

LAW & POLICY UPDATE:

TRENDS IN THE INTEGRATION OF ENVIRONMENTAL AND PLANNING LAW

THE NEW ERA OF ONTARIO INFRASTRUCTURE: WHAT LAWS GOVERN INFRASTRUCTURE PLANNING?

**A PAPER FOR
THE ONTARIO BAR ASSOCIATION
CONTINUING LEGAL EDUCATION**

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The views expressed in this paper are provided by the author for present discussion purposes only. They do not constitute legal advice by the author or firm.

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SUMMARY

Ontario is entering a new age of major infrastructure investment and construction across many sectors – including energy, transportation, drinking water, and waste management. There are now legal requirements for major plans to guide this kind of investment. However, Ontario does not appear to have an integrated process to ensure that individual infrastructure projects receive appropriate approval: good infrastructure projects seem to be subject to the same lengthy and uncertain processes as bad projects. There is thus a pressing need to ensure that planning processes get beyond process and rely on substantive standards that can distinguish between good and bad locations, technologies, designs, and impacts. There is no shortage of available standards; however, there is presently a lack of clear provincial direction to identify planning standards that are binding and ensure that only those infrastructure projects that meet binding standards get approval and funding. The paper discusses options and opportunities to address these challenges using examples drawn from existing planning law regimes.

INTRODUCTION

According to the current news and commentary, we have just witnessed in September 2008 the end of "laissez-faire" economics around the world. From decades of looking to the private sector to lead economic activity and prosperity (if only governments would get out the way), we have suddenly turned to governments for economic leadership, and criticized any government that has not quickly joined the new consensus.

An old term receiving enormous new attention is infrastructure. During the laissez-faire period, there was talk of infrastructure, but the talk was as often about infrastructure deficits as infrastructure spending. During the laissez-faire period, governments never seemed to have the money to invest in infrastructure; instead, they looked to cut back public sector spending. Today, by contrast, infrastructure spending is the new gospel: public spending to stimulate our economy, public works to improve our quality of life.

But, as governments look to spend their millions and billions, it will surely be essential that they spend wisely. Based on past experience, a first problem is that, for some infrastructure, the people will not come in response to infrastructure in the wrong location (e.g., Mirabel airport in Quebec far outside Montreal). A more obvious problem particularly evident in southern Ontario is that, for much infrastructure, people will come in response to infrastructure whatever its location. This makes it imperative to pick locations wisely (e.g., avoid greenfields that cause sprawl, and/or avoid rural spaces that impair greenbelts).

In many respects, Ontario is well-positioned to provide wise infrastructure spending. While much of the rest of the developed world remained entranced with laissez-faire capitalism, important aspects of the laissez-faire doctrine ended in 2004 with the election of the present provincial government. At that time, the Ontario government responded to laissez-faire capitalism in land use and in electricity generation by putting forward major new legislation to direct these economic sectors away from unplanned growth and piecemeal planning towards development that would accord with new provincial plans. Thus, we now have laws addressing:

- a provincial integrated power system plan under the *Electricity Act, 1998*;
- a Greater Golden Horseshoe (GGH) Growth Plan under the *Places to Grow Act, 2005*; and
- a southern Ontario Greenbelt Plan under the *Greenbelt Act, 2005*.

Still more recently, the Province has expanded its planning role into specific infrastructure sectors, namely transportation and drinking water, adding:

- the Greater Toronto Area regional transportation plan under the *Greater Toronto Transportation Authority Act, 2006*; and
- source water protection plans under the *Clean Water Act, 2006*.

These planning initiatives augment considerably those in existence prior to 2004, which involved:

- (a) binding official plans and subdivision plans under the *Planning Act*;
- (b) binding provincial plans for some specific areas of the Province, namely the Niagara Escarpment Plan under the *Niagara Escarpment Planning and Development Act*, the Oak Ridges Moraine Conservation Plan under the *Oak Ridges Moraine Conservation Act, 2001*, and the Parkway Belt West Plan under the *Ontario Planning and Development Act*; and
- (c) binding plans for specific sectors, namely forest management plans under the *Crown Forest Sustainability Act*, and aggregate extraction site plans under the *Aggregate Resources Act*.

Yet, despite these many precedent-setting government initiatives, there is still considerable room to question whether these laws will deliver what is needed on infrastructure. For example, detailed empirical work that raises questions about the adequacy of the Province's growth management plan may be found in work led by the Neptis Foundation¹.

