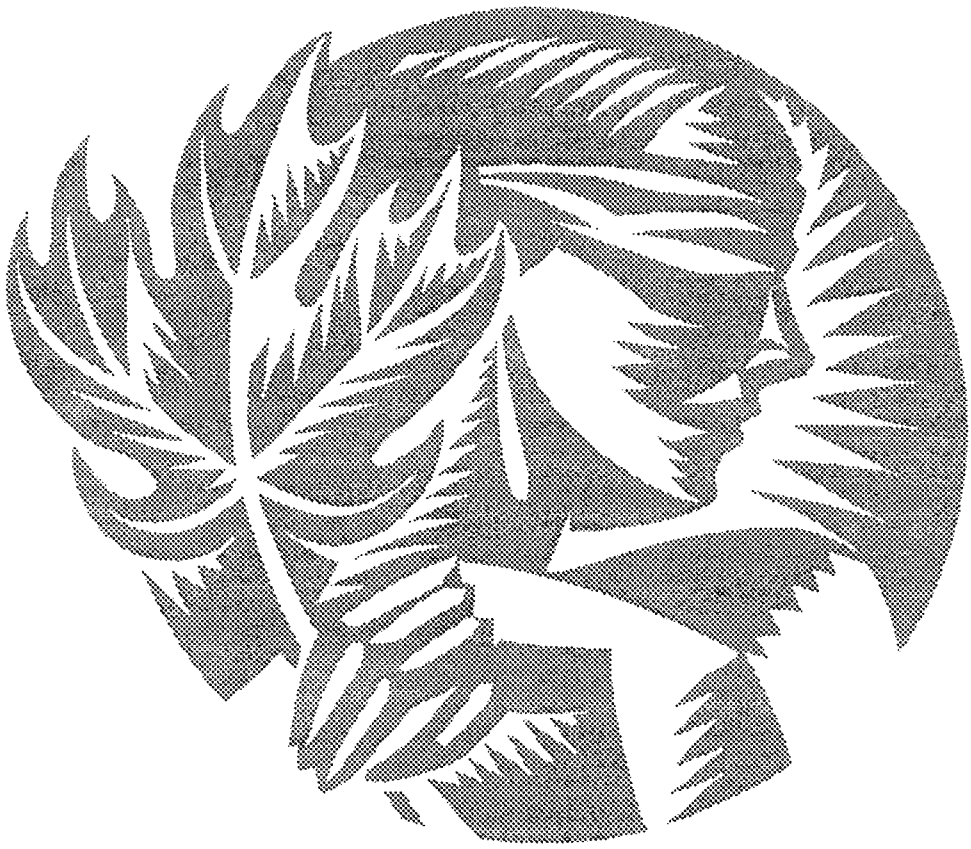
A REVIEW OF

ENVIRONMENTAL ASSESSMENT IN ONTARIO



Prepared for the Canadian Environmental Law Association and published in volume 11, no. 2, of the *Journal of Environmental Law and Practice*

June 2002

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
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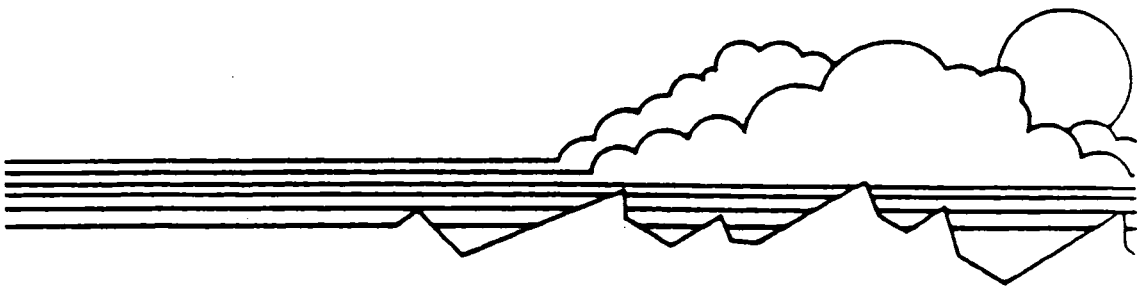
JOURNAL OF ENVIRONMENTAL LAW AND PRACTICE



PUBLISHED IN ASSOCIATION WITH GOWLING LAFLEUR HENDERSON and THE ENVIRONMENTAL LAW CENTRE

Volume 11, No. 2

released June 2002

CARSWELL

A REVIEW OF ENVIRONMENTAL ASSESSMENT IN ONTARIO

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UNIVERSITY OF TORONTO

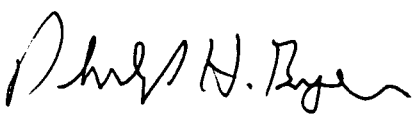
June 2002

The Canadian Environmental Law Association has for many years been an important force advancing environmental protection in Ontario by analyzing and making recommendations on legal and administrative structures that affect the environment. Again, a timely public service has been performed with this CELA-sponsored report by Alan Levy, which analyzes the state of the EA program in Ontario five years after the passage of major changes to the Environmental Assessment Act. It provides a clear explanation of the role of EA in protecting the environment, a description of the current EA program, and a critical analysis of it.

During my chairmanship of the Ontario Environmental Assessment Advisory Committee from 1986 to 1995, the Committee carried out an extensive public review of the entire EA program for the provincial government. We heard a number of significant, legitimate concerns about the lack of government commitment to effective and efficient implementation of the EA Act, the length and cost of the EA process, the need for greater direction and certainty, the emphasis on process rather than results, the need for early and effective public involvement and the limited and inconsistent application of the Act. We also found broad support for the sound principles underlying the Act: the evaluation of potential environmental effects, consideration of alternatives, the broad definition of the environment, documentation of the assessment, pubic and government consultation and review, and decision making by an independent tribunal where warranted. Our report to the Minister in 1992 contained 96 detailed recommendations for both administrative and legislative changes to address the concerns while maintaining and strengthening the principles underlying the Act. The government at that time chose not to amend the Act, but rather focused on making certain administrative improvements, which were not nearly enough to address problems with the EA process.

When I appeared before the legislative committee reviewing Bill 76 in 1996, I commended the current (Harris) government for trying to tackle at least some of the problems through legislative changes and was pleased to see a number of changes that were recommended by the Committee. However, I also pointed out that "details in the bill run counter to the spirit of the government's statement that the revised act will maintain the key elements of EA .... Unless appropriate changes are made, the bill will undermine the effectiveness, fairness and integrity of the EA Act."

This report analyzes what has happened to the EA program since then. Unfortunately, while the EA process has become more efficient for proponents, it has become less effective in protecting the environment and less fair for those affected by proposed projects. By pointing out the current weaknesses in both the Act and its administration, the report provides valuable advice on how to begin to improve the program and live up to the government's promise of improving environmental assessments in Ontario.



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A Review of Environmental Assessment in Ontario

*Alan D. Levy**

The environmental assessment (EA) program in Ontario, established in 1975 with the passage of the Environmental Assessment Act, has traditionally involved a comprehensive planning process which includes an examination of need and alternatives. It encompasses the physical (natural) and human (social, economic and cultural) aspects of the environment and applies to provincial and municipal undertakings (including proposals, plans and programs) with significant potential environmental impacts, and those private sector projects which are designated by Regulation. A tribunal was created to conduct hearings and render binding decisions (subject to Cabinet review) with respect to applications referred to it by the Minister of Environment, and a Class EA system was developed to process the large number of routine projects which occur frequently, have a predictable range of effects, and cause only minor environmental impacts. Administrative efforts designed to address concerns over delay, cost and uncertainty as to outcome were well underway when the current provincial Government began to radically change the system (through legislative amendments and otherwise) after it came to power in 1995.

After reviewing the development of Ontario EA from its earliest days, this article attempts to identify and illustrate most of the significant changes which have occurred as part of the present Government's overhaul of the program. It describes a system which now entails much more political intervention in decision-making, and far less environmental planning. EA in Ontario currently resembles a project approval regime and reflects the narrow approach which existed before the Act was passed almost three decades ago, namely that of identifying and mitigating the adverse environmental effects of individual projects. Commitment to protecting and enhancing environmental values has apparently given way to a single-minded campaign to deregulate, reduce the size and role of government, and grow the economy quickly and at all costs. The article concludes that although many of these recent reform measures are flawed, the system can be improved substantially and quickly by an immediate and interim step. In addition, it identifies numerous areas which are in need of immediate investigation, discussion and change.

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Le programme ontarien d'évaluation environnementale, créé en 1975 par l'adoption de la Loi sur les évaluations environnementales, a traditionnellement compris un processus de planification complet dont fait partie un examen des besoins et des solutions de rechange. Il englobe les aspects physiques (naturels) et humains (sociaux, économiques et culturels) de l'environnement et les applique aux projets provinciaux et municipaux (y compris les propositions, plans et programmes) ayant des impacts environnementaux potentiellement importants ainsi qu'aux projets du secteur privé qui sont désignés par règlement. Un tribunal a été mis sur pied dans le but de tenir des audiences et de rendre des décisions ayant force obligatoire (décisions qui sont assujetties à l'examen du Cabinet) relativement aux applications que lui a attribuées le ministre de l'Environnement. Un régime d'évaluation environnementale a aussi été développé pour traiter la grande quantité de projets routiniers qui sont mis sur pied fréquemment, ont un éventail de conséquences prévisibles et n'ont que des impacts environnementaux mineurs. Les efforts faits par l'administration afin de répondre aux préoccupations portant sur les délais, les coûts et l'incertitude relativement au résultat étaient en cours lorsque le gouvernement provincial actuel a commencé à apporter des changements radicaux au système (à l'aide d'amendements législatifs et d'autres façons) après avoir accédé au pouvoir en 1995.

Cet article commence par faire un examen du développement de l'évaluation environnementale en Ontario dès ses premiers balbutiements, puis tente d'identifier et d'illustrer la plupart des changements importants qui sont survenus en raison du remaniement de ce programme par le gouvernement actuel. L'article décrit un régime qui comporte maintenant, dans le cadre de la prise de décisions, une intervention politique accrue et beaucoup moins de planification environnementale. En ce moment, l'évaluation environnementale en Ontario ressemble à un régime d'approbation de projets et reflète l'approche étroite qui existait avant l'adoption de la Loi il y a près de trois décennies, soit l'identification et la mitigation des impacts environnementaux négatifs occasionnés par les projets particuliers. L'engagement qui a été pris de protéger les valeurs environnementales et d'y mettre l'accent a apparemment laissé la place à une campagne résolue à établir la déréglementation, à réduire la taille et le rôle du gouvernement et à permettre la croissance rapide de l'économie, et ce, à n'importe quel prix. Cet article conclut que, même si beaucoup de ces récentes mesures de réforme ont des défauts, le système peut être grandement et rapidement amélioré à l'aide de mesures immédiates et provisoires. De plus, l'article identifie de nombreux domaines qui auraient besoin de faire immédiatement l'objet d'études, de discussions et de changements.

1. INTRODUCTION[1]

> *CELA[2] has always viewed environmental assessment (EA) as a cornerstone of sound environmental planning and proper resource management. We are supported in this view by the reports of the World Commission on Environment and Development and the National Task Force on Environment and Economy, both of which recommended a strengthened role for EA in order to implement the principles of sustainable development.*[3]

The Ontario *Environmental Assessment Act* (EAA)[4] was originally enacted in 1975 by a Progressive Conservative (PC) Government under Premier Bill Davis on the eve of an election. Twenty years later, a new (and current) PC Government of Ontario was elected to its first term in June 1995 relying on an election platform titled *The Common Sense Revolution*,[5] with policy proposals which included cutting taxes, lowering government spending, shrinking the size of government,[6] reducing regu-

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1 The appendices which are referred to in the article and separately comprise more than 130 pages, are available on request from the Canadian Environmental Law Association (CELA) but have not been reproduced in this publication.

2 This article is part of an ongoing review of environmental assessment in Ontario which has been undertaken by CELA and the Research Library for the Environment and the Law. The author acknowledges the kind financial support provided by The George Cedric Metcalf Charitable Foundation and The Law Foundation of Ontario for this phase of the project.

3 Submission by Kathy Cooper (CELA) to the Ontario Minister of Environment (Jim Bradley), September 20, 1989.

4 R.S.O. 1990 c. E-18 (a current version of the Act is found at Appendix 4 of this article). A recent name change is noted in this article. The Environmental Assessment Board (EAB) and the Environmental Appeal Board had been merging, at least administratively, since 1997. They were co-located and shared the same rules of procedure. In late 2000, the two boards were formally merged and the name changed to the Environmental Review Tribunal (ERT): *Environmental Review Tribunal Act, 2000*, attached as Schedule F to Bill 119, the *Red Tape Reduction Act, 2000*, S.O. 2000 c.26. A copy of the ERT Act is at Appendix 5. Many of the publications of the Ministry of Environment (MOE) still refer to the "Board" and the "EAB," and in this article references will be made to both names and acronyms. For the purpose of this discussion they can be treated as synonymous.

5 The 21-page 1995 campaign document of the Ontario Progressive Conservative Party (*The Common Sense Revolution*) does not discuss, or even mention, environmental assessment or environmental protection.

6 From Karen Clark and James Yacoumidis, *Ontario's Environment and the Common Sense Revolution - A Fifth Year Report* (Toronto: Canadian Institute for Environmental Law & Policy, 2000) at 7:

> Since the advent of the Common Sense Revolution, Ministry of the Environment budgets have been cut by about 60 percent, based on the combined cuts to capital and operating expenses.
>
> The May 2000 budget continues the trend. In 1994, the ministry had an operating budget of almost $400 million and a capital budget of more than $150 million. For 2000-1, the Ontario budget shows $158 million for operations and $65 million for

lation, removing barriers to growth, and eliminating "red tape."[7] The new PC Premier, Mike Harris, announced frequently that "Ontario is open for business" and appointed a Red Tape Commission to address regulatory obstacles which impede economic growth. According to information published by the Red Tape Commission,[8] it seeks among other things to:

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capital expenditures.

Budget cuts to the MNR are also significant. Staff at the ministry has been cut almost in half from 6,639 in 1995 to 3,380 in 2000. In the budget plan 2000-01, capital expenditures from the MNR are $376 million, a decrease of $82 million or 18 percent from the $458 million in the interim 1999-2000 budget.

A survey of conservation authorities conducted by CIELAP in April 2000 found that many conservation authorities have been forced to scale back programs, implement smaller remediation projects, and delay the implementation of new initiatives due to limited funding and staff resources. Overall, conservation authority staffing is at 50 to 75 percent of levels before the provincial reduction in operating grants in 1995.

7 Ibid. at 8-9:

Deregulation—or cutting "red tape" - has been a major component of the Common Sense Revolution. Environmental "red tape" cuts include air and water quality monitoring systems, environmental assessment hearings, environmental inspections, provincial oversight of risky undertakings such as mining, and municipal controls on developers.

The first four years of the Common Sense Revolution accomplished most of the major cuts to environmental protection. During the report period, Bill 11 made some more small cuts to a few environmental laws. The province also cut the last of its acid rain monitoring program (total savings of this cut to the taxpayer: $100,000, an amount less than six percent of the $1.6 million annual budget of the Red Tape Commission).

The effects of all the cuts are becoming clear. At the end of May 2000, the Commission on Environmental Cooperation (CEC) released its *Taking Stock, 1997* report. The report ranks Ontario as the second worst polluting jurisdiction for total air releases, fourth worst for total releases to all media, and third worst for total transfers. The report shows that Ontario's total generation of pollutants increased by 5.9 percent from 1995 to 1997 and total transfers increased by 40 percent.

This past year, the province made the Red Tape Commission a permanent legislative body. The RTC may be one of the most powerful and influential decision-makers in the province, but its deliberations and recommendations are exempt from access-to-information laws.

8 The Red Tape Commission's website is at *www.redtape.gov.on.ca*. Red tape is described there as follows:

Red tape refers to government measures that impede job creation and investment opportunities and diminish competitiveness by adding unnecessary, uncoordinated or unjustifiable requirements, restrictions, compliance, implementation or administrative costs to everyday business activities.

It includes government imposed legislation, regulations, registration, licenses, permits, approvals, restrictions, standards, guidelines, procedures, reporting, filing and certification requirements, paperwork, investigation, inspection and enforcement practices or other measures that truly are not needed to protect public health, safety and environment.

- "improve Ontario's business climate for investment and job creation."
- "make government more responsive to consumers, institutions and businesses and to provide more effective and efficient customer service."
- "help businesses keep their costs down."
- "Obtain and keep good jobs, protect our standard of living and improve the quality of life."
- keep the "regulatory focus ... on outcomes not process."
- "Protect public health, safety and the environment."

The new Environment Minister quickly announced that all environmental regulation would be reviewed and "streamlined."[9] This review resulted in a report in 1996 calling for major changes.[10]

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9 From "Environment review triggers 'alarm bells'" by Martin Mittelstaedt, *Globe & Mail* (September 26, 1995):

> Environment Minister Brenda Elliott says the review is necessary because the ministry has not done a good enough job at ensuring the efficiency of the regulatory process. ... Ms. Elliott said the ministry has not served the public well and those wishing to construct environmentally contentious projects because of the length of time it takes for these assessments to reach decisions. ...
>
> To that end, the government plans to review the environmental assessment process, the rules under which most large projects deemed to have ecological impacts are judged. It is also considering slashing budgets given to citizens' groups - so called intervenor funding - to help them evaluate such projects. ...
>
> Ms. Elliott says streamlining the process is needed to help municipalities select waste disposal sites in a more timely and cost effective fashion. ...
>
> The Ontario Waste Management Association, a lobby group for garbage companies, is urging the government not to renew the intervenor funding legislation.
>
> The legislation "has created a bottleneck for the environmental assessment process," contends Nancy Porteous-Koehle, OWMA president. "It's being used to do nothing but derail projects. The whole environmental assessment process seems to be broken."

And from "Tories ponder easing dump site scrutiny" by D. Girard, *Toronto Star* (October 20, 1995):

> The provincial government is considering exempting dumps from environmental assessments as part of a plan to streamline the process.
>
> "It's very clear to me that the process is not working," Environment Minister Brenda Elliott said yesterday. "It's not timely, it's not efficient and it's not ending up with a predictable result."
>
> Elliott said the government has not decided how it will revise the process or when, but refused to rule out the possibility of landfill sites being spared environmental assessments.

10 From "Ontario proposes environmental law overhaul" by James Rusk, *Globe & Mail* (August 1, 1996):

> The Ontario government yesterday proposed a sweeping overhaul of environmental regulation in the province designed to make it more responsive to the needs of

Bill 76 was passed in the following year (1996) and took effect in January 1997.[11] It was hailed by the Ontario Government as a long overdue overhaul of the EAA which had remained more or less unchanged since it was passed in 1975. When Bill 76 was introduced, the Government claimed that the controversial amendments would make environmental assessment (EA) "less costly, more timely and more effective."[12]

There were numerous critics of the process, particularly within industry and municipal government. They complained bitterly about the expense of conducting EA studies, slow processing of applications by the Ministry of Environment (MOE), the "hi-jacking" of the process by consultants and lawyers, the burden of having to pay intervenor funding and costs to opponents, long and costly hearings, and lack of certainty about outcome (would approval be granted at the end of the process). For example, one commentator observed years ago that the "scheme of the

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economic growth and job creation.

"Every dollar industry and municipalities save on the elimination of red tape and obsolete regulations is a dollar to invest in job creation and economic development," said the 72-page reform proposal, called Responsive Environmental Protection.

The report said that a one-year review of environmental regulation in Ontario has found that the province's 19 environmental laws and 80 regulations are accompanied by unnecessary rules and red tape that act as barriers to job creation and economic growth.

What the report proposes is a series of broad changes that would eliminate many regulations, some that are obsolete, others that are controversial, and place more reliance on voluntary compliance by industry with good environmental practices.

11 The amendments were contained in the *Environmental Assessment and Consultation Improvement Act, 1996*, S.O. 1996 c.27. For an excellent review and critique of the amendments see Professor Marcia Valiante (Faculty of Law, University of Windsor), "Evaluating Ontario's Environmental Assessment Reforms" (1999) 8 J.E.L.P. 215. The June 2001 Office Consolidation of the revised EA Act, containing the amendments arising from Bill 76 and subsequent amendments, is listed as Appendix 4 of this article. The most recent amendments to the EAA were enacted in June 2001by Bill 57 (Schedule G), *Government Efficiency Act, 2001*, S.O. 2001 c.9. These amendments were not included in the June Office Consolidation, but have been inserted into the copy of the Act at Appendix 4 to this article. A list of related legislation is found at Appendix 13.

12 According to p.1 of "Compendium of Background Information" issued when Bill 76 was tabled in the Legislature, the Minister of Environment (Brenda Elliott) stated that her "government is committed to environmental assessment as a way to safeguard Ontario's environment and natural resources. ... Environmental protection remains the overriding objective of the act. ... A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, the role of the Environmental Assessment Board as an independent decision-maker. These amendments will ensure high-quality environmental protection while making it easier for people to participate in the decision-making process. This is great news for the environment." (*Hansard* at 3529, June 13, 1996)

[EAA] is simple, but its implementation is complex and time-consuming."[13]

On the other hand, the process helped to uncover cases of flawed (or non-existent) planning and environmentally risky projects, increase accountability, and involve the public in environmental decision-making to a much greater degree than ever before. Many observers and participants in the EA process were critical of the amendments or the Government's approach.[14] Some said the changes did not go far enough[15] while others said that they would undermine environmental protection.[16]

In late 2000, CELA and the Resource Library for the Environment and the Law (RLEL) began work on a project entitled "Improving Environmental Assessment in Ontario" (the EA Project), the first phase of which was to gather information and provide a scan of Ontario's current EA program under the revised Act.[17] In doing so, an Advisory Committee

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13 Harry Poch, *Corporate and Municipal Environmental Law* (Toronto: Carswell, 1989) at 228. An illustration of that complexity is seen in the following excerpt:

> The recurring headache for those responsible for advising proponents is to determine whether the particular undertaking in question is included in those undertakings subject to the Act, and if so, whether it is also included in the exemptions, exceptions from the exemptions, or exclusions from the exceptions. That problem is compounded by the fact that these categories are in a relatively constant state of flux, with almost each issue of *The Ontario Gazette* bringing changes, and by the fact that different aspects or stages of any particular undertaking may be included in different categories in the regulations or as part of a class environmental assessment process. (at 311)

14 The following comments are from a column by Dianne Saxe, an environmental law specialist and former MOE staff lawyer, in *Hazardous Materials Management* (August/September 1996), an industry magazine: "However, the Minister's lack of forthrightness in introducing this Bill is another regrettable sign that the public cannot trust her to say what she means or to do what she says."

15 Terry Mundell, president of the Association of Municipalities of Ontario, informed the Legislative Committee reviewing Bill 76 that "if the province is not ready to exempt municipalities, then the proposed law should be amended to allow the minister to limit the environmental assessment and to give environmental-assessment boards less discretion": from "Ontario Pushing New Environment Law" by James Rusk, *Globe & Mail* (August 8, 1996).

16 Ibid.: "Both Richard Lindgren of [CELA] and Mark Winfield of the Canadian Institute for Environmental Law and Policy told the committee that the discretionary power the new law would give the minister would gut the current environmental-review process.... Mr. Lindgren's interpretation is that once the changes are passed there will no longer be full environmental assessments of landfills, incinerators or any other projects with a major environmental impact. 'It marks the demise of sound environmental planning in Ontario.'"

17 The author, Alan D. Levy, is the director of the EA Project and member of CELA's board of directors. He was a founder of CELA, and from 1990 to 1998 a Vice-Chair of the Environmental Assessment Board (now named the Environmental Review Tribunal).

was established[18] and public consultation was undertaken.[19] As part of this phase another more focused paper, entitled "Scoping Issues and Imposing Time Limits by Ontario's Environment Minister at Environmental Assessment Hearings - A History and Case Study," was published last year.[20]

Commencing in Fall 2000 and continuing for more than a year, many discussions and meetings (formal and otherwise) have been held, and correspondence and documentation exchanged, with stakeholders including some environmental lawyers and consultants, planners, industry representatives, municipal staff, gatherings of professional organizations, environmentalists, staff in the office of the Minister of Environment, MOE lawyers, staff with the Environmental Commissioner of Ontario and the Information and Privacy Commissioner, current and former staff of the MOE's Environmental Assessment and Approvals Branch, current and former members and staff of the EA Board, academics, students and community members affected by specific EA undertakings.

In addition, the author attended consultation sessions held by the EA Branch and met to discuss EA with the current Minister of Environment, Environmental Commissioner of Ontario, and Director of the EA Branch.

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18 The 15 members of the Project's volunteer Advisory Committee are listed in Appendix 3 of this article. CELA and RLEL express their gratitude to each of the Committee's members for their willing contribution of advice and assistance to the work of the Project. The opinions and comments expressed in this article are not necessarily those of any of the members of the Advisory Committee.

19 A survey form was distributed widely to representatives of the Ministry of Environment, other provincial agencies, municipalities, conservation authorities, planners, lawyers, EA consultants, industry, professional associations and environmental organizations. The form is at Appendix 3 of this article. The responses received are confidential, although the ideas and suggestions offered therein are reflected in this article.

20 Alan D. Levy, (2000) 10 J.E.L.P. 147. The text of the abstract prefacing that article is reproduced below:

> The creation of new statutory powers for the provincial Minister of Environment to scope issues (i.e. limit the number and range of issues which might be examined) for an environmental assessment matter referred to hearing, and to set a deadline for the tribunal to conduct the hearing and render its decision, was part of the provincial government's efforts to overhaul the EA process. The lengthy history behind the passage in 1996 of these controversial powers through amendments to the [EAA] is reviewed in this article, along with a description and analysis of the experience of those involved in the only two EA hearings (Adams Mine and Quinte Landfill) which have been conducted since that time. Concerns and suggestions arising out of the use of these powers are discussed and highlighted. They touch on fundamental issues such as the purpose of the hearing process, tribunal independence, fairness, political intervention, procedural transparency, exercise of discretion, the purpose of EA planning, and the integrity of the EA process. Although experience with these powers is still rather limited, the article concludes that it is important to begin now to develop constructive recommendations to address the concerns which have been raised.

This article was completed in early 2002,[21] a point which marks the passage of five years since the EAA was revamped.

Among other things, this article attempts to introduce and explain the subject of EA for those who may have less familiarity or experience with it. Another objective was to provide a convenient and compact compilation of some important documents and information sources on EA.[22] For those with considerable background in the field this article traverses familiar territory which has been covered elsewhere. Notwithstanding the consultations described above, the article is not a representative opinion survey. Although it attempts to include differing perspectives on the subject, it reflects the author's point of view and opinions. This has influenced to some degree the selection of concerns and responses expressed by others, as well as other references which have been included in the article.

It begins with a discussion of the role of EA in protecting the environment (section 2), followed by a brief description of various elements of the EA process (section 3). Next, a section on the history of Ontario's EA regime (section 4) is provided as a back-drop for a review of the current program (section 5) and some commentary (section 6). The brief conclusion (section 7) is followed by a list of supporting information and documentation.

What emerges from this review is the perception that apart from the Class EA System (a complex area which requires far more study and independent evaluation) the Ontario Government has retained an environmental assessment program in name only. It appears that EA in this province has, after years of development and evolution, reverted from a progressive, open and environmentally enlightened planning and decision-making process to a narrow approach, one that focuses solely on identifying and mitigating the adverse biophysical effects of individual projects. And this at a time when most other jurisdictions have been forging ahead with incremental improvements to their EA programs.[23] Of course, site specific mitigation exercises are necessary and important, but

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21 The article is based primarily on information obtained before the end of 2001. Although changes and developments have continued to occur since then, there was time to reference only a few of them before submission of the final manuscript to the publisher.

22 This documentation, identified in the list of appendices at the end of the article, is available on request from CELA.

23 To mention a few, there are advances elsewhere in cumulative and regional effects assessment, innovative approaches to monitoring, strategic level assessments, and sustainability-based criteria for approvals.

they are not considered to be a proper substitute for EA planning (involving the assessment of factors such as need and alternatives).

The result is little more than a project approval regime involving an over-abundance of direct political intervention in both process and outcomes. Most key aspects of the EA program have been gutted, especially those components designed to promote transparency and accountability to the public.[24]

In this new approach, potentially serious negative environmental impacts are addressed and a project is approved if those impacts can be mitigated at modest cost. The current goal is for the project proponent to reach a "predictable outcome" (this means approval) in an efficient and effective manner (meaning quickly and cheaply) with as little interference (by Government regulators) and involvement in "process" (namely planning) as possible.

2. THE ROLE OF EA IN ENVIRONMENTAL PROTECTION[25]

> *The element of "integrated consideration" is based on a recognition that environmental concerns are interconnected, often causally, with concerns and decisions in the economic and social system. One purpose of introducing an environmental assessment procedure would be to ensure that potentially significant environmental effects are integrated with the other issues considered in review of major undertakings.*[26]

What is EA and why is it important? EA has been defined as an "evaluation of the advantages and disadvantages to the physical environment and the social and economic life" of people resulting "from an activity or policy, in comparison with the likely advantages and disadvantages of alternatives to the activity or policy."[27] The EA planning process may be applied

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24 It was the opinion of one survey respondent that the Government has sought to make EA ineffective in order to remove barriers to more economic activity and growth. The logic is that more projects will likely receive approval, more quickly, at less cost, and with fewer restrictions.

25 Readers familiar with the role of EA could skip to the next section of this article.

26 Ontario Ministry of the Environment, *Green Paper on Environmental Assessment* (September 1973), at 6.

27 Dr. D. James Kingham (former Vice-Chair of the Ontario Environmental Assessment Board), "Bolting the Barn Door While the Horse is Leaving" at 5, a paper presented to the Canadian Bar Association—Ontario Branch on December 5, 1992. He observed that "the repair of environmental damage after a project has proceeded is akin to bolting the barn door after the horse has left" (at 11).

not only to specific projects, but also to programs, policies or plans[28] (the 4 Ps), including standard setting, and should lead to a determination as to "whether the undertaking should proceed and, if so, what steps should be taken to reduce or mitigate the negative impacts."[29] It entails the following:

> This planning process usually consists of carrying out a study of the program, plan, or project. The study should be comprehensive. It should identify the direct and indirect costs of an undertaking in terms of such things as environmental degradation, the use of energy and resources, and social and economic disruption, and weigh these costs against the benefits from the undertaking. Its purpose is to discover the problems an undertaking might cause before a final decision is made to go ahead with it. ...
>
> Once completed, the study is required to undergo some form of public scrutiny. Thus, [EA], unlike many traditional planning and decision-making processes, is designed to be an open and public process.[30]

It is widely accepted that EA is the most important environmental protection tool available to industrial society, and as such has "ambitious objectives."[31] In fact, it is recognized at an international level in instruments

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28 Rodney Northey and John Swaigen, "Environmental Assessment," chapter 9 in David Estrin and John Swaigen, *Environment On Trial*, 3rd ed. (Toronto: Emond Montgomery Publications Limited, 1993), at 189:

> To achieve the goal of sustainable development, [EA] should not simply focus on individual projects. The overall purpose of [EA] is to ensure that environmental concerns are considered throughout the planning process, from a general evaluation of needs and alternative responses to detailed design of the preferred alternative. Environmental assessment may be more effective as a planning tool by scrutinizing not only individual projects but also the larger framework of plans, programs, and policies into which the individual projects fit.

