



The Ontario Archaeological Society Inc.

encouraging the ethical practice of archaeology

March 17th, 2024

EA Modernization Project Team
Environmental Assessment Modernization Branch
Ministry of the Environment, Conservation & Parks
135 St Clair Ave West, 4th Floor
Toronto, ON M4V 1P5

Re: ERO 019-7891 (New regulation to focus municipal environmental assessment requirements)

The Ontario Archaeological Society (OAS) has become aware of the Ministry of the Environment, Conservation and Parks' (the Ministry's) recent proposal to revoke the **Municipal Class Environmental Assessment (MCEA)** and **Private Sector Developers Regulation** in favour of a new "streamlined Environmental Assessment process." It is our understanding that under this new streamlined model, the following examples of municipal projects would no longer be subject to EA Act requirements:

- municipal roads
- bridge reconstructions
- all private sector infrastructure

According to the ERO 019-7891, the Ministry proposes "sensible, practical changes that would maintain appropriate environmental oversight while reducing delays on municipal infrastructure projects." We understand that this new proposal has come out of Bill 197. As that bill was fast-tracked without public consultation during a time when citizens were preoccupied with the implications of a global pandemic, the OAS has yet to respond to Bill 197 or any associated proposals. Therefore, we would like to take the opportunity to express our concerns during this spring 2024 commentary period for the newly proposed Environmental Assessment (EA) regulation.

In the following letter, the OAS argues that 1) this new model would fail to provide sufficient protection for archaeological heritage and Ancestor burials, despite the fact that it would remain illegal for municipalities and private developers to disturb these sites under the Ontario Heritage Act and the Funeral, Burial and Cremation Services Act; 2) the new proposal would lead to reduced consultation with Indigenous communities on development projects, despite the fact that municipalities and private developers are still delegated procedural aspects of the Duty to Consult and

Accommodate with Indigenous communities on these matters; and finally 3) uprooting the MCEA—a finely tuned system that has been in place for roughly 45 years—is not only unlikely to lead to greater speed and efficiency, but rather would lead to a patchwork of municipal policies and procedures, all across the large province of Ontario, all striving to fill the void the MCEA would leave behind.

The OAS is concerned that the proposed streamlined EA process will fail to protect both known and unknown archaeological sites and Ancestor burials.

The argument that the Ministry has made in their proposal to revoke the MCEA, is that the aforementioned development projects pose a low risk of negatively impacting the environment. We would assert, though, that these project types pose just as great a risk of impacting archaeological sites as any other development project, and by removing the MCEA, and with it the trigger for archaeological assessment in advance of these development projects, it will leave archaeological sites and Ancestor burials vulnerable to impact—particularly in municipalities who do not currently have an archaeological management plan or effective data sharing agreement with the Ministry of Citizenship and Multiculturalism (MCM) in place. In Northern Ontario, we argue that there is even less impetus for municipalities to follow this process, given that there is one representative in the MCM to make sure that the municipalities are looking after archaeological concerns in an area the size of a European country.

In the Canadian Environmental Law Association's (CELA) response to this proposal in 2023, they argued that "the nature, extent, frequency, magnitude, and duration of environmental impacts is greatly dependent on the site-specific location, design, construction, and operation of the proposed roadway."¹ In other words, the potential impacts of a project are less related to the type of development, and more related to the context of the project. The OAS would agree with CELA's position and add that from a heritage conservation point of view, it is nonsensical to try to delimit a subset of project "types" as being exempt from EA requirements, when the project type often bears no relationship to its potential to impact known and unknown archaeological resources in the project area. Of even greater concern to the OAS is the ambiguity with which this proposal was written, and the great number of project types not referenced within the proposal at all.

Ironically, one project type which bears a **positive** correlation with archaeological potential—bridge reconstruction—has been included on the list of projects **not** subject to EA Act requirements. Of course, archaeologists know that this proximity to water substantially increases our chances of identifying archaeological sites (e.g., the Dog Rib Rapids project near Pikangikum First Nation is one of the largest archaeological sites ever found in Northern Ontario and directly related to a proposed bridge project). The Ministry has provided no supporting evidence as to why these project types in particular

¹ See RE: ERO 019-4219 (Project List Amendments), ERO 019-6693 (Municipal Class EA), and ERO 019-6705 (Improving Timelines for Comprehensive EAs; 2023) – Canadian Environmental Law Association: [https://prod-environmental-registry.s3.amazonaws.com/public_uploads/2023-05/CELA%20ltr%20re%20EAA%20changes%20\(May%208,%202023\)_0.pdf](https://prod-environmental-registry.s3.amazonaws.com/public_uploads/2023-05/CELA%20ltr%20re%20EAA%20changes%20(May%208,%202023)_0.pdf)

are categorized as “low-impact,” and we maintain that without conducting an appropriate archaeological survey on each specific project area prior to development, neither municipalities nor private sector developers could possibly have any idea which of their projects will impact sites of cultural, heritage value or interest or Ancestor burials of a given region.

