Environmental Law in Ontario 2019 – Recent Changes and Proposals

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Lots of Bills

- Bill 57, "an Act to enact, repeal and amend various statutes," introduced by the Minister of Finance, Vic Fideli on November 15, 2018
- Bill 66, "An Act to restore competitiveness by restoring or repealing certain Acts," introduced by the Minister of Economic Development, Job Creation and Trade, Todd Smith on December 6, 2018
- Bill 100, "An Act to implement certain budget measures, and to enact, repeal and amend various statutes," introduced by the Minister of Finance, Vic Fideli on April 11, 2019
- Bill 108, "An Act to amend various statues related to housing, other development, and various other matters" introduced by the Minister of Municipal Affairs and Housing, Steve Clark on May 2, 2019
- Not an exhaustive list, just the major "omnibus" bills amending multiple statutes and programs at a time

Bill 57, Schedule 15, Environmental Bill of Rights (EBR)

- Bill 57 which received royal assent on December 6, 2018 was introduced on November 15, 2018, extremely fast passage. Various schedules dealt with various positions and officers of the legislature among others, including the Environmental Commissioner of Ontario established by the EBR.
- A key change was to remove the status of the Environmental Commissioner of Ontario as an independent officer of the legislature; rather the position is now an employee of the Auditor General
- Several of the oversight functions related to the EBR were not transferred to the Auditor General; rather she retains only the responsibility to "oversee the function of the Act".
- Education and assistance in relation to the Act are transferred to the MOECP; and in a very problematic move, requests for review or investigation under the EBR are filed first with the affected Ministry.

Bill 66

- Schedule 5 of Bill 66 proposed the phase out of the Toxic Reduction Act
- Current requirements for facilities that emit toxic substances to prepare plans will be completed by 2021 and after that those companies would not be required to review and renew their plans. Schedule 5 was passed with the Bill and proclaimed in force in April 2019.
- Schedule 10 of Bill 66 proposed a new tool, “open for business by-laws”, and if municipalities passed such by-laws, a large suite of significant requirements to conform to the Greenbelt Plan, the Clean Water Act, the Lake Simcoe Protection Act, the Oak Ridges Moraine Protection Act, the Great Lakes Protection Act, many Planning Act requirements, and much else would have been waived
- Schedule 10 was withdrawn by the government when the Bill went through amendment at committee and was not part of the Bill as passed

Bill 100, the 2019 budget implementation bill – Schedule 17 re Crown Liability

- Bill 100 is still at third reading debate as of today's date
- Schedule 17 proposes to remove the *Proceedings Against the Crown Act* and replaced it with a new *Crown Liability and Proceedings Act, 2019*
- CELA is highly concerned with these changes.
- section 11 of the CLPA extinguishes causes of action against the Crown, or an officer, employee or agent of the Crown, in relation to:
  - negligence or failure to take reasonable care when exercising powers, duties or functions of a legislative nature;
  - negligence or failure to take reasonable care in regulatory decisions "made in good faith," or the purported failure to make a regulatory decision; and
  - negligence or failure to take reasonable care in policy decisions "made in good faith," or the purported failure to make a policy decision

Crown Liability changes cont'd

- Section 11 is a new provision that has no counterpart in the PACA, and it represents a sweeping attempt to bar certain types of claims that have been traditionally available to Ontarians if they have suffered loss, injury or damages from negligent acts or omissions by provincial representatives.
- In addition, it appears that the prohibitions under section 11 not only apply to current or future regulatory negligence claims against the Ontario government, but they also purport to retroactively extinguish any existing proceedings which involve causes of action that are being precluded by the CLPA
- These changes received no advance consultation that we can ascertain

No claim against Crown for “regulatory decisions”

- The expansive definition of “regulatory decision” under the proposed Crown liability legislation would appear to catch virtually all of the regulatory activities (e.g. approval issuance, monitoring, inspection and enforcement) carried out by provincial officers, employees and agents under Ontario’s environmental law framework such as:

the Aggregates Resources Act	Lakes and Rivers Improvement Act
Clean Water Act, 2006	Nutrient Management Act, 2002
Environmental Assessment Act	Oil, Gas and Salt Resources Act
Environmental Protection Act	Ontario Water Resources Act
Invasive Species Act, 2015	Pesticides Act
Lake Simcoe Protection Act, 2008	Safe Drinking Water Act, 2002

“good faith” bars claims

- The CLPA bars negligence actions in respect of regulatory decisions (and policy decisions16) that were “made in good faith.” However, the CLPA provides no definition or criteria to assist in determining whether a provincial decision was – or was not – bona fide. Therefore, this subjective term appears to create considerable uncertainty, and will undoubtedly result in litigation in order to clarify its nature and scope
- In virtually all of the regulatory negligence cases discussed below, the governmental agents and servants were presumably acting in good faith, in the sense that they did not intentionally attempt to harm the plaintiffs. Nevertheless, liability was imposed upon the Crown by the courts, primarily because negligence involves considerations of neglect or default, rather than deliberate or malicious conduct by public servants.