29 Ibid. at 188.

30 Ibid. at 188-9. The study process leads to the preparation of a report, or series of reports. This documentation is referred to collectively as the EA. One survey respondent emphasized that the public should be engaged even before the design of the specific EA study process has been determined.

31 They are described in the following passage from Rodney Northey and William A. Tilleman, "Environmental Assessment," at chapter 6 in *Environmental Law and Policy*, 2nd ed. (Toronto: Emond Montgomery Publications Limited, 1998) at 189-90:

> An environmental assessment may serve ambitious objectives. To serve the objective of considering the broadest range of potential environmental effects, environmental assessments have used an expansive definition of the environment, including the natural environment and the human social, economic, and cultural environments. To serve the objective of reducing effects upon the environment, environmental assessments have examined not only the project itself, but project alternatives and alternative ways of carrying out the project. To serve the objective of developing public support for assessment decision making, environmental assessments have involved broad consultation, access to assessment documents, and hearings with intervenor

such as the 1991 "Convention on Environmental Impact Assessment in a Transboundary Context" (referred to as the Espoo Convention) of the United Nations Economic Commission for Europe (UNECE).[32]

EA has been described as follows:

> The concept of the environmental assessment is no more complex than the age-old common wisdom that "an ounce of prevention is worth a pound of cure." ... [T]he process must be efficient and fair. Each project should receive the amount of time—and the kind of assessment—it requires. ... [T]he principle of anticipate and prevent should always take precedence over the less effective and more expensive approach of react and cure. Only in this manner can we begin to assure a sustainable economy in a healthy environment.[33]

EA makes it possible for most, if not all, risks and impacts to be determined and analyzed before an undertaking is permitted to proceed. In other words, look before you leap! The basic intent of the EAA "is to bring to bear on the issue at hand the best information and scientific insight that can be mobilized."[34] However, "EA is only one component of the immensely difficult task of integrated planning and management of all human enterprises to ensure social and environmental sustainability."[35]

If significant potential environmental problems cannot be avoided or minimized in the design or location of a project, approval should be refused so that harmful pollution is thereby prevented *before* it occurs and without the burden of *any* remediation costs.

Other benefits from EA include:

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funding for independent and expert examination of assessment results. Environmental assessment must have ambitious objectives if it is to address successfully the many public interests in the environment.

32 Canada signed this Convention in 1991and ratified it in 1998. The preamble notes "the interrelationship between economic activities and their environmental consequences" and the "need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general." It recognizes the "need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact." The Convention is reproduced in Appendix III of Stephen Hazell, *Canada v. The Environment* (Toronto: Canadian Environmental Defense Fund, 1999) at 203.

33 Robert de Cotret, former federal Minister of Environment (Progressive Conservative), addressing Parliament on June 18, 1990 during his introduction of the *Canadian Environmental Assessment Act*.

34 Len Gertler, former Vice-Chair of the Environmental Assessment Board, in an address to the Technical University of Nova Scotia on May 14, 1992.

35 Phil S. Elder (law professor, University of Calgary), "Environmental and Sustainability Assessment" (1992), 2 J.E.L.P. 125 at 129.

- involving the affected public in the information-gathering process in order to augment the supply of local (and perhaps traditional) knowledge, and experience;
- democratizing the process;[36]
- making decision-making more transparent and rational;[37]
- internalizing costs;[38]
- resolving or narrowing disputes;
- increasing public acceptance of decisions once they have been made.[39]

Paul Emond referred many years ago to this last issue in the following passage:

> Given that a certain level of assessment already exists under other regulatory provisions, why has the public been so eager to see further "environmental assessments" take place? The public, having lost confidence in private industry, has apparently now lost confidence in the government's ability to regulate development in "the public interest."
>
> Assessment apparently offers a formal guarantee to the public, the proponent and government that major projects will not proceed unless the proposed project survives a full assessment of the potential consequences of proceeding. ... The proponent needs environmental assessment because it may be the only way to "prove" to a skeptical and increasingly conservative public that a proposed project should go ahead. Without a full and frank examination of the political, emotional and technical issues associated with a particular project, public hostility and resentment to proposed projects may well spell their demise. ... And finally, government sees impact assessments as the best way to ensure that its

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36 *Supra* note 28, *Environment On Trial*, 3rd ed. at 190:

> Instead of leaving the analysis solely to industrial experts and government bureaucrats and politicians, [EA] asks the public about their concerns and gives them a chance to make their own evaluation of the effects of a project. Thus, [EA] shifts power away from proponents, bureaucrats, and experts toward the affected public. This loss of authority explains one aspect of the ongoing opposition to [EA].

37 One survey respondent commented that the public should also be included in decision-making.

38 *Supra* note 28 at 191:

> [EA] may also facilitate a significant change in responsibility for paying the costs of health problems, social disruption, and environmental degradation. As discussed above, projects may cause significant social costs. In the past, these costs have been "externalized"; that is, they have not been borne by the proponent, but by others. One of the questions raised by [EA] is, "Who will pay for the adverse effects?" [EA] forces this question to be asked and answered *before* the program or project is approved.

39 In the opinion of one survey respondent, EA should be recognized as a valuable educational tool.

> views and the broader public interest are built into the decision-making process. The public interest seems to have extended into most facets of our modern society and environmental assessment is simply one of the most recent and most pervasive aspects of this phenomenon. It is clear that environmental assessment is not a passing fad; it is here to stay.[40]

It is submitted that all aspects of EA legislation, policies, guidelines and practices ought to be evaluated in light of the above-noted goals and benefits.

3. EA PROCESS AND DECISION-MAKING[41]

> *The Environmental Assessment Act states that all sites have to be considered and the best solution is the one that must be selected ... the EA Act stipulates that all alternatives must be explored.*[42]

The role of EA in environmental planning and decision-making involves both "discharge approval laws and land-use planning laws."[43] It has been recognized by no less authority than the Supreme Court of Canada:[44]

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40 Professor D. Paul Emond (Osgoode Hall Law School, York University), *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery Ltd., 1978), at 2-4.

41 Readers familiar with the nature of the EA process could skip to the next section of this article.

42 MPP Mike Harris (PC) on June 27, 1991 in the Ontario Legislature: *Hansard* at 2399.

43 Rodney Northey and William A. Tilleman, *supra* note 31 at 190:

> Environmental assessment is unlike other environmental laws in the breadth of its procedural requirements. For example, it encompasses and exceeds the requirements of two different environmental regimes that are also regarded as having broad scope: discharge approval laws and land-use planning laws. In relation to discharge approval laws that focus on point source emissions and technologies to capture emissions, environmental assessment goes beyond such requirements by making provision to examine alternatives to such emissions—for example, through alternative production processes or alternative emission technologies. Environmental assessment also goes beyond discharge laws by making provision to examine more fully the effects of emissions, including social and cultural effects, and cumulative effects. Second, in relation to land use planning laws that set out separation distances between neighbouring uses of land and zone areas to prohibit or restrict certain uses, environmental assessment includes consideration of these requirements, but also makes provision to examine alternative locations and thereby determine a preferred location in light of all potential advantages and disadvantages. In short, environmental assessment is intended to be a comprehensive process to address all fundamental environmental issues. Where a proposed action does not stand up to this scrutiny, environmental assessment should stop the action from proceeding.

44 *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.) at 51-52 (from the majority opinion of La Forest J.).

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D.P. Emond in "Environmental Impact Assessment," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981), p.245, at p.247:

> "The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation."

As a planning tool it has both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development: see M.I. Jeffery, *Environmental Approvals in Canada* (Toronto: Butterworths, 1989), at p. 1.2 §1.4; D.P. Emond, *Environmental Assessment Law in Canada* (Toronto: Emond Montgomery, 1978), at p.5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

The planning component of EA is a complex process which involves numerous steps and study. In very simple terms, it begins with a problem or opportunity to be addressed. An investigation plan or study process is developed to explore the problem or opportunity. Alternatives (options) are selected and assessed, based on appropriate criteria, and ultimately a solution (the preferred alternative) is selected.

Steps along the way can include gathering information, assessing data, consulting with affected parties, establishing and weighting criteria, assessing need,[45] examining all aspects of the environment (biophysical, social, economic, cultural, and their inter-relationships), scoping environmental issues, screening for a reasonable range of alternatives, examining alternatives to and alternative methods,[46] ranking alternatives, conducting

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45 From section 3.8.2 of MOE Guideline E-3, "Environmental Assessment (EA) Planning and Approvals" (April 1994):

> The word "need" is not a term which is used in the *EA Act*. Despite this, the issue of whether a specific proposal is "needed" often arises in planning, and is one which the EA Board considers to be important. ...
>
> The comparison of the undertaking to the do nothing alternative is a key aspect of demonstrating the "need" for the undertaking. This provides the basis for determining that the advantages of proceeding with the undertaking outweigh the disadvantages to the proponent and the people of the Province.

46 "Alternatives to" an undertaking have been defined as those alternatives which are functionally different ways of approaching and dealing with a problem or opportunity. For example, an alternative to garbage disposal is reducing or eliminating the amount of

an alternatives analysis (comparing alternatives), determining net environmental effects,[47] selecting and applying evaluation processes, scaling of results, undertaking risk assessment and risk management, conducting sensitivity analyses, providing clear and complete documentation, and making decisions.[48]

Over the years, numerous EAB decisions and MOE materials have discussed features which are desirable in EA planning. Among other things, a proper EA process should be as transparent, methodical, traceable,[49] iterative,[50] rational and objective as possible. The evaluation process has been defined as:

> The process involving: the identification of criteria; rating of predicted impacts; assignment of weights to criteria; and the aggregation of weights, rates, and criteria to produce an ordering of alternatives. Evaluation methods are concerned with the aggregation stage of this process.[51]

Public consultation, a key ingredient in EA, is considered to be the responsibility of a proponent and should happen as early as possible in the process. Consultation ought to be "open, forthright and co-operative" and provide all of "the information required for meaningful consultation to take place."[52] It must respect the public's need "to be adequately informed, to question and to be listened to." At the same time, those affected by a proposed undertaking "have the responsibility to share in a co-operative search for the best solution." As an aid to the public's involvement, participant or intervenor funding can help the public to seek independent advice and verification (both technical and legal) of the proponent's information and position. Contentious issues can be referred to mediation or adjudication for resolution.

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garbage which is produced at source. "Alternative methods" of carrying out the undertaking are different ways of doing the same activity. For example, in the case of garbage disposal, expanding an existing landfill or establishing a new facility.

47 Net environmental effects are the environmental effects of an undertaking, or its alternatives, after mitigation potential has been taken into account.

48 These are not listed in the order in which an EA study would necessarily unfold.

49 Traceability enables an outsider to follow and understand the development and implementation of the EA process.

50 An iterative process involves the repetition of steps along the way a number of times, particularly as new information or issues emerge, in order to reach a convergent and consistent outcome.

51 VHB Research & Consulting Inc. et al., *Evaluation Methods in Environmental Assessment* (MOE, 1990) at 105.

52 MOE Guideline E-2, "Pre-Submission Consultation in the Environmental Assessment (EA) Process" (April 1994) at §1.0.

In the EA process, as with many other areas, responsible decision-making ought to be independent, informed, transparent, consistent, consensual, fully explained and credible. Decision-making must recognize that the stark reality of scientific uncertainty[53] leaves evaluations and predictions tenuous at best. Ecological and ethical principles (for example, the precautionary principle, cumulative impacts,[54] sustainable development, ecosystem planning, watershed and bioregional management, avoidance v. mitigation, resource preservation, guarding environmentally sensitive areas, internalizing costs, protecting future generations, social equity,[55] and preserving natural habitat and biodiversity) should be

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53 See D. Wismer, B. Shuter and H. Regier, "Predictive accuracy of a model of thermal impact of the Bruce Nuclear Power Development on bass: 20 years later" (Institute for Environmental Studies, Monograph no.14, University of Toronto, 1997). They referred to "uncertainty and error" as the "constant companions" of ecologists (at 4), and identified ecosystems as "not only more complex than we think, but more complex than we can think." And at 6:

> Applied ecological science is not a search for everlasting truth but more of an exercise to better define the limits of everlasting error. The science is necessarily based upon likelihoods (typically expected values occurring within some confidence band) and very few unassailable facts. The use of numbers, computer models and statistical-based surveys does not guarantee conclusive results or avoid the need for scientists to make judgments.

54 One survey respondent indicated that impacts almost never occur in isolation, and distinguished between incremental (project by project) and cumulative assessment ("the tyranny of small decisions"). EA must therefore be integrative and interdisciplinary, and involve collaborative study of "the interactive and synergistic nature of multiple projects occurring within a given environment."

55 In the 1989 *Halton* EA decision (file CH-86-02), the Joint Board noted the following concern raised by some members of the public: "Social Equity - Residents of this area feel that they have received waste from the wider community for long enough and it is somebody else's turn to receive waste now." (at 24). The issue of economic inequity is raised in the following excerpt from Reg Lang, "Environmental Impact Assessment: reform or rhetoric?," in William Leiss (ed.), *Ecology versus Politics in Canada* (Toronto: University of Toronto Press, 1979), at 248:

> Clearly, this [EA] is a political process. But it cannot just be the politics we have now. Environmentally, it would be self-defeating to rely on current political processes which undervalue environmental factors, as they do the well-being of the less privileged in society. The two are closely related at this point, for a characteristic of that North American blend described above is that it distributes its costs and benefits quite unevenly among its members. And so the poor suffer most from deteriorated environments—living in the most unsatisfactory housing, in inner cities where the air is heavily polluted and the noise is most oppressive, or in rural slums with the fewest available means for weekend escape to better environments. They are also likely to pay a disproportionate share of the costs to remedy environmental problems.

understood, identified and incorporated into evaluations and decisions.[56]

Over time, many important and desirable attributes of an EA process have been discussed in the substantial volume of literature which has accumulated on this subject. The list includes the following:

Goals

The development of clear goals is recognized as an essential element of EA. Two areas which have been identified are:

- local, national and global sustainability;
- environmental protection through integrative decision-making (biophysical, social and economic).

Scope

- EA to involve the 4 P's—projects, plans, programs and policies (including standard setting);[57]

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56 By way of example, the following excerpt is from a strategic plan document developed and published by the Environmental Assessment Board in 1993:

> There is a greater and more widespread awareness of the global environmental hazards resulting from human activities. This awareness recognizes that more than traditional industrial processes affect the global environment: "affluence" localized in the midst of widespread poverty and our preferences for certain values and lifestyles contribute in a fundamental way to the self-inflicted global environmental hazard.
>
> In the face of this awareness, the sustainability ethic has arisen. This ethic will require that the Board:
>
> - anticipate and prevent environmental problems
> - require thorough environmental cost accounting for development proposals
> - make *informed* decisions
> - provide for conservation of environmental capital
> - put quality of development before quantity
> - respect nature, and respect the rights of future generations ...
>
> Policies to address economic stress will be tempered by the awareness of global environmental hazards and acceptance of the sustainability ethic. ...
>
> The coming generation will expect and demand that the "powers that be" (corporate or government) ensure that environmental quality is maintained. Such demands for enhanced environmental quality may well be coupled with the apparently antithetical demand that *individuals* not be required to devote more of their own personal resources and energy to providing such enhanced environmental quality.

57 "Strategic environmental assessment" (SEA) involves the EA of policies (the inspiration for an action), plans (set of coordinated and time objectives for a policy's execution) and programs (set of projects in a particular area), in that order. According to SEA theory,

- must apply to all undertakings (both public and private sector) that may have environmentally significant effects (direct or indirect, local or global);
- only ground for exemption from EA process to be environmental emergency, in which case full evaluation still required after the event;
- to involve environmental effects which occur both inside and outside of the legislation's geographic jurisdiction;
- clear and automatic (not discretionary) application to undertakings;
- undertaking's purposes to be critically examined;
- comparative evaluation of feasible and sustainable alternatives (including do nothing, alternatives to, and alternative methods) required (but excluding alternatives involving unacceptable risk), even though some of these may not be viable options for the proponent;[58]
- worst case scenarios (for example, resulting or caused by accidents, errors or natural calamity) must be included in analysis;
- analysis to include evaluation of all environmental, social and economic costs (including all decommissioning, monitoring and post-project maintenance and supervision);
- impacts from other existing and proposed activities (cumulative effects) must be fully considered.[59]

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projects should be examined only after decisions have been made on policies, plans and programs. See Stephen Hazell and Hugh Benevides, "Federal Strategic Environmental Assessment: Towards a Legal Framework" (1997), 7 J.E.L.P. 349. The Espoo Convention (Environmental Impact Assessment in a Transboundary Context), *supra* note 32, provides that although EA should "as a minimum requirement, be undertaken at the project level of the proposed activity," its principles should be applied to policies, plans and programs to "the extent appropriate" (Article 2, section 7).

58 The UNECE Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context), *supra* note 32, provides that EA documentation must, at a minimum include a "description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative" as well as a description of the potential environmental impact of the alternatives, and its significance: Article 4 and paragraphs (c) and (d) of Appendix II.

59 Environment Canada, *Strengthening Environmental Assessment for Canadians - Report of the Minister of the Environment to the Parliament of Canada on the Review of the Canadian Environmental Assessment Act* (March 2001), at 21:

> Under the current Act, the consideration of cumulative effects is limited to the environmental assessment of individual project proposals. During the [5-year] review, a number of organizations suggested that regional or area-wide reviews of development activity and proposals within an ecosystem or geographic region may be better able to address cumulative effects, make more efficient use of scientific

Process

- an integrated and comprehensive planning process, involving broad range of environmental considerations;[60]
- process available for joint decision-making involving multiple jurisdictions;
- protocol developed for involvement of and consultation with First Nations;
- competent technical analysis;
- burden of proof on the proponent;
- identify best options, not just acceptable proposals;
- disclosure of degree of confidence (risk of error) in the formulation of predictions;
- decision criteria to be rigorous and binding on decision-makers;
- EA study and decision-making to be open;
- process must be efficient;
- early opportunity for public participation (beginning at the front-end of the process);
- well-understood channels to be available for public participation and involvement of stakeholders;
- requirement of full disclosure by proponent and access to information by intervenors and participants;[61]

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expertise and local knowledge, and provide more consistent requirements for industry. ...

In an effort to improve the systematic consideration of cumulative effects, the bill would recognize the value of regional studies in assessing cumulative environmental effects, and in streamlining project assessments where provinces and territories are in agreement with such an approach. The proposed amendment would recognize that federal authorities could participate in such regional approaches and that the results of these studies could be used in conducting environmental assessments under the Act, including the consideration of any cumulative environmental effects.

In support of these proposed changes, the Agency proposes to work with federal departments to refine cumulative effects guidance material further, and to serve as a clearinghouse for sharing ideas and experiences on best practices and case studies.

60 A survey respondent indicated, by way of example, that EA studies for electricity generation projects ought to consider issues such as the environmental effects of coal mining and transport prior to arrival at the power plant, power transmission and distribution, and the fate of nuclear waste and its long-term management (for hundreds of years or more).

61 The 1998 Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) of the UNECE (United Nations Economic Commission for Europe), to which Canada is not yet a signatory, notes in the preamble that in order to assert one's right to an environment adequate for "health and well-being," and to "protect and improve the environment for the benefit of present and future generations, ... citizens must have access to information,

- participant and intervenor funding programs provided to ensure active and informed public participation;[62]
- process to be fair.

Administration

- EA system to be administered by an agency independent of government, political and other interventions;
- EA requirements to be included in legislation, and be specific, mandatory and enforceable.

Public Hearings

- opportunity for review in a public forum, such as a hearing before a tribunal;
- the tribunal should not be part of the Ministry of the Environment;[63]
- the tribunal and its members should be non-partisan, and independent of government, political and other interventions;
- tribunal members to be representative of the community at large;
- members to be selected through a non-partisan and public process;

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be entitled to participate in decision-making and have access to justice in environmental matters." The Convention, found at *www.unece.org/env/pp*, includes the following definition at Article 2, par.3:

> "Environmental information" means any information in written, visual, aural, electronic or any other material form on:
> (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
> (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

62 The Aarhus Convention, ibid., recognizes in its preamble the "importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection," and that "citizens may need assistance in order to exercise their rights."

63 One respondent suggested that the tribunal should not be controlled by any Ministry, in order to minimize government influence and interference.

- if the tribunal makes a binding decision, rather than a recommendation, there should be a statutory right of appeal from that decision.

Approval Requirements

- substantial net positive social impact;
- no approval of environmentally damaging or unsustainable undertakings, or where environmental impacts uncertain or serious, regardless of the profitability or desirability of the proposal;
- full contingency planning;
- terms and conditions to be enforceable;
- legislated post-project evaluation;
- compliance enforcement mechanisms;
- monitoring of effects.[64]

4. HISTORY OF EA IN ONTARIO[65]

As one of the first jurisdictions in the world to consider implementation of environmental impact assessment legislation and at the same time (in its "Green Paper on Environmental Assessment" of September 1973) to affirm the need for a high degree of public participation in the process, the Ontario government is to be congratulated.

However, for these very reasons, it is important that those who will follow Ontario's actions have, for a precedent, legislation which offers to the public the proper access to the assessment process. This will be the best means of ensuring that the quality of the environment will be stabilized and maintained.[66]

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64 The Espoo Convention (Convention on Environmental Impact Assessment in a Transboundary Context), *supra* note 32, contains the following list of objectives for "Post-Project Analysis" (Article 7, Appendix V):

(a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures;

(b) Review of an impact for proper management and in order to cope with uncertainties;

(c) Verification of past predictions in order to transfer experience to future activities of the same type.

65 For a detailed history of EA in Ontario see Marcia Valiante *supra* note 11 at 217-23, and *Environment on Trial*, 3rd ed., *supra* note 28 at 193-6. Readers familiar with the history of EA in Ontario could skip to the next section of this article.

66 CELA's "Principles for Environmental Impact Assessment - Submissions Concerning the Ministry of Environment Green Paper on Environmental Assessment" (Toronto, October 1973) at 1.

The Canadian Environmental Law Association (CELA) has long been an advocate for a comprehensive and rigorous EA regime. Almost from its inception in 1970, CELA campaigned for the creation of EA legislation. The Ontario Government's response began with the issue of the MOE's *Green Paper on Environmental Assessment* in 1973. In his introduction, the Environment Minister (James A.C. Auld) noted that existing environmental protection legislation "has not provided the means of ensuring that all environmental factors are considered in a comprehensive and coordinated fashion, including public input, before major projects and technological developments proceed."

The *Green Paper* referred to the Ministry's increasing emphasis on "preventive aspects of environmental management" in order to "attempt to identify and resolve potential environmental problems as they emerge and before actual environmental damage occurs" (at 3). It urged that a new approach be taken:

> A procedure should be developed to bring about an integrated consideration at an early stage of the entire complex of environmental effects which might be generated by a project. ... Without a strong provincial involvement in this area, society could often be in a situation of reacting to environmental problems which could have been avoided. (at 5)

One month after the *Green Paper* was released, CELA responded with written submissions urging that several fundamental principles must be incorporated into EA procedure in order to ensure environmental protection:

(1) The law must require social and environmental assessment studies and cost-benefit analyses prior to project development approval for projects likely to have significant environmental impact. ...
(2) The creation of an independent, powerful environmental review board is a prerequisite to public confidence in the new procedures. ...
(3) Any person should be able to require the board to consider whether a proposed project needs an environmental assessment or (if an assessment has been filed) whether it adequately explains expected environmental effects. ...
(4) Public access to all information about proposed projects must be guaranteed. ...
(5) A firm timetable must be established for implementation of the legislation in both the public and private sectors. ...
(6) Public or private funds should be available to objectors acting in the public interest. ...

(7) The environmental assessment document must contain all responsible contentions of interested or affected persons, outside experts, organizations and governmental agencies on the possible environmental and social impacts[67] of a proposed project. ...
(8) The originator or proponent of an undertaking should prepare and pay for its assessment. ...
(9) The review board, working with the Ministry of the Environment staff, should assure that all stages of the assessment process follow proper procedures. ...
(10) Early notice of a proposed project must reach all those interested and likely to be affected.[68]

CELA's submission refers to a resolution passed by the Canadian Bar Association (CBA) which "supports public participation in the planning and approval of projects that have a significant environmental impact" and requires such projects "be preceded by an environmental impact study, paid for by the proponent."[69] It also called for full disclosure to the public, a mandatory public hearing if requested by objectors, and the right of objectors (without having to demonstrate "a special interest or damage") with leave of a court to have the project reviewed.

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67 In *Meaford, Re* (1990), Doc. CH-88-03 (Ont. Joint Bd.), the Joint Board noted: "The need for an assessment of the social impacts of the undertaking and its alternatives arises from the definition of environment in the EAA, which includes the 'social, economic and cultural conditions that influence the life of man or a community.'" (at 51)
In *Steetley Quarry Products Inc. (Steetley), Re* (1995), 16 C.E.L.R. (N.S.) 161 (Ont. Joint Bd.), costs award at (1995), 19 C.E.L.R. (N.S.) 212 (Ont. Joint Bd.), an EA landfill case, the Joint Board noted the definition provided by an expert witness (Dr. Audrey Armour) for social impacts as "changes that would occur as a result of a proposed development on the people's way of life, and in particular their day to day activities, on their cultural traditions, for example shared beliefs or values and customs, and on their community, and that includes things like the community's population structure, its cohesion, its character, and the services and facilities which provide for the quality of life of residents of that community" (Vol. 16 at 362). The Board also received the following definitions of standard and "special" impacts from Dr. Armour:

> Standard impacts are the direct or indirect results of the changes in the environment, either from the developments, for example, the displacement of residents, or its externalities, noise pollution and traffic effects. Special impacts may result from the people's perceptions of the proposed facility and its potential risk. Special impacts can also result from the planning and approvals process, in terms of people's feelings of powerlessness, inequity, or unfair treatment. Dr. Armour indicated that special impacts are considered because these perceptions can influence how residents react to standard impacts, particularly the importance they attach to those changes in their way of life, in their cultural traditions, or in their community.

68 CELA, *supra* note 66 at 2-5.

69 Ibid. at 7, "Public Participation in Environmental Decisions," Key-note Resolution No.3, 55th Canadian Bar Association Annual Meeting—Vancouver, 1973.

The EAA was passed in 1975[70] but not proclaimed in force until 1976, approximately 15 months later. It applied to undertakings of provincial, municipal or other public bodies, and as of January 1977, to "major commercial or business enterprises designated by regulation."[71] However, regulations were promptly passed exempting municipalities, numerous Ministries and other agencies such that "few undertakings remain within the ambit of the Act."[72] Of those that did remain covered, the Minister of Environment "issued a host of exemption orders" which may have included some conditions with respect to environmental concerns or planning.

Professor J.W. Samuels noted that by 1978 only one EA had been submitted (a Class EA) and observed:

> The fundamental problem of [the EAA] is that it promises so much and can deliver so little. ... I suggest there are tolerable limits to the gap between the word and reality of legislation. When the practice bears no resemblance to the reading of the Act, then the illusion breeds a sense of disrespect which is dangerous. ... It is becoming tiresome hearing the Ministry repeat over and over again that the Act is not intended to do what it says it does. ...
>
> The [EAA] was never intended to apply as it reads. It will never be applied in that way. Except to those in the Ministry and a few persons outside it, the Act is an illusion. It exists only as an exemption process. Before the people of Ontario lose all faith in the promise, it is time to make environmental assessment meaningful. The Act should be amended to make clear that it applies only to major undertakings of significant environmental concern. Then, instead of granting exemptions, the government should apply its legislation and put into *real* operation the environmental assessment system.[73]

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70 According to Professor Doug Macdonald, "[CELA] in 1975 played an important part in both developing and lobbying for adoption of the [EAA]": *The Politics of Pollution* (Toronto: McClelland & Stewart Inc., 1991) at 46.

71 Professor J.W. Samuels (Faculty of Law, University of Western Ontario), "Environmental Assessment in Ontario: Myth or Reality?" (1978), 56 *Canadian Bar Review* 523.

72 Ibid. at 525.

73 Ibid. at 528-9, 532. The exemption approach in the Act is explained in the following passage from *Environment On Trial*, 3rd ed., *supra* note 28 at 194-5:

> When the Ontario government first proposed an environmental impact assessment process, it envisioned an amendment to the *Environmental Protection Act* that would authorize the government, in its absolute discretion, to designate individual projects that it considered significant. Environmentalists feared—with justification, as it turns out—that such a process would result in the vast majority of harmful projects escaping assessment. Led by [CELA], public pressure caused the government to reverse its earlier position and enact a statute that required *all* public sector projects to be assessed. A more logical approach would have been a statute such as the US *National Environmental Policy Act*, specifying that undertakings having *significant* environmental impact would be subject to assessment; but looking at the successful

The gradual expansion of the EAA to public sector projects is described in the following account:

> The first public sector expansion of the Act was to conservation authorities in 1977. Municipal undertakings were made subject to the Act in 1980, following years of successful lobbying by municipalities to delay implementation. Even then, municipal projects budgeted to cost less than $2 million were exempt from assessment, an exemption that has no logical relationship to the amount of harm a project may cause. (This exemption was later increased to $3.5 million to take inflation into account.)[74]

As of October 1977, the EAA had been applied to only two private sector projects.[75] The extension to the private sector since then is detailed below:

> Despite repeated promises by both the Liberal government and the NDP to extend the Act to the private sector, the only classes of private projects that are subject to the Act are major energy-from-waste undertakings and the establishment or expansion of facilities for landfilling, incineration, processing, or transfer of wastes, where the facility exceeds a certain size. The Act was extended to these projects, whether public or private, in May 1987. Previously, private waste management facilities had been subject only to the *Environmental Protection Act*, under which the matters requiring consideration before approval are much narrower.

> efforts made in the courts by US environmentalists to litigate the meaning of "significant," the Ontario government tried to avoid using terms that would allow the courts to fetter its discretion to avoid assessments. Instead, the government made the [EAA] apply to the entire public sector, but included a provision allowing it to exempt any undertaking, without any criteria for deciding which undertakings should be exempted.

74 *Supra* note 28, *Environment On Trial*, 3rd ed. at 193. Harry Poch, *supra* note 13 at 288, observed that much is excluded in calculating the "estimated cost" so that many major municipal undertakings are exempt:

> Estimated cost does not include any costs for land acquisition, feasibility studies, and design carried out in respect of the undertaking or the operation, maintenance, repairs and activities of the undertaking. Where an undertaking is being conducted in phases, the estimated cost includes the cost of all phases. Estimated cost also does not include any costs:
>
> 1. for a building which has its construction regulated by the *Building Code Act*, and
> 2. furnishings, equipment and ancillary facilities and machinery provided in or for such buildings.

Some survey respondents have criticized this monetary threshold as arbitrary and inequitable. As one put it, values seem to be more related to lobbying skills than environmental impacts.

75 David Estrin and John Swaigen, *Environment On Trial*, 2nd ed. (Toronto: Canadian Environmental Law Association, 1978) at 45. The authors note that in 1976 "the Government published 200 pages of orders exempting various undertakings completely or in part" (45-6).