The OAS membership find ourselves concerned, not only for the wellbeing of unknown archaeological sites and Ancestor burials, but also for the wellbeing of **known** sites and burials. At the present time, municipalities inconsistently have access to known archaeological site information through data sharing agreements with the province. Even for those with access, it is unclear how effectively that data is being used or distributed among municipal planners and decision makers. Additionally, even though the MCM hosts a database meant to keep a record of all known archaeological sites, due to a severe lack of funding the Archaeology Unit has not been given sufficient resources to properly maintain and update it. As a result, the database has become nearly impossible to navigate for those not familiar with its idiosyncrasies. The database is also rife with incomplete or, in too many cases, inaccurate information. Currently, the database is only accessible by licenced archaeologists who know to supplement their database enquiries with additional background research. Even if municipalities are granted access to this database, it is our opinion that they would not have the expertise to troubleshoot the issues within the database. Additionally, we do not believe they would have access to the resources necessary to deliver Stage 1 archaeological background studies of the same caliber that a licenced archaeologist could.² As a result, upon revoking the MCEA process, a municipal project could easily result in impacting previously recorded archaeological sites and Ancestor burials in contravention of provincial legislation.

The OAS would like to remind the Ministry that all sites deemed of archaeological and historical significance are subject to protection from all “commercial, industrial, agricultural, residential or other development” under the Ontario Heritage Act.³ If a developer is ever found to be impacting such a site, the MCM would be obligated to issue a stop work order.

Additionally, under the Funeral, Burial and Cremation Services Act, disturbing or ordering the disturbance of a burial site or associated artifacts will also continue to remain illegal regardless of how the EA Act changes.⁴ The protection of archaeological sites and unmarked burials within a given project area will be something that municipalities and private sector developers will continue to bear liability for regardless of whether the MCEA is revoked or not.

² See Standards and Guidelines for Consultant Archaeologists (2011) – Ministry of Citizenship and Multiculturalism: <https://files.ontario.ca/mhstci-standards-guidelines-consultant-archaeologists-en-2022-03-29.pdf>

³ See Ontario Heritage Act, R.S.O. 1990, c. O.18: <https://www.ontario.ca/laws/statute/90o18>

⁴ See Funeral, Burial and Cremation Services Act, 2002, S.O. 2002, c. 33: <https://www.ontario.ca/laws/statute/02f33>

The OAS is concerned, therefore, that revoking the MCEA will lead to more projects pushing forward prematurely only to result in the damage or destruction of recorded and unrecorded archaeological sites and burials. The damage that development projects can do to heritage, ceremonial, and spiritual landscapes can never be undone, and the full integrity of these sites can never be regained once they have been disturbed. Additionally, from the proponent's perspective, when a site becomes known partway through development, the project itself will also inevitably suffer from the extra costs and delays associated with interrupting work to conduct an archaeological investigation after construction crews have already been engaged.

The OAS is concerned that the proposed streamlined Environmental Assessment process will result in reduced consultation with Indigenous communities.

In 2017, the Ontario Archaeological Society changed our Statement of Ethical Principles⁵ to be more in-line with the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)⁶ as well as the Truth and Reconciliation Commission (TRC) Calls to Action.⁷ Our message to the archaeologists working in the province of Ontario and beyond was clear: conducting ethical archaeological investigation on Indigenous ancestral belongings and Ancestor burials is impossible without obtaining the free, prior, and informed consent of local and descendant Indigenous communities. Since 2017, we have continued to hope that provincial legislation would eventually follow suit by making amendments that would further protect and honour the Treaty Rights of Ontario's local and descendant Indigenous communities.

Not only has the Ontario Government **not** been proactive in incorporating further regulations and structures that would better facilitate consultation with Indigenous communities on projects that impact both natural and cultural heritage landscapes, but it is our belief that passing this new streamlined EA proposal would, in fact, lead to reduced consultation. Once again, we remind the Ministry that the Crown will continue to be legally obligated to adhere to their Duty to Consult and Accommodate local and descendant Indigenous communities on all development projects taking place on Canadian soil,⁸ and that revoking the MCEA will only remove the framework by which municipalities and private sector developers currently fulfill the delegated aspects of these obligations on behalf of the Crown.