Claims barred

- If enacted, section 11 of the proposed CLPA will bar virtually all Ontarians from commencing otherwise meritorious litigation for loss, injury or harm attributable to regulatory negligence by provincial representatives.
- This is particularly true in the environmental context, where careless conduct by agents and servants of the provincial government has directly resulted in harm to Ontarians' health, property or pecuniary interests.
  - An example includes the Walkerton Inquiry where the Commissioner found that the Ontario government's budgetary cutbacks, inspection and oversight deficiencies, and overzealous de-regulation (and the related failure to pass a notification regulation requiring drinking water testing facilities to report adverse water quality results) were among the causes of the Walkerton disaster.
  - In light of its regulatory failures, the Ontario government was also named as a co-defendant in a class action that was brought on behalf of **Walkerton residents**. Fortunately, this class action was certified on consent under the Class Proceedings Act, 1992 and settled without trial, and compensation has been paid to numerous Walkerton families for the grievous harm suffered (and, in some cases, continues to be suffered) as a result of this tragic event. In CELA's opinion, the Walkerton litigation against the Crown is precisely the type of regulatory negligence case that will be prohibited by section 11 of the CLPA, which would be a highly undesirable consequence.

Other types of environmental claims barred

- **Swaita v Her Majesty the Queen in the Right of Ontario (Environment)**: A homeowner in Ottawa brought a negligence claim against the Ministry of the Environment (MOE) concerning soil contamination of the plaintiff's property which resulted from an oil spill that originated on a neighbouring property. The court refused Ontario's preliminary motion to dismiss the action, and noted that "the MOE decided to get involved in the **oil spill** on the Shell property, made the decision regarding excavation, and failed to ensure that the contaminants were controlled; as a result, the plaintiff's property became contaminated and the plaintiff sustained damages." Further, the judge held that "I can see no policy reasons that ought to negate a finding of a duty of care to the plaintiff at this pleadings stage."
- **Heighington v Ontario**: This case involved negligence (and breach of contract) claims by plaintiffs who were owners and former owners of residences in a Scarborough subdivision where refining of radioactive materials had taken place during a prior use of the property. Elevated levels of radioactivity - up to 20 times above the standard - were found. Although provincial officials were aware of the situation, no conditions were imposed for the safe disposal of the radioactive material or the decontamination of the soil. Ontario was held to be negligent for failing to ensure that **radioactive materials** were safely removed from the site in accordance with the duties imposed by the Public Health Act. The court also found that it was foreseeable that leaving these materials on-site may harm the health of future occupants of the property.

Types of claims barred

- **Bisson v Brunette Holdings Ltd**: In this case, the Ontario government was held liable in negligence in the context of a gasoline leak from a service station into the plaintiffs' basement in Timmins. The plaintiffs detected gasoline fumes emanating from their home, and observed **raw gasoline** which had pooled in a depth of 18 inches in their basement. Thus, the plaintiffs and their tenants were forced to evacuate the building for excavation and remediation operations. The MOE became involved pursuant to its mandate under the Environmental Protection Act. The on-site excavation took place with Ministry supervision, but without instructions from a structural engineer which subsequently resulted in substantial damage to the building foundation. The plaintiffs' action was successful and the MOE was held liable for damages incurred by the plaintiffs after the Ministry had made the decision to undertake clean-up and restoration.
- **Gauvin v Ontario**: The plaintiffs were homeowners in the Ottawa area who brought a claim against the MOE for improper approval of their **septic sewage system**, which had been installed by a private contractor. They began to experience problems with the system, and it was only when they dug up the area that they discovered that no filter sand had been installed, contrary to what was required by law. According to the court, the Environmental Protection Act sets out detailed methods to control and contain raw sewage from entering into the environment. The MOE's approval of the deficient system was considered by the court to be a breach of duty by the approval authority, and the plaintiffs were successful in their claim against the MOE.