This paper focuses on a legal question about the adequacy of these plans: do these plans ensure that Ontario will develop smart infrastructure? This question is particularly complex legally because it requires consideration of additional legal regimes not yet mentioned. In particular, as Ontario develops a range of new plans across a number of infrastructure sectors - such as energy, transportation, waste management, drinking water - and there is a pressing interest in new infrastructure, it is important to know how well Ontario is tying these infrastructure plans to two related environmental planning regimes developed to maximize the benefits of infrastructure and avoid significant adverse impacts.

The regimes in question are the Ontario *Environmental Assessment Act* (EAA) and the *Canadian Environmental Assessment Act* (CEAA). Presently, the EAA applies to virtually all infrastructure related to municipal servicing (roads, water, wastewater), transportation (highways and transit), waste management, and electricity generation and transmission. The CEAA also applies to all of this infrastructure. It may also apply to other infrastructure that is proposed by the federal government or that receives federal funding, federal land, or a designated federal approval. Two basic legal questions addressed by this paper are whether these two EA regimes are duplicative, and, if not, what each requires of infrastructure projects.

A further basic legal question that is addressed by this paper is how these EA regimes relate to those Ontario sectors that are subject to legally-required plans. For these sectors, is EA this duplicative or complementary? To answer these questions, this paper focuses on how planning under the EAA compares with planning under the *Planning Act* (also referred to as the "PLA"). There are several reasons why this paper focuses on the *Planning Act* as the standard-bearer for integrated planning: first, it is the most well-established land use planning regime in the Province; second, its approach

¹ See, for example, Taylor, Z., and Van Nostrant, J., *Shaping the Toronto Region, Past, Present, and Future* (Neptis Foundation, Toronto, September 2008)

has clear favour with the Province as the Province has used the *Planning Act* to provide the foundation for several of the other planning initiatives described above (e.g., the GGH Growth Plan, the Greenbelt Plan, and the Oak Ridges Moraine Conservation Plan); and, thirdly, the *Planning Act* provides the most expansive and rigorous legal standards. The PLA clearly applies to infrastructure; it clearly provides binding provincial planning policies²; and it applies to a very broad range of provincial and municipal decision-makers responsible for infrastructure. For these reasons, any conclusions on whether it is possible or desirable to bring the EAA and PLA planning regimes together into a single process of integrated planning will be relevant to the integration of all provincial plans into EA planning processes³.

Integrated Planning

The situation whereby one planning regime addresses the requirements of another regime that a Yes decision under the first regime dictates a Yes decision under the other regime.

Organization of this Paper

The present paper has three parts:

Part I sets out the basic principles of three legal planning regimes – the *Canadian Environmental Assessment Act*, the *Ontario Environmental Assessment Act*, and the *Planning Act*;

Part II identifies those aspects of environmental assessment planning that are amenable to integration and considers ways to provide integration; and

Part III examines whether there are any aspects of the EAA and PLA that would prevent their integration through an environmental assessment.

² The Provincial Policy Statement Order in Council (PPSOC) is, in one respect, different from the many provincial and municipal plans identified above since it is not a plan; however, this difference is, in law, likely not significant. The plans alluded to above consist of frameworks of policies and mapping. The PPSOC is predominantly policies with minimal mapping. The key challenge to the integration of land use planning and environmental assessment is not mapping, however, but policies. Thus, if the PPSOC policy framework can be integrated with EA planning, it would appear likely that such integration is also possible for each of the various provincial plans.

³ It is also possible to apply the approaches identified in this paper to integrate into EA the full variety of other approvals (e.g., environmental, energy, resource) applicable to infrastructure, but the specific ways of doing so are beyond the scope of this paper.

PART I: BASIC PRINCIPLES OF KEY PLANNING LAW REGIMES

1.1 ONTARIO ENVIRONMENTAL ASSESSMENT ACT

1.1.1 History

The EAA was passed into law in 1975. It has received one major reform, which occurred in 1996. Throughout its existence, the Ministry of the Environment has administered the EAA, led by its Environmental Assessment (& Approvals) Branch.

The EAA legal regime has diverse elements: it includes general designation and exemption regulations, undertaking-specific designation and exemption regulations, multiple individual and class EA approvals, guidance documents on carrying out an EA, and administrative board decisions (by joint boards under the *Consolidated Hearings Act*, and the former Environmental Assessment Board – now called the Environmental Review Tribunal). At one time, hearings were frequently required of major undertakings, and hearing decisions provided extensive EA guidance; however, there have been very few hearings since the 1996 reforms, and the nature of the 1996 reforms makes some pre-1996 guidance of uncertain value.