On this matter, though, the OAS would like to defer to the knowledge and expertise of Indigenous communities themselves. Therefore, we were disturbed to learn, while reading some of the responses submitted by First Nations on this proposal in 2023, that

⁵ See The OAS Statement of Ethical Principles (2017): <https://ontarioarchaeology.org/the-organization/policies/>

⁶ See United Nations Declaration on the Rights of Indigenous Peoples (2007): https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁷ See Truth and Reconciliation Commission of Canada: Calls to Action (2015): https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf

⁸ See Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011): <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729>

Indigenous communities had not been meaningfully consulted on the development of this proposed set of EA regulations. According to the response letter Deshkan Ziiibiing (also known as Chippewa of the Thames First Nation) delivered in May of 2023, **“The current proposals do not reflect the feedback that we have given or heard from other Nations throughout this process, and calls for Ontario to substantively consider cumulative effects, federal climate targets, and Indigenous Knowledge in the EA process have gone unanswered.”**⁹ Even worse, due to failure of the Ministry to widely disseminate notice of this proposal, many Indigenous communities have not even had a chance to respond to it at all.

Responses submitted from Deshkan Ziiibiing, Mississaugas of the Credit First Nation¹⁰, and Ginoogaming First Nation¹¹ have all raised concerns relating to the vagueness of the regulations being proposed, as well as relating to that fact that the new streamlined model is likely to lead to reduced consultation with Indigenous communities on development projects. In their letter, Deshkan Ziiibiing has highlighted that the new proposal is suggesting that the option to make a Section 16 Order request would be enough to protect the rights of Indigenous communities.⁹ Not only would this be a highly inadequate and ineffective way for Indigenous communities to raise concerns relating to development projects, but it would place the burden of policing development projects on Indigenous communities—all without any offer from the government to invest resources to meet these increased demands. Additionally, Mississaugas of the Credit First Nation have flagged that the new proposal will only protect Indigenous rights that have been proven to exist in a Canadian court, leaving asserted rights unprotected.¹⁰ To the OAS, all of this reads as municipalities and private developers shirking their duty to consult on behalf of the Crown.

Passing this streamlined EA regulation, then, would fly in the face of UNDRIP and the TRC Calls to Action on several levels. The OAS would like to lend our support to Indigenous voices opposing the disturbing implications of this proposal. We also recommend that the Ministry take the time to not only carefully read the letters that Indigenous communities have submitted in response to this proposal, but also to devote the time and resources needed to complete meaningful consultation with these communities before moving forward with any revisions to the EA Act.

⁹ See Re: EA Modernization Initiative Notice March 10, 2023 (2023) - Deshkan Ziiibiing (Chippewas of the Thames First Nation): https://prod-environmental-registry.s3.amazonaws.com/public_uploads/2023-05/COTTFN%20EA%20Modernization%20comments%2009.05.23_0.pdf

¹⁰ See Comment on Modernizing Ontario’s environmental assessment program - Environmental Assessment Act (2023) – Mississaugas of the Credit First Nation: https://prod-environmental-registry.s3.amazonaws.com/public_uploads/2019-05/MCFN%20comment%20re%20Environmental%20Assessment%20Act.pdf

¹¹ See Comment on Evaluating municipal class environmental assessment requirements for infrastructure projects (2023) - Ginoogaming First Nation: <https://ero.ontario.ca/comment/84894#comment-84894>

The OAS is concerned that the proposed streamlined EA process will only result in the province downloading responsibilities onto municipalities, resulting in a collection of piecemeal, ad-hoc, policy responses across the province.

According to the Ministry, their streamlined proposal “will help [them] eliminate unnecessary burden on lower-impact projects and reduce duplicative requirements to support Ontario’s rapidly growing population.” Neither the Ministry nor any of the submitted responses from the proposal’s supporters, explicitly outline which procedures are being duplicated in adhering to the MCEA. On the contrary, the OAS would argue that the MCEA remains an important regulating framework which municipalities and private developers can follow to ensure they are meeting their legal obligations. Without the MCEA to trigger archaeological assessment in advance of development, we believe that initiating development projects in Ontario will become more complicated and less efficient for all parties involved.