> The most significant impacts of this increased scope have occurred in solid waste management, where decisions of the Environmental Assessment Board and joint boards on both private and public applications have resulted in improvements in the quality of study and investigation associated with assessment waste disposal sites. ...
>
> In addition to waste facilities, a few other high-profile private projects have been individually designated for assessment. These include a power dam proposed by Inco on the Spanish River and a paper mill proposed by Reed Pulp and Paper at Ear Falls, in northwestern Ontario.[76]

Public sector EAs have typically included waste disposal, highway and energy corridor projects. No policy EAs have ever been subjected to the EA process. The only plan EA under the Act reached the hearing stage but was withdrawn by the proponent during the process.[77]

An evolutionary development was the class assessment procedure.[78] Class assessments were not established by the 1975 Act, but this process was instituted within a few years of passage.[79] Soon, it became the dom-

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76 *Supra* note 28, *Environment On Trial*, 3rd ed., at 193-4.

77 Referred to as the *Ontario Hydro Demand Supply Plan EA* (a plan for the provision of electrical energy to meet provincial needs for a 25 year horizon), it was referred to the Board in 1990 (EAB file EA-90-01) and withdrawn during the second year of hearings.

78 A MOE list identifying the Class Environmental Assessments currently approved or pending is at Appendix 8 of this paper. Copies of these Class EA documents are available to the public only from the individual proponents. None of them are available from the Ministry, although they can be inspected at the offices of the EAAB. The Parks & Conservation Reserves Class EA submitted by the Ministry of Natural Resources has not yet been approved. Hydro One's Transmission Facilities Class EA was submitted in 1997 to amend its existing approved parent document. However, the amended Class EA has not yet been approved due to deregulation of the electricity sector. It appears that the previously approved transmission Class EA continues to apply to Hydro One. In the meantime, the EAAB's "Guide to Environmental Assessment Requirements for Electricity Projects" was issued in March 2001.

79 This began to unfold at the time *Environment On Trial*, 2nd ed. (*supra* note 75) was written, as seen in the following passage at 51-2:

> To avoid doing individual assessments of many small projects, the Ministry of the Environment is planning to require only 'class assessments' on smaller, frequently recurring undertakings where a common set of procedures for construction and implementation can be identified. For example, individual assessments might be done on new routes or major realignments for highways, but only a class assessment might be done on highway widening or upgrading procedures. However, projects in classes can still be individually assessed if the Minister so agrees [now referred to as "bump-ups" or Part II orders]. Class assessments can be a useful supplement to individual assessments, and could significantly shorten their length and reduce their cost. But they are not a substitute for an individual assessment. Their broad general conclusions may be completely useless when applied to an individual site. For example, to control water pollution or erosion while widening a highway, it is necessary to have specific information on the type of soil, vegetation, and grades,

inant form of EA in the Province.[80] Few bump-up requests were granted for specific projects covered by class assessments, and almost none since the beginning of the 1990s. Only one Class EA has been sent to the Board for hearing.[81]

Between 1975 and 1996 only a few minor amendments were made to the Act, dealing with such matters as the Board's power to award costs. However, a number of other significant events occurred during this time. The Environmental Assessment Act Steering Committee was created by the Ontario Premier after the legislation was enacted to advise him on the development of the regulations. Its mandate expanded to advise on exemptions of public projects and requests to designate private ones. Two years after it was terminated, the Environmental Assessment Advisory Committee (EAAC) was created to provide advice to the Minister of Environment.[82]

A significant boost for EA in Ontario occurred when intervenor funding was introduced into the process "to assist ordinary people in understanding and evaluating the complex scientific and planning studies submitted by proponents, and in hiring experts and lawyers to represent their interests."[83] Efforts by the EAB to award costs in advance (rather than after the fact) were struck down by the court in 1985.

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the amount of rainfall in the area, and the type of earth-moving equipment being used on each site—the kind of information a class assessment does not provide.

80 Professor Marcia Valiante, *supra* note 11 at 220:

> The scheme with Class EA was to approve the broad class of undertakings through the full EA process, then each individual undertaking within that class would be required to follow a simpler alternative approval process. This approach became increasingly popular until, by 1993, fully 90% of the undertakings subject to the Act were approved through the Class EA process.

81 The *Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario* was referred to the Board in 1987 and after a hearing lasting approximately four years a 550 page decision was released in 1994 (EAB file EA-87-02). Some observers have suggested that this was more in the nature of a program EA than a Class EA.

82 *Supra* note 28, *Environment On Trial*, 3rd ed., at 195:

> In 1983, the government appointed [EAAC], consisting of three members from outside government, to advise the Minister of the Environment on matters such as exemptions and designation requests, EA procedures, and any other matter relating to environmental assessment about which the Minister seeks the committee's advice. EAAC has proven time and time again to be a useful watchdog, notifying the public of cases it is considering, consulting the public, and even holding informal public hearings into requests for designation of projects and removal of exemptions. The committee has often put forward useful compromises or well-reasoned recommendations for partial or full [EA].

83 Ibid. at 207.

CELA and other public interest groups petitioned the Minister to provide this type of financial aid, and thus began the use of Orders-in-Council for specific hearings such as the *Timber Management* class EA and the *Ontario Waste Management Corporation* hazardous waste facility. Then in 1988 the *Intervenor Funding Project Act*[84] (IFPA) was passed to institutionalize an administrative process for providing funding at hearings before the EAB, Joint Boards[85] and the Ontario Energy Board. In some cases, funding schemes were developed to provide financial assistance even before the Board's hearing process had begun.[86] The IFPA program actively continued until 1996 when the current Government refused to extend the life of the legislation.

1988 was also the year when the Ontario Government commenced the Environmental Assessment Program Improvement Project (EAPIP).[87] It began an examination into concerns about whether EA in Ontario was "effective, fair and efficient," and how it might be improved. An EA Task Force was formed by the Ministry in 1989.[88] In 1990 the Minister of Environment asked EAAC to hold public consultations on the Task Force Discussion Paper and report to her with its findings.[89] The major changes proposed by EAAC are summarized below:

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84 R.S.O. 1990 c. I-13.

85 Joint Boards are individual hearing panels comprised of members of the EAB (now the Environmental Review Tribunal) and the Ontario Municipal Board. These panels are constituted on an *ad hoc* basis under the *Consolidated Hearings Act*, R.S.O. 1990 c. C-29 to hear matters jointly in certain situations where multiple but separate hearings might otherwise occur.

86 Some proponents would voluntarily and directly allocate "participant funding" prior to the EA's referral to the Board, so that concerned parties could seek professional technical and legal advice early. In some cases, such funds would be allocated by the Board through a more formal process pursuant to an Order-in-Council. See for example *Essex-Windsor Waste Management Master Plan Funding Program, Re* (March 23, 1992), Doc. OC-91-01(F) (Ont. Environmental App. Bd.) and *Interim Waste Authority Participant Funding Program, Re* (February 28, 1994), Doc. OC-93-01(F) (Ont. Joint Bd.), reallocation and supplementary decision at (March 10, 1995), Doc. OC-93-01(F) (Ont. Joint Bd.).

87 According to Professor Valiante, *supra* note 11 at 221, EAPIP resulted from a significant study of Ontario EA by Professors Robert Gibson and Beth Savan: *Environmental Assessment in Ontario* (Toronto: Canadian Environmental Law Research Foundation, 1986).

88 In 1990 the EA Task Force issued a Discussion Paper, *Toward Improving the Environmental Assessment Program in Ontario* and recommended administrative and legislative changes. Appendix 9 of this article includes excerpts from that Paper, namely the Table of Contents, Executive Summary, Conclusions and a chart illustrating a Proposed Environmental Assessment Process (Appendix A).

89 EAAC's report (*Reforms to the Environmental Assessment Program*) was issued in two parts (1991 and 1992) and called for both administrative and legislative changes. Appendix 10 of this article includes excerpts from EAAC's report, namely the Table of Contents,

- realistic procedural time frames;
- early and meaningful direction to proponents through policies and guidelines;
- an initial EA proposal from the proponent before the EA study is commenced;
- opportunity to public and agencies to review the EA proposal;
- early and effective public consultation;
- more information in the final EA document (for example, description of EA process, other planning, cumulative effects, public and agency concerns, response to these concerns, post-approval compliance monitoring, effects monitoring);
- expeditious review of the EA;
- combined acceptance and approval decisions;
- in appropriate circumstances, opportunity for changes to undertaking after approval;
- greater control by EAB over its hearings to reduce length, set time limits, scope issues, use alternative dispute resolution (ADR), implement case management, adopt more investigative role, and make proceedings less intimidating;
- joint assessments with other jurisdictions;
- extension of application of EA to all undertakings which may have significant environmental effects, regardless of who is the proponent (including plans, programs, policies, technologies and the private sector);
- criteria and procedures for faster decision-making by Minister on designation, exemption and bump-up requests, with more public input before decision is made;
- legislate Class EA process, but limit its application to less significant undertakings;
- specific minimum requirements for Class EAs, including consideration of alternatives;
- examination of significant cumulative effects of some classes of undertakings before Class EA approved;
- *Planning Act* to include EA principles such as alternatives evaluation for land use planning decision-making;
- independent EA agency, with more resources, training and guidance to replace EA Branch;

Summary, s. 5 (The Committee's View) and s. 24 (Concluding Remark on Implementation).

- improve EAAC's role (earlier referral, wider scope of referrals, more public input);
- more consideration of First Nations' needs within EA process.

The previous Government issued a response (through the MOE) in 1993 to the reports filed by EAAC[90] and announced a plan for administrative changes to be implemented before any legislative amendments would be considered. These would include a large number of EAAC's recommendations, but specifically excluded establishing provincial environmental policies under the EAA, extending coverage to the private sector, and applying EA requirements to government policies and new technologies. The MOE report provided an appendix listing 40 reform documents which were being prepared to further these reforms.

Meantime, the EAB had also undertaken a consultation process with its stakeholders in 1990-91 to examine ways of taking more control over its hearings, and making them shorter and less expensive.[91] Later, it amended its Rules of Procedure with this in mind, and began to experiment with a series of new approaches to the pre-hearing and hearing processes.

An EA survey was undertaken on behalf of the MOE and a report was submitted in June 1995. Some comments from that study are reproduced in the following passage:

> Most people tend to want to talk more about the problems than the successes. On the positive side, there is a general acceptance of the need for an environmental impact assessment process. After allowing participants to raise their immediate concerns, there was an apparent desire to look for constructive solutions to the problems they themselves raised.
>
> Working with the EA process over the last decade has not only developed much more knowledge about the environment and the impact of many different human [activities] on it, but with that knowledge has come substantial new Ontario expertise on the environment and on waste management in particular. Corporations and municipalities are more conscious of environmental issues as real questions to be addressed and properly answered.

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90 This report (*Environmental Assessment Reform - A Report on Improvements in Program Administration*, Ministry of Environment and Energy) accepted the need for administrative changes but not legislative reform at that point. A copy is included at Appendix 11 of this article (exclusive of its two appendices).

91 As part of this consultation the Board released a paper in 1990 (*The Hearing Process: Discussion Papers on Procedural and Legislative Change*), invited written submissions from stakeholders and held a series of roundtable meetings with many of them. At Appendix 12 of this article is the "Outline of Discussion Papers for Roundtable Meetings" and a follow-up letter (July 5, 1991) from the EAB Chair, Grace Patterson, which was subsequently sent to all participants in this process.

> While the bad news is that there are a significant number of angry and frustrated people out there, the good news is that they claim to want to find workable solutions.
>
> Late in the consultation period, [MOE] pointed out that decisions were rendered under the EA process on 20 landfill proposals between 1983 -95. Of those only 3 were definitively denied. Fourteen of 20 were approved by the Minister without recourse to a Board. Of the 6 submitted to a Board hearing, 3 were approved and 3 denied. While these statistics tell part of the story, each proposal undoubtedly had its own special characteristics and considerations. The Storrington EA Board decision, for example, while classed in the approved category has been apparently shelved because the approximately 120 conditions imposed by the EA Board no longer made the project economically viable in the eyes of the proponent.
>
> The proposals denied by an EA or CH [Consolidate Hearings] Board seem to be the most recent landfill applications heard by these bodies. They are therefore the decisions top-of-mind with proponents who are very concerned that they indicate a trend.[92]

When the current Government was first elected in June 1995 under the platform of the *Common Sense Revolution*, several of the MOE's proposed new guidelines were still being developed. According to Professor Valiante, the Government promptly "stopped the process ... terminated the EAAC and initiated legislative reform of the EA program without further public consultation."[93] In June 1996 the Minister of Environment introduced Bill 76 to overhaul the EAA. At or since that time a number of events have occurred, including the following:

(1) The MOE's Environmental Assessment Branch has been merged with the Environmental Approvals Branch and the number of staff positions cut very substantially.[94]
(2) The Environmental Assessment Advisory Committee was disbanded by the Ontario Government almost immediately post-election (in October 1995) and not replaced with another advisory body.[95]

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92 David Powell, *Survey of the Ontario Environmental Assessment Process with a comparative study of the Quebec Environmental Impact Assessment Process* (June 1995), at 14.

93 "Evaluating Ontario's Environmental Assessment Reforms," *supra* note 11, at 222.

94 Some survey respondents have commented on the extent of loss of expertise at the Branch due to the departure of so many experienced staff members. They also suggest that the merger of these two departments dilutes the planning expertise and focus which had previously prevailed within the EA Branch.

95 Minister Brenda Elliott wrote to EAAC (September 29, 1995) to inform it of its termination and advised that "the Ministry now has a sufficiently sound basis of advice and experience from which to ensure the effective operation of the [EA] Program." A MOE

(3) The *Intervenor Funding Project Act* was allowed to expire in 1996 and no other funding program of any sort has been put in place since.[96] Nor are proponents being told by the MOE to provide intervenor or participant funding.[97]

News Release issued the same day stated that EAAC, as well as two other environmental advisory committees, had "completed their jobs." In a letter to constituents and participants (October 12, 1995), EAAC strongly disagreed with this decision:

> We believe that this indicates a lack of appreciation of the important ongoing role that the Committee has played in providing the Minister with broad public input and independent advice. This was understood by previous Ministers. As the government addresses controversial and environmentally significant projects and considers changes to the EA program, it is particularly short-sighted to lose a cost-efficient means of ensuring that the Minister has a broad range of advice upon which to make decisions. With constraints in government, we are concerned that Ministry staff will not be able to provide an adequate process for public input. In addition, their advice will continue to be constrained by specific mandates and will remain confidential."

Ironically, this occurred at the very time that a national opinion poll indicated considerable public concern about the environment. The following is from Robert Matas, "Environmental protection a priority for Canadians," *Globe & Mail* (October 24, 1995):

> Most Canadians consider environmental protection a priority and hold governments accountable for continuing, long-term improvements, a national survey has found.
> ...
> Conducted last month, the survey found most Canadians believe environmental protection does not have to be traded off for economic development. Seventy-eight per cent of respondents said environmental regulations should be strictly enforced in times of recession, while 20 per cent said the government should be more flexible in enforcement. ...
> Also in last month's survey, when asked the best way to reduce industrial pollution, 48 per cent cited government regulation; 25 per cent said through tax incentives and 19 per cent said through public reporting. Nobody chose the other option - voluntary encouragement.
> When asked if sustainable development should be a major priority for governments, 80 per cent of respondents said yes, up 10 percentage points from three years ago.
> ...
> It also found that one person in two believes his long-term health has already been affected by deterioration of the environment and that the majority of Canadians believe Canada has gone only 30 per cent toward a safe environment.

96 Professional advisors are needed not only to interpret and understand a proponent's reports, but also to identify and secure all necessary information. Harry Poch, *supra* note 13 at 280, commented as follows:

> The most basic problem when attempting to protect oneself against environmental damage, seeking redress for an environmental wrong, or attempting to be informed and to play a role in planning and management, has been to locate and be provided with relevant information. Without accurate and up-to-date information no case can be made out. It is no secret that business and government win many of their environmental assessment cases through "secrecy."

97 From "Environmental intervenor funds cut off by Ontario" by Martin Mittelstaedt, *Globe & Mail* (April 1, 1996):

(4) With one exception, no EAs under the new regime have been rejected or refused by the Minister, the EA Branch or the Board.[98]

(5) No comprehensive EA studies, requiring analysis of need, alternatives to and alternative methods, have been required for any project if the proponent requested otherwise.

(6) The independent Chair of the EAB was dismissed in 1997 and replaced with a provincial civil servant on secondment.

(7) No other members of the EAB, sitting at the time the new PC Government was elected in 1995, remain at the Board.

(8) Only two EAs have been referred to the Board for hearing, both of them on the same day in December 1997.[99]

> "We're going to allow it to sunset," Ms. Elliott said, calling the step "part of our new approach to improving environmental decision-making." ...
> The [*Intervenor Funding Project Act*] has been criticized by garbage industry officials for adding to the expense and time taken up by environmental hearings. The Ontario Waste Management Association, an industry lobby group, yesterday praised the decision to drop the act, calling it an important part of the government's effort to reform the environmental approval process. ...
> Ms. Elliott said she believes citizens affected by projects will still be able to influence environmental assessments effectively without intervenor funding. ...
> "People are able to come forward as volunteers still," she said.

98 The exception is Simcoe County's proposed 2.1 million tonne landfill for the Township of Adjala-Tosorontio (EA submitted May 1997), which was refused by the Minister on January 22, 2001.

99 These were the *Adams Mine* landfill site in Kirkland Lake and the *Quinte Sanitation* landfill site in Quinte West (near Belleville). An illustration of the approval of a controversial project without hearing was the East Quarry Landfill Site at the former Taro Aggregates property in Stony Creek (approved July 1996 by Minister, EA file PR-TA-02). The following excerpts are from a news report titled "Minister's decision on dump may spur appeal by citizens" by S.Silcoff, *Globe & Mail* (July 24, 1996):

> [Residents'] lawyer Doug Thomson said the government is making "a marked departure from past practice" by not calling a public hearing in light of the controversy. "Virtually without exception when there has been this level of public and government-agency concern about a landfill proposal of this sort, the minister has referred the proposal to a public hearing," Mr. Thomson said. ...
> Mr. Thomson argued that a public hearing is the only way the selection process can be "adequately scrutinized," because this involves a public review by an independent environmental-assessment board. ...
> But Environment Ministry spokesman John Steele said public concerns "can be dealt with through the terms and conditions" the company must meet before it gets final approval.

Problems with the landfill and its operations have surfaced frequently since that time. A recent MOE News Release (November 20, 2001) reported on concerns, study and unusual action by the MOE related to such issues as the adequacy of leachate monitoring and the potential health impacts on nearby residents. The MOE has now approved plans for a new sewer to carry landfill leachate to a municipal sewer and conducted "vigilant surveillance ... through comprehensive inspections by a full time inspector." The project's

(9) The word "assessment" was removed from the name of the Board (the current name is the Environmental Review Tribunal).

(10) The size of the Board has been reduced by over 70%: in 1995 the EAB had 15 members (9 full-time and 6 part-time) and the Environmental Appeal Board had 20 members (2 full-time and 18 part-time), for a total of 35 members; they are now combined in the ERT with a total of 10 members[100] (5 full-time and 5 part-time).

These and other changes are discussed further in the remaining sections of this article.

5. ONTARIO'S CURRENT EA PROGRAM

> *These sites are not subject to the fullest kind of environmental assessment, and we are appalled at that. ... [W]e do not agree with your process for the establishment of long-term landfill sites. Were I presenting the motion, I would have said at the end of the motion: "That, therefore, this government ... (2) Implement a more democratic process to explore all alternatives ... (3) Commit to full, not partial, environmental assessment of potential landfill sites." ... "I will commit that there will be a full environmental assessment, that all alternatives must be considered."* [101]

This section attempts to synoptically describe current developments and practices in Ontario's EA regime.[102] The chief aspects of the revised Act and Regulations promulgated under it (as amended) are described, along with the administration of the EA system by three related components of the Ministry of Environment: the Environmental Assessment and Ap-

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Community Liaison Committee is to be funded to permit the hiring of independent lawyers and consultants to review landfill reports. The Taro East Landfill Expert Panel studying the operations includes "experts in health, landfill design and operation, hydrogeology, organic chemistry, waste water treatment and air quality," and the panel has recommended, among other things, that the MOE "review its testing protocols for landfill sites." All of this for a facility that, according to the Environment Minister's 1996 approval, did not require a public hearing because it would operate "in an environmentally acceptable manner" and be subjected to "terms and conditions to ensure environmental safety."

100 Based on published information available as of September 2001.

101 MPP Mike Harris (PC leader) on October 15, 1992 in the Ontario Legislature (*Hansard* at 2722-3), speaking about the Interim Waste Authority site search process for landfill sites to serve the Greater Toronto Area.

102 A condensed summary by the MOE of the steps in the EA process, entitled "*Environmental Assessment Act's* review and approval process" is found on the MOE's web site (*www.ene.gov.on.ca*) and at Appendix 6 of this article.

provals Branch (EAAB),[103] the Minister of Environment and the Environmental Review Tribunal (ERT).

(a) Environmental Assessment Act

The revised EAA is similar to its previous structure. The title of each part (and the former title where different) follows:

Part I	Interpretation and Application
Part II	Environmental Assessments *(previously Acceptance, Amendment, Approval)*
Part II.1	Class Environmental Assessments *(new)*
Part II.2	Municipal Waste Disposal *(new)*
Part III	Tribunal Proceedings *(previously Environmental Assessment Board)*
Part IV	Provincial Officers
Part V	Administration
Part VI	Regulations

The Act's stated goal[104] and the comprehensive definition of the environment remain unchanged.[105] Preparation of an EA study (a term no

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103 The Environmental Assessment and Approvals Branch (EAAB) is part of the Operations Division of the MOE. A detailed description of the Branch circa 1989 is found at Poch, *supra* note 13 at 233-6. A current MOE Organization Chart is at Appendix 6 of this paper. Also included there is an outline of the structure of the Environmental Assessment and Approvals Branch, and a listing of those Branch staff involved in EA matters. The EA Project Coordination Unit prepares advice for the Minister's office regarding EA matters. Those personnel listed in the Program Support Unit, among other duties, provide assistance with EA programs at the Branch.

104 Section 2 of the EAA: "The purpose of this Act is the 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." The following observations by Harry Poch, *supra* note 13 at 286, are related to this provision:

> This is akin to the public trust doctrine, which provides that governments hold resources within their dominion in trust for their citizens. This doctrine would also oblige municipalities to protect their resources for future generations.
>
> The public trust duty is in effect an evolution in our present concept of ownership. In view of the potential for collective harm and risk flowing from many resource-based actions, the argument for a common interest in and a common protection of natural resources is strengthened. The right of citizens to seek legal protection for threatened resources, and the duty of governments and their agents to protect land, air, water and other resources and punish offenders are linked to the status of these things as a public heritage.

105 The definition of environment in s. 1(1) remains unchanged and comprehensive, including "(a) air, land or water, (b) plant and animal life, including human life, (c) the

longer defined by the Act) is mandatory for provincial and municipal undertakings[106] or those from the private sector which are designated by regulation. For the most part, the private sector continues to remain exempt from the Act, except where providing domestic waste disposal services.[107] On the other hand, as is discussed later in this article, there is now a strategic advantage for proponents to proceed under the Act, namely avoidance of any public hearings. Mandatory hearings under the *Environmental Protection Act* and/or the *Ontario Water Resources Act* can thereby be avoided entirely, while the likelihood of referral to an EAA hearing is practically nil.

The power to "exempt" an undertaking from the application of the Act under previous s. 29 is now called a declaration order: s. 3.2(1).[108] Historically there has been considerable concern about the extensive use of this power. However, with the growth of Class EAs, increased simplicity of the EAA process,[109] and the likelihood of avoiding public hear-

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social, economic and cultural conditions that influence the life of humans or a community, (d) any building, structure, machine or other device or thing made by humans, (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or (f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario."

106 An undertaking is defined by s. 1(1) to include "an enterprise or activity or a proposal, plan or program."

107 The issue of generally extending the application of the EAA to the private sector is a controversial topic (involving obstacles such as the inability of a proponent to acquire alternative sites which it does not own, and lack of expropriation powers) which is not reviewed here due to its lengthy history and complexity.

108 Information published on the MOE's web site under "Declaration Requests" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/Declaration_Requests.htm*) includes the following:

> Cabinet concurrence with the Minister's order is required. ...
>
> Declaration Orders are usually considered in cases of emergency or where the proposal is in the public interest and potential environmental impacts are minimal or where environmental impacts are being addressed adequately.
>
> A proponent may make a written submission to the Minister requesting that a project be declared not subject to the provisions of the EAA. The Minister will often require a review of the request prior to making a decision on whether to grant the Declaration or not.
>
> The request is usually posted for a minimum of 30 days on the Environmental Bill of Rights Registry prior to the Minister's decision. The public has an opportunity to comment on the proposed Declaration during the 30-day period.
>
> Usually a Declaration Order includes conditions which a proponent must meet. These conditions are used to ensure environmental protection and address such matters as the period for which the Declaration Order will be in effect, the specific studies to be done and/or the consultation to be undertaken.

109 One survey respondent described the current EA process as 'superficial' and 'meaningless.'

ings, the time and cost of pursuing the exemption process is probably less appealing than remaining under the Act.

Theoretically, an EA study must adhere to the same formula as before (now numbered s. 6.1) and describe the undertaking's purpose and rationale, the rationale of alternative methods and alternatives to the undertaking, the effects of the undertaking and alternatives on the environment, mitigation required to deal with those effects, and the consultation by the proponent. It must also evaluate the advantages and disadvantages of the undertaking and alternatives.

Ecological principles such as sustainability, cumulative effects[110] and the precautionary principle have not been adopted by any amendments to the EAA to date, although there has been a trend to incorporate these values elsewhere at all jurisdictional levels, as well as in international agreements and treaties.[111] Moreover, there is no indication that such principles are currently being reflected in any EA studies or the approvals which are being processed by the EAAB and Minister.[112]

The revisions resulting from Bill 76 and subsequent recent amendments can be summarized briefly.[113] In essence, the primary shift has been to put more administrative power and discretion in the hands of the MOE and its Minister. As a result, the Minister is now directly responsible for making more determinations in the process.

Key changes include the following list of items:

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110 A survey respondent from industry commented that cumulative effects is a good concept if applied on a practical basis, but expressed concerns about "a proponent's ability to consider the activities of others past, present and future."

111 For example, the *Environmental Bill of Rights, 1993*, S.O. 1993 c.28, includes among its purposes (s. 2) providing "sustainability" of the environment, "the right to a healthful environment," and protection of "biological, ecological and genetic diversity." The MOE's *Statement of Environmental Values* (1994) adopted the "ecosystem approach" as a guiding principle, indicated the Ministry's commitment to public participation (fostering "an open and consultative process"), and included the following among the list of factors to be considered when the MOE makes decisions: "cumulative effects"; the "interdependence of air, land, water and living organisms"; a "precautionary approach" in favour of the environment; energy efficiency; energy and water conservation; and use of 3Rs (reduction, reuse and recycling). The Ministry's *Statement of Environmental Values* (SEV) is reproduced at Appendix 14 of this article.

112 This observation has been reported in survey responses.

113 Other minor amendments to the Act have been passed since Bill 76: S.O. 2000 c.26 (Bill 119), Schedule E, section 2 and Schedule F, section 11; and S.O. 2001 c.9 (Bill 57), Schedule G. The "General" Regulation 334, R.R.O. 1990, has been amended several times since Bill 76: O.Reg. 615/98, 173/99, 247/00 and 117/01. O.Reg. 616/98 ("Deadlines") and 116/01 ("Electricity Projects") have also been promulgated.

- The power to "exempt" an undertaking from the application of the Act under old s. 29 is now called a declaration order (a more ambiguous name): s. 3.2(1).
- The basic legislative approach to what should be included in an EA study remains the same, except that it can now be varied or eliminated (at least, that is the MOE's interpretation). Section 6(1) requires "terms of reference" (TOR) to be submitted by a proponent for approval by the Minister in advance of carrying out the EA process. According to the MOE, the TOR may deviate somewhat, or completely, from the prescribed formula and governs the EA once approved: ss. 6(2) and 6.1(1).[114] The Minister may choose to amend the TOR as part of the approval: s. 6(4).[115]

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114 This interpretation is being challenged by CELA in a judicial review application filed with the Ontario Divisional Court. CELA has claimed that the Minister's power to approve TORs under the new provisions permits clarification and/or enhancement of the suite of requirements found in s. 6, but cannot be used to wholly eliminate such requirements.

115 Information published on the MOE's web site under the title "What are Terms of Reference" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/What_Are_Terms_of_Reference.htm*) includes the following:

> One of the new features of the [EAA] is the requirement for the preparation, submission and approval of a Terms of Reference before work begins on the individual [EA]. Once approved by the Minister, the [TOR] set out a framework that will guide and focus the preparation of an EA. The approval of the [TOR] is the first statutory decision by the Minister in the EA planning and approval process.
>
> The proponent is responsible for preparing the [TOR] which outline such things as: background to the proposed undertaking; a description of the proposed undertaking; alternatives to the undertaking; the study area and potential effects, and preliminary evaluation criteria. The [TOR] include a work plan for the preparation of the EA.
>
> The [TOR] must be accompanied by a description of the public and agency consultation that was undertaken during the preparation of the [TOR], and the [TOR] must describe on the kinds of public/agency consultation that will take place during the preparation of the EA.
>
> The [TOR] are submitted to the Ministry for public and government agency comment and review. Along with proposed [TOR], the proponent also submits background information and supporting material setting out the justification behind any proposal to dispense with the consideration of alternatives to the undertaking or alternative means of proceeding. This enables interested parties to understand the basis of the proposal submitted for the Minister's consideration.
>
> The [TOR] require approval by the Minister of the Environment. This process takes approximately 12 weeks following submission of the document, if there is no need to amend the [TOR]. ...
>
> [TOR] set out at a minimum, what the proponent will do in the preparation of an EA. The proponent may undertake to do more, but cannot do less than what they agreed to do in the approved [TOR]. Once the [TOR] have been approved by the Minister, the proponent may prepare the EA.
>
> If in the course of preparing the EA, the proponent discovers a need to change the [TOR] they may submit an amended [TOR]. Depending upon the nature of the

Approval of the TOR is required if the Minister is satisfied that an EA based on the TOR "will be consistent" with the purpose of the EAA and the public interest: s. 6(4). The Minister must consider the approved TOR when making her decision regarding approval of the undertaking: s. 9(2)2. So also must the Tribunal under s. 9.1(3)2 or 9.2(5)2, and its decision "must be consistent" with the TOR: s. 9.1(4).

A TOR guideline is still under development by the Ministry.[116]

- The two-step decision process (first, the question of whether to "accept" the EA study and report, and then whether to "approve" the proposed undertaking) has now been reduced to just one issue - whether or not to approve the undertaking: ss. 5(1), 9(1).[117]
- The Act now provides for deadlines at various stages, and the regulation power provides for determining and prescribing such deadlines: for example, ss. 6(6), 6.3(1), 6.4(2), 7(2), 7.2(2), 10 and 39(i).[118] O. Reg. 616/98 provides detailed time prescriptions and includes a table with various timelines.[119]
- Certain decisions made by the Minister must now be accompanied by written reasons: for example, ss. 3.1(5)—harmonization, 9(3)—approval decision, 11.1(5)—deferral of decision, 11.2(4)—review of Tribunal decision, and 16(9)—bump-up or Part II order. MOE Guideline E-6, "Written Reasons Required for Minister's Decisions on Environmental Assessments" (September 1996) was produced in order to assist participants and the Minister with respect to the Act's requirements, additional administrative rules (for example, the Minister will provide written reasons for

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changes, the Ministry may be able to process the new [TOR] on an expedited basis. The new [TOR] may provide for some or all of the work already done under the old [TOR] being used for the EA submitted under the new [TOR].