1.1.2 Enforcement

Where it applies, the EAA is binding on all persons subject to its terms. It is an offence to breach the EAA. Importantly, not only are proponents subject to its prohibitions, the EAA also prohibits any government from providing approval or funding for an undertaking subject to the EAA until the EAA approval is received.

1.1.3 Planning Context

Table 1, below, sets out the basic principles of the EAA. These principles introduce the key EAA terms: undertaking, individual EA, class EA, EA process, and alternatives.

1.2 CANADIAN ENVIRONMENTAL ASSESSMENT ACT

1.2.1 History

The legal route to the establishment of the CEAA is complex. In 1972, the federal government released a task force report on environmental assessment. The federal response to the task force report was to initiate the environmental assessment and review process (EARP) in 1973, through cabinet policy. To implement EARP, the government also established the Federal Environmental Assessment Review Office in April, 1974. The focus of EARP was public review of significant projects, programs and activities. The first public review was conducted on the original Point Lepreau Nuclear Power Generation Station in New Brunswick. The review was conducted in April, 1975 and reported on in May, 1975. In 1977, cabinet provided some minor modifications of EARP.

Alongside EARP, however, the most important environmental assessment in the 1970s was conducted through a federal public inquiry chaired by then-Justice, Mr. Thomas Berger. The federal government asked Justice Berger to inquire into two pipeline proposals to deliver natural gas from the Arctic Ocean to southern markets. The result was a landmark hearings process and an overall recommendation not to proceed with either pipeline. This recommendation was followed by government.

In 1984, following internal and external review, the government approved of Environmental Assessment and Review Process Guidelines Order (EARPGO) under the authority of the *Government Organization Act, 1979*. At this time, the EARPGO was conceived of as simply a planning tool for government actions and not a legally binding directive. However, in 1989, the Federal Court of Canada ruled that the EARPGO was legally binding. Subsequent court decisions suggested that the EARPGO applied to any proposal having an environmental effect on an area of federal jurisdiction. In 1992, this broad scope for the EARPGO was narrowed by the first Supreme Court of Canada decision to deal with environmental assessment: *Friends of the Oldman River Society v. Canada (Minister of Transport)*.

In response to the multiple court challenges over government compliance with EARPGO, the federal government began work on federal environmental assessment legislation. An initial draft of the proposed *Canadian Environmental Assessment Act* was released in 1990. Following a lengthy committee process that made many modifications to the draft bill and a further process of Senate hearings, the CEAA was given Royal Assent in June 1992. However, political issues resulted in the federal government postponing its proclamation. In 1994, the federal government changed and the new government determined that the CEAA should be proclaimed. Following a further process of legislative hearings and amendments, the CEAA was proclaimed in force on January 19, 1995.

One of the critical differences between the EARPGO and the CEAA is that the EARPGO applied to "proposals" while the CEAA applies to "projects" only. The term, proposal, is much broader than project and included policies and programs. Thus, the CEAA makes no provision for assessing the environmental effects of plans, policies or programs.

A second key feature of the CEAA is that its implementation is governed by key regulations. At the outset, there were four key regulations: the Inclusion List Regulations, which clarify an aspect of the definition of "project"; the Law List Regulations, which clarify which classes of federal approval trigger the CEAA; the Exclusion List Regulations, which set out projects exempt from the CEAA; and the Comprehensive Study List Regulations, which sets out the classes of project that must receive "comprehensive study" under the CEAA, rather than the more cursory "screening".

Since that time, additional regulations have been tabled for development through a systematic consultation process headed by the Agency, known as the Regulatory Advisory Committee (RAC). Regulations under consideration since the proclamation of the CEAA include regulations for projects outside Canada, Crown corporation environmental assessments, and process efficiency.

TABLE 1: Basic Principles Of the Ontario EAA

(1) Application - The EAA applies to public sector undertakings, unless specifically exempted by order or regulation, but does not apply to private sector undertakings, unless specifically designated by order or regulation. An "undertaking" can be a concrete "enterprise or activity" or a "plan or program", but virtually all EAs have been about concrete enterprises or activities, not plans or programs.