Revoking this framework would only force municipalities to develop their own processes for completing archaeological and other technical reports, meaning that heritage management would turn into a piecemeal collage of policies, losing the consistency we now maintain across the province. Since archaeology and heritage is provincially regulated, this would impose increased burden upon Indigenous communities, archaeological consultants, and the MCM, who would all be expected to adapt to a variety of municipal policies. The OAS does not understand how the Ministry can expect this proposal to lead to faster timelines or greater efficiency. As the Municipal Engineers Association have remarked in response to the proposal, “there remains the question of consistency and standardization in consultation practices, and construction methods province wide.”¹²

Finally, the timeline of 120 days that the Ministry has suggested as part of their new streamlined model also means that archaeological assessments would need to be initiated by the municipality **before** the EA stage. The “streamlined” approach being proposed by the Ministry will do nothing to actually improve timelines—the only thing that will change is that municipalities will be forced to frontload the work in order to fulfill their duties under the Ontario Heritage Act, the Funeral, Burial and Cremation Services Act, and the Crown’s Duty to Consult and Accommodate.

We have seen attacks on archaeology and heritage requirements in the past when the provincial government, concerned about speeding up approvals for subdivision developers, blamed archaeological investigations for delaying housing projects. In a study funded by the Ontario government in 1990, it was determined that these concerns about delays due to archaeology were baseless and, further, that the completion of archaeological assessments did not result in any delays in approvals or excessive costs

¹² See Municipal Engineers Association Comments to ERO 019-6693 - Evaluating Municipal Class Environmental Assessment requirements for infrastructure projects (2023) – Municipal Engineers Association: https://prod-environmental-registry.s3.amazonaws.com/public_uploads/2023-05/MEA%20Response%20to%20ERO%20019-6693%20May%202023.pdf

to proponents.¹³ The recommendations in the 1990 study included; informing proponents of the requirements early along with comprehensive information explaining the requirements; increasing government review resources; increasing training for proponents, municipal, and planning staff; and, refining the predictive modeling to reduce unnecessary archaeological assessments.¹³ Since this review was undertaken, many municipalities have completed archaeological management plans to assist in the development of local modeling for areas of archaeological potential, and to provide their staff and proponents with clear and comprehensive information about the requirements for archaeological assessment. However, most Ontario municipalities remain without an archaeological management plan and with no money or capacity to make that happen.

Rather than removing the trigger for archaeological assessment, we recommend that the Provincial government allocate more resources to reviewing bodies, such as the Archaeology Unit of the MCM. This would improve timelines substantially by reducing the delays associated with reviewing and accepting archaeological assessment reports and increase capacity to provide clear communication to the archaeological community regarding any proposed changes to the requirements. In our experience, the vast majority of the delays associated with archaeological assessment are, in fact, related to the MCM's review times rather than the archaeological work itself.

Conclusion

In conclusion, it does not come as a surprise to the OAS that this proposal has been so well-received by the housing sector—clearly, the revised EA regulations are intended to cut corners, reduce costs and delays for private developers. The OAS is not confident these intentions will be realized given the points presented above. What this approach will likely accomplish is the undermining of the Treaty rights of Indigenous communities and the inevitable destruction of irreplaceable cultural heritage. The OAS refutes that revoking the MCEA and the Private Sector Developers Regulation would remove (as yet uncited) duplicate efforts or streamline Environmental Assessments. Instead, it would remove the framework by which municipalities and private developers currently ensure they meet their legal obligations with relation to the Ontario Heritage Act, the Funeral, Burial and Cremation Services Act, and the Duty to Consult and Accommodate Indigenous communities. Once again, this proposal, as currently formulated, will contribute to greater uncertainty and more exposure to liability at municipal and provincial levels and puts irreplaceable cultural heritage at unnecessary risk.

The OAS is an organization fortunate to have hundreds of vigilant members living all over Ontario, each having an extensive knowledge of the archaeological landscapes within their locality. Should this proposal be passed, we would be quick to advise our members to keep careful watch over the development projects in their area and report any impacts to known and unknown archaeological sites and burials to the Ministry of Citizenship and Multiculturalism to ensure that any necessary stop work orders are issued where known sites are being impacted. The OAS has a proud history of

¹³ See Report on Heritage Conservation (Specifically Archaeology) in Municipal Planning (1990) – Ogilvie, Ogilvie, and Company.

coordinating heritage advocacy initiatives, and we would be eager to reinstate volunteer programs, such as the Archaeology Conservation Officers Programme, should we lose faith in the province's ability to regulate adherence to its own Ontario Heritage Act and Funeral, Burial and Cremation Services Act.

We would be happy to further discuss any of our above comments with the Ministry of Environment, Conservation, and Parks should they desire.

Regards,

The Ontario Archaeological Society Board of Directors