When reviewing the EA, [MOE] staff will ensure that the EA followed the process as set out in the [TOR].

116 Drafts of a TOR guideline have been circulating for the past few years. The most recent version, "A Guide to Preparing Terms of Reference for Environmental Assessments" (44 pages including seven appendices), is dated December 15, 2000 and can be found on the MOE's web site. The Table of Contents of this draft is included in Appendix 6 of this article. A consultation process was conducted by the EAAB in early 2001. A revised version is underway but release is not expected before early 2002.

117 According to a survey respondent, one impact of eliminating the "acceptance" decision is that an undertaking can be approved even if the EA document, study and process is defective. Consequently, proper EA decision-making is no longer happening.

118 A MOE chart ("Time Lines in the Environmental Assessment Process"), taken from a "Draft Guide to Preparing Terms of Reference for Environmental Assessments" (December 15, 2000) is included in Appendix 6 of this article.

119 A reproduction of the Table in the Regulation is included at Appendix 6 of this article.

the 12 types of decisions which the Act requires, not just the five categories for which the EAA specifically demand reasons), and what will be considered in making decisions.[120]

- The proponent may now amend an EA at any time before the deadline for the MOE Review under s. 6.2(2), or after it on terms as permitted by the Minister: s. 6.2(3).
- Before completing the MOE Review, the Director may give the proponent a statement pursuant to s. 7(4) as to how the EA is deficient with respect to the TOR and purpose of the Act. The proponent is then given an opportunity to remedy those deficiencies: s. 7(5). If the deficiencies are not remedied to the Director's satisfaction, the Minister has the power to reject the EA: s. 7(6).
- In general, EAs can now be refused (rejected), not just approved, amended or sent back for further study: s. 9(1)(c).
- The Minister or Tribunal may defer decisions regarding an application if "the matter is being considered in another forum or for scientific, technical or other reasons": s. 11.1.[121]
- Mediation is identified repeatedly in the Act, and parties in dispute may be required by the Minister to submit to mediation: for ex-

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120 From the Guideline's "Synopsis":

> This guideline specifies that written reasons will accompany all decisions made by the Minister regarding the three types of [EAs] and related hearings. The three types are individual EAs; class EA parent documents; and proposal, plan and program EAs ... The Act does not require written reasons for all Minister's decisions on these matters. The Act does not specify what matters the Minister will consider in: making a decision to vary or substitute an EA Board decision, or to require a new hearing; or responding to a proponent's proposal to withdraw an EA. This guideline introduces the matters that the Minister will consider in these decisions. The Ministry will refer to this guideline in the course of making recommendations for decisions on EAs and hearings.
>
> Minister's decisions regarding bump-ups, designations and exemptions are not included in this guideline.

121 While new to the EAA, a more open-ended deferral power has been included in the *Consolidated Hearing Act* since its inception: s. 5(3). It was used in the 1990 *Keele Valley Landfill* Joint Board decision (file CH-89-01). The use of the deferral power in that case was considered and upheld by the Divisional Court in its decision dismissing a judicial review application: *Metropolitan Toronto (Municipality) v. Ontario (Joint Board established under Consolidated Hearings Act)* (1991), 8 C.E.L.R. (N.S.) 85 (Ont. Div. Ct.). The EA Branch does not track whether there have been deferrals made by the Minister under this provision (communication March 5, 2002).

ample, ss. 6(5), 8, 9.1(2)6, 9.1(3)6.[122] A mediation guideline is still under development by the Ministry.[123]

- Public consultation, a traditional part of the EA study process though absent from the EAA previously, is now identified in the Act and made mandatory at the TOR and EA preparation stages:

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122 Information published on the MOE's web site under "Mediation" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/Mediation.htm*) includes the following:

> While not all disputes are amendable to the process, when properly approached, mediation can strengthen a proponent's public consultation process, increase trust and accountability among participants, and facilitate a more timely EA preparation, review and approval.
>
> Proponents and participants may jointly choose mediation without involving the Minister (Self Directed Mediation). This would follow a mutually agreed upon process and would involve selecting a mediator.
>
> Although participants are encouraged to conduct Self Directed Mediation whenever possible, the [EAA] provides for Minister-directed mediation, bound by a 60-day time line. This may be at the request of interested participants or the proponent, or as recommended by the Ministry. The Minister may appoint one or more persons to act as a mediator to resolve identified contentious issues, including the [Tribunal]. The EAA also permits the Minister to initiate mediation with respect to the Terms of Reference [s. 6(5)] and in regard to the Minister's decision on approval of the application. [s. 8(1)]
>
> Once the mediation process itself is complete, the mediator is required to produce a report which is forwarded to the Ministry for review and consideration. ...
>
> The Minister may also appoint the [Tribunal] to act as a mediator to resolve outstanding environmentally contentious issues associated with an EA.

123 Drafts of an EA mediation guideline have been circulating for the past few years. The most recent version, "The Use of Mediation in Ontario's Environmental Assessment Process" (13 pages), is dated December 15, 2000 and can be found on the MOE's web site. A consultation process was conducted by the EA Branch in early 2001. A revised version is underway but release is not expected before early 2002.

ss. 5.1 and 6.1(2)(e).[124] A new consultation guideline is still under development by the Ministry.[125]

- The Act now expressly permits property to be acquired before an undertaking is approved, and even before an EA study has been commenced: s. 12.2(1)(b).

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124 In fact, the legislation (Bill 76) which revised the EAA featured this issue in its name, the *Environmental Assessment and Consultation Improvement Act, 1996*. Information published on the MOE's web site under the title "How do people get involved in an Environmental Assessment" (at *www. ene.gov.on.ca/envision/env_reg/ea/English/General_info/How_do_people_get_involved_in_an_Environmental_Assessment.htm*) includes the following:

> The [EAA] requires proponents to consult with such persons as may be interested. To make this a meaningful activity, proponents should include their immediate neighbours, government review agencies and the public in their considerations leading up to the preparation of the [TOR] and the preparation of the [EA].
>
> This public consultation is a key component of the EA process. Mandatory consultation enables potentially significant issues to be identified early in the decision-making process and enables the proponent to justify any restrictions in the scope of the EA.
>
> Any individual who is interested in the EA proposal, or may be affected by such a proposal, is encouraged to become involved in the process, as early as possible, before irreversible decisions are made.
>
> In the case of an individual EA, the proponent must give public notice of the submission of an EA. The notice indicates when and where members of the public may inspect the EA. Any person may comment in writing on the EA (or undertaking) and submit the comments to the Ministry. If the comments are submitted by the required deadline, they will be considered by the [EAAB] in the preparation of the Ministry Review of the EA. Interested persons may also make submissions to other review agencies who will be making submissions to the Ministry Review related to their areas of interest. Consultation is also an important component of the Class EA process.
>
> Following publication of the Ministry Review, the public has an opportunity to comment on the Ministry Review, the EA, and the proposed undertaking. The public may also request that the [Minister] refer the matter to a hearing before making a decision on the EA.

125 A draft "Guideline on Consultation in the Environmental Assessment Process" (26 pages) is dated December 15, 2000 and can be found on the MOE's web site. A consultation process was conducted by the EAAB in early 2001and a final version is underway but not expected for release before early 2002. A copy of the Table of Contents from this draft has been included in Appendix 6 to this article. Guidance documents on public consultation have been published previously by the MOE and are in general usage. These include: "Pre-Submission Consultation in the Environmental Assessment (EA) Process," MOE Guideline E-2 (formerly 03-03), revised April/94; "Procedures for Pre-Submission Consultation in the Environmental Assessment Process," MOE Procedure E-2-1; "Public Consultation," MOE Guideline H-5 (formerly 16-09), April 1994.

- In making a decision on a matter the Tribunal must "consider" any policy guidelines issued by the Minister with respect to environmental issues: s. 27.1.[126]
- The Minister may refer a matter (but apparently not the entire application) for a decision to a person other than the Tribunal: s. 11(1).
- The Tribunal may itself refer a part of the application to another forum for a decision: s. 11(7).
- Applications referred for hearing may be "scoped" by the Minister, so that only certain issues or parts of the application can be considered and determined by the Board: s. 9.2(1). In such cases the Minister must inform the Tribunal of how she intends to decide the matters which are not referred: s. 9.2(3).
- Deadlines may be imposed by the Minister on EA hearings and decisions: ss. 9.1(5), 9.2(6).
- The Tribunal may make its decision without ever conducting a hearing, even though the matter was referred to it by the Minister for a hearing: s. 20.
- The power of the Tribunal to review and reconsider one of its own decisions under s. 21.2 of the *Statutory Powers Procedure Act* has been expressly eliminated by the 1996 amendments to the EAA: s. 11.4(5). Instead, the Minister may (if she considers it appropriate) reconsider an approval decision (made by the Minister or Tribunal) if there is a change in circumstances or there is new information about the application: s. 11.4(1). The Minister may delegate the question of reconsideration to the Tribunal to decide: s. 11.4(2) and (3).[127]
- Class assessments (under the authority of approved "parent" Class EAs[128]), which have long been the dominant area of EA activity, are now explicitly recognized and regulated by the Act (in Part

126 According to EA Branch staff, no policy guidelines have been issued pursuant to this provision (communication November 8, 2001).

127 Section 11.4(4) provides that an approval "may be amended or revoked in accordance with such rules and subject to such restrictions as may be prescribed." According to EA Branch staff, no such rules or restrictions have been prescribed to date (communication November 8, 2001). They maintain, however, that this would not prevent the Minister from acting under s. 11.4, and in addition, that amendments could somehow be made by way of a declaration order.

128 A list of approved and pending Class EAs has been provided by the MOE and is reproduced at Appendix 8 to this article.

II.1).[129] Unlike the Ministry's descriptive material on class assessments, these new statutory provisions do not define Class EAs or their purpose, or establish any limits on the types of undertakings which are appropriate for very streamlined procedure.[130] In it a TOR must be submitted in advance and approved: s. 13.2. Pursuant to s. 14(2), the list of prescribed contents of a Class EA includes the following:

(1) A description of the class of undertakings to which it applies.
(2) A description of the reasons for using a class environmental assessment with respect to undertakings in the class.
(3) A description of the similarities and differences to be expected among the undertakings in the class.
(4) A description of the expected range of environmental effects that may result from proceeding with undertakings in the class.
(5) A description of measures that could be taken to mitigate against adverse environmental effects that may result from proceeding with undertakings in the class.
(6) A description of the process to be used by a proponent of a proposed undertaking to consult with the public and with persons who may be affected by the undertaking.
(7) A description of the method to be used to evaluate a proposed undertaking with respect to the matters described in paragraphs 4 to 6.

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129 For a thorough (though now dated) review of the topic of "Class Municipal Environmental Assessments" see Harry Poch, *supra* note 13 at 236-270.

130 Information published on the MOE's web site under the title "What are Class EAs?" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/What_are_Class_EAs.htm*) includes the following:

> Not all undertakings subject to the [EAA] need to go through the Act's review and approval process as previously described. There are some groups or "classes" of projects which are:
>
> - carried out routinely; and
> - have predictable and mitigable environmental effects,
>
> and therefore, do not warrant an individual [EA]. ... Currently, Ontario has approved a total of 11 Class EAs, which cover routine activities related to such things as: highway construction and maintenance; forest management activities; conservation authorities works; and other public-sector activities. ...
>
> The Class EA is submitted and reviewed under the previously described review and approval process. Approval, if granted, applies to the entire class of undertakings and the procedures described in the document. ...
>
> To ensure that environmental effects are considered for each project, proponents are required to follow the planning and design procedures set out in the approved Class EA including public consultation. Terms of Reference are required for the preparation of the Class EA but are not necessary for the individual projects under an approved Class EA.

(8) A description of the method to be used to determine the final design of a proposed undertaking based upon the evaluation described in paragraph 7.
(9) Such other information as may be prescribed.

The list does not include, and therefore does not require, an examination of alternatives (either alternatives to or alternative methods), including a net effects analysis.[131] Once approved, the Class EA governs the procedure for individual projects.[132] The procedure for bump-ups is also included in this new Part of the Act: s. 16.[133]

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131 A practitioner advised that Class EAs which have been approved or are under development since Bill 76 was passed, require review of alternatives for at least some projects. In this person's view, Class EAs may be seen as a last refuge for consideration of alternatives, though the analysis may not be done very well in practice. Nevertheless, in his view there are some areas in which good practices are being followed.

132 Information published on the MOE's web site under the title "Bump-Ups (Part II orders)," found at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/Bump_Ups.htm* includes the following:

> This is a self-assessment proponent-driven process where the proponent of a project is responsible for meeting the requirements in the Class EA prior to implementing a project. The Class EA approach allows for evaluation of the environmental effects of alternatives to an undertaking and alternative methods of carrying out a project, includes mandatory public consultation requirements, and expedites the environmental assessment of smaller recurring projects (e.g. road widening/upgrading). ... Approximately 90% of projects subject to the EAA are planned and implemented in accordance with a Class EA. A project meets the requirements of the EAA if it is planned in accordance with the process set out in an approved Class EA document and is not "bumped up" to an individual EA by the Minister.

133 Ibid.:

> A common feature of Class EA documents is a provision which enables any individual, group or agency that has significant environmental concerns with a project to write to the Minister requesting that the project undergo an individual EA, i.e., bump-up the status of the project under the EAA.
>
> All Part II Order (bump-up) requests are reviewed by the [EAAB]. Staff consult with the requester(s), the proponent and any other agency or group potentially affected by the Minister's decision. Information is summarized by staff and a recommendation package is forwarded via the ADM of Operations Division to the Minister who is ultimately responsible for the decision. Evaluation criteria for bump-up requests include the purpose of the EAA, factors suggesting that the proposed undertaking differs from other undertakings in the class to which the Class EA applies, the significance of these factors and differences, the nature of concerns raised by the requester(s), and the benefits of carrying out an individual EA. Staff also evaluate the applicability and effectiveness of other legislation and decision-making processes to address the concerns of the requester.
>
> Timelines for the Minister's decision on a request typically range from 45 to 66 days, depending on the Class EA document. The Minister has 4 options for a decision on a bump-up request: • Deny the request. • Deny the request with conditions. • Refer to mediation. • Grant the request and require the proponent to undergo an individual EA.

- In a move referred to as "harmonization," the Minister may vary or dispense with requirements under the EAA where another jurisdiction governs the undertaking, provided the requirements of the other jurisdiction are equivalent to the EAA: s. 3.1.[134]

(b) Regulations

There are four current regulations under the Act, not including amending regulations or those which provided for specific exemptions and designations:

- "General": O.Reg. 334, amended to O.Reg. 117/01.
- "Designation and Exemption—Private Sector Developers": O.Reg. 345/93.
- "Deadlines": O.Reg. 616/98.
- "Electricity Projects": O.Reg. 116/01.

The "General" Regulation under the Act, Reg. 334, has been amended in the recent past by O.Reg. 173/99, 247/00 and 117/01. It covers a wide assortment of details such as some information required in the EA (s. 2), the list of agencies defined as public bodies under the Act (s. 3), those Ministries which have been exempted (s. 6), the $3.5 million municipal cost threshold (s. 5(2)(a)), and the various exempted activities of Conservation Authorities (s. 8).

O.Reg. 345/93, entitled "Designation and Exemption—Private Sector Developers," defines a private sector developer as a developer of land not owned by provincial-public-municipal bodies. By a group of separate regulations individual enterprises in the private sector are specifically designated under the Act or exempted from its application. The Act has not been changed with respect to designations. According to s. 3(b) of the

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134 Information published on MOE's web site under "Federal Government" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/Federal_Government.htm*) includes the following:

> The *Canadian Environmental Assessment Act* (CEAA) establishes a process based on a federal statute for conducting environmental assessments of projects involving the federal government. The CEAA applies to projects for which the federal government holds decision-making authority—whether as proponent, land administrator, a source of funding, or regulator. Some undertakings will require both provincial and federal approval. Canada and Ontario are currently working together to harmonize both the federal and the provincial EA approval processes.
>
> Survey responses expressed support for avoiding two separate processes with two separate decisions.

EAA it applies to major commercial or business enterprises or activities or proposals, plans or programs in respect of major commercial or business enterprises or activities, other than those referred to in clause (a) (namely, provincial and municipal public sector undertakings), as are designated by regulation.[135]

As discussed above, O.Reg. 616/98, entitled "Deadlines," provides detailed time limits and includes a table with various time lines (Appendix 6 to this article). This Regulation augments the various revisions to the EAA which identify steps in the process to be governed by time limits, but do not specify those limits. For example, the first item in the table provides that the time limit for approval of the TOR by the Minister under s. 6(6) of the Act is 12 weeks, or if there is a mediation reference, then seven weeks after the mediator's report.[136]

O.Reg. 116/01, entitled "Electricity Projects," provides definitions for terminology related to the energy sector, and identifies those facilities and activities in this field which are (and are not) defined as "a major commercial or business enterprise or activity" (from the definition of "undertaking" in the Act) and designated as undertakings under the EAA.[137] This Regulation followed the issue of the MOE's detailed *Guide to Environmental Assessment Requirements for Electricity Projects* (March 2001). The MOE announced that both public and private sector

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135 Information published on MOE's web site under "Designation Requests" (at *www.ene.gov.on.ca/envision/env_reg/ea/English/General_info/Designation_Requests.htm*) includes the following:

> In most cases designation requests involve private sector activities and in particular, waste related projects.
>
> When a designation request is received, and before the Minister makes a decision on the request, the public is given an opportunity to comment on the proposal to designate the activity. As required under the *Environmental Bill of Rights*, a notice of proposal to designate will be placed on the Environmental Registry for a minimum 30 days public consultation period.
>
> When assessing designation requests, consideration is given to such issues as: the ability of other legislation to address issues or concerns; the concerns or positions of members of the Government Review Team (affected ministries and agencies) regarding potential environmental effects; and, public comments and concerns. ...
>
> The Minister may choose to grant or to deny the Designation Request. This decision will be posted on the Environmental Registry, updating the original proposal.

136 According to one survey respondent (an environmental lawyer), to the extent that the timelines have been a factor in the process, they tend to favour proponents.

137 A notice was published on the EBR Registry ("Environmental assessment requirements for electricity sector projects in the new competitive electricity market—proposed regulation and guideline") and a nine-page summary of the issues, consultation and decisions has been posted: see EBR Registry no. RA00E0005 located at *http://204.40.253.254/envregistry/012935er.htm*.

new electricity projects will be covered by specially "modified" (reduced) EA requirements.[138]

(c) Administration

From a review of the revised legislation and regulations alone, one might not expect that the Ontario EA regime has seen particularly dramatic changes during the past six years. But under the banner of the Common Sense Revolution, the administration of the Act and the EA process by the Ontario Government has indeed been radically transformed from that which preceded it. While the EAA has contemplated from its inception significant political involvement in decision-making, the opportunity for more direct Ministerial control was increased immensely by Bill 76 amendments. These changes are grouped and discussed below under 13 different topics, although there is considerable overlap among them, and additional categories could undoubtedly be added to the list.[139]

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138 From MOE Media Backgrounder "New Environmental Assessment Process for the Electricity Sector" found at *www.ene.gov.on.ca/envision/news/042301mb.htm* (April 23, 2001):

> The new requirements under the [EAA] distinguish between three project categories ...
>
> A. projects with relatively benign environmental effects like photovoltaic cells or small windfarms: These projects will not be subject to EA requirements;
>
> B. projects with environmental effects that can likely be mitigated: These projects will be subject to the EAA, and will undergo a screening process developed by the ministry; and
>
> C. projects with known and significant environmental effects: These projects will be subject to individual environmental assessments. ...
>
> The Environmental Screening Process (for projects in Category B) is a self-assessment process which requires proponents to identify the potential environmental effects of their new projects, consult with governmental agencies and members of the public, and outline measures to manage environmental impacts.
>
> Proponents must make the conclusions of their screening reports available for public review. Parties who feel that the proponent's impact management measures are not adequate can ask the Ministry of the Environment to require the proponent to either conduct a more detailed Environmental Review of the project, or to prepare an individual EA.

139 The author acknowledges the kind assistance of EAAB staff in responding to research inquiries with respect to the preparation of this article. In addition to statistical information found elsewhere in this article, the following details were received by the author from the Branch on March 7, 2002. The number of declaration (exemption) orders dropped from 16 during the 1994-95 fiscal year to 7 in 2000-01, for a total during this period of 71. The number of designation orders made by Cabinet was small, ranging from none in 1994-95 to four in 1997-98, for a total to 2000-01 of 14. TORs submitted since the Act was revised during 1996-97 total 31 to 2000-01, with the number of TOR decisions totalling 29. EA submissions made under the Act since 1994-95 total 63 to

(i) *Increased Political Control*

A significant change is the increased direct involvement of the political branch of government, namely the Environment Minister and Cabinet (the Lieutenant Governor in Council) in controlling and micro-managing the EA process. As a result of changes in the Act, the Minister now has the power to:

- vary or dispense with the application of the Act if another jurisdiction is involved and there is equivalency, under s. 3.1.
- reduce the scope of an EA study through the TOR decision, under s. 6(4);
- amend the TOR under s. 6(4);
- order parties to submit to mediation regarding the TOR, under s. 6(5);
- reject an EA if the Director's list of deficiencies in the EA have not been remedied within seven days, under s. 7(6);
- appoint any person to act as mediator with respect to the issue of approval of the undertaking, and have the mediator submit to the Minister a report on "the conduct and results of the mediation,"[140] under s. 8;
- impose a deadline on the Tribunal when referring a matter to it, under s. 9.1(5), and extend the deadline if the reason for the extension involves unusual, urgent or compassionate grounds, under s. 9.2(6);
- refer just one or more issues in an application to the Tribunal for hearing, under s. 9.2(1) or 9.3(3), and impose directions and conditions on the referral, under s. 9.2(2);

2000-01, with the largest number (18) occurring during the year when Bill 76 came into force (1996-97). The number of decisions made with respect to pending EA applications between 1994-95 (14) and 2000-01 (12) totals 71. Statistics regarding timing and compliance with deadlines in processing individual applications are not currently maintained by the Branch, although steps are underway to begin to track this information. At this time there are no policies, guidelines or other information available to explain or assist with the application of EAA section 17.1, Part II.2 ("Municipal Waste Disposal"). No statistics have been compiled with respect to deficiency statements issued under s. 7(4), if any, and rejections of EAs due to failure to remedy deficiencies under s. 7(6).

140 The mediation power was lauded by survey respondents ("excellent option"), but they were critical of the lack of "application."

- inform the Tribunal in advance of decisions she proposes to make on the non-referred aspects of an application, under s. 9.2(3) - note that the Tribunal must consider these decisions under s. 9.2(5)6;
- refer (and amend the referral of) just one or more issues within an application for decision to any one other than the Tribunal (s. 11(1)), whether or not that person is authorized by other legislation to decide the matter (s. 11(4)), and give binding directions or conditions to that person, and direct that s/he not conduct a hearing, even if one is required (s. 11(3));
- defer deciding an aspect of an application because it "is being considered in another forum or for scientific, technical or other reasons," under s. 11.1(1);
- reconsider an approval (by the Minister or Tribunal) of an undertaking, if there is a change in circumstances or new information, under s. 11.4(1);
- have the Tribunal determine whether an approval should be reconsidered, under s. 11.4(2), and reconsider it under s. 11.4(3);
- make similar orders respecting Class EAs;
- "issue policy guidelines concerning the protection, conservation and wise management of the environment" (and which the Tribunal must consider), under s. 27.1; and
- delegate to any employee in the Ministry his powers under the Act, and include limitations, conditions and requirements on the delegation, under s. 31(2), except for the power to approve undertakings, refer matters to the Tribunal, or reconsider decisions, under s. 31(3);

These new powers are in addition to those extensive powers, already in the hands of the Minister before Bill 76, to:

- refer an EA application to hearing, under ss. 7.2(3), 9.1(1) and 9.3(2);
- decide whether to approve or reject the undertaking or impose conditions (with approval of Cabinet) under s. 9;
- review, vary or substitute (with Cabinet's approval) the decision made by the Tribunal, within 28 days or longer if she wishes, under s. 11.2(2);
- order bump-ups, give directions, impose conditions and so forth under s. 16; and
- make declaration (exemption) orders (with Cabinet's approval) under s. 3.2.

In addition, the Ontario Government now has a new power under s. 17.1 in Part II.2 ("Municipal Waste Disposal") of the Act, to issue a regulation requiring a municipality, if designated, to seek approval under the Act in order to use the waste disposal facilities of other persons.[141] This power may be exercised even if that facility has already been approved under the Act.

Strangely, this provision was not in the version of Bill 76 which passed first and second reading and went before a Legislative Committee. It was inserted afterwards and before final passage even though no one ever publicly recommended or asked for it. According to the Government during third reading debate, its last minute inclusion was based on a concern that there might not be sufficient opportunity for public input with respect to waste disposal decision-making. Others, however, expressed the view that it was intended as a club to be used by the Government to influence the direction of decisions which it wanted municipalities to take.

Cabinet continues to have the power to designate private sector undertakings for coverage by the Act, under s. 3(b).[142] Finally, as before, the EAAB remains within the command structure of the MOE (Organizational Chart in Appendix 6 of this paper), although the Branch Director now reports to the MOE Associate Deputy Minister.

(ii) *Decreased Scope of EAs*

Advocates for more comprehensive assessments have complained that the level of analysis was insufficient even before this additional dilution in standards.[143] And now, one of the most significant administrative developments since passage of Bill 76 is the routine approval by the

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141 According to EA Branch staff, no municipalities have been brought under the application of this provision to date (communication November 8, 2001).

142 One survey respondent indicated that not only is relatively little private sector activity proceeding under the EA Act, very little public sector activity is occurring outside of the Class EA process.

143 One survey respondent from industry indicated that EA and the Act have "failed to evolve over the last 30 years":

> All decisions to carry out an undertaking go through a business case analysis which involves monetizing costs, benefits and risks. The literature is filled with the failure of environmental reviews to incorporate full cost, true cost or natural capital accounting into the process. Sketchy evidence shows that in EA 100% of the monetary costs are generally known, 30% of the Social and we are lucky if 1% of environmental costs are represented. So with every decision we select economic benefits over social and environmental.

Minister of proposed Terms of Reference with reduced or no examination of alternatives.[144] The following comments are from a submission to MOE by CELA with respect to TORs:

> In its 1996 critique of Bill 76, CELA expressed considerable concern about the potential use of ToR's to wholly dispense with mandatory EA elements, such as need, alternatives to, and alternative methods. ...
>
> Since Bill 76 took effect in 1997, these concerns about ToR content have been substantiated. For example, in virtually every individual EA case that CELA is involved with at the present time, the proponents have *not* committed to undertaking a "full" EA pursuant to section 6.1(2) of the EA Act. Instead, these proponents have submitted ToR's which purport to wholly eliminate critically important EA requirements (e.g. need, "alternatives to," alternative sites, etc.) from further study or consideration during the EA process.[145] While it is perhaps understandable why proponents might suggest a less-than-full EA, particularly for controversial proposals such as landfills or incinerators, it is less clear why these narrowly framed ToR's are routinely being approved by the MOE. In fact, CELA is unaware of a single instance where the Minister has rejected a proposed ToR to date.[146]

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144 An example is the Laflèche Landfill (8 million tonnes - with a service area of the entire province), located 500 m from a creek and next to a significant wetland, in the Township of Roxborough in eastern Ontario. Terms of reference were approved in December 1997, and the alternatives study requirement described below is from a summary posted by the MOE on its EA website (*www.ene.gov.on.ca/envision/env_reg/ea/English/ToRs/lafleche_tor.htm*):

> The only alternative to the undertaking that will be considered by Laflèche Environment Inc. will be the "do nothing" alternative, which consists of not developing a waste disposal facility on this site while continuing with the current land use which consists of commercial peat extraction.
>
> The proponent states that incineration is not being considered because it is not the field of activity for which the company has expertise/experience and was established. The consideration of recycling as an alternative to landfilling is outside the mandate and control of Laflèche Environment Inc. as the undertaking is being proposed as an option for area municipalities to dispose of their residual waste. There may be opportunities for the proponent to assist in the provision of recycling services, however this is not part of the current undertaking.
>
> This is the only site owned by the proponent and that will be considered. The proponent does not feel that seeking another site is reasonable. Alternative methods of carrying out the undertaking will include various landfill design alternatives on this site, such as location of waste placement, depth of excavation, depth of fill, final contours, leachate treatment options, etc. These will form part of further technical studies and reports.

145 The submission cites as examples the approved TORs for the proposed expansions of the Warwick Landfill and Richmond Landfill, and the TOR for a proposed new PCB incinerator in Kirkland Lake (note 4 at 3).

146 Richard Lindgren (CELA Counsel), "Submissions of the Canadian Environmental Law Association to the Ministry of the Environment Regarding Proposed Guidelines under the *Environmental Assessment Act*" (March 30, 2001) at 2-3.

The Minister's decisions, based on this revision of the Act (and from which there is no appeal), strike at the very heart of the EA process, and effectively eliminate the evaluative and planning component of EA studies.[147] Scoping of this nature appears to be based on the assumption that there can only be two or three issues of importance to be addressed. In reality, there are usually numerous issues, which are made even more complicated because of the interrelationship amongst them.

Approval of narrow Terms of Reference (TOR) casts the project in stone before it is properly evaluated, and constrains the introduction of new ideas or alternatives that were not anticipated by the TOR. To compound the problem, practitioners have reported that proponents are including intentionally vague language and plans in their draft TORs, in order that once it has been approved it can be used to justify and defend an EA which is even more restrictive in scope.

In theory, TORs can contribute to greater efficiency without reducing environmental effectiveness, provided that there is a careful and thoughtful review of any proposed narrowing (scoping) of issues. But this would entail substantial review and consultation involving an informed public and MOE staff, with the goal of eliminating only trite, inconsequential, uncontroversial and/or resolved matters from the agenda. This approach, however, would require a significantly increased staff burden for the EA Branch. The Branch was understaffed even before the 1995 election and the addition of the TOR process. As discussed elsewhere, the staff complement has been greatly reduced since then, not expanded.[148]

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147 Efforts to have the courts scrutinize the adequacy of alternatives have failed, even under the pre-1996 amendments. In *Ofner Essex Resources v. Ontario (Minister of Environment & Energy)* (1996), 18 C.E.L.R. (N.S.) 317 (Ont. Div. Ct.), a judicial review application which sought to overturn the acceptance and approval decisions, McRae J. stated at 318:

> The [EAA] gives the Minister authority to determine whether an [EA] meets the requirement of the Act including the alternatives the proponents must consider. What qualifies as a reasonable alternative for the proponent to study is not a question for judicial review but is a matter solely within the Minister's opinion. The applicants in this judicial review were given the opportunity and did make their submissions to the Minister on every possible occasion. They cannot seek to appeal the merits of the Minister's decision. The applicants, in any event, have not made such a reasonable alternative proposal and if they had, the municipality would not be under any legal duty to accept such alternative proposal. ...
>
> Finally, the courts will not review decisions of Ministers of the Crown unless it were demonstrated that they were made in bad faith or that the Minister clearly failed to comply with the statutory conditions.