(2) Categories of Planning Processes:

(a) Individual EA Process - For undertakings requiring individual EA, the EAA provides a five-stage approval process that consists of: terms of reference; proponent planning; government review; ministerial decision-making; and, where necessary, a hearing and decision by an independent administrative board.

(b) Class EA Process - The EAA encourages proponents of many similar undertakings to develop and implement a class EA process that is more expeditious and less onerous than individual EA, and usually consists of a self-assessment process by proponents that has multiple planning steps, and includes government review, but limited recourse to ministerial decision-making or hearings by independent administrative boards.

(c) Sectoral EA Regulations - For specific sectors, usually led by private sector proponents, the EAA has supported the development of sector regulations that (i) designate private sector proponents under the Act for specific classes of undertaking, and (ii) allow such proponents to avoid individual EA by carrying out an EA "screening" process. The screening processes authorized by these regulations resemble Class EA processes in that they are more expeditious and less onerous than individual EA, and proponent-led with limited recourse to ministerial decision-making or hearings by independent administrative boards.

(3) Scope of planning - The common ingredient to all EAs is the "environment", which the EAA defines very broadly to include, with no hierarchy, the natural environment (i.e., air, land, and water), the biological environment (plant and animal life), the human environment (social, cultural and economic conditions affecting individuals and communities, and human structures), and the inter-relationship of these parts.

(4) Focus of planning - For EAs of public sector undertakings, the EAA generally requires broad consideration of "alternatives", through a "narrowing down" process that considers all reasonable alternatives and their relative positive and negative environmental effects in order to ultimately identify a preferred alternative; for EAs of private sector undertakings, the EAA is generally less onerous and focuses upon mitigating the potentially negative effects of a specific undertaking, with little or no consideration of alternatives.

(5) Test for approval – The EAA has no legislated test for approval of an undertaking. In practice, for public sector undertakings, the test considers alternatives and the narrowing down process, and asks whether, overall, the preferred alternative provides the best balance of advantages and disadvantages to the environment; for private sector undertakings, the test is based on a less onerous planning process, and asks whether, overall, the preferred undertaking provides an acceptable balance of advantages and disadvantages to the environment.

(6) Hearings – For individual EAs, there is no requirement for a hearing; under the EAA, hearings are at the discretion of the Minister and the MOE has opposed hearings since the 1996 EAA reforms; however, there is some ability for a proponent to require a hearing under the Consolidated Hearings Act. Under class EAs and sectoral EA regulations, hearings are virtually nonexistent, as neither type of regime makes general provision for hearings, and thus hearings depend on specific provision in specific approvals (e.g., Municipal Class EA).

The CEAA included provision for a mandatory 5-year legislative review of its implementation. In response to this legislative review, the government introduced amending legislation in March 2001 through Bill C-19. This legislation was ultimately proclaimed in force on October 30, 2003. The new amendments provided some new duties: the first such duty is the duty of the Minister to determine early in the assessment process whether a comprehensive study will continue as comprehensive study or be referred to a panel or mediation. The second duty arises through the amendments to section 55 which create a duty to establish and maintain a Registry that has an electronic and paper component. By contrast, the rest of the amendments seem merely to add new discretion to existing powers. The amendments also added two significant new provisions: the creation of the position of federal environmental assessment coordinator appears to deal exclusively with improving the timing and coordination of assessments, but does not appear to change the approach to decision-making, whether interim (e.g., scoping) or final; and the amendment of the CEAA purpose section and the creation of a new overarching duty to exercise the powers provided in the Act to protect the environment and human health.

Canadian Environmental Assessment Agency

The Canadian Environmental Assessment Agency ("Agency") oversees the implementation of the CEAA. This Agency replaces the Federal Environmental Assessment Review Office (FEARO). Unlike FEARO, the Agency is independent and not under the direct supervision of the Minister of the Environment. However, like FEARO, the Agency provides advice to governments and proponents on carrying out environmental assessments, but has no decision-making powers respecting projects. The statutory objects of the Agency also include ensuring an opportunity for public participation in the environmental assessment process and promoting uniformity of environmental assessments and consistency of environmental assessments with the purposes of the CEAA.

1.2.2 Enforcement

Where it applies, the CEAA is binding on all persons subject to its terms. However, the CEAA contains no offence provisions. It is generally enforceable only by way of judicial review in accordance with the principles of administrative law. It also contains provisions for the federal government to obtain injunctive relief against proponents who seek to carry out projects without first complying with the CEAA (ss. 11.1 & 11.2).