Summary re Crown Liability changes proposed in the budget bill 100

- Section 11 of the proposed CLPA is fundamentally unfair and highly unconscionable since it deprives Ontarians of access to justice and leaves them uncompensated for harm or loss attributable to regulatory negligence.
- The purported extinguishment of Ontarians' current and future legal rights provides no incentive for the Crown, and its officers, employees and agents, to ensure that they act with due care and skill when addressing or deciding matters involving environmental or public health.

Bill 108 dealing with housing, land use, ESA, CAA and much else

- Bill 108 is currently awaiting referral to committee expected at the end of this week (with standing committee hearings expected Friday); it will be expedited due to a time allocation motion
- Bill 108 contains a suite of schedules impacting Ontario environmental and planning law
- Schedule 2 deals with changes to the Conservation Authorities Act
- Schedule 3 changes the Development Charges Act (and a separate schedule changes Education development charges)
- Schedule 5 changes the Endangered Species Act
- Schedule 6 amends the province's Environmental Assessment Act
- Schedule 7 is a minor change to the Environmental protection Act's enforcement powers

Bill 108 cont'd

- Schedule 9 changes the Local Planning Appeal Tribunal Act (essentially the former Ontario Municipal Board whose appeal and hearing powers had been substantially changed by the last government)
- Schedule 11 changes the Ontario Heritage Act
- Schedule 12 changes the Ontario Planning Act
- Other schedules deal with other items such as workplace health insurance premiums, and cannabis.

CELA's Bill 108 Submissions

- CELA is making submissions on the Conservation Authorities, Endangered Species, Environmental Assessment, and Planning Acts affected by Bill 108.
- There are several separate EBR postings related to these legislative proposals, along with related policy proposals, with varying deadlines past and looming.
- On the first three, overall CELA's analysis is that despite a few amendments of a positive nature in the schedules (e.g. reconsideration of previous environmental assessment approvals), the overwhelming impact of the amendments do not advance sound environmental protection.
- The cumulative negative impact of the amendments, could facilitate increased environmental harm, cause further decline in endangered and threatened species, and hamstring flood protection measures in the province at a time when increasingly extreme weather events fueled by climate change are accelerating these problems.

Bill 108 Schedule 2 Conservation Authorities Act

- Despite being billed as improving Ontario's resilience to climate change, CELA's analysis is that the proposed amendments will not accomplish this objective
- In our view the proposed changes (1) could constrain the ability of conservation authorities to engage in proper watershed management (by limiting core programs and services related to conservation and management to lands owned by conservation authorities); and (2) are coupled with a 50 per cent cut to the natural hazards funding of conservation authorities by the provincial government.
- Furthermore, the proposed policy also calls for the exemption of "low risk" developments from obtaining a permit from a conservation authority.
- Such amendments will not make Ontario more resilient to climate change or less prone to flood hazards and risks.

Bill 108 Schedule 5, Endangered Species Act

- Proposed amendments to the province's ESA could allow threatened and endangered species to remain unprotected in Ontario if there are more robust populations outside of Ontario (based on consideration of their biologically relevant geographic range external to Ontario).
- The amendments could delay both the classification of species not currently listed on the Species At Risk in Ontario ("SARO") List (O Reg 230/08) and their automatic protection upon being listed.
- There is a proposal for a new form of agreement, known as a Landscape Agreement, which will permit otherwise prohibited activities to occur within a defined geographic area, thereby risking further loss of species in return for making a financial contribution to a "Conservation Fund".
- The changes would allow the Minister to enter such a Landscape Agreement without first seeking expert scientific advice.
- These measures are not consistent with a statute whose purpose is to protect endangered and threatened species.

Bill 108 Schedule 6, Environmental Assessment Act

- Proposed amendments to the *Environmental Assessment Act* would exempt undertakings (or groups of undertakings such as public works, or provincial transportation facilities) from the statute's existing class environmental assessment ("EA") regime. Note that the class EA system is already a system of streamlined assessment and public consultation of what are supposed to be environmentally routine and low risk projects.
- The class EA process has long been criticized by the office of Environmental Commissioner, the Auditor General of Ontario, and the 2005 Ontario Environmental Assessment Advisory Panel for being too lax and not subject to proper provincial government oversight. Bill 108 will not improve this situation.