148 In a 1996 article ("Comments to the Ministry of Environment and Energy regarding Bill 76 - *Environmental Assessment and Consultation Improvement Act, 1996*"), Prof.

Class EAs are not required by the EAA to necessarily consider alternatives at all. Considering the fact that the use of Class EAs is continuing to expand,[149] the comprehensive evaluation of alternatives (particularly "alternatives to") is apparently diminishing in Ontario.[150]

Finally, it does not appear that even one plan, program or policy EA[151] has been required anywhere in the Province or submitted for approval since the Ontario Government changed in 1995. As a result, the application of EA has been effectively limited to individual projects or classes of individual projects, and strategic EA has been eliminated.

(iii) *Expansion of Class EAs*

The use of Class EAs to process and approve thousands of individual projects in a generic fashion has been justified on the basis that it is an efficient way of regulating a large number of undertakings "where the activity in question occurs frequently, has a predictable range of effects, and is likely to have only minor impacts on the environment."[152]

Robert B. Gibson offers the following comments on this issue:

> The unrestricted opening for terms of reference of any kind will increase substantially the potential range of variation from common expectations in EA. Unavoidably this will increase, rather than minimize, uncertainty in the EA process. Everything will be open to negotiation. Many terms of reference deliberations and decisions will be politically sensitive as well as administratively complex. Insofar as important parties will not be at the table, politically astute decision makers will have to take readings of possible reactions. Insofar as most proponents are in the public sector, internal differences of analyses and priorities will have to be resolved through interministerial and provincial-municipal discussion. Such deliberations in a case-by-case process will add greatly to the burdens of the EA Branch and the Minister's office. It is difficult to see how the effects will not undermine commitments to timely and yet competent decision making. (at 2)

149 EAAB personnel indicate that thousands of undertakings are being approved under the currently approved (parent) Class EAs. They are listed in Appendix 8 of this article.

150 In the opinion of one survey respondent, the scoping power is possibly the worst of the Bill 76 amendments:

> The TOR process has re-introduced all the worst aspects of back-room decision-making on the environment that we thought largely had died. I am not aware of a single proponent proposing in a TOR document that it study in its EA - need, alternatives to, or alternative locations to a proposed undertaking. Nor am I aware of a single EA Branch recommendation, or Ministerial decision that has imposed such requirements. The TOR process has single-handedly gutted EA in Ontario.

151 "Strategic environmental assessment" is a term used to refer to the application of EA to policies, plans and programs.

152 From *Environment on Trial* (3rd ed.), *supra* note 28 at 204. It also states: "Where the government feels that a class of undertakings meets these requirements, it may authorize an agency that frequently carries out this kind of undertaking to carry out a generic assessment of the impacts of the entire class of projects." One survey respondent

Concerns have been expressed for a considerable time about the effect of widespread use of Class EAs:

> "Class" assessments may also reduce public participation. Initially designed to avoid the repetition of assessing relatively small recurring projects, there is some danger that class assessments could become a substitute for full individual assessments. Were this the case, the hearings might cease to be an important feature of the assessment and public participation would be limited to a less structured form of consultation. Another potential problem of class assessments is that they may obscure the cumulative impact of a number of small projects.[153]

The issue of cumulative effects has been a particular focus of concern for a long time, at least in academic circles. The following comments were published in 1979:

> Finally, environments are degraded less by discrete actions than by the combined and cumulative effects of many actions in complex and often incalculable ways that defy advance assessment. For example, it may not be a trunk sewer or a road that significantly changes an environment but rather the subsequent pattern of urban 'development' attracted by excess service capacity. Environmental impact assessment processes, therefore, must not only predict and seek ways to mitigate adverse environmental effects but also monitor and evaluate the actual effects irrespective of their causes and initiate corrective responses. Pre-action and post-action evaluation are unquestionably integral. Yet EIA legislation focuses only on the former, ignoring or giving mere lip-service to the latter.[154]

According to the Government, by adding Part II.1 ("Class Environmental Assessments") Bill 76 was merely giving statutory recognition to this significant aspect of the EA process.[155] Previously, there was only brief reference in the Act to the term "class."[156] However, neither the amended EAA nor any of the Regulations thereunder in any way purport to limit

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indicated that with some proponents the Class EA process seems to be more like a public relations exercise than a genuine evaluation process.

153 Roger Cotton and Paul Emond, "Environmental Impact Assessment," chapter 5 in John Swaigen, ed., *Environmental Rights In Canada* (Toronto: Butterworths, 1981) at 269.

154 Reg Lang, "Environmental Impact Assessment: reform or rhetoric?," *supra* note 55 at 247.

155 Tom Froese, PC MPP during 3rd reading debate on Bill 76: "For the first time, the role of the class EAs will be made clear in legislation ..." (*Hansard* - October 31, 1996).

156 Under the heading "Class of Undertakings" former EAA s. 40 stated: "A class of undertakings under this Act or the regulations may be defined with respect to any attribute, quality or characteristic or combination thereof and may be defined to include any number of undertakings under one ownership or more than one ownership and whether or not of the same type or with the same attributes, qualities or characteristics." The revised Act now has ss. 1(2), (3) and (4) which are intended to define the term "class."

the scope of Class EAs to a predictable range of effects with minor environmental impacts. Consequently, the application of Class EAs is spreading to more substantial and environmentally significant undertakings.[157]

An example of this comprehensive reach is the draft "Class Environmental Assessment for MNR (Ministry of Natural Resources) Resource Stewardship and Facility Development Projects" which has been submitted to the MOE.[158] Its purpose is "to ensure that the broad range of natural resource management projects, covering programs such as lands, waters, and fisheries conducted by MNR, solely or together with partners, meets the legal requirements of the [EAA]." It will subsume those projects currently covered by the "Class EA for Small Scale MNR Projects" and other undertakings dealt with by various exemption and declaration orders. The list of matters to be included is far-ranging (for example, developing and decommissioning public resource facilities, fisheries habitat, plugging oil and gas wells, sewage systems, water works, roads and dams, and waste disposal) leading some observers to refer to it critically as a "kitchen sink" Class EA.[159]

The proposal's Terms of Reference document makes explicit the goal of avoiding individual EAs:

> The Class EA will describe a process whereby activities on Crown lands and waters can be approved (e.g. planned, designed, constructed, operated, maintained, rehabilitated, and/or retired) without having to obtain activity-specific approval under the EA Act. ...

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157 A survey respondent from industry endorsed the use of Class EAs as follows: "On a practical level, the Class EA establishes a reasonable level of investigation and keeps lead times and costs in proportion to the nature of the project. The Class EA allows the proponent to tailor the level of effort to the extent of impacts and public concern. If impacts can be readily mitigated and there are no significant public concern[s], approval is possible within 30 days rather than months to years." However, an environmental lawyer maintained that Class EAs are too narrow, with too much potential for abuse. Proponents with Class EA approvals are building large projects which are not being subjected to individual EA scrutiny. But then he noted that even individual EAs can now circumvent the full EAA process as well.

158 The Notice of Proposal for Policy was posted on the EBR Registry (no. PB8E6012) in May 2001 (at *http://204.40.253.254/envregistry/009175ep.htm*). It notes that MNR "projects associated with forest management, wildlife management, fighting forest fires, rabies control and provincial park management, as well as the management and protection of natural heritage values in conservation reserves" are covered by separate EAA "coverage mechanisms."

159 The suggestion is that it involves everything including the kitchen sink. One source advised, however, that this new Class EA will replace the exemptions with a clearer, common process that is more stringent than the original exemption requirements.

> Once the Class EA is approved, and MNR is given approval to proceed with the Class EA, all activities of the type included in the Class may proceed. They will be carried out in accordance with the commitments made in the Class EA, and any additional requirements specified in the EA Act approval. ...
>
> The Class EA approach affords considerable efficiencies and cost savings to the proponent, partners, agencies and the public by grouping a large number of activities with similar characteristics, and by following a pre-approved, predictable process. ...
>
> MNR has used the Class EA approach since 1979, and considers it to be an efficient, environmentally responsive, and cost effective approach to manage facility development and resource stewardship activities. The alternatives to a Class EA include either preparing an Individual EA for each activity, or obtaining an activity-specific Declaration Order. These approaches would be extremely onerous, time consuming, and costly, and as explained above are not necessary to achieve the intention of the EA Act.[160]

Several ingredients of EA planning will not be included in the Class EA.[161] Nowhere in this Terms of Reference does it state that the subject matter for the Class will be restricted only to those projects which occur frequently, have a predictable range of effects, and are likely to have only minor impacts on the environment. These elements, which traditionally have restricted the scope of Class EAs, are noteworthy by their absence. Rather, the TOR proposes an "environmental screening" within the Class EA according to "level of environmental significance, and the need for planning and consultation" (at 5). The range of categories is as follows:

(1) Emergency, Public Safety, or Public Agency EA Activities.
(2) Activities with Low Potential for Significant Effects (standard prescriptions, no public notification).
(3) Activities with Potential for Significant Effects and/or Public Concern (public notice required).
(4) Activities which are Environmentally Significant and Require Planning Process and Consultation (and where the public has

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160 "Terms of Reference - Revising the Class Environmental Assessment for Small Scale MNR Projects" (September 22, 1999), Land Use Planning Branch, Ontario Ministry of Natural Resources, at 3-5. Posted at *www.mnr.gov.on.ca/MNR/stewardea2001/terms_ref.pdf.*

161 Ibid. at 5: "Owing to the difficulty of defining discrete alternatives for the full range of activities to be included in the Class EA, the consideration of potential environmental effects and 'alternatives to' and 'alternative methods' (including the 'null alternative') will be identified and addressed where appropriate during planning for specific activity proposals. It will also afford an opportunity to apply conditions of approval on an activity-specific basis, tailored to address the anticipated environmental effects."

> expressed "significant concern," a planning and consultation process will be included). The "framework, steps, and basic components" of this process will be outlined in the Class EA. (at 6)

The TOR provides for moving a proposal to a higher category within the range where "persons see a need for a more detailed process to address their concerns" and for a bump-up to individual EA, although this decision is "entirely within the purview of the MOE."

The trend to craft special rules and processes, the hallmark of the Class EA system, is also evident in the approach described in the detailed *Guide to Environmental Assessment Requirements for Electricity Projects* (80 pages, March 2001) discussed above. In announcing it the MOE indicated that new electricity projects would be covered by specially "modified" EA requirements.[162]

The subject of Class EAs is complex, important and beset by many unknowns with respect to application. It deserves far more study and discussion than is possible here. For example, the treatment of alternatives, public consultation and monitoring differs widely among the various parent Class EA documents, and new versions are emerging which suggest that the field may be in considerable flux. Further, there is a lack of independent evaluation to assess whether Class EAs are delivering all that they have promised to achieve.

(iv) *Relaxed Standards for Approval*

It would appear that practically all EA applications submitted to the EAAB are being approved.[163] And no Terms of Reference have been rejected.[164] Of course, the complement of Ministry staff available to su-

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162 One source emphasized that although the process requirements may be less than those for a full unmodified EA, private sector proponents in this industry are now at least covered by the Act for the first time.

163 One exception noted on the MOE's EA web site is Simcoe County's proposed 2.1 million tonne landfill for the Township of Adjala-Tosorontio (EA submitted May 1997), which was refused on January 22, 2001. According to the posted notice, there were technical concerns about hydrogeological suitability for the preferred site, and insufficient information on protection of ground water resources and the environment was submitted with respect to all candidate sites. Approximately 15,000 submissions opposing the site were received by the MOE.

164 According to information received from Branch personnel at the beginning of March 2001, TORs had been submitted for 31 individual applications. The vast majority of these have opted under s. 6(2)(c) to deviate from the full alternatives formula required

pervise EA matters has been dramatically reduced since the Ministry was downsized by about 40%. The recent report of the Walkerton Inquiry[165] has referred to numerous negative and systemic influences such as"the loss of technical expertise" within the Ministry (at 413), a "34% reduction in funded positions ... between 1995-96 and 1999-00" (at 416), and low morale at MOE "because of the cutbacks" (at 436). The report referred to "the regulatory culture created by the government through the Red Tape Commission review process" (at 33), which "favoured regulation as a last resort" (at 465).[166]

Notwithstanding the large number of applications which have been made to the Minister to elevate individual projects to Part II of the Act (the individual EA process), not one bump-up request has been allowed since the current Government came to power.[167]

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by s. 6.1(2). Twenty-seven of them were approved, eight without amendment and 16 with amendments. Three of them were withdrawn, re-submitted and then approved. Two TORs were withdrawn but not re-submitted. Two had not yet been approved as of that date, and none had been refused. EA Branch staff indicate that these statistics are the most recent available (communication November 8, 2001).

165 *Report of the Walkerton Inquiry - Part One*, Justice Dennis O'Connor (January 2002). Note that the Part Two report has not yet been completed and released.

166 The impact of the Red Tape Commission on the work of the MOE, a comparatively tiny Ministry, is described in the following brief excerpt from the Report, ibid. at 464:

> The Red Tape Commission directed 36 of its 131 recommendations to the MOE. By way of comparison, the Ministry of Labour and the Ministry of Health received 18 and 12 recommendations, respectively. The MOE received by far the greatest attention of any ministry, and the Premier testified that it was high on the priority list of the Red Tape Commission.

167 According to information supplied by staff at the Environmental Assessment and Approvals Branch, during the period from April 1995 to November 2001 a total of 271 bump-up requests were reviewed by the Minister—none were granted. The only exception noted on the Ministry's web site is a request related to a proposed extension of Wonderland Road in the City of London. However, a review of that file by Branch Staff at the author's request has revealed that the bump-up decision in that matter was made on June 14, 1991. The Minister's letter states that the bump-up request was granted because of "the deficiencies in the identification and evaluation of alternatives, lack of meaningful public consultation, and the clear piecemealing of this project."

Branch staff indicated that the Minister's bump-up (Part II) denial decisions "often have conditions and/or commitments attached ... in order to ensure certain outstanding issues will be addressed." In addition, proponents have "been required to explain how they will, or have, addressed the requesters' issues as part of the ministry's review process" (communication November 21, 2001).

The following is a recent example of a bump-up denial. In a letter (October 23, 2001) to the City of Hamilton (proponent) denying a bump-up request with respect to erosion control and leachate management systems for two municipal landfills (Rennie Street and Brampton Street), the Minister stated that "an individual environmental assessment (EA) is not required" or "warranted," and that "the proposed Project has undergone the planning process" in the Class EA. Those requesting the bump-up were not informed

Many examples of approvals involving environmentally questionable projects[168] and the circumvention of EA studies and procedures are available. The case of *Lindsay-Ops Landfill* is illustrative on both counts. This landfill, opened in 1980 and leaking contaminated leachate ever since, is located on the Scugog River[169] where it empties into Sturgeon Lake:

> Although the landfill site comprises 10.5 ha of a 74 ha property, there are virtually no buffer lands on the east, south, west and northwest of the waste disposal area. Drainage ditches, which flow to the Scugog River, run along the southern, eastern and northern boundaries. Further, the aeration ponds and head works for the lagoon system [of the Town of Lindsay's 120 acre sewage treatment facility] are only a few meters from the fill area.[170]

The Board concluded then that this landfill was "not located in a good setting from a hydrogeological point of view nor from a social impact perspective," that leachate "will inevitably reach the bedrock groundwater system and is already affecting the groundwater quality that flows in the granular interbed in the overburden soils," and that the landfill and sewage

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of the request refusal by the Minister or Ministry. A condition was included requiring the City to schedule a monthly meeting with the Community Liaison Committee to report on progress.

168 From "Province suggests Simcoe dump site" by Tracy McLaughlin, *Globe & Mail* (January 30, 2001):

> The Ontario government wants Simcoe County to put a dump smack at the end of an airport runway in Collingwood, a tourist haven on the shores of Georgian Bay, Environment Minister Dan Newman announced yesterday.
>
> Even the province's own Energy Minister, Jim Wilson, MPP for Simcoe-Grey, said the idea didn't make much sense, urging county residents to oppose the plan.
>
> "We spent several million dollars expanding that airport so that jumbo jets could land there in the hopes that the area will become an economic development magnet."
>
> He said that Transport Canada guidelines dictate that a dump can't be located within eight kilometers of an airport, although he tried to mute his criticism, saying he was "satisfied that the Environment Ministry has done its part by making sure there are no scientific hazards."
>
> In selecting the site, the province turned aside a recommendation approved last year by Simcoe County to put the dump about 20 kilometres south of Barrie. The Collingwood site "met the government's strict environmental assessment requirements," Mr. Newman said.
>
> Residents said the new dump would pose a danger because seagulls and other birds attracted to it would get caught in the engines of the planes.
>
> Mr. Newman said the county will be required to set up a bird management program.

169 According to an editorial by Guy Crittenden, entitled "Lindsay Oops!" in the October-November 2000 edition of *Solid Waste & Recycling Magazine*, communities downstream "take their drinking water from systems connected to Scugog River, including Bobcaygeon and Sturgeon Point."

170 From a 1994 decision of the Environmental Assessment Board (file EP-93-02) dealing with an EPA Part V expansion application, at 2.

lagoons "have the potential, by a number of pathways, to contaminate a valuable wetland and the Scugog River" (at 15).

The landfill had been scheduled to close several times, and an EA study process was well underway to select a different facility or system as a replacement. A Waste Management Master Plan process was commenced by the County of Victoria in 1988. A decision had been made to eliminate expansion of this site from further consideration, and it was operating with temporary authority under its fifth emergency Certificate of Approval. Then something abruptly changed:

> However, for reasons that remain unclear, in 1998 then Environment Minister Norm Sterling short-circuited the process that had short-listed three other sites. He moved expansion of the existing landfill to the top of the list. In fact, it was Victoria County's idea to deposit an additional million tonnes of waste at the site and expand its borders to within 500 metres of the Scugog River. The landfill abuts provincially significant Class 1 wetlands that are supposedly protected by special provincial guidelines. The use of controversial liner technology is supposed to alleviate concern. Also, large numbers of seagulls at the site pose a significant threat to aircraft from a nearby airport.
>
> Local opposition to the plan has been fierce but as recently as July [2000] Environment Minister Dan Newman signed and sent letters to opponents to assure them that no approval had been granted and that the matter was still under review.
>
> However, in early August the minister was forced to admit that he had already approved the project on May 31 and that the environmental assessment and review were finished. ...
>
> Government communication about the whole affair was not reassuring. John Macklem, warden for Victoria County, conceded that it's a "roll of the dice" as to whether the expansion can be done without environmental damage.
>
> "But it will be a roll of the dice wherever it will be located," he told reporters.
>
> Mr. Newman said the site is 650 metres from the river, whereas the law requires only a 500-metre separation. But topographical maps show that the boundary of the planned expansion is, in fact, 500 metres from the riverbank and maybe even less.
>
> Government documents suggest that, at the very least, the province shrugged its shoulders and downloaded its rightful responsibilities to the municipal level.
>
> Documents obtained by the *Toronto Star* reveal that from the start there was concern both inside and outside the environment ministry about the County's plans to circumvent the list of already-approved sites and fast-track the Lindsay-Ops expansion. Placing this option above the others was at the very least "questionable" according to one ministry official's note. ...

> At the time, Toronto lawyer Doug Hatch, who acts for a local opponent, warned the ministry that any process that didn't ensure detailed comparisons with the other candidate sites would be contrary to the [EAA]. ...
>
> Interviewed in mid-August after the controversy erupted, Mr. Hatch commented, "You may as well repeal the legislation. It means nothing."[171]

In the editorial Mr. Crittenden related speculation about the possibility of "political interference" in the decision to select and approve the Lindsay-Ops landfill. He concluded with the following comments:

> The Harris government streamlined the *EA Act* but proponents are still required to meet its basic requirements. The process is meant to ensure that decisions are evaluated on their environmental merits and not moved forward from political expediency.
>
> Common sense suggests that the Lindsay-Ops landfill should be closed and that the legally required process should select another site. In the alternative, the public deserves nothing less than a full account of why this bizarre decision was made, and by whom.[172]

In general, it appears that "unofficial" Government policy has negated the validity and importance of EA as a rigorous, methodical and objective planning process.[173] Instead, expedient and extraneous factors are allowed to significantly influence environmental decision-making during, and under the guise of, the EA process.[174]

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171 From Crittenden, *supra* note 169. According to an October 2000 "Staff Report Prepared for the Environmental Commissioner of Ontario" regarding the Lindsay-Ops Landfill, one of the reasons given by the Minister for approval was that the "Government Review Team has indicated no outstanding concerns that cannot be addressed through conditions of approval" (at 7-8). The file review by ECO staff revealed that technical review comments made by MOE staff included concerns about the hydro-geological suitability of the site and several other factors. These concerns were raised at different stages in the progress of the file (at 12).

172 According to EA Branch staff, an EPA application has now been submitted by the County and is under review by the Branch (communication November 8, 2001).

173 One survey respondent indicated that the trademarks of good EA planning (qualities such as transparent, methodical, traceable, iterative, rational and objective) have now largely disappeared from the Ontario process. In his opinion, the quality of EA oversight at the Branch has diminished since the change in Government in 1995, and that many good EA planners there have been systemically driven out.

174 Based on the ECO staff report, *supra* note 171, there were serious questions about the lack of transparency and traceability in the EA decision-making process, an intentional lack of a coordinated technical review (requested by the proponent), and a failure by the proponent's consultants to disclose in EA documentation any internal MOE concerns or comments from residents.

(v) *Reduced Technical Scrutiny*

The apparent trend by proponents of individual waste disposal projects (such as landfills and incinerators) governed by the EAA is to refrain from submitting detailed design and operations plans and specifications as part of the EA. Instead, that documentation is provided sometime after the EAA approval has been received.[175] The effect of this is to shield it from public scrutiny.[176]

EA applications are now practically always approved without referral to a hearing.[177] And once EA approval is granted, the various technical, environmental and site-specific issues of the undertaking (for example, design and operations) are no longer sent to a hearing pursuant to the *Environmental Protection Act* (EPA) or the *Ontario Water Resources Act* (OWRA). This is the case even where such hearings are specifically required by that legislation. Such is the effect of very unusual regulations which were unexpectedly passed after Bill 76 was enacted.[178] Instead of a combined hearing on the proposal (under the EAA, EPA and OWRA),

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175 According to EA Branch staff (communication November 8, 2001), the level of information provided by a proponent is subject to the limits imposed by the Terms of Reference. An EA must provide the Minister with sufficient detail about alternatives ("e.g. footprint, performance criteria, technology, operational characteristics") as would "predict impacts after reasonable mitigation, for comparative purposes." After the preferred alternative is selected, then its design criteria and operational details "may also be revisited, in order to confirm the project- and site-specific impacts and establish that proposed mitigation will mitigate to acceptable levels." Even after EA approval, conditions of approval may require the provision of further information about design and operational details.

176 The following observations were included at the conclusion (at 12) of the ECO Staff Report, *supra* note 171, filed in October 2000:

> Our review suggests that ministry staff raised technical concerns about the suitability of the Lindsay/Ops landfill site at the ToR and EA stages. It is unclear from the public record whether most or all of these concerns were addressed by the proponent and the MOE, and whether too many technical details related to development of the expanded site were left to the *EPA* approval stage, as opposed to being considered through the EA process and its associated public consultation process. Once an undertaking has reached the *EPA* stage the public has no further chance to comment [on an *EPA* approval which might otherwise be posted on the *EBR* Registry] since the *EBR* provisions for public notice, comment and leave to appeal would not apply, due to the exemption found in s.32 of the *EBR*.

177 Only two EA matters have been sent to a hearing since the current Government was first elected in 1995. But even if there is an EAA hearing, one survey respondent noted that if *Adams Mine* is any benchmark, they are even less comprehensive than technical EPA hearings.

178 O.Reg. 206/97 under the EPA was promulgated as part of the implementation of Bill 76. It contains only one provision and exempts from EPA Part V hearings any waste disposal site or waste management system which is proceeding under an individual or

which frequently occurred for such matters prior to Bill 76,[179] no hearings under any of this legislation now occur.[180]

In the result, there is little or no opportunity for scrutiny by the public and the Tribunal into the technical design details of the facility.[181] This is borne out by the dramatic drop in the number of EPA hearings conducted by the EAB or ERT subsequent to the revision of the Act.[182] Not surprisingly, designation under the EAA is probably now attractive to proponents as it ensures that there will be no public hearings under any legislation.[183]

Class EA. Section 1 provides as follows:

> A waste disposal site or waste management system is exempt from sections 30 and 32 of the *Environmental Protection Act* if it is or forms part of an undertaking that,
>
> (a) is subject to section 5 of the *Environmental Assessment Act*; or
>
> (b) is exempt from section 5 of the *Environmental Assessment Act* under section 15.1 of that Act.

In other words, an EPA hearing is now precluded whether or not there is an EAA hearing, and even if the undertaking is exempted from coverage by the EA Act altogether. Similarly, O.Reg. 207/97 under the *Ontario Water Resources Act* (OWRA) exempts a sewage works from hearing requirements under ss. 54 or 55 of the OWRA, provided that the matter is being processed as an individual or Class EA under the EAA—again, whether or not there is an EA hearing and even if the undertaking is exempted from the Act. Section 33 of the EAA, repealed by Bill 76, had provided in essence that in a matter where the EAA applies as well as the hearing requirements of the EPA or OWRA, the Minister "shall order" that a hearing would occur under the EAA only, or the EPA or OWRA only, but not both. It did not pre-empt EPA and OWRA hearings when there was no EA hearing, or when an undertaking was exempted from the EA Act.

179 A joint hearing of this nature was conducted when a proponent served notice to trigger the application of the *Consolidated Hearings Act*.

180 The Supplement to the 1997 Annual Report (*Open Doors*) of the Environmental Commissioner of Ontario included at 3 the following comments on the topic of these Regulations:

- Opportunities for public participation in siting proposals for some waste management sites could be reduced.
- Changes may reduce some duplication and overlap; however, the hearings labelled "duplicate" are not identical in purpose and scope.
- Previously some waste management site proposals required hearings under the EPA; that requirement is replaced with ministerial discretion as to whether to hold an EAA hearing.

181 One practitioner has advised that due to the block on EPA hearings resulting from Reg. 206/97, proponents are motivated to push all technical detail which is allowable out of the EA process and into the subsequent EPA approval component, since that no longer entails public scrutiny and participation.

182 For example, the EAB Annual Report for 2000 indicates that only one EPA application was referred to the Board for hearing during that fiscal year, and none under the OWRA (at 8). The numbers were the same for the previous year. With respect to the *Consolidated Hearings Act*, four applications were received. In the previous year there were three.

183 An example is the application to expand the Energy-From-Waste (EFW) facility of KMS Peel Inc. in Brampton. According to the 1998 Annual Report (*Open Doors*) of the Environmental Commissioner of Ontario, this undertaking "would add a fifth incinerator and boiler, modify the air-cooled condenser, and modify the air pollution control

As an example of the decreased opportunity for technical scrutiny, consider the case of the Safety-Kleen (formerly Laidlaw) waste facility in Sarnia:

> In September 1997, for example, the [MOE] approved a 1.9 million cubic meter expansion of Laidlaw Environmental Services hazardous waste landfill in Sarnia with no public hearing under either the *Environmental Protection Act* or the *Environmental Assessment Act*. This was despite concerns raised by members of the public regarding the proposal. The facility is the only hazardous waste landfill in the province. The expansion is expected to extend its life for another 15-20 years.[184]

The following passage is from the most recent ECO report,[185] which discussed applications for review regarding this facility:

> The ECO's review of MOE's handling of this application has concluded that the ministry did have evidence of potential harm that wasn't considered when the environmental assessment was approved and the C of A issued. The most obvious example is that the landfill expansion was approved in 1997 in part because the thick clay underlying the landfill was expected not to leak for 10,000 years. Just two years later, the ministry had to close the site for 10 days when a significant leak (described by MOE as a "gas and water seep") was discovered in subcell 3 of the newly approved area. MOE's occurrence reports for the facility during 1998, 1999 and 2000, examined by the ECO, provide ample evidence to support the applicants' request for an on-site inspector and better emergency response procedures than were required in the 1997 approval. (at 140) ...
>
> MOE's response to these applications leaves the ECO and the applicants wondering – who is in charge, the ministry or the company? Public confidence in the hazardous waste facility and in MOE's ability to regulate it has been shaken by recent events, resulting in public protests at the company's gate, and prompting these *EBR* applications for review. To restore public trust and its own credibility, MOE has to be seen to be in charge, and to be making decisions in a transparent and accountable manner. Given the interest and concern expressed by the local community, MOE should make reasonable efforts to provide additional opportunities for public participation before it issues instruments such as an approval for the amended Design and Operations Report for the landfill and for modifications to the incinerator. (at 143)

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system" (at 238). The undertaking was designated (brought under the jurisdiction of the EAA) by Regulation 153/98 thereby requiring the preparation of an EA study. The ECO noted that the proponent "requested that the facility expansion be designated under the EAA."

184 Mark Winfield and Greg Jenish, *Ontario's Environment and the Common Sense Revolution: A Four Year Report* (Toronto: Canadian Institute for Environmental Law & Policy, 1999), at 2-11.

185 2000-2001 Annual Report (*Having Regard*) of the Environmental Commissioner of Ontario.

(vi) *Reduced Public Participation*

Bill 76 has made public consultation mandatory for the preparation of a proposed TOR, and also for the preparation of the EA itself.[186] However, no participant funding programs are available at the Ministry or required of proponents to assist the public in studying the various technical and legal aspects of a proposed undertaking.[187] There is no indication that proponents are expected by EAAB staff to consider funding intervenors.[188] The funding regime created initially by Orders-in-Council and then in 1988 by the *Intervenor Funding Project Act* was dismantled when that legislation was terminated by the Ontario Government in early 1996, even before Bill 76 had been introduced.[189]

The importance of funding was recognized long ago. A study conducted for the EAB on public participation observed in 1978 that Board members expect "public interest groups and the lay public to make sig-

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186 Ironically, in the 1996 Annual Report of the Environmental Commissioner of Ontario (*Keep the Doors Open to Better Environmental Decision Making*), the Government was criticized for providing inadequate public consultation on Bill 76:

> This legislation was developed without enough public consultation. The Environmental Registry posting provided only 54 days for comment—not enough time for Ontarians to comment on such a complex initiative. There were legislative committee hearings, but most people cannot participate in those like they can through the [EBR] notice and comment provisions.
>
> The Ministry should have published a detailed, objective analysis of the proposed changes and options, and provided expanded public consultation. (at 23)

187 According to one survey respondent, the termination of intervenor funding has also meant the end of participant funding (funding available before the commencement of the Board's proceedings). The reason is that although participant funding was never mandatory, proponents knew that if they did not make funding available "up front" before the hearing process commenced, they would be ordered to provide it as intervenor funding in any event. The hearing might then be delayed in order to give additional time to the intervenors to consult, investigate and prepare.