1.2.3 Planning Context

Table 2, below, sets out the basic principles of the CEAA. These principles introduce most of the key CEAA terms: project, comprehensive study, panel review, screening, and significant adverse environmental effects (SAEEs).

1.3 ONTARIO *PLANNING ACT*

The purpose of the following section is to provide some historical context to the PLA and its basic principles, so that its role in planning law may be understood and compared with the EA regimes described above. This section will demonstrate that, although the PLA and various EA regimes give priority to planning, what each regime means by planning has been and remains very different.

1.3.1 *History*

Land use planning is the first Ontario example of legally-mandated planning. Ontario initiated land use planning in the early part of the 20th Century through zoning by-laws passed under the *Municipal Act* as it then existed. Ontario passed its first *Planning Act* in 1946, which also introduced two types of plans to guide municipal development: (i) an "official plan" for a planning area that could include one or more municipalities; and (ii) a "plan of subdivision" within designated urban development areas. In 1959, Ontario integrated zoning by-laws (then called restricted area by-laws) into the *Planning Act*. From the outset, the PLA was binding upon municipalities through its definition of "public works". According to the Act, where an official plan was in effect, no public work could proceed that did not conform to the applicable official plan.

In 1983, the Province substantially reformed the *Planning Act*. First, it introduced provision for provincial policy to guide municipal planning. Provincial policy would arise through policy "statements" that would have cabinet approval. Second, the Province mandated that decision-makers "have regard to" such policies. Third, it introduced the "natural environment" as a provincial interest that merited protection.

From 1994 to 2005, the Province oscillated back and forth on the appropriate role of the Province in land use planning. In 1994, Ontario provided a strong provincial role by approving a new and comprehensive set of provincial policies and introducing the requirement that decision-making should be "consistent with" such policies. In 1996, however, the Province sought to diminish and subvert its role in relationship to municipalities by reverting to the "have regard to" standard and providing a new, less comprehensive policy statement to address this role. Then, in 2004, the Province renewed a strong provincial role by reinstating the "consistent with" standard and providing a new, more comprehensive policy statement to address this new standard.

During this period of consolidating provincial policy statements, the scope of provincial interests and policies expanded significantly, so that the current PPSOC covers a wide range of topics, including not only land use compatibility and community development, but also on environmental protection, growth management, and infrastructure. By infrastructure, the current PPSOC extends its coverage broadly:

Infrastructure: means physical structures (facilities and corridors) that form the foundation for development. Infrastructure includes: sewage and water systems, septage treatment systems, waste management systems, electric power generation and transmission, communications/telecommunications, transit and transportation corridors and facilities, oil and gas pipelines and associated facilities.

Through this definition, the PLA clearly applies to a broad range of infrastructure and has modernized its traditional focus on public works.

TABLE 2: Basic Principles of the CEAA

(1) Application - The CEAA applies to any project - public or private - that involves federal proponent, federal funding, federal realty or designated federal approval.

(2) Categories of Planning Processes:

(a): Comprehensive Study – Applies to the most significant 1% of projects, but only those projects found on the Comprehensive Study List. Where a CSL project triggers the CEAA, the CEAA demands an immediate determination by the Minister of the Environment whether the project planning will proceed as a CSL or whether it will involve "assessment by a review panel" that is led by independent experts appointed by the Minister.

i. panel review: this is the most onerous form of CEAA assessment and involves five stages of planning: a. the Minister's determination of the panel terms of reference; b. the panel's determinations on the scope of the required Environmental Impact Statement (EIS) from the proponent; iii. proponent planning in response to the EIS Guidelines; iv. panel review of the submitted EIS for its adequacy; and, v. when and if the EIS is adequate, panel hearings on the EIS and the project, concluding with a panel report of conclusions and recommendations. At the end of this process, there is cabinet review of the panel report and issuance of a government response that advises of the government's decision on the EA.

ii: comprehensive study: this the second most onerous CEAA process and involves: a. the responsible authority's determination on the scope of the project and the assessment; b. proponent planning; and c. submission of the EA to the Minister for public and government comment. It is followed by a decision by the Minister of the Environment on the EA.

(b) Screenings – Unless a project is found on the Comprehensive Study List, every project triggers a screening or class screening, each of which focuses on a specific project and determines whether any adverse effects of the project are likely to be significant, taking mitigation measures into account; if not, the project may proceed; if yes, the project triggers independent public review.