Environmental Assessment Act Schedule 6 cont'd

- The changes proposed would also further constrain the public's ability to file requests for "bump-up" orders seeking a full environmental assessment of particular class EA projects.
- Between 2011 and 2016, the Auditor General found that only 1 of 177 bump-up requests were granted by the province. In the circumstances, this regime should not be further restricted to only those situations of (1) potential impacts to existing treaty and aboriginal rights under s. 35 of the Constitution; (2) a prescribed matter of "provincial importance"; or (3) a matter raised by a "qualified" person, as proposed by Bill 108.

Bill 108, Schedules 12 & 9 , Planning Act and LPAT Act

- In CELA's view, any analysis of the land use planning system should be viewed through the lens of ensuring access to justice. Any Ontarian interested in, or affected by, land use planning decisions should have a meaningful opportunity to participate in the decision-making process. Bill 108's reforms to the *Planning Act* and *Local Planning Appeal Tribunal Act* do not address this critical access to justice issue.
- CELA supports the return to *de novo* hearings at the Local Planning Appeal Tribunal to restore procedural rights and ensure that evidence on serious environmental issues is tested.
- However, CELA is concerned and asks that amendments which restrict public participation in appeals in the planning system, including short timelines for decision and limits on appeals, to be removed.

Improving the land use appeal system

- CELA opposed the former government's Bill 139's amendments to the Ontario Municipal Board regime because it eliminated important procedural and substantive rights for the public and community groups.
- However, CELA does not recommend restoring the pre-Bill 139 status quo without further reform particularly in terms of protecting provincial interests, enabling local decision-making, ensuring meaningful public participation, and providing effective appellate oversight by a specialized administrative body.
- In particular, Bill 108 does not address the fundamental access to justice issue in our land use planning system, namely, the financial barriers facing residents and non-governmental organizations who seek to participate in decision-making. The current land use planning system is difficult to access and relies heavily on expensive experts so that it is difficult to ensure that the public can participate and contribute to the development of their communities in a fair manner.
- We also note that the Ontario government's decision to discontinue funding for the Local Planning Appeal Support Centre ("LPASC"), which provided legal and planning support to the public, exacerbates this access to justice issue. We recommend that funding for the LPASC be restored.

Land use public appeal rights in Bill 108 – the downside

- CELA opposes Bill 108's proposal to remove public appeal rights including the following:
  - Under the proposal, there is no appeal of Minister-ordered development permit system provisions in Official Plans, unless the Minister himself appeals.
  - The ability for a member of the public to appeal a non-decision on an Official Plan has also been removed. Now, it is only a municipality, the Minister, or the proponent of an amendment who can appeal.
  - The public's ability to appeal decisions on plans of subdivision has been removed. In the current system a person who made oral or written submissions to the municipality or planning board can appeal. The term "person" has been removed from subsections 51(39) and 51(48). Instead, the list of the persons who can appeal is now found in subsection 51(48.3) and only includes corporate entities, such as a corporations operating an electric utility, Ontario Power Generation Inc., and a corporation operating telecommunication infrastructure.
- We also note that the ability of the public to appeal official plans and official plan updates has not been restored.
- Restricting access to the LPAT is contrary to sound decision-making and will likely to result in more issues being litigated in the court system, which is more costly and lacks the planning expertise of the tribunal. It is advisable to ensure that the LPAT has a robust appeal authority.

Appeal rights in Bill 108 – the upside

- On the other hand, Bill 108's proposed repeal of certain sections of the current legislation restores more fulsome appeal grounds to appeals to the Local Planning Appeal Tribunal.
- The current system restricts appeals by only considering whether a decision is inconsistent with a policy statement, fails to conform with or conflicts with a provincial plan, or fails to conform with an applicable official plan.
- CELA welcomes the ability that Bill 108 would provide to raise other appropriate planning grounds on appeal, for instance grounds such as prematurity, land use incompatibility, non-conformity with provincial interests listed in section 2 of the Planning Act, non-compliance with statutory prerequisites, or conflict with other provincial legislation.

Further steps

- Responding to the proposals is essential
- Respond to EBR postings & legislation; set up meetings with elected representatives at all levels
- Invite local elected officials to water and nature events; ensure they know your area's unique valuable natural resources
- Build coalitions and develop common positions
- Utilize the existing tools to participate and keep track of what works and what doesn't
- Watch CELA's bulletin and website for analysis of proposals www.cela.ca (subscribe there too)
- Continue to engage even after the laws are passed or amended
- Bottom line message should be: environmental regulation is about safeguarding our natural heritage, public health and safety, and common values.

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