188 According to EA Branch staff, the Ministry has no current policy to encourage or require proponents to provide participant or intervenor funding (communication November 8, 2001). With respect to an application to expand the Energy-From-Waste (EFW) facility of KMS Peel Inc. in Brampton, the 1998 Annual Report (*Open Doors*) of the Environmental Commissioner of Ontario noted that comments about the proposal were received by the MOE from three significant public interest groups. ECO's Report noted that the Minister's decision designating the undertaking under the EAA "did not appear to have considered the comments that a participant funding regime be included to allow the public to take a more active and effective role in the assessment process" (at 238).

189 The lack of funding was criticized by survey respondents. One industry representative added, however, that it should be controlled tightly to avoid duplication and misuse, since there were past instances of "exorbitant costs and wasteful use of funds."

nificant and meaningful contributions to hearings."[190] It noted the following survey results:

> The signal from those who have attended Environmental Assessment Board hearings is clear. Members of the lay public as well as applicants and government representatives consider direct funding of research and participation to be the most important option for improving Board hearings.

The report recommended that the Board consider various "methods available for providing direct financial assistance and other resources to interest groups and others who are parties to board hearings under the [EAA], but who are unable to participate fully because of inadequate resources" (at 88). Among other things it proposed "an experimental public participation funding program run by the Board which would encompass both the provision of direct research grants as well as reimbursement of expenses in selected cases."

The following comments with respect to the funding issue were published back in 1981:

> First, funding must be provided by the proponent or government to enable all interests to research, analyze and present all relevant perspectives. Those who object to funding the opponents of a project must recognize that the cost of such participation must be evaluated against the cost of tunnel vision, inadequate information and the frustration of those who are denied full access to the process.[191]

In a submission 20 years later to the MOE, CELA commented on the problems created by the elimination of funding. The following are excerpts from that brief:

> To the contrary, the upfront provision of adequate participant funding is the *quid pro quo* for meaningful public participation throughout the EA process. This is particularly true in light of the highly technical and complex nature of most undertakings which are subject to the EA Act. ...
>
> It should be further noted that the unfortunate demise of the *Intervenor Funding Project Act* ("IFPA") has made it exceedingly difficult for EA participants to secure adequate funding prior to and during hearings before the Environmental Review Tribunal. Significantly, when the IFPA expired, the MOE noted that it was still open to proponents to voluntarily provide funding to public interest

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190 From *A Public Participation Program for the Ontario Environmental Assessment Board*, a study and report by K.F. Mauer, Research Officer with the Environmental Assessment Board (February 22, 1978) at 86.

191 Roger Cotton and Paul Emond, *supra* note 153, at 265.

> representatives. However, the practical reality has been that few, if any, proponents have provided much or any participant funding, particularly for undertakings that were not referred to public hearings. Similarly, commitments by proponents to provide participant funding to citizens' groups have been conspicuously absent from most, if not all, the ToRs that CELA has reviewed to date. In the absence of such commitments, proponents have flatly refused to provide funding in response to reasonable, indeed modest, requests by public interest groups.[192]

The Ministry's advice to the public is to participate early in the process before any decisions are made.[193] Failure to be involved when the starting gun sounds may limit or preclude the entitlement to further involvement, yet experience demonstrates that most people are unaware of proposals at that early stage. In any event, there is no Ministry program to enhance or support public consultation and participation.[194] Moreover, no longer are there hearings for the public to attend in order to learn more about and scrutinize the merits of a proposal.[195] The following observation, made long ago, is still apt:

> Public participation need not have any significant impact on the process. If it is little more than a public airing of concerns, it may only accentuate public hostility by falsely raising expectations.[196]

In fact, the statutory opportunity for public consultation in the early phase (TOR preparation) may now be used as a reason for denying hearing requests, on the basis that the objectors' views have been given early and

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192 Richard Lindgren, *supra* note 146, at 8.

193 The web site advisory (title: "How do people get involved in an Environmental Assessment") cited above, *supra* note 124, states that "Any individual who is interested in the EA proposal, or may be affected by such a proposal, is encouraged to become involved in the process, as early as possible, before irreversible decisions are made."

194 A draft EA consultation guideline prepared by EA Branch staff (December 2000) states that proponents should be "innovative in identifying appropriate measures for effective participation in the EA process" (at 24) and that this "may make the difference between a consultation program that works and one that does not." It lists as examples meeting facilities accessible to the disabled, travel and child care costs for participants attending consultation events, administrative support (photocopying, postage, meeting space) and funding for peer review of technical work. It cautions participants to have "realistic expectations" in this regard.

195 Only two matters, the *Adams Mine* and *Quinte Landfill* EAs, have been referred for hearing since the present Government took power in 1995. The EAB decision in the former is reported as *Notre Development Corp., Re* (1998), 28 C.E.L.R. (N.S.) 1 (Ont. Environmental Assess. Bd.).

196 Roger Cotton and Paul Emond, *supra* note 153, at 273.

ample consideration.[197] In the result, public consultation and participation has declined overall since Bill 76 took effect.[198]

The Environmental Commissioner of Ontario (ECO) has identified other EAA-related problems with and obstacles to public consultation and participation.[199] The EBR exempts from the requirement to post proposal notices for environmentally significant decisions on the EBR Registry those decisions related to undertakings which are subject to or exempted from the EAA.[200] The assumption behind the creation of this posting exemption was that coverage by the EA Act would result in sufficient public notice and involvement, making EBR postings redundant.[201] EA activities are not posted on the EBR Registry, but rather on

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197 Typically, the Minister's reasons for approval without a hearing indicate that she/he has considered all of the comments and submissions about the proposal which have been received by the Ministry, and is satisfied that the concerns expressed can be satisfied by terms and conditions.

198 One survey respondent has indicated that with the advent of scoped Terms of Reference, lack of funding and absence of hearings, "public consultation ... has become a true sham and ... contributes to the poor reputation the EAA process enjoys across the province." In his view, the EA Branch web site is not kept up-to-date, and useful information such as the actual advice offered by the Branch to the Minister at particular stages of applications (such as the Terms of Reference scoping decision) is never posted.

199 This is in addition to the numerous other barriers about which the ECO has reported. For example, a Special Report, *Broken Promises: MNR's Failure to Safeguard Environmental Rights* (June 2001), includes the following statements (at 1):

> I am reporting that the Ministry of Natural Resources (MNR) is thwarting public participation and public scrutiny of environmental decision-making by effectively blocking the final steps in a legal process set out in the *EBR*. I see the need to issue this special report to respond publicly to the long string of broken promises that MNR has made to my office since 1995, each time asserting that the ministry would very shortly be complying with the *EBR* by "classifying its instruments" - in other words, opening its instruments to public comment and review. ...
>
> The practical effect of MNR's failure to classify its instruments is that the public cannot use the *EBR* as it was intended. Over the past five years, our office has been contacted by many Ontario residents with concerns about instruments administered by MNR. Many express shock and disappointment when they learn that MNR's instruments are still not subject to the public comment, review and appeal rights of the *EBR*.

200 The ECO's 1999/2000 Annual Report (*Changing Perspectives*) described at 54 how the MOE refused to post a decision to issue an order under the *Environmental Protection Act* to London Hydro to clean up coal tar contamination leaching into the Thames River from its property. The reason for MOE's refusal to post was that London Hydro is a proponent which is generally subject to the EAA.

201 The following excerpt is from an October 2000 "Staff Report Prepared for the Environmental Commissioner of Ontario" regarding the Lindsay-Ops Landfill (see also note 171 *supra*):

> Both the *EBR* and the *EAA* set out processes whereby the public may become involved in the decision-making process. In enacting the *EBR*, the government did not want to subject some activities to "double jeopardy" whereby they wold be required to go

MOE's EA Activities web site, and some postings have not been made until after considerable delay.[202] For example, some notices have been posted long after TORs and/or undertakings have been reviewed and, in some cases, approved. The tight restrictions for public comment imposed on the EA process by the Deadline Regulation have raised concerns for the Commissioner about public participation.[203]

(vii) *Refusal of Hearing Requests*

A few years before Premier Harris' party formed the Government, he was critical of what he claimed was a lack of full public EA hearings. The following statement was addressed by him to the Minister of Environment at that time (Ruth Grier, NDP):

> The Minister is critical of the former government, I understand that, but let me get it straight. She is critical of it for having shortcuts and having some hearings but not the full hearings. She now has no hearings, absolutely none. The Minister is shortcutting the possibility of any public input. She is shortcutting the possibility of any input from the regions. She is shortcutting the possibility of finding the best environmental solution.[204]

In a departure from the past, each of the five Environment Ministers during the administration of the current Government has refused all re-

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through both the *EBR* and the *EAA* approval processes to obtain the necessary approvals. Therefore, certain exceptions were made under the *EBR* for projects and activities that had received an approval under the *EAA*. (at 2)

202 The ECO criticized the fact that the draft EAA Deadline Regulation was not posted on the MOE EA web site for public comment until eight months after it had been filed (*supra* note 200, at S4-11). With respect to failure to use the EBR Registry the ECO report stated:

> The use of two different Internet sites—the Environmental Registry and the EA Activities Web site—will be confusing to some members of the public. It would be preferable if all the information was accessible through one Registry.

203 Related comments in the ECO's 1998 Annual Report (*Open Doors*) at 235 include the following:

> In those cases where the scope of the proposed undertaking is significant and complex, it will be difficult for members of the public to respond to proposed TOR [terms of reference] documents within such a short time frame.
>
> Some commenters thought that some deadlines contained in the regulation were unrealistic and that there should be a public process set out to extend the deadlines as necessary.

204 Mike Harris MPP in the Ontario Legislature on October 28, 1991 (*Hansard* at 3178). Subsequently, when he was asked in the Legislature as Premier whether he believed that "Ontario's dumps ought to be the subject of full and public hearings under the [EAA], he said "Yes, I do" (October 23, 1995 - *Hansard* at 375).

quests for referral to hearing in every EA case, with just two exceptions.[205] This has occurred even though in some cases large numbers of objectors have filed notices[206] and public concern is widespread.[207] Typically the

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205 *Adams Mine* (EA-97-01), *supra* note 195, and *Quinte Landfill* (EA-97-02). In the opinion of one survey respondent, an environmental lawyer, the elimination of funding and hearings has brought the administration of the EAA process into disrepute. Another noted that members of the public have an automatic right to a hearing before the Ontario Municipal Board on a variety of relatively small planning matters, but cannot get any hearing whatsoever on a new, very large and controversial facility with significant potential adverse environmental impacts.

206 With respect to the Dufferin County Landfill, MOE EA file no. MU-0126(02), the Minister's Notice of Approval to Proceed with the Undertaking (October 23, 1997), approved by Order-in-Council 2087/97, refused requests for referral to hearing and acknowledged that there were "306 submissions received during the Notice of Acceptance 15-day public review period," of which 304 asked for a hearing. A few of these objectors were municipalities. Some objectors also requested mediation. In a subsequent letter to counsel for some objectors the Minister commented:

> I carefully reviewed the concerns raised in the submission and determined that a hearing was unnecessary and any outstanding issues could be dealt with in my decision. As a result, mediation was also unnecessary.

The Township in which the landfill was sited brought an application for judicial review, arguing that the Minister exceeded his jurisdiction in granting approval without a hearing. The court quashed the application on motion, without a full hearing on the JR application: *East Luther Grand Valley (Township) v. Ontario (Minister of Environment & Energy)* (2000), 33 C.E.L.R. (N.S.) 23 (Ont. S.C.J.). O'Connor J. described the onus facing the applicant:

> Thus, to succeed on a judicial review the Township must show the Minister acted in bad faith, or that he clearly failed to comply with the statutory conditions, as per *Ofner, supra*, or that he showed "... the exercise of discretion for an improper purpose, and the use of irrelevant considerations ...", as per *Baker, supra*, at page 224, or that he was biased in his decision or that there is a reasonable apprehension that he was biased. Failing to comply with the statute has been held to mean a failure to consider matters the *Act* requires be considered or considering matters outside of the *Act*. (at 30)

207 In the *Taro Aggregates* case (EA file PR-TA-02), an application for a very large private-sector proposed landfill in a quarry in Stoney Creek (near Hamilton) was approved in 1996 without a hearing. The site, located on fractured limestone near environmentally sensitive areas and hundreds of residents, lacked any natural attenuation or containment, and would require engineering (a double liner and hydraulic trap) to prevent leachate escape and ground water contamination. A nearby site (the "West Quarry"), had been used as a landfill and is the cause of a ground water contaminant plume. The East Quarry application was opposed by residents' groups, the Niagara Escarpment Commission, the Hamilton Regional Conservation Authority and the City of Stoney Creek. The residents claimed that the EA process followed by the proponent was fundamentally flawed. A petition was signed by more than 4,200 people objecting to the proposal, and over 2,000 letters of opposition were sent to the MOE. Yet, no social impact assessment was required by the MOE. And no EPA hearing into the technical issues related to the landfill was ever conducted. A few months before the Minister's decision another large quarry site in the Hamilton area, also with fractured limestone bedrock, was found to be totally unsuitable in hydrogeological terms for landfilling by a Joint Board after a

Minister's reasons for approving a proposal without a hearing include statements similar to the following, and do not mention any of the specific concerns which have been raised about the adequacy and extent of the proponent's EA study:

- the Minister does "not consider it advisable or necessary to hold a hearing";
- "the undertaking should be given approval to proceed";
- the Ministry's "technical review team has concluded that the proposed landfill can be constructed without undue harm to the natural environment";
- "appropriate mitigation measures will be designed into the facility to adequately protect the natural environment";
- there are some government agencies not opposed to the proposal;
- the technical issues raised in the submissions received from the public "will be addressed through EAA and EPA terms and conditions in order to protect the environment;"
- "there are no overriding environmental issues which cannot be adequately addressed through terms and conditions."[208]

(viii) *More Discretionary Decision Points*

Numerous new decision points available to the Minister, Cabinet or Branch Director provide very wide discretion. Little, if any, guidance is found in the Act to direct these decision-makers in making such determinations.

For example, s. 9.2(2) permits the Minister, on referring a matter to the Tribunal for hearing, to give whatever directions and impose whatever conditions "as the Minister considers appropriate" and these must then be observed by the Tribunal under s. 9.2(5). Similarly, under s. 11(1) the Minister may refer a matter, along with binding directions and conditions, to someone other that the Tribunal for a decision "if he or she considers it appropriate in the circumstances."

Perhaps the widest area of discretion without any specific statutory guidance has been retained in the Act and untouched by Bill 76. With

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lengthy hearing: *Steetley Quarry Products Inc. (Steetley), Re* (1995), 16 C.E.L.R. (N.S.) 161 (Ont. Joint Bd.), costs decision at (1995), 19 C.E.L.R. (N.S.) 212 (Ont. Joint Bd.) (Board file CH-91-08).

208 Taken from the Minister's "Notice of Approval to Proceed with the Undertaking" in *Taro Aggregates*, ibid (July 15, 1996) and *Dufferin County Landfill* (October 13, 1997), *supra*, note 206 and the Order-in-Council in *Dufferin* (November 22, 1997).

Cabinet's approval, the Minister may, under s. 11.2(2), vary a decision of the Tribunal, or substitute his own decision in its place, but no principles or limiting factors are identified to guide such an important determination. In some provisions, only vague principles are mentioned, such as being "consistent with the purpose of this Act and the public interest" (from s. 6(4) governing the approval of TORs). The term *public interest* is nowhere defined, and its meaning is considered by some to be less than objective and more in the mind of the beholder.

Even where statutory guidance is provided, it is not necessarily evident to the observer that the decisions being made have followed this direction.

At the time when Bill 76 was under consideration by a legislative committee, the following warning was offered in a submission by Professor Robert B. Gibson:

> Some flexibility is necessary, since the laws have to apply to a range of cases and circumstances. But more flexibility typically means less certainty and less administrative efficiency. Or it is a cover for an intent not to apply the law (which can be certain and efficient, but amounts to a legislated fraud).
>
> The lesson of equally long experience is that clarity and flexibility need to be pursued together in open processes with maximum involvement of the affected parties. Efficiencies are to be gained chiefly through anticipation, integration and, where appropriate, devolution.[209]

The use and abuse of discretion has been a concern in EA systems in general, and the Ontario regime in particular. The following comments about the EAA were published twenty years ago:

> The Act leaves many important decisions to the discretion of those who administer it. Whether an undertaking is subject to assessment depends very much on whether the Ministry of Environment feels it needs assessment. The staff (and the Minister) decide on designations, exemptions, and the initial interpretation of key words and phrases such as "in the public interest." There are no firm guidelines to guarantee that large, obviously significant, undertakings will be assessed. The many discretionary provisions mean that administrative effectiveness and the climate of public opinion will considerably influence the effectiveness of the process.
>
> While discretion is in itself a necessity in such a complex administrative process as environmental impact assessment (where it is impossible to predict every

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209 From "Comments to the Ministry of Environment and Energy regarding Bill 76—*Environmental Assessment and Consultation Improvement Act, 1996*," *supra* note 148, at 7.

> detail or situation that may arise), we are concerned here in general with the abuse of discretion, particularly for political expediency. Few would argue that the government should have no discretionary right of exemption from the process, particularly (as in the case of Quebec and Saskatchewan) in "emergencies." In Ontario the exemptions are much broader. Almost any exemption can be justified as being "in the public interest," particularly if public interest is equated with the interest of the proponent and his customers.
>
> There is clearly a point at which the legitimate use of discretion crosses the line into political manipulation, and it is that abuse of discretion in the process, particularly in Ontario, that concerns us. The excessive use of discretion is, in our opinion, one of the most pervasive and persistent problems in environmental impact assessment.[210]

(ix) *Monitoring, Enforcement & Compliance*

Although they are separate topics, monitoring, enforcement and compliance have been grouped together in this s. for brevity. They are overlapping, inter-related and critical components of an effective environmental program.[211]

The following comments were made in a report to Parliament by the federal Environment Minister:

> Follow-up is an essential component of an effective environmental assessment process. It can help build in accountability and ensure that sound environmental protection measures are in place during construction, operation and decommissioning of a project. Above all, follow-up is a tool for encouraging continuous learning and improvement over the long run—using past experience to improve the quality of future assessments.[212]

The value of post-approval monitoring is well-known:

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210 Roger Cotton and Paul Emond, *supra* note 153, at 257-8.

211 The following perspective is from the 2000-2001 ECO Annual Report (*Having Regard*), at 72-3:

> Legislation and regulations are important. However, they are effective only when companies and residents comply with them—and if ministries enforce them when they are contravened. Compliance with a particular Act or regulation is usually said to be achieved when a large portion of companies and residents subject to its requirements adhere to it.
>
> Ontario residents want to be assured that our environmental laws are being followed by industries, municipalities and others who discharge pollutants. Fair, firm and consistent enforcement ensures that good environmental performers are recognized for their efforts and poor performers are penalized. Moreover, firm enforcement ensures that ecosystems are protected and human health is safe-guarded.

212 *Strengthening Environmental Assessment for Canadians* (March 2001), *supra* note 59, at 20.

> For example, the information gathered through well-designed monitoring programs can allow the proponent to make necessary adjustments or improvements during the construction, operation, or maintenance phases of a project's life.
>
> Similarly, this information may provide important data for the proponent and others for the purposes of any future planning, design, construction, operation, maintenance, shutdown or decommissioning of the undertaking or similar undertakings. In addition, "proper awareness and surveillance of requirements helps to identify and deal with on-site problems quickly, so as to reduce possible environmental damage, public complaints and delays to the construction schedule."[213]

Two different types of monitoring have been the focus of particular attention:

> "Compliance monitoring" refers to activities which may be undertaken at the operational or post-project stages to ensure that regulations have been obeyed and standards have [been] met by the proponent. More specifically, compliance monitoring is undertaken to ensure that the proponent has done everything it was supposed to do in relation to the undertaking ...
>
> "Effects-effectiveness monitoring" refers to activities which may be undertaken in the post-approval period to assess the actual environmental effects of an undertaking, and/or to evaluate the effectiveness of measures intended to prevent, mitigate or remedy those effects. In particular, effects-effectiveness monitoring usually involves the comparison of the *predicted* environmental effects to the *actual* environmental effects with a view to determining whether the measured environmental changes are attributable to the undertaking. Thus the utility of such monitoring is often contingent on the availability of sound baseline information ...[214]

Despite repeated recommendations made in the past, there are still no mandatory provisions in the EAA requiring monitoring of approved undertakings to assess the predictive accuracy of the assessment[215] and

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213 Richard Lindgren, *Monitoring and Environmental Assessment in Ontario* (Toronto: CELA, 1994) at 8-9. The quoted reference in this passage is at 39 of the 1990 MOE report, *Toward Improving the Environmental Assessment Program in Ontario, supra*, note 88 and see Appendix 9 at the end of this article.

214 Ibid. at 10-12.

215 Some research has identified "the difficulties of accurately predicting and understanding ecological responses to incremental human intervention." See Wismer, Shuter and Regier, *supra* note 53 at 2. According to one survey respondent from industry, studies indicate "that fewer than 5 studies out of a thousand could be verified to have accurately predicted or mitigated the expected impacts." Without EA verification and post-EA audit, this respondent maintained that "EA does not learn from experience or mistakes and does not gain experience." An illustration of this "information feedback" is found in the *Eastview Road Landfill* case, involving a municipal waste facility in Guelph established in the early 1960s. In a 1993 decision concerning an expansion application,

ensure that the projects are performing as expected and not causing negative environmental impacts.

There is no requirement for monitoring exempted undertakings to ensure that they do not exceed what was promised at the time the exemption was sought and granted.[216] Nor are there programs established by the EAAB to ensure that such investigations are conducted, or that there has been compliance with EAA conditions of approval.[217]

If, on the other hand, an undertaking requires that a Certificate of Approval be issued under the *Environmental Protection Act* or the *Ontario Water Resources Act*, then any "terms and conditions" or "conditions of approval" included in that Certificate would more likely be monitored

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the EAB (file EP-92-02) found that contaminated leachate had been leaking from the landfill for many years. It referred to a 1971 decision of the Ontario Municipal Board which had approved the site over opposition from residents who were concerned about "the danger of polluted wells and water courses due to the possible escape of leachate" (EAB at 22). The OMB decision cited technical evidence adduced by the City which had assured the Board that impermeable seals used in each of the landfill cells would prevent leachate escape. The OMB accepted this evidence but the landfill leaked nevertheless.

216 An example of this involves the building of the Highway 407 west extension by a private consortium through Burlington in 1999. The undertaking had been exempted from the EAA by the Minister. Residents near the Cavendish Woods (located on Crown land) viewed the plans earlier that year and had been satisfied that the very large and old hardwood forest located between their homes and the highway right-of-way would not be significantly reduced beyond a previous tree removal program carried out in 1996. According to residents, the developer arrived without warning on a Saturday morning and began to clear-cut a large swath (up to 300 m) of old forest, apparently as a project cost-cutting measure. Even though promises were subsequently made to municipal officials to suspend cutting after complaints were lodged by local residents, the developer continued to remove the forest. Residents were informed that no action could be taken by the municipality or the Ministry of Natural Resources.

217 One survey respondent indicated that post-approval monitoring and follow-up under the EAA is not occurring, and the investigation and enforcement of compliance with conditions of approval is minimal. It appears that there has been no improvement since Richard Lindgren, *supra* note 213, wrote the following in 1994:

> Considerable concern has also been expressed about the Ministry's general lack of monitoring programs, guidelines or objectives. For example, in 1985 the Ministry's E.A. Branch conducted an audit of approved undertakings to determine the level of proponent compliance with conditions of approval. Incredibly, the study concluded that the E.A. Branch was unable to verify from its files if terms and conditions have been met. A similar study by the Ministry's Management Audit Branch found that the E.A. Branch staff had no specific review procedures for ensuring fulfilment of conditions of approval. (at 18-19)

The CIELAP *Four Year Report* (1999), *supra* note 184 at 2-12, noted that the Provincial Auditor's Annual Report of 1997 had identified a "lack of indicators to measure and report on the effectiveness of the [EA] process and monitor compliance with the terms and conditions of approved projects."

and enforced in the normal course by MOE inspection and enforcement staff.

The Environmental Commissioner of Ontario has identified problems with EAA contraventions and enforcement involving other Ministries as well as the MOE.[218]

Approvals of undertakings under the EA Act are often accompanied by numerous terms and conditions, and some of them may be vital with respect to environmental protection. It is clear from past decisions of the EAB that in some instances approvals were granted reluctantly, and only on the strength of conditions which were considered necessary to ensure such things as vigilance and early contingency response, if needed.[219] The Board's problem with this lack of oversight and enforcement by the Ministry was noted publicly years ago:

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218 For example, the ECO's 1999/2000 Annual Report (*Changing Perspectives*) described at 97-98 repeated problems with compliance by the Ministry of Natural Resources of some EAA terms and conditions which were included in the EAB's Class EA approval in 1994. The quality of MOE's investigation into complaints of non-compliance was criticized by the ECO:

> MOE's reports to the applicants [complainants] and to the ECO have been very poor. MOE has provided misleading, and in some cases, incorrect information that appears simply to summarize MNR's response to the allegations. Several of the MOE reports acknowledge that MNR has not yet implemented certain conditions, but then merely pass along MNR's promises to develop policy or produce reports "in the near future." Applicants deserve a clearer and more objective response to the allegations of *EAA* contraventions made in *EBR* applications.

In fact the Ontario Divisional Court found (and was later upheld by the Court of Appeal) that MNR had violated several terms and conditions of the Class EA: *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)* (1998), 26 C.E.L.R. (N.S.) 163 (Ont. Div. Ct.), additional reasons at (1998), 27 C.E.L.R. (N.S.) 218 (Ont. Div. Ct.), reversed in part (1998), 29 C.E.L.R. (N.S.) 29 (Ont. C.A.), additional reasons at (2000), 32 C.E.L.R. (N.S.) 233 (Ont. C.A.).

219 This is illustrated in the following comments from the Board's 1994 decision in *Lindsay Ops*, *supra* note 170, discussed earlier (in which all of the parties at the hearing agreed to approval of the expansion application only after negotiating a set of terms and conditions), at 15-16:

> From an operational point of view, the evidence is that the site has not been operated in accordance with its Certificate of Approval. ...
>
> We have carefully reviewed the evidence, both written and oral, and have come to the conclusion that the five year expansion can be approved subject to the stringent Conditions of Approval as set out in Appendix A and subject to additional conditions which we will require.
>
> We believe that the expansion will prolong the period of time during which leachate will emanate from the site. However, the application for expansion and the interest of the neighbouring residents has led to more comprehensive investigation of the potential for environmental degradation and to more comprehensive safeguards which are ensconced in the Conditions of Approval.
>
> The proposed Public Review Committee will have an important task to perform - to ensure that the Conditions of Approval are strictly enforced.

> Certain decisions on approval would not have been given without specific terms and conditions attached. The Board has expressed concern that certain conditions established on approval are not being monitored for compliance and there is no formal process or procedure in place to monitor compliance. Some recent approvals have included conditions to require compliance reporting by the proponent but as with most other conditions there is no Ministry program in place or individuals responsible for administration, verification and enforcement. At present, the responsibility of the EA Coordinator ends once the undertaking is approved and no one is assigned responsibility for monitoring a project during implementation.[220]

Without monitoring, surveillance, policing and enforcement terms and conditions are ineffective. Yet these important oversight activities appear to have diminished even further.[221] The Environmental Commissioner of Ontario has collected evidence which "suggests that enforcement and compliance activities in several ministries remain uneven across the province and contravenors often are not brought to justice in cases where firm action appears warranted."[222] And the Walkerton Inquiry reported that one of the "most significant deficiencies associated with the MOE" was "the preference for voluntary rather than mandatory abatement."[223]

In a Special Report (*Accountability and Value for Money*, Fall 2000), the Provincial Auditor of Ontario published the following findings related to the MOE:

- A reduction in staff of 25% over the last four years had contributed to a 34% decrease in the number of ministry-initiated inspections conducted per year. Further, the Ministry identified significant violations in 31% of the inspections conducted. The rate of non-compliance would have been even higher had many violations the Ministry considered minor been more appropriately treated as significant.
- The Ministry relied extensively on facility operators to comply voluntarily rather than impose stringent enforcement measures, such as issuing control orders or laying charges. This was of particular concern as one third of violators were repeat offenders. In addition, the Ministry did not appropriately follow up on many violations to ensure that deficiencies had been corrected. ...

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220 From the 1990 MOE report, *Toward Improving the Environmental Assessment Program in Ontario*, *supra* note 88 at 40.

221 According to one government source, MOE Operations and Field Staff no longer monitor compliance, and staff in Toronto almost never go out into the field.

222 2000-2001 ECO Annual Report (*Having Regard*), at 73.

223 *Report of the Walkerton Inquiry*, *supra* note 165, at 25.

- The Ministry typically learned of contaminated sites only after serious harm to the environment had already occurred. This made it difficult to hold facility operators responsible for the damages where significant clean-up costs were required and long time periods had elapsed. The Ministry needs to develop a strategy for early identification of high-risk contaminated sites to allow for better planning and prioritization of clean-up efforts. (from s. 3.06, at 111-112)

There is evidence of an apparent aversion by the current Ontario Government to utilizing prosecutions as an enforcement tool.[224] There are also problems with the short limitation period (6 months) and low sentencing limits should prosecution for breach of EAA conditions be pursued (a fine of no more than $10,000 for a first offence).[225] The problem is compounded further when violations of the EA Act are also committed by the staff of provincial departments.[226] Moreover, with so many personnel cut from the Ministry since the current Government was elected in 1995, staff are scarce at the best of times.

Illustrative of these concerns, among others, is the case of a road project (Airport Parkway at Hunt Club Road) by the City of Ottawa

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224 From Martin Mittelstaedt, "Few Ontario Polluters charged, environmental group says," *Globe & Mail* (November 5, 2001):

> Polluters broke Ontario water regulations nearly 10,000 times between 1996 and 1999 but only 11 of the facilities dumping toxic and other harmful chemicals into waterways were charged, according to a report being released today.
>
> The report by the Sierra Legal Defence fund [*Ontario, Yours to Pollute*], an environmental lobby group, says the province rarely prosecutes repeat offenders of pollution laws, often exempts companies from its clean-water rules, and asks businesses to comply voluntarily with regulations.
>
> This policy approach is a failure, according to the report, which argues that asking companies to obey regulations voluntarily "has proven to be an extremely ineffective method to ensure compliance with the law."

225 Under s. 38, failure to comply with a term or condition of approval can lead to a maximum fine of $10,000 on a first conviction, and $25,000 maximum per day for subsequent convictions.

226 The 1997 Annual Report of the Environmental Commissioner of Ontario (*Open Doors*) detailed in the Supplement at 40 the following request from the public for investigation filed with the ECO (file 196017):

> The applicants alleged that MNR approved construction of a road, clearing of vegetation, construction of parking facilities and construction of a boat ramp without following the public participation procedures set out in MNR's Class EA for Small Scale Projects. The allegations related to access to two lakes in Temagami's Cross Lake and Baie Jeanne (on Lake Temagami).