(c) Class screenings: the CEAA encourages proponents of many similar projects to develop and implement a class screening process that is more expeditious and less onerous than individual screening EAs.

(3) Scope of planning – the common ingredient to all EAs is the examination of "environmental effects" which the CEAA defines in a way that gives priority to biophysical effects (i.e., effects on land, air, water, living organisms, and ecosystems. Socio-economic effects may be considered only where such effects are the direct result of biophysical effects.

(4) Focus of EA - The focus of all assessments is evaluating the environmental significance of potential environmental effects, including cumulative effects and some socio-economic effects. This evaluation is also supposed to take account of mitigation measures.

(5) Test for approval – the CEAA has an explicit test for making a decision that will allow a project to proceed in whole or in part: the project is not likely to cause any significant adverse environmental effects, taking mitigation into account. Where it is uncertain whether a project is likely to cause such effects, the project is supposed to be referred to a review panel. Where a project is likely to cause significant adverse environmental effects, after taking into account mitigation, it can only be approved if the effects "can be justified in the circumstances".

(6) Hearings – The CEAA permits hearings in two circumstances: for projects on the CSL, where the Minister determines, as set out above, that the project should proceed immediately to panel review; or, for projects subject to a screening, where the Minister concludes that public concerns warrant a referral, it is uncertain whether the project is likely to cause significant adverse environmental effects, or it is likely that the project will cause significant adverse environmental effects and not clear whether such effects can be justified in the circumstances.

1.3.2 Enforcement

Where it applies, the PLA is binding on all persons subject to its terms. However, the PLA contains a mixture of approaches to enforcement. The PLA makes it an offence to breach its requirements governing site plan control, powers of entry, and sale of lands regarding unregistered plans. It is also an offence to breach a municipal zoning by-law or interim control by-law. However, other provisions, such as those governing official plans, public works, and the provincial policy statement are enforceable only by way of appeal to the Ontario Municipal Board or an application to Ontario courts consistent with the principles of administrative law.

1.3.3 Planning Context

Table 3, below, sets out the basic principles of the *Planning Act* regime. These principles introduce most of the key PLA terms: zoning by-laws, severances, subdivisions, official plans, public works, and provincial plans & policies.

PART II: INTEGRATED INFRASTRUCTURE PLANNING

This Part of the paper compares and contrasts the three planning law regimes considered separately above. Section 2.1 compares and contrasts the EAA and CEAA regimes for environmental assessment planning. Section 2.2 compares and contrasts the EAA and PLA regimes for environmental assessment and land use planning.

2.1 COMPARING ONTARIO AND FEDERAL ENVIRONMENTAL ASSESSMENT PLANNING

2.1.1 Historical basis for the existence of very different Ontario and federal EA regimes

For persons unfamiliar with environmental assessment planning, it appears reasonable to believe that two legal regimes having the same subject matter would share similar goals and processes.

In most of Canada and the United States, this belief is reliable as most jurisdictions have similar EA processes between the federal and provincial/ territorial/ state governments. However, in Ontario, this belief about EA is not reliable.

The reasons behind these differences start in history. Both the Ontario and federal EA regimes are based upon different aspects of an earlier United States regime – the environmental assessment regime provided by the *National Environmental Policy Act of 1969* (NEPA). One part of NEPA emphasizes determinations of environmental significance; another part of NEPA emphasizes comparison of alternatives. Based on NEPA, Ontario has followed the emphasis on alternatives. Yet, also based on NEPA, the federal government has followed the emphasis on significance. Across Canada, virtually all provincial EA regimes follow the CEAA emphasis on significance and thus have EA regimes that are compatible with the CEAA. On the other hand, across the United States, virtually all state EA regimes are compatible with NEPA and its emphasis on alternatives.

TABLE 3: Basic Principles of the Ontario *Planning Act*

(1) Application - The PLA applies generally to any lands within a municipality or provincially designated planning area; it does not generally apply to Crown lands. Where applicable, the PLA requires (a) municipal approval of any public or private proposal to subdivide land; (b) compliance with the existing municipal zoning by-law for any new use of land, or municipal approval to amend the ZBL to allow compliance. The PLA also has special application to public works.

(2) Planning Processes. The PLA makes provision for three types of plans; it also provides planning processes for the passage of zoning and other by-laws related to the use of land.