The MOE's Investigation and Enforcement Branch investigated and MNR was charged in connection with construction of the access road to Cross Lake. MNR pleaded guilty in Provincial Court and was fined $1,200 in December 1997.

reported in the most recent Annual Report of the Environmental Commissioner of Ontario.[227] It arose out of an EBR application for investigation alleging EA Act violations by the City:

> The applicants alleged that the City of Ottawa improperly assessed project costs and split modifications ... into several parts ("piecemealing") instead of considering the components as one project. The Class EA requires varying levels of environmental assessment work based on the type and estimated cost of the project. Generally, smaller components of work involve a less rigorous level of environmental review and public consultation. The Class EA prohibits piecemealing and requires holistic planning so that the potential impacts of the entire project can be assessed together.
>
> The City of Ottawa is also alleged to have proceeded with new additional modifications to the Airport Parkway prior to properly completing the monitoring and assessment of existing Parkway modifications. MOE required this monitoring in 1997 when the public raised concerns about *EAA* compliance.
>
> The applicants asserted that the City of Ottawa's alleged failure to comply with *EAA* and Class EA requirements has resulted in the development of a commuter expressway without proper consideration of environmental effects, and has caused much higher traffic flows and a decreased quality of life in downtown Ottawa neighbourhoods.

In denying a bump-up (or Part II order) request in 1997, the Minister promised that any breach of the Class EA would be sent to the MOE Investigation and Enforcement Branch (IEB). Subsequently, (April 1999) information about violations was sent by the complainants to the EA Branch which took five months to respond. It forwarded the information on to the IEB, but due to the passage of considerable time the six month limitation period had expired. In April 2001, about the time the EA Branch was submitting comments to the ECO about this case, it also initiated discussions with the City about its non-compliance.

The ECO's review of the matter led to the following findings:

> The purpose of the *EAA* is the protection, conservation and wise management of Ontario's environment. When proponents fail to properly assess and minimize the impacts of a project being planned under the *EAA*, the natural environment and communities can suffer from adverse impacts. In this case, the applicants alleged that improperly planned modifications to the Airport Parkway dramatically increased traffic volumes in certain downtown Ottawa neighbourhoods, resulting in degraded environments in those communities.

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227 File no. I2000007, Supplement (at 224-2) to 2000-2001 Annual Report (*Having Regard*) of the Environmental Commissioner of Ontario.

> The ECO is pleased that the ministry took action in April 2001 to act upon the citizens' concerns about *EAA* compliance. However, these steps, taken only after a lengthy delay and public accountability problems, should have begun sooner. As the public authority responsible for administering the *EAA*, EAAB had an obligation to respond promptly to public complaints, completely document the alleged *EAA* contraventions, and closely monitor the proponent's ongoing activities to foster compliance.
>
> Clearly, EAAB needs to establish a strong program of compliance monitoring to promote environmental protection and meet its Statement of Environmental Values requirements. Therefore, we are encouraged to learn that the Branch is developing a compliance strategy for the EA program. ...
>
> The *EAA*'s six month limitation period (provided for in the [*Provincial Offences Act*]) is inadequate and has serious implications for *EBR* applications for investigation. MOE was not proactive in following up on this project after initial findings of non-compliance, and it took EAAB two years to make a "preliminary" determination of additional non-compliance after a local resident brought information forward.
>
> The *EAA* requires its own limitation period that reasonably reflects the timelines associated with planning, constructing, operating and monitoring the complex projects such as roads, sewage and water treatment facilities, landfill sites, forest management plans and electricity generating facilities that proceed under the legislation. The ECO urges the ministry to act quickly in making appropriate legislative amendments and will monitor the ministry's progress. Increasing the statutory limitation period in the *EAA* to two years or more will make the Act more consistent with other provincial laws such as the *Environmental Protection Act*, *Public Lands Act*, *Crown Forest Sustainability Act* and federal laws such as the *Fisheries Act* and the *Canadian Environmental Protection Act*. (at 226)

The ECO's Annual Reports routinely recite situations in which people have been complaining about serious difficulty in having terms and conditions enforced. The following excerpt from the most recent ECO report[228] is an example related to an EAA-approved undertaking:

> The Safety-Kleen facility is Ontario's only commercial hazardous waste landfill and incinerator. Given the nature of this facility's activities, it is, not surprisingly, subject to heightened public concern. ... [S]ince January 1998 this facility has been the subject of hundreds of complaints. The ECO also requested copies of and reviewed almost 300 occurrence reports logged by MOE in a 25-month period between 1998 and 2000 related to Safety-Kleen's operations. A voluntary approach has been used extensively over this period to attempt to resolve compliance issues such as complaints from residents about odour, exceedances of air emissions and groundwater limits, and instances of non-compliance with reporting requirements. Safety-Kleen has arrangements with MOE so that the

228 Ibid.

> facility itself in many instances investigates complaints about its own non-compliance incidents, and reports back to MOE without verification or validation by the ministry. When MOE has confirmed non-compliance, the ministry has usually requested the facility to provide a mechanism and a timeframe for achieving compliance instead of using mandatory compliance measures. The large and continuing number of complaints suggests that the voluntary approach may not be capable of solving some of the problems that can result from such operations. (at 81) ...
>
> In its response to the applicants, MOE said that a full-time geo-technical engineer was not needed because Safety-Kleen employs consultants, including geo-technical consultants, and their information is submitted to the ministry in an annual report. But the current system has not been working. The ministry's occurrence reports show that MOE found that Safety-Kleen failed to submit a number of results of monitoring programs to the ministry in its annual reports in 1998 and 1999, as required. (at 140)

The following observations, though made several years ago, still seem to accurately reflect the fundamental significance of the apparent continuing deficit in both monitoring and enforcement:

> The general absence of comprehensive post-approval programs in Ontario suggests that monitoring is regarded as a relatively unimportant "add-on" component of the E.A. process. This perspective unfortunately fails to recognize the importance of ensuring that the proponent fulfills all conditions of approval and commitments made during the E.A. process. More fundamentally, the lack of rigorous post-approval programs raises serious questions about the utility and ability of the *Environmental Assessment Act* to meet its stated purpose of ensuring the protection, conservation and wise management of Ontario's environment.[229]

(x) *Reduced Independence of Tribunal*

Information published by the MOE and the Environmental Review Tribunal indicates that it is an "independent" and "quasi-judicial" decision-making body.[230] However, on several counts this claim to independence is without foundation.[231]

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229 Richard Lindgren, *supra* note 213 at 2.

230 The Tribunal's Annual Report for 2000 states that its "mandate is to provide both an independent and impartial review of the decisions of Directors ... and a fair and unbiased public hearing process that assesses the merits of proposed development projects, plans or programs that will have an impact on the environment" (at 3). It describes itself as "a quasi-judicial tribunal, subject to the rules of natural justice and the requirements of the *Statutory Powers Procedure Act*." In the MOE's information advisory entitled "Mediation" the Board is referred to as "an independent and impartial tribunal."

231 Not that an administrative tribunal is necessarily required to be independent (as is the case with judges and the courts), provided that its mandating legislation so provides. A

Genuine judicial independence[232] generally implies no direct or indirect control, influence, conflicts of interest, relationship with any of the parties to the proceedings, close relationship with counsel, stake in the outcome of any hearing, or any other strings (actual or apparent) attached.[233] But as well as needing impartial and independent decision-

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decision of the Supreme Court of Canada in September 2001 held that such boards are "created precisely for the purpose of implementing government policy" (par.24), and that legislatures can legitimately determine their composition and structure: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52 (S.C.C.) (File 27371). The following excerpt is from par.20 of the judgment:

> This conclusion, in my view, is inescapable. It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be considered as a whole to determine the degree of independence the legislature intended.

232 Good reasons can be advanced in favour of applying to tribunals the same standards of independence required of the courts. The following excerpt is from Mr. Justice David Marshall, *Judicial Conduct and Accountability* (Toronto: Carswell, 1995):

> Put simply, to accomplish their judicial role in society, judges must be separated from government and indeed from all concentrations of power. To ensure this separation, judges must be given certain powers and protections others do not have. ... In the past, it has been kings, queens or parliaments, powerful industrialists, or powerful trade unions [with concentrations of power]. But these are not unique. Any concentration of power that is hindered in its pursuits or views by law or constitutional rule will be tempted to set aside, ever so little, for even so short a time, the Rule of Law. Like a chameleon, different ways at different times will be sought to pervert judicial independence. Novel times will bring novel attacks on judicial independence, and society must be vigilant. One thing is certain—the temptation for those in power to bind the independent will of judges will not go away in a democracy. Indeed, such grasping is a part, perhaps not a noble one, but a part of our human nature. (at 4-5)

233 From an address by The Honourable R. Roy McMurtry, Chief Justice of Ontario, on November 20, 1997 to the Conference of Ontario's Boards and Agencies (COBA):

> Independence means, of course, having administrative justice agencies and their adjudicators so positioned and organized that they see themselves and are seen by others as being free to decide undeterred by outside influences or fear of personal consequences. (at 5) ...
>
> Fundamental to a high level of administrative justice is the requirement that tribunals be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way which reflects respect for their independence. If appointments are made for short terms and poorly remunerated with no security of tenure, this could invite in the appointees either a passive commitment or create a deterrent to courageous judgment calls. It is clearly essential that the collegial internal tribunal environment be not dominated by fear of non-renewal. (at 12-13)

makers,[234] independence also requires institutional independence.[235]

Bill 76 altered a long-standing legislative prohibition against Government employees being appointed to the Board. This rule was based on the view that public servants might have loyalties to their employer which are inconsistent with Board independence. For example, future promotions and appointments would continue to be within the control of the Ontario Government as their employer. A Government career employee would probably also have loyalties to other employees and colleagues (especially those from the same Ministry). Or at least it might appear this

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234 The following comment by Margaret Marland (PC MPP) was made during proceedings of the Standing Committee on Government Agencies (Appointments Review) on January 30, 1991 in opposing the appointment of a candidate for Vice-Chair of a tribunal (*Hansard* at A-141 to 143):

> Therefore, the total objectivity of the vice-chair, in fairness to everyone and to maintain the credibility of that tribunal, has to be paramount in our decision today. I would be saying exactly the same thing if we had a very talented person whose background was totally on another side. ... I realize that a chair must be neutral at all times. We read in the newspapers every day that when a judge cannot be neutral or exposes himself to too many hard facts, he is criticized by the general public and his peers.

235 Mr. Justice David Marshall, *supra* note 232 at 17-18:

> Independence, the Supreme Court [in *R. v. Valente* (1985), 24 D.L.R. (4th) 161] concluded, was of two types—individual independence and institutional or collective independence. The court attempted to further delineate the relationship between these two aspects of judicial independence in this way:
>
> > [A]n individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.

way to some parties appearing before the Board.[236] This restriction was removed from the EAA by the current Government.[237]

Within a year of Bill 76 coming into force the presiding Chair of the Board[238] was replaced with an Ontario Government employee of long standing on secondment. The Chair, who assigns members (including himself) to sit on each particular case, reports directly to the Deputy Minister of the Environment. At present, there are no sitting members at the ERT who had been term appointees under previous governments.[239]

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236 From Cotton and Emond, *supra* note 153, at 260:

> A federal task force on environmental impact assessment has suggested that such a board or tribunal should be a "non-partisan, independent body without vested interests." "To confirm this independence and disinterest," the task force suggested, "the board would have none of the regulatory, administrative or other routine responsibilities of a department of government, nor should it in any way be part of any department." To enhance the likelihood of independence from government, it might also be suggested that members should be full-time, and appointed for a fixed term with guaranteed tenure and salary. They should not be "on loan" from government departments or filling up their retirement years with part-time "charity." The method of appointment of members may be crucial to determining whether they are representative of the community and independent of government.

Draft provincial EA legislation was proposed by J.F. Castrilli, David Estrin and John Swaigen in "An Environmental Impact Assessment Statute for Ontario with Commentary," chapter 10 at 319 of P.S. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Research Foundation, 1975). With respect to appointments and membership, s. 3 of the proposed legislation included the following criteria, among others (at 323-4):

> (4)(b) No person shall be appointed to the Board who is, or was at any time in the three years previous to his appointment, a public servant or civil servant of Ontario or Canada or of any agency of the Crown, or who is a sitting member of the Legislative Assembly of Ontario. ...
>
> (5) Membership on the Board shall at all times be
>
> (a) individuals competent in matters of environmental control and conservation or
>
> (b) Justices of the High Court of the Supreme Court of Ontario or
>
> (c) a combination of (a) and (b).

237 With respect to the composition of the Board, the phrase in former s. 18(2), "none of whom shall be employed in the public service of Ontario in any ministry," was removed by Bill 76.

238 She was a full-time member of the Board for approximately 11 years, seven of them as Chair, but was abruptly dismissed with only a few days notice. This occurred at the same time the *Adams Mine* matter, *supra* note 195, a highly politicized landfill proposal, was referred by the Minister to the Board for hearing.

239 From Jonathan Eaton, "Questions growing on picks for tribunals," *Toronto Star* (December 22, 1997):

> Now, some high-profile members of the legal community are voicing fears that Ontario's system of administrative justice is in danger. The way appointments to these tribunals are being handled by the Mike Harris government, these people assert,

Of the five full-time members currently on the ERT, including the Chair, four have been appointed by the present Government.[240]

Structurally, the Tribunal is financed directly by the MOE. The Minister has a role in the selection of the Chair and members, although candidates are politically screened by the Premier's office and ultimately appointed by Cabinet order. Appointments are generally for short fixed terms, not exceeding three years. Reappointment of a member is subject to the whim of the Ontario Cabinet.[241]

Apart from all of the decision-making powers of the Minister to control other aspects of the EA process, as discussed above, the Minister's array of powers in connection with the Tribunal include:

- deciding which, if any, cases are referred to the Tribunal, under s. 9.1(1);

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has sent a chill through the system so severe that it could be fatal.

The following is from James Rusk, "Appointments to welfare board bring accusations of patronage," *Globe & Mail* (October 12, 1995):

> Two weeks after Ontario's Progressive Conservative government fired four members of the province's Social Assistance Review Board reportedly as a cost-saving measure, it appointed three former Conservative election candidates to the board. ... [The Minister] defended the moves. "These appointments were done on the basis of principles, not politics," he said. "We wanted individuals who would take a tough stand on welfare and welfare fraud." ...
>
> [An opposition member] added that the position taken by the minister—that the new members were selected because they would be hard on welfare fraud—violates the principle of the board's independence as a quasi-judicial agency.
>
> "The minister has no right to give it (SARB) instructions. The law, the (welfare) act, gives it instructions and the board adjudicates ..."

240 According to the 1999-2000 ERT Annual Report, one of these members, a former federal Progressive Conservative politician, was appointed within four months of the Government coming to power. This occurred at a time when the Board was downsizing and not seeking new members due to budget cuts. Another is a former provincial Progressive Conservative candidate and municipal politician. The latest appointee is a former senior MOE employee and principal in an environmental consulting firm which has been actively involved in EA matters. The other full-time member (other than the Chair) had been a long-standing member of the Environmental Appeal Board before it was amalgamated into the ERT.

241 From Jonathan Eaton, *supra* note 239:

> [Ron Ellis] described how some adjudicators have been routinely reappointed by the Harris government while others have been "summarily dismissed, suddenly, unexpectedly and inexplicably."
>
> In short, he said, the government is "screening out" decision makers who appear to be unpopular with the government or its allies. ...
>
> [T]he Harris government's appointment process was "fundamentally incompatible with the principles of natural justice ... Ontario adjudicators no longer have reason to be confident that they can make their decisions without fear of personal consequences."

- selecting those issues in an application which the Tribunal will be allowed to consider, under s. 9.2;[242]
- informing the Tribunal in advance how she will decide other aspects of the application which were not sent to the Tribunal, under s. 9.2(3);
- giving binding directions and imposing conditions on the Tribunal at the time of referral, under s. 9.2(2);
- binding the Tribunal to the TOR which was approved at the outset of the EA process, under s. 9.1(4);
- issuing policy guidelines which the Tribunal must consider, under s. 27.1;
- imposing deadlines on the Tribunal for any matter referred to it, under s. 9(5);
- appearing as a statutory party at all EA hearings, under s. 19(3);
- changing part or all of a Tribunal decision (with Cabinet's approval) within 28 days, under s. 11.2(2);
- subsequently reviewing and reconsidering the Tribunal's decisions, under s. 11.4.[243]

By maintaining publicly that an "independent" quasi-judicial board is available to make important and difficult decisions, while at the same time exerting behind the scenes an almost ubiquitous control over the board, its personnel and process (such as terminating the system which provided funding for intervenors and participants), the Government appears to be trying to have it both ways. The outcomes and procedures which the Government desires are practically assured, while the responsibility for the decision-making appears (to the uninformed at least) to lie with an ostensibly detached, non-political, arm's-length agency.[244]

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242 The EAB's view of having issues scoped by the Minister when referring matters for hearing, was expressed in the following excerpt from an EAB submission to EAAC, and found in Part 1 of EAAC's report (1991), *supra* note 89, at 38:

> As the tribunal charged with the responsibility of adjudicating on the impacts of an undertaking, the EAB should not be placed in the untenable position of having issues, which it concludes are relevant and important to the proper exercise of its jurisdiction, hidden from scrutiny as a result of this proposed authority. The Board is concerned about the possible perception of political interference.

243 Amendments have removed the power of the Tribunal to review and reconsider its own decisions under s. 21.2 of the *Statutory Powers Procedure Act*. Now, reconsideration of an approval decision can only be authorized by the Minister (or delegated by her to the Tribunal) if there is a change in circumstances or there is new information about the application: s. 11.4.

244 According to commentators, this is a long-standing problem which appears to be endemic with almost all governments and tribunals across Canada, except for Quebec

By way of illustration, the Tribunal has been focusing on the issue of speedy scheduling of hearings as a top priority. It issued a written practice direction ("Guidelines on Requests for Adjournments") which referred to a report from a Government committee calling for hearings to be completed within one year of the date of filing.[245] The practice which resulted is discussed below:

> To expedite hearings, the board established the practice of setting hearing dates regardless of prior commitments of the parties and placed strict limits on adjournments. In one case, the parties asked for an adjournment in order to undertake tests that would help them establish terms for a settlement. The board initially refused this request, forcing the parties to undertake unnecessary and expensive negotiations with the board. The board adjusted its stance on setting dates after repeated objections from parties who now have a range of seven days from which to choose. ...
>
> The single-minded focus on timelines has, however, also led to some poor results, and some unsatisfactory decisions ... that participants have described as "rushed through with unseemly haste."[246]

However, there is a credibility problem with trying to have it both ways. The point of having an independent decision-maker such as an arm's length tribunal is to have decisions which will be perceived as neutral, fair, rational and acceptable. The ERT, and more importantly its decisions, will not be considered credible by the public if independence is lacking. Skepticism is enhanced by efforts made to promote the fiction of Tribunal independence. This facade undermines credibility even further.

Concerns about integrity and independence of the ERT (and EAB) are far from new. Note the following observations made in 1978 with respect to the EAB:

> In addition to establishing an internal and external image for the Board, it is also important that the Board establish its independence from the Ministry of Environment. As already noted, the questionnaires from hearing participants suggested that there is a great deal of confusion in the minds of the public about the Board's relationship to the Ministry. Many of those who responded to the questionnaire thought either that the Board was a part of the Ministry or that it was

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which fundamentally changed its administrative law system in 1996. For example, see paper ("Super Provincial Tribunals") by Ron Ellis (November 2001) presented to the Canadian Bar Association (National Administrative Law Section Annual Conference).

245 The Guidelines referred to the *Report of the Special Review Committee on the Review of Regulatory and Adjudicative Agencies Draft Performance Measures* (March 1999).

246 From Karen Clark and James Yacoumidis, *supra* note 6 at 32.

responsible for enforcing pollution control standards, a task of the Ministry of the Environment.[247]

(xi) *Increased Discretion for Tribunal*

Bill 76 and more recent amendments have provided the Tribunal with some new discretionary powers. It may on its own choose under s. 11(7) to refer an aspect of an application to someone else ("another tribunal or entity") to decide, even though this aspect might be a central issue in the application.[248]

The Tribunal was also given the power (similar to that of the Minister) under s. 11.1(2) to defer deciding any aspect of an application because it "is being considered in another forum or for scientific, technical or other reasons."

In amendments to the EAA made in 2000, the Tribunal was given the discretion under s. 20(1) to render a decision in an application without ever conducting a hearing, even though it was expressly directed by the Minister to hold a hearing before making its decision. It is understood that the purpose of this change was to permit the Tribunal to make a decision based on an agreed-upon settlement reached by the parties prior to presenting all or even part of their evidence.[249]

There are two concerns about this interpretation. The first is that the EAB has for many years been making decisions based on settlements of the parties, provided that it is satisfied "that the project is consistent with

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247 From *A Public Participation Program for the Ontario Environmental Assessment Board*, *supra* note 190 at 142.

248 This power was apparently used by the Board in the *Adams Mine* landfill decision, *supra* note 195, in a manner which was very controversial, although it survived a judicial review challenge. The site was a very large former open-faced quarry near Kirkland Lake, now full of water derived from ground water infiltration. The proposal was to fill the quarry with millions of tonnes of garbage hauled by rail from Toronto. The majority of the hearing panel, in a 2:1 split decision, decided that the ground water and leachate issue required further borehole testing under the quarry in order to determine the environmental safety of filling the quarry with garbage. Leachate control had been the only issue referred to the Board by the Minister, who indicated in advance that all other aspects of the proposal would be approved. The majority ordered that further drilling and testing should occur, and that a MOE Director should review the results and then make the decision as to whether leachate from landfilling would escape from the site, or be adequately containable and collectable. The Director complied with the majority decision and gave his approval. Opposing parties viewed this as an improper delegation of decision-making authority, since the Director (an employee of one of the parties at the hearing, the MOE, which supported the undertaking) was in effect making the central decision in the matter.

249 Communication from Tribunal counsel on June 5, 2001.

the purpose and provisions of the relevant legislation, and is in the public interest."[250] This new legislative authority was not considered necessary. Secondly, the wording of the amendment does not so limit this new authority.

At the same time, an amendment was made to the Act which provided that a decision by the Tribunal would not be treated as "invalid solely on the ground that a matter was not addressed by testimony at a hearing": s. 20(2). Presumably, the purpose behind this change is related to the new power to decide without a hearing, although this amendment does not in any way restrict it to that situation. It is not clear whether objections based on natural justice and fairness would prevail in the face of such explicit statutory authority, should the Tribunal begin to make decisions which rely on technical or other knowledge acquired from sources other than the evidence given at or filed during a hearing.

(xii) *Budgetary Restrictions*

A pervasive influence on the ability of MOE staff members, including those in the Environmental Assessment and Approvals Branch, to fulfill their responsibilities has been the enormous budget cuts which the Ministry sustained both before and since 1995.[251] A request for information

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250 From s. 1 of the "Guideline for Consideration of Agreements," one of the guidance documents appended to the *Rules of Practice* for the ERT (*www.ert.gov.on.ca/rules.htm*). The information required by the ERT is outlined in the following excerpt from the Guideline:

> The Tribunal will determine whether it is satisfied through the documentation provided by the parties (which should be logical and traceable and include the rationale for each aspect of the agreement) and any oral evidence, if required. The Tribunal will identify for the parties what oral evidence, if any, or further documentation it will require.
>
> If the documentation is sufficient and the parties are prepared to waive their right to a Hearing, the Tribunal may decide that a full, formal Hearing is not necessary and accept the agreement and approve the project. Section 4 of the *Statutory Powers Procedure Act* [SPPA] allows for this.
>
> There would in all cases be a preliminary hearing. A public meeting (usually in the form of a public evening session) should be held by the Tribunal before it decides not to hold a full and formal hearing and before it decides to approve the project.

Section 4.1 of the SPPA provides: "If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise."

251 Some of the negative effects of declining funding on the MOE's ability to perform were noted in *Managing the Environment: A Review of Best Practices*, a recent report. It resulted from a study commissioned by the Government with respect to "overall management effectiveness" at the MOE and best practices utilized by other environmental departments and agencies. The study was directed by a former Ontario Deputy Minister,

regarding the budget allocation for the Environmental Assessment and Approvals Branch (and the previously separate Environmental Assessment Branch) as well as the size of its staff, for current and past years, was refused.[252]

During the five-year period before the current Government was elected, operating expenditures were reduced by $92 million (25%) to $271 million, with staff count reduced by 98 people (4%) to 2,208. During the five-year period after the current Government was elected (1995-96 to 1999-00) operating expenses were reduced by another $97 million (36%) to $174 million, and the staff count reduced by an additional 834 people (38%) to 1,374. MOE operating expenses by March 31, 2000 were less than half (48%) of what they were in 1990-91.[253] The following observations are from Justice O'Connor's Report (Part One) from the Walkerton Inquiry:

> The reductions were initiated by the central agencies of the government, rather than from within the MOE, and they were not based on an assessment of what was required to carry out the MOE's statutory responsibilities.
>
> Before the decision was made to significantly reduce the MOE's budget in 1996, senior government officials, ministers, and the Cabinet received numerous warnings that the impacts could result in increased risks to the environment and human health. These risks included those resulting from reducing the number of proactive inspections - risks that turned out to be relevant to the events in Walkerton. The decision to proceed with the budget reductions was taken without either an assessment of the risks or the preparation of a risk management plan. There is evidence that those at the most senior levels of government who were responsible for the decision considered the risks to be manageable. But there is no evidence that the specific risks, including the risks arising from the fact that the [laboratory testing results] notification protocol was a guideline rather than a regulation, were properly assessed or addressed.[254]

According to this Report, Cabinet approved the MOE's 1996 business plan and published it without including "assessments of the adverse impacts or concerns about increased risks to the environment and human

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Valerie Gibbons, and released in January 2001.

252 Communication from Branch staff on December 13, 2001. The author was advised that he could pursue this request under the Ontario *Freedom of Information and Protection of Privacy Act*.

253 These figures are taken from tables provided in the *Report of the Walkerton Inquiry*, *supra* note 165, at 414-5.

254 Ibid. at 34-5. The 'central agencies' referred to in this passage included Management Board Secretariat, Ministry of Finance, Cabinet Office and the Premier's Office.

health resulting from the budget reductions" (at 412). The report continues:

> In fact, the business plan that was released to the public promised reforms "without lowering the current high level of environmental protection in Ontario."
>
> One cannot help but question the basis for this statement, given the nature of the risks identified in the original business plan and the failure to conduct a risk assessment or develop a risk management plan.

Tragically, this so-called high level of environmental protection did not in fact exist.

The ERT's statutory power to retain experts[255] survived the legislative amendments.[256] This option may have had less significance when there was a program available for intervenor funding, since opponents were enabled thereby to competently scrutinize and challenge technical evidence advanced by the proponent and MOE.[257] But the provision of intervenor and participant funding has all but disappeared since the Ontario Government terminated the *Intervenor Funding Project Act* in 1996, and the ERT has no technical staff of its own. Nor does it have any budget allotment for such purpose.[258] Its *Rules of Practice* identify this power[259] although its public information flyers on EAA hearings do not refer to it.

Without the budget to retain such witnesses, the Tribunal's ability to independently verify expert evidence has been diminished, if not lost. It appears that neither the EAB nor ERT have used this power since the

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255 For more detail on the EAB's power to retain and call expert evidence, see Robert B. Eisen, "Expert Opinion Evidence at Environmental Board Hearings" (1989), 3 C.E.L.R. (N.S.) 63.

256 The authority to do so was transferred from s. 18(10) of the EAA to s. 6 of the new *Environmental Review Tribunal Act, 2000*. It permits the ERT to "appoint from time to time one or more persons having technical or special knowledge of any matter to inquire into and report to the Tribunal and to assist the Tribunal in any capacity in respect of any matter before it."

257 In all but a very few hearings, the Ministry's position (despite claims of neutrality) has provided support for approval of the undertaking, and its witnesses buttress the evidence advanced by proponents. More than one survey respondent has noted MOE's lack of critical commentary in Government Reviews (described as very superficial), and blamed the EA Branch for a perceived lack of adequate direction and guidance for proponents and other parties. According to this view, this problem in turn could have been a factor leading to longer hearings and a refusal to approve applications.

258 There is no indication in the Tribunal's 2001-2002 Business Plan (posted on its web site at *www.ert.gov.on.ca*) or its Annual Report (1999-2000) that money has been allocated for this purpose, or that it has even been considered as an expense category.

259 Rule 64 states: "At the request of a party or on its own initiative, the Tribunal may retain any person having professional, technical or other special knowledge and expertise to give evidence in respect of any matter before it."

current Government came to power. This is not surprising given the extent of its budget cuts.[260] It has assumed a more passive than investigative role and depends strictly on the evidentiary base provided by the parties.[261]

(xiii) *Reduced Opportunity for Judicial Review*

The EA Act does not provide for any appeal from decisions made by Cabinet, the Minister, the Tribunal or MOE staff such as Directors. Given the number of decision points which now exist in the process, the extent of direct political control over the EA system, and the very broad discretion permitted to decision-makers, one of the only avenues left for redress from serious errors and potential abuse is that of judicial review (JR). In general, however, parties have had very limited success in seeking judicial review of administrative and executive decisions made in the Ontario EA process.[262]

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260 For the 1994-95 fiscal year the budget of the former EAB was approximately $2.31 million, and for the Environmental Appeal Board $596,000 (total $2.91 million). The Approved Budget for the 2000-2001 fiscal year for the Tribunal (the combined Boards) was $1,577,000 (a drop of 46%).

261 By way of contrast, the following excerpt is from the Chair's Message in the EAB's 1992 Annual Report:

> We are seeking clear statutory authority ... so that we can operate more in the mode of a public meeting or public inquiry where appropriate; and to strengthen our ability to conduct our own investigations. The Board seeks to obtain better information faster, but intends neither to side-step issues of concern to the parties involved in our hearings, nor to circumscribe their legitimate right to a hearing, which will always be open and accessible to the public. In fact, we hope that this type of mixed approach to our process, both adversarial and investigative, will make the process more informal, understandable and less legalistic to the average participant. (at 3).

In this regard, a 1991 paper ("Ontario's Environmental Assessment Process") to the Canadian Institute for Administrative Justice, by former EAB Vice-Chairs Jim Robb and Len Gertler, stated:

> The EAB has identified three attributes of the investigative model that it believes will improve the hearing process. The first is direct access by the public to the hearing with minimal obstacles by way of intimidating rules. This could be described in today's jargon as a more user-friendly setting. The second aspect of the investigative model is its potential to allow direct probing of issues by the Board. And finally, the investigative model accommodates the judicious use of expert staff (with proper safeguards) to assist the Board in interpreting specialized and technical information, and to pursue information gaps. (at 13)

262 This type of relief is sought by application to the Divisional Court (a branch of the Superior Court of Justice) pursuant to the *Judicial Review Procedure Act*. In *Save the Rouge Valley System Inc. v. Ontario (Attorney General)* (2001), 41 C.E.L.R. (N.S.) 295 (Ont. Div. Ct.), (File 576/01) the applicant sought a judicial review of the Minister's EA approval of a road (an extension of Bayview Avenue in York Region), but was

In an amendment made in 2000, the "privative" clause in the Act (a provision which is intended to limit or preclude appeals to or review by the courts) was replaced so as to require the application of the "patently unreasonable" test in any and every judicial review challenge of a Tribunal decision.[263] This test is the most stringent hurdle for a JR applicant to clear in the hierarchy of tests. The amendment seeks to oust the common law approach of imposing different standards depending on several factors including the type of decision under review, the nature of the error or problem which has been alleged, and the type and expertise (based on qualifications and experience) of the tribunal.[264]

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unsuccessful. McRae J. stated:

> It is not however for the court on judicial review to analyze and test the adequacy or otherwise of the assessment. ...
>
> The decision of the Minister to approve the project was an exercise of his discretion. The courts will not review the decisions of a Minister unless it is made in bad faith, was in excess of his jurisdiction or was patently wrong. That is not the case here. (para. 11 and 12)

263 New s. 23.1 provides that an ERT decision "is final and not subject to appeal ... and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable." Prior to this amendment the applicable provision was s. 18(25), which stated:

> No decision, order, direction, resolution or ruling of the Board shall be questioned or reviewed in any court and no proceeding shall be taken in any court by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, application for judicial review, quo warranto, or otherwise to question, review, prohibit or restrain the Board or any of its decisions, orders, directions, resolutions or rulings.