(a) Official Plans – an official plan is intended to guide the physical development of a municipality and effects on the social, economic and natural environment. Its guidance generally consists of goals, objectives, policies, and maps. It guides all relevant decisions of a municipality, including decisions on public works, decisions on zoning by-laws and amendments, and decisions on plans of subdivision. It involves a process of public and agency notice, a public meeting, and opportunity for comment, leading to a municipal decision to adopt the plan, and then a decision by the Minister of Municipal Affairs and Housing or delegated municipality on whether to approve the plan. Plans may be amended by a municipality or any other person, and require a public process similar to plan approval.

(b) Plans of subdivision – a plan of subdivision is intended to guide the physical development of an area zoned for development; it is triggered by a person seeking to change the existing pattern of land ownership by creating new land interests or smaller land parcels (a consent or severance may avoid subdivision approval where the ownership change is minor). The approval process involves public and agency notice, a public meeting, and an opportunity for comment.

(c) Site Plans – a site plan is intended to guide the development of specific properties that required rezoning; following zoning approval, site plan control regulates the specific design and location of proposed buildings and structures and site grading. Generally, the approval process involves negotiations and an agreement between the developer and municipality.

(d) Zoning By-law Amendments – If a person seeks to use land in a way that is not authorized by an applicable municipal zoning by-law, the proponent must apply to the municipality passing the zoning by-law for permission to amend the by-law and rezone the land. Where a rezoning is required, a developer may also apply for an official plan amendment. The approval process involves public and agency notice, a public meeting, and an opportunity for comment.

(4) Scope of planning - The PLA contains no defined scope. It promotes consideration of a very broad range of topics, through reference to "provincial interests", "provincial policy statements", and different ranges of approved topics for official plans, zoning by-laws, plans of subdivision, and site plans. Topics include not only physical change to human settings, but also the economic, social, and natural (air, land, water, and plant & animal life) environments, the built environment, and the cultural environment.

(5) Focus of planning – To design development to benefit the public interest and be compatible with adjacent and nearby developments and land uses.

(6) Test for approval – All PLA decisions must be consistent with the PPSOC. All municipal by-law decisions, including decisions on zoning by-laws and public works, must conform to the applicable official plan(s).

(7) Hearings – In general, a proponent who makes an application to change a land use, sever or subdivide land, or amend an official plan has the right to appeal a municipal refusal to make the requested decision or any decision within a specified time. The PLA also authorizes any other person interested in any of these applications to bring an appeal. Recent amendments to the PLA do impose some restrictions on appeal rights of proponents where the appeal seeks to change an urban boundary or an employment land use. All PLA appeals go to the Ontario Municipal Board unless a joint board has been ordered under the Consolidated Hearings Act.

In theory, the two emphases – significance versus alternatives – are perfectly compatible: after all, NEPA has housed both emphases for almost four decades. NEPA, however, integrates the two emphases by making the focus on significance a "Stage 1" EA process, and, for initiatives having this significance, making the focus on alternatives the required "Stage 2" process. This 2-stage approach is not followed by either the EAA or the CEAA. Instead, each has followed the same emphases through multiple-stage processes. To date, this means that the EAA and CEAA regimes result in very different planning processes and results. As set out below in Table 4, each has a very different planning scope, focus, and test for approval. For this reason, it is difficult to see common ground between the EAA and the CEAA.

2.1.2 Evaluating the absolute and relative merits of the different EA regimes

As the Ontario and federal EA regimes differ on fundamentals, their requirements do not appear to overlap or duplicate each other. To the contrary, for major projects subject to both the EAA and CEAA, it seems possible for the two regimes to reach inconsistent conclusions about what is the preferred project. In particular, the EAA focus on comparing alternatives for advantages and disadvantages across a broad range of environmental and socio-economic measures may result in the identification of an alternative that differs from what the CEAA identifies by starting with a specific project and focusing on designing it to avoid significant adverse environmental effects.

In one key respect, however, the application of these two EA regimes to a single project is duplicative: recently, neither regime has a strong history of saying No to projects. While the policy reasons for the recent approach may be similar, the legal reasons are not.

* For CEAA projects, the inherent difficulty with getting a No is that few proponents or government agencies are prepared to insist upon an adequate criterion of significance when assessing adverse environmental effects. Instead, for most projects and most effects, the criterion of significance is veiled behind multiple considerations and vague opinions or the criterion is set so high that virtually no project could ever exceed the standard. It is revealing that, after more than thirty years of federal experience dealing with EA focused on "significance", there is no list anywhere of specific examples of significant effect. Moreover, when asked, Canadian courts have recently refused to address this issue as an issue of law subject to judicial scrutiny⁴.