264 From Chris Paliare and Robert A. Centa, "Grounds for Review: A Primer" at tab 5 of *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (Toronto: Canadian Bar Association - Ontario, 2000), at 21-4:

> The pragmatic and functional approach to determining the standard of review recognizes that it is now appropriate to speak of different standards of review. The standards of review span a spectrum of relative deference to the administrative body. Some decisions of administrative bodies are entitled to a high level of deference; other decisions are entitled to no deference at all. The Supreme Court has defined three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness. ...
>
> Courts must consider four categories of factors when determining the appropriate standard of review for a statutory appeal or judicial review: the presence or absence of a privative clause; the relative expertise of the tribunal to the court on the matter in issue; the purpose of the statute as a whole and the provision in particular; and the nature of the problem before the board. ...
>
> If the court concludes that the appropriate standard of review is patent unreasonableness, counsel challenging the decision will have a difficult time convincing the court to interfere with the decision of the tribunal.

In his paper "Recent Developments in Standard of Review" at tab 14, Professor David J. Mullan (Faculty of Law, Queen's University) describes a possible fourth standard which has been identified in one Supreme Court judgment as a "clearly wrong" test (at 16). Patent unreasonableness, which involves paying the greatest level of deference to

The virtual loss of recourse to a judicial review based on the merits practically eliminates the possibility of securing an outside and independent examination of EA decision-making. Without such checks and balances in the system, effective accountability is lost.

6. COMMENTARY

> *"Many of the significant environmental problems identified in this year's report," Miller said, "come from our inability to look at the whole landscape when making our decisions and to incorporate an ecosystem perspective into those decisions."*[265]

Environmental assessment, done properly, is designed to produce comprehensive and integrated decisions which will prevent future environmental problems. Since 1995 the Ontario EA program (apart from the Class EA system, which requires far more study and independent evaluation) has been incrementally reduced to little more than an expedited approvals system[266] for individual projects, involving relatively few private sector activities (e.g. industry) and most often processed through relatively speedy, and sometimes simple, self-assessments.[267]

It would be difficult to claim that these changes have complied with the goals and principles articulated in MOE's *Statement of Environmental Values*, a document which is supposed to inform the Ministry's legislation, Regulations, policies, programs and decision-making and has been in place since 1994.[268]

The preceding sections have attempted to catalogue the details of the transformation in the Ontario regime and provide a synoptic view of the contemporary provincial EA landscape. That exposition was the primary purpose of this article.

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the judgment of a tribunal, has been likened to "irrational" or "not in accordance with reason" by the Supreme Court of Canada, and called "a very strict test" (at 18). Professor Mullan listed four different situations which another Supreme Court opinion described as possibly involving a patently unreasonable decision, namely where it (1) is punitive, (2) violates the *Charter*, (3) is missing a rational connection between breach, consequences and remedy, and (4) is inconsistent with the legislation's purpose (at 19).

265 From a News Release (October 1, 2001) by the Environmental Commissioner of Ontario at the time of releasing his 2000-2001 Annual Report, *Having Regard*.

266 Other descriptors which have been used in some quarters are: free of red tape, stripped-down, stream-lined, efficient, predictable, affordable and timely.

267 Some practitioners have indicated that the Ontario EA program no longer includes a planning process.

268 Reproduced at Appendix 14 of this article.

What follows in this section is a brief discussion of some general observations which emerge from a review of the multitude of changes in EA legislation, Regulations and administration which have been occurring since the current Government came to power.

(a) What Was Promised

The current EA program does not resemble what the current Government promised to create in 1995. A few examples illustrate the almost total disconnect between what was envisaged and what has been delivered.

- Shortly after coming to power the Premier commented on the fundamental importance of a full EA process:

> I want to say very clearly to the member that the last time a government decided to skip full environmental assessments, skip the wishes of the people, skip this whole process, short-circuit everything, was when his party was in power and they proceeded to try to force mega-dumps on the people in and around Metropolitan Toronto without a full environmental assessment. ... I want to tell you that we made a decision then and there that that was not the role of the government - not to short-circuit the process, not to do that.[269]

- In its first year in power, the Government terminated intervenor funding legislation. The Minister of Environment made the following comments at that time about this program:

> One of my foremost considerations ... has been the continuation of a system which will ensure effective public participation in government decision-making. ... In addition, we will continue to encourage proponents to provide participant funding on a voluntary basis. With these measures, we are confident that there will be minimal impact on public accessibility, and that hearings will result in balanced and informed decisions.[270]

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269 Premier Mike Harris on October 23, 1995 in the Ontario Legislature (*Hansard*, at 375-6).

270 Correspondence from Minister Brenda Elliott to the EAB on March 28, 1996. During 3rd reading debate on Bill 76, MPP Doug Galt (PC), Parliamentary Secretary to the Environment Minister, made the following comments by way of response to comments from the opposition (*Hansard* - October 31, 1996):

> You made reference to participant funding, and the funding can also be involved in this. That can be part of the proposal of the proponent or part of the objection of the public if they feel there should be some funding in there, and the proponent can provide it and it can be agreed to by the minister. It really comes down to what the minister's provided [sic] to sign off on and have up front in those terms of reference.

- When introducing Bill 76 for first reading, the Environment Minister said, among other things:

> A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, the role of the Environmental Assessment Board as an independent decision-maker.
>
> These amendments will ensure high-quality environmental protection while making it easier for people to participate in the decision-making process.[271] ...
>
> All proponents will be subject to full environmental assessments. Of that my colleague opposite can be absolutely assured.[272]

- Shortly before Bill 76 was enacted, the Environment Minister was asked why, in view of the Premier's position that "we ought to consider all options for disposal of waste and that any option must be subject to a full [EA]," the rules were being changed so that this would no longer be required. He answered:

> Under the new act we are passing we will be giving waste disposal sites full environmental assessment. I don't see what has changed.[273]

- During third reading debate over Bill 76 the Parliamentary Secretary to the Environment Minister said:

> We have taken great pains to ensure that the key elements of environmental assessment are maintained. These include ... the examination of alternatives in environmental decision-making, and an independent Environmental Assessment Board. These defining features of the EA process will not change.[274]

- The following comments about the importance of public consultation were made by a Government Member during that debate:

> One of the most important parts of Bill 76 is consultation. Consultation

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271 Minister Brenda Elliott on June 13, 1996 in the Ontario Legislature (*Hansard* at 3529).

272 Ibid. at 3538. The last statement was in response to an opposition question: "will you absolutely guarantee today that all landfills in Ontario will be the subject of full and public hearings as well under the *Environmental Assessment Act*?"

273 Environment Minister Norm Sterling on October 17, 1996 in the Ontario Legislature (*Hansard* at 4615).

274 MPP Doug Galt (PC) on October 31, 1996 in the Ontario Legislature (*Hansard*).

> of course is essential to any democratic process. Nowhere is this more true and important than when it comes to environmental protection. ... We must remember that when an environmentally significant project is set up in a community it is the community that must live with the consequences. That's why the decision-making process has to be as inclusive as possible. People have the right to voice their concern when it comes to such far-reaching decisions. This right should be ensured right from the beginning, rather than when things have proceeded to a point where the momentum is hard to stop.
>
> The airing of public concerns is at the heart of the environmental assessment. In addition to ensuring that the important environmental issues get resolved, consultation gives people from all sides the confidence that their concerns have been heard and adequately dealt with. ...
>
> Public consultation is the cornerstone of any successful environmental assessment process. Throughout the development of Bill 76, this government has gone to great effort to enshrine the public's right to a say in environmental assessment.[275]

- The following statement is from a Ministry bulletin published at the time that Bill 76 first came into force:

> EA Board hearings will be focused on outstanding contentious issues ... [I]ssues will be identified and resolved early on through Terms of Reference and mediation ... The key elements of an EA will be maintained and will include a broad definition of environment and identify which alternatives will be examined. ... The public's right to request a hearing remains an integral part of the Act. No one wants unnecessary or lengthy hearings. When a hearing is in the public interest, the Act allows the Minister to focus the hearing to outstanding, environmentally contentious issues only ... If hearings are required, concentrating on specific outstanding issues only will prevent the rehashing of issues which have already been resolved.[276]

As discussed earlier, the current EA program in Ontario no longer appears to involve a full EA process, the examination of alternatives, participant or intervenor funding, significant public accessibility and participation, resolution of public concerns, or public hearings.

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275 MPP Tom Froese (PC) on October 31, 1996 in the Ontario Legislature (*Hansard*).

276 Ministry of Environment and Energy, "In Brief" no.1, January 1997. This reflects the shift in approach with respect to alternatives and hearings, which became evident at the implementation stage of Bill 76.

(b) Predictions by Commentators and Critics

While the current Ontario EA program may not resemble what was promised by the Government or match the description of it found in previous or current Government informational publications, it nevertheless appears to bear an uncanny likeness to the predictions and warnings made early on by many critics and commentators.

Immediately after Bill 76 was first tabled in the Legislature by the Environment Minister (without any advance public consultation), an opposition critic voiced several concerns, some of which are reflected in the following passage:

> However, the amendments announced by the minister today will undermine parts of the EA process.
>
> There is still no guarantee that new landfill sites will be subject to a full public hearing despite promises by the Premier as recently as last October here in this House ... Public involvement at the front end of the process is all very well, but it won't do the public any good at all if there turns out to be no EA at the end of the day.
>
> Furthermore, landfill or incinerator proponents will not necessarily have to look at alternatives. It depends on what kind of business they're in. An incinerator company or landfill company may not have to look at the alternatives like the three Rs - recycling, reuse etc. ...
>
> The legislation politicizes the EA process, and it actually could at the end of the day shut out public participation, which is another recurring theme in the actions of this government.[277]

Shortly after Bill 76 was introduced, CELA submitted a critique which included the following comments:

> Contrary to assurances provided by the Minister ... Bill 76 does *not* guarantee that full [EAs] will still be required, even for waste management facilities or other environmentally significant undertakings. Similarly, Bill 76 does *not* guarantee early or effective public participation in the EA process. In addition, Bill 76 does *not* reduce uncertainty or unpredictability within the EA process.
>
> In general, the amendments contained in Bill 76 undermine or negate many of the essential elements of the existing EA process. Moreover, the Bill 76 amendments do not properly reflect or implement the reforms recommended by [EAAC]. Accordingly, Bill 76 represents an unjustifiable rollback of the current

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277 MPP Marilyn Churley (NDP) on June 13, 1996 in the Ontario Legislature (*Hansard* at 3531).

> EA Act, and Bill 76 should be either withdrawn or substantially amended to address the following concerns ...[278]

CELA's brief discussed problems anticipated with, among other things, exemption declarations, terms of reference, public consultation, the Minister's decision powers, funding, Class EAs, monitoring and compliance, as well as objecting to the failure of the amendments to deal with extending the Act's coverage of the private sector, assessment of policies and programs, incorporation of cumulative effects and ecosystem principles, and integration of EA and land use planning.

The Ontario Association for Impact Assessment, which had an EA Reform Sub-Committee actively involved in the issue of reform, submitted comments after Bill 76 was introduced.[279] The following are excerpts from OAIA's submission:

> We would like a clearer idea of how the government proposes to use the broad range of discretion that would be provided by Bill 76. Section 6.2(3), for example, allows the Minister or her delegate to approve terms of reference that override all of the fundamental principles that would otherwise be required under this legislation. We would support a tighter definition of these powers within the legislation itself, to assist in generating certainty and confidence over the longer term. ...
>
> Old policies and practices are being stripped away, with little assurance as to the content of new regulations and policies that will determine how the Act is to be applied. The Act gives the Minister or her delegate extensive powers to relieve proponents of the need to comply with fundamental EA requirements. We are concerned that the nature of these powers is not fully reflected in supporting material released to the public on the proposed legislation. There is some uncertainty as to whether there will be a predictable framework for future EAs, or whether new terms of reference will be dealt with on a case by case basis. (at 2-3) ...
>
> Although the scope of this discretion [the TOR scoping decision] may become clearer through future regulations and guidelines, we suggest that the Act is an appropriate vehicle for establishing the minimum that will be expected of proponents, and that this be given expression in the legislation. (at 4) ...
>
> We are concerned that the new legislation would open up potential for civil servants to be appointed as board panel members. The credibility of EAB and Joint Board panels depends to a large extent on their arm's length relationship

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278 From the Executive Summary of *Submissions of the Canadian Environmental Law Association to the Standing Committee on Social Development re Bill 76* (July 1996).

279 The submission (July 26, 1996) was made to the Ontario Standing Committee on Social Development. OAIA membership includes EA practitioners from both the public and private sectors and includes planners, engineers, scientists and lawyers.

> with government. We would appreciate clarification of the circumstances in which a public servant appointee would be seen to be warranted, and how the government intends to maintain the independence of Board panels, given this and other changes including the scoping of hearings and reduced tenure for Board members. (at 6) ...
>
> At the same time, we believe that the definition of "class" should be more specific, making reference to projects that recur and are similar in nature and scale, with environmental effects that can be readily mitigated.
>
> The required contents of a Class EA set out in proposed section 14(2) appear to relate more closely to a project evaluation type of approach, rather than the scoped planning process traditionally associated with Class EAs. It is our view that Class EAs for individual projects should continue to include statements on need and alternatives, unless this is clearly inappropriate in the circumstances. ...
>
> Proponents should not be permitted to subdivide larger projects so that they can be approved under Class EAs on a piecemeal basis, rather than under an individual EA. (at 8)

OAIA expressed concern about the use of timelines and "ensuring that significant issues will be before the Board" (at 6). Among other things, it sought the inclusion of funding, justification of need, alternatives to and alternative methods in the EA study process, extension of EA to the private sector, "application to broad scale policy or 'strategic' planning" (at 3) and the evaluation of cumulative effects, sustainability protection of natural capital, and the effects of malfunctions and accidents.

The Canadian Institute for Environmental Law and Policy also provided critical submissions on Bill 76.[280] The following excerpts address only a few of the various issues discussed in CIELAP's brief:

> [T]he scope of the environmental assessment process would be significantly narrowed. Indeed, the process could cease to be an environmental planning process. Rather, there would be a focus on the review of the immediate and direct environmental impacts of proposed undertakings. Issues related to the need for undertakings, and the availability of less environmentally harmful alternatives, seem likely to be removed from the process. (at 1) ...
>
> The Bill makes no provision for the establishment of "participant" or "intervenor" funding to replace the IFPA. This will present significant barriers to the participation of individual citizens, and community and public interest organizations, in the environmental assessment process. (at 2) ...

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280 Dr. Mark Winfield, *Brief to the Standing Committee on Social Development Re: Bill 76* (Toronto: CIELAP, August 1996).

> [I]n order to be meaningful, the Act should specify requirements for consultation from the earliest stages of environmental assessment planning through the entire assessment process. In addition, following the model of the *Environmental Bill of Rights*, the Act should specify minimum requirements in terms of the form that consultation should take. The Act should also be amended to ensure free and timely public access to all relevant environmental assessment documentation. (at 5) ...
>
> In practice, this provision seems likely to result in the *de facto* repeal of the current provisions of the Act to consider the rationale for the undertaking, alternatives to the undertaking and alternative methods of carrying out the undertaking, as it is unlikely that any proponent would propose terms of reference including these elements. The removal of these requirements would introduce a fundamental change to the purpose and structure of the Act. The Act would cease to be a pro-active environmental planning statute. Rather, it would become a reactive process, focused on the mitigation of the likely direct and immediate impacts of undertakings. (at 6) ...

During third reading debate on Bill 76, the opposition environment critic's remarks included the following statements:

> When I look at the legislation that's come forward from this government or the policy initiatives, they are largely designed to move us back 20 or 30 years in terms of our treatment of the environment. ...
>
> [T]he minister now has sweeping new powers. Oh, when you're a minister, you like to have that. I'm not convinced it's healthy for democracy, but these are sweeping new powers. ...
>
> The bill takes away far too many powers from the Environmental Assessment Board and grants the minister sweeping discretionary powers over environmentally significant projects. By tying the hands of [EAB] members, the board is now severely limited in its ability to provide objective, independent advice on environmental issues. ...
>
> Although we support the inclusion of mandatory public consultation on EA documents, the government has eliminated intervenor funding. That means that few groups will have the resources to participate in the EA process. So once again we divide Ontario into the rich and the not-rich, and the rich shall prevail ...[281]

In a detailed analysis of Bill 76 published after the amendments came into force, Professor Valiante made the following concluding observations:

> The recent overhaul to Ontario's EA program was intended to "modernize" the process and make it more efficient and effective. Starting with the CELRF study

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281 MPP James Bradley (Liberal) on October 31, 1996 in the Ontario Legislature (*Hansard*).

in 1986,[282] several waves of comprehensive reform identified in great detail the framework for a better EA program, all with the hope that EA could at last fulfill its potential to improve environmental quality and achieve sustainability.

The EA reforms that were adopted drew from this framework, but somewhat selectively. The Act now provides legal authority for deadlines, public consultation, class EA, mediation and harmonization which will help make the process more efficient, at least in the sense that proponents will traverse it more quickly. The most salient feature of the EA reforms is the enhanced degree of discretion in the Minister of the Environment over whether any process need be followed and what its components will be in individual cases. This discretion is largely unlimited by legislated criteria governing its exercise. Because of the uncertainty associated with how this discretion will be exercised, the promised efficiency may be superficial and effectiveness may be compromised. Early indications are that EAs will be narrowly focused, leaving issues of need and alternatives (and the value choices within them) out of the required analysis.

Furthermore, the EA reforms did not draw on some of the most fundamental aspects of the recommended framework. Most importantly, issues of broader application of the process, participant funding, fair appeal process, mandatory follow-up, and integration with other decision-making processes were ignored. Also ignored was the practical difficulty of imposing higher expectations on a depleted staff. These choices may mean that EA in Ontario becomes increasingly ineffective as its full scope will apply to ever fewer proposals, the public will be less able to participate effectively and decisions will be made in isolation from other related decisions. There seems to be little hope that this new program will lead directly to a more sustainable future or to the "betterment of the people of Ontario."[283]

Despite the Government's public pronouncements to the contrary, it appears that the critics and commentators apparently understood and expected from the beginning that the game plan of the Common Sense Revolution in this area was to retain the EAA (for little more than public relations purposes) but effectively neutralize most aspects of Ontario's EA program.[284]

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282 *Supra* note 87.

283 *Supra* note 11, at 263-4.

284 The Gibbons report, *Managing the Environment: A Review of Best Practices* (January 2001), *supra* note 251, a major study requested by the Secretary of Cabinet, provides very scant attention to EA in its 355 pages or so (including appendices and summary). The Gibbons study deals with "overall management effectiveness" at the MOE and best practices utilized by other environmental departments and agencies, and was directed by a former Ontario Deputy Minister. The summary states that the "origin of our review was the Government's stated commitment to establishing Ontario as a leading environmental jurisdiction and as a model in the future for other jurisdictions to emulate" (at 1). Last year the Government began to implement the report's recommendations. One survey respondent indicated that the lack of focus on EA in this report reflects the Government's goal of "planned obsolescence" for the EA program.

(c) Exercising Discretion

Broad discretionary power and direct political control were present to some degree in the legislation long before the current Government came to power, but they did not produce a program remotely similar to the current regime. Although the Government has made a myriad of changes to legislation and regulations, this does not explain the type and quality of decision-making which has been occurring under Ontario's EA program. The present regulatory structure need not (and should not) be necessarily applied in this fashion since practically all of the decision-making throughout the process is discretionary.

Of course Bill 76 (in particular, the elimination of the acceptance decision, and introduction of broad ministerial scoping powers) has seemingly made it much easier for this Government to strip away all vestiges of a modern EA process and step backward into a simplified approval regime where only two questions appear to be relevant: what are the likely serious negative environmental impacts of a proposed undertaking, and can they be more-or-less mitigated at a modest cost now or sometime in the future if the undertaking should prove to be really troublesome?

It appears that little else is at play any more. However, what is also actively operating and possibly expanding is direct political intervention in, and micro-management of, the EA process and decision-making. Enabled by overly broad discretionary authority, this contributes to the growing loss of faith in the system. The following comment, made two decades ago and focused on the issue of exemptions, continues to resonate:

> The result is public cynicism about the effectiveness of the process. These decisions have been perceived to have been made in a haphazard manner, subject to political whim and according to the desires of those who have the most to gain by avoiding assessment.[285]

It appears to those on the outside that it is the private and unofficial adoption of this concept of a comparatively fast, simple and politically controlled approvals system which has uniquely informed EA decision-making under the Common Sense Revolution and produced the current state of affairs.[286] Several attempts have been made to petition the courts to overturn decisions which appear to have distorted, or even abused, the exercise of discretion in this context. But for the most part, as discussed

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285 Roger Cotton and Paul Emond (1981), *supra* note 153, at 251.

286 The distaste of the Ontario Government for the EA process is discerned in the following comment by Environment Minister Brenda Elliott when she first introduced Bill 76 on

previously, the threshold of persuasion in judicial review applications of this nature has been extremely high, practically beyond reach.

Finally, it would appear reasonable to conclude that the exercise of discretion in contemporary Ontario EA decision-making (involving the host of changes made to the EA regulatory system itself, as well as the routine administration of it) has excluded, if not disavowed, the goals and principles enunciated in the MOE's own *Statement of Environmental Values*.[287]

7. CONCLUSION

> *"By giving communities more access during the early phases of the process, we will avoid the costly and time-consuming assessments that were all too common in the past," Mr. Sterling said. "We are making the Environmental Assessment Act more effective and, at the same time, less costly to administer. ...*

June 13, 1996 in the Legislature (*Hansard*, at 3539):

> [I]n this province we have spent millions and millions of dollars on wasted process. It is over.

It appears that in the Government's view a process that does not lead to an approval, particularly since it involves the expenditure of time and money, is considered a waste. A positive outcome of the EA process, namely the avoidance of an environmentally problematic undertaking, is somehow regarded as a failure, rather than a success. During third reading debate over Bill 76, MPP Doug Galt, the Parliamentary Secretary to the Environment Minister, made the following comment (*Hansard* - October 31, 1996):

> The Mike Harris government recognizes that environmental assessment has become antiquated and bureaucratic in recent years, with the process often overwhelming the results being sought. The cart has gotten somewhat ahead of the horse. Fortunately, this is eminently correctable. This government is determined to make Ontario's EA system more workable, more certain, less costly and less time-consuming.

During the debate MPP John O'Toole (PC) said:

> We'll also get rid of the waste, the waste that the process itself created. ... I believe the essential elements of this particular debate are to protect the environment and to protect the process so that indeed we end up with a solution at the end of expense.

The same view holds true with respect to public consultation. The following comments were made by MPP Tom Froese (PC) during this debate:

> At the same time, however, we must ensure that consultation remains focused and constructive. Too many important opportunities and initiatives failed when endless consultations were used to hold up the process without ever getting to the point.

287 The MOE has taken the position that the SEV need only be considered in relation to EBR prescribed decisions, and it does not view most EA approvals as prescribed decisions. It claims to have applied its SEV in decision-making related to regulatory changes such as Bill 76. The MOE's approach to its SEV is discussed further in *Residents Against Company Pollution Inc., Re* (1996), 24 C.E.L.R. (N.S.) 92 (Ontario Environmental App. Bd.).

I believe that, within the next year, we'll start to see tremendous benefits from these reforms," Mr. Sterling said. "We'll see a better protected environment and we'll see more worthwhile projects making a contribution to Ontario's economic renewal." [288]

January 2002 marked the fifth anniversary of EA under provincial legislation transformed by Bill 76. Within the space of a relatively few years the current Government has dismantled, or at least disengaged, an environmental assessment program in Ontario which took at least 20 years to develop and enhance (1975-1995). Its single-minded focus on bottom lines, business plans, client service, partnerships, program spending cutbacks ("doing more with less"), provincial downloading, cutting "red tape," deregulation, tax-cuts, shrinking government and implementing libertarian values has helped to shut down the integrated process of proactive environmental planning, investigation and scrutiny, known as environmental assessment.

It appears that according to the current political "fashion" in Ontario, ecosystem protection through comprehensive EA is out; growing the economy quickly, infinitely and at almost any cost and consequence, appears to be in. When it comes to EA, we have returned to the old days of paying lip-service, mislabelling, pretending that something is other than what it is, and engaging in public relations exercises.[289]

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288 From Ministry of Environment News Release, no. 06896.NR (title, "Sterling announces proclamation of environmental assessment reforms"), December 31, 1996.

289 Reg Lang, "Environmental Impact Assessment: reform or rhetoric?" (1979), *supra* note 55 at 250-1:

> Environmental impact assessment: reform or rhetoric? The answer is yes, some of each, because they are related. The rhetoric of EIA stems in part from an astute political awareness of the risk it creates for unintended reform. As a measure aimed at forcing environmental considerations into decision-making EIA is an *intended minor* reform. What makes it different, and what raises the prospect of *unintended major* reform, is the environmental assessment *process* which legitimates, brings together, and provides a forum for examination of some sensitive issues, central to the way our society now operates, which otherwise tend to be kept under cover and apart. Need and the distribution of costs/benefits have been cited. In addition, people directly and adversely affected by a project get a say in key decisions (they are usually opposed) and their views are brought into contrast with those (usually farther away) who favour the project and experience a better cost-benefit ratio. The often tenuous basis for decisions (certain environmental standards, for example) is exposed and behind-the-scenes giving of scientific advice is forced out into the open for challenge. Matters of fact and matters of value are separated and both become relevant; blurring the distinction tends to favour the former and makes project decision-making the exclusive domain of technicians. Advisers and decision-makers alike are brought face-to-face, some for the first time, with the people whose lives and environments their actions affect directly. A fair number of people, politicized in the process, go away wondering not just what the hell is going on *here* but in

The following passage described the perception of Ontario EA in the early years, but may also provide a somewhat familiar echo of the present (post 1996) situation, particularly if one considers the number of comprehensive EAs which are now being required (practically none):

> But the provincial government's real commitment to EIA [environmental impact assessment] is seriously in doubt. A recent newspaper editorial observed: 'And this month, as we celebrate the third anniversary of the passage of the Environmental Assessment Act, there is no alternative to the conclusion that the act has withered on the vine, been subverted from the outset, is a sham, a subterfuge, a bust. All show, no go.' So many projects have been allowed to bypass the legislation that it has come to be known as the Environmental Exemption Act. The Ministry of the Environment has received only five project assessments (four are still under review), compared with the hundreds that have been exempted, and no public hearings have been held under the act by the environmental assessment board.[290]

This is not to suggest that all prior concerns about efficiency (in terms of cost and delay) and uncertainty of outcome were insincere or unreasonable. But ignoring the considerable programmatic developments and progress which had been made by mid-1995 (and were continuing), and exaggerating and distorting all of the EA program's shortcomings in order to justify radical (in this case, reactionary) surgery as an urgently required quick (and simple) fix, does not seem to be an acceptable or appropriate response for responsible government. And more importantly, it is not efficient either.

In the recent past Ontario was witness, all too painfully, to what can result from thoughtless and unplanned deregulation and severe underfunding of important public services. It appears from the Walkerton tragedy that when it comes to environmental protection and safeguarding public health, the obsessive cutting of programs, funding and regulation is not efficient at all—quite the opposite. The mistakes made and damage caused take enormous time to address and cost a vast fortune to repair. Even worse, some of the harm can never be repaired.

The findings from this review of contemporary EA in Ontario reveal that much of the approach taken to reforming the program, which has been underway since 1995, is quite flawed.[291] The principal reason for

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general. And the publicity their case receives can be manipulated to link up with concerns of wider constituencies, perhaps creating a serious political issue.

290 Ibid. at 245.

291 One practitioner speculated that with the total block on hearings and severe reduction in public input resulting from Bill 76 in combination with Regulations 205/97, 206/97 and 207/97 (prohibiting site-specific hearings under the *Consolidated Hearings Act*,

this may be that the package of reforms implemented by the Government was not designed with the goal of enhancing environmental protection, even though this is identified in EAA s. 2 as the legislation's sole purpose. Rather, the evidence suggests that its purpose appears to have been the removal of perceived barriers to economic growth, financial prosperity and individual liberty or autonomy. Paradoxically, it is questionable whether these values have been advanced as a result.

The legitimate challenge is to avoid extremes, strike the right balances and continue to search for creative solutions—but not to throw out EA along with the bath water.[292] This approach will take time and effort. Although this article does not offer concrete proposals or options for change, three preliminary recommendations are advanced.

The first is a strategic shift by Government to create and support opportunities as quickly as possible for investigation, discussion and improvement of the EA process. The list of topics for examination should include, among others, areas such as enhancing consultation, political decision-making (process, outcome, appeals), adequate MOE funding, re-establishing EAAC,[293] provision of resources for public participation, comprehensive EA planning (such issues as alternatives, cumulative effects and sustainability), Terms of Reference scoping, alternatives analysis, Class EAs, public hearings, Tribunal independence, bump-ups (Part II orders), alternative dispute resolution, coverage of private sector undertakings, post-approval monitoring, enforcement of approval conditions, and independent agency status for the EA Branch.

The second recommendation, an interim measure only, is based on the prediction that the current EA regime in Ontario can be shifted quickly without the immediate need of any legislative amendments. This change will require a reversal of the private unofficial policy edict of the Gov-

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Environmental Protection Act and the *Ontario Water Resources Act*) for any matter covered or exempted by the EAA, environmental protection in Ontario would be better served with the repeal of the EAA altogether.

292 Some practitioners maintain that by 1996 acquired experience and administrative advances had led to a better understanding of the EA process, improved outcome predictability and more control by the EAB over its funding process (and awards) and public hearings.

293 The Government had been very quick to abolish EAAC (the Environmental Assessment Advisory Committee) within four months after it was first elected. The new Minister wrote that the MOE "now has a sufficiently sound basis of advice and experience from which to ensure the effective operation of the EA Program" (*supra* note 95). More than five years later the Gibbons report, *Managing the Environment: A Review of Best Practices* (January 2001), *supra* note 251, has recommended that independent advisory committees can play a very helpful and important role in advising government to make good decisions (e.g. Executive Summary at 23).

ernment to reject the principles and practices which comprise and are fundamental to EA, the EA process and EA decision-making. Adequate departmental resources (personnel and funding) to support the various components of a comprehensive EA system must be allocated quickly.

The third recommendation is that the Government must, instead of turning its back on the MOE's *Statement of Environmental Values*, inform everyone throughout the realm that it will henceforth genuinely uphold, apply and support the SEV's goals and principles in all EA decision-making.

"Fortunately" Ontario EA "is eminently [and imminently] correctable."[294]

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- Environmental Assessment Board's "Outline of Discussion Papers for Roundtable Meetings" (1990)
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