⁴ Compare, for example, the legal review carried out in *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1990), 6 C.E.L.R. (N.S.) 89 at 103 (F.C.A.) with the review carried out in *Alberta Wilderness Association v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 at 181-182 (F.C.A.). Note also that U.S. courts reviewing the issue of "significance" under the National Environmental Policy Act of 1969 have repeatedly examined the topic and whether certain EA conclusions about significance are or are not legally valid: see analysis provided by Mandelker, D., *NEPA Law and Litigation* (2nd) (Westlaw), Chapter 8, section VI, pp. 8-86 to 8-101.

* For EAA projects, the inherent difficulty with getting a No is the absence of any clear test for approval and the related absence of any binding or even focused guidance on what should constitute a screening criterion (i.e., a Yes/No question that can eliminate an alternative) or a comparative evaluation criterion (i.e., a question that compares alternatives for their relative merits). One historic source of binding guidance was hearings before a board where the board could make decisions and provided detailed reasons for its EA decisions, several of which said No to environmental assessments⁵; however, EA hearings are now very rare.

Instead of meeting these challenges, both the EAA and the CEAA seem increasingly evaluated according to their success delivering Yes results. This is unfortunate because the now almost four decades of experience with Ontario and federal EA has illustrated the merits of saying No on occasion.

More significantly, the recent experience of Ontario with sprawl and its efforts to demand minimum standards for project planning needs to show some No decisions to infrastructure projects that do not meet these standards.

It may also be noted that, for certain medium-scale projects in certain sectors like the electricity and waste sectors, the EAA has authorized the development of regulations that provide abridged EAs focusing on the avoidance of significant adverse environmental effects and thus seem very similar to the CEAA requirements and its challenges with saying No.

Additionally, it may be noted that, through another sectoral regulation, there is also new provision for an abridged EA process for most transit-sector projects. This process requires some, as yet unclear, consideration of alternatives, but without any legal clarity on how to evaluate and prefer certain alternatives over others.

2.1.3 Integration of the two EA regimes

Because of the differences between the CEAA and EAA, the Ontario and federal governments have not, to date, succeeded in agreeing to a single integrated EA process for any projects that trigger both the CEAA and EAA. Instead, the governments have agreed on processes of "coordinated" EAs, whereby the proponent carries out two distinct EAs, but on an integrated timeline⁶.

⁵ See, for example, *Re North Simcoe Waste Management Association* (1991), 5 C.E.L.R.(N.S.) 98 at 113-118 (Joint Board) and *Re Town of Meaford and Township of St. Vincent* [unreported] (Joint Board, Reasons for Decision and Decision, December 11, 1990).

⁶ See *Federal/Provincial Environmental Assessment Coordination: A Guide for Proponents and the Public* (Version 1.1, October 2006), available from the Ontario Ministry of the Environment or the Canadian Environmental Assessment Agency

TABLE 4: Comparing the EAA and the CEAA

Topic	EAA	CEAA
Planning scope	<p>EAA definition of the "environment", which includes the natural environment (i.e., air, land, and water), the biological environment (plant and animal life), the human environment (social, cultural and economic conditions affecting individuals and communities, and human structures), and the inter-relationship of these parts.</p>	<p>CEAA definition of "environmental effects", which gives priority to biophysical effects (i.e., effects on land, air, water, living organisms, and ecosystems). Socio-economic effects may be considered only where such effects are the direct result of biophysical effects.</p>
Planning focus	<p>Different focus for different classes of proponents and different sectors of undertakings.</p> <p>For sectors dominated by public sector proponents, the EAA generally requires broad consideration of "alternatives", through a "narrowing down" process that considers alternatives and their relative advantages and disadvantages</p> <p>For sectors dominated by private sector proponents, the EAA is generally less onerous and focuses upon mitigating the potentially negative effects, with little or no consideration of alternatives.</p>	<p>The focus of all assessments is evaluating the significance of adverse environmental effects, including cumulative effects and some socio-economic effects. This evaluation is also supposed to take account of mitigation measures.</p>
Test for approval	<p>* No legislated test for approval of an undertaking.</p> <p>* In practice, different tests for different undertakings and sectors of undertakings:</p> <p>Public sector undertakings: Taking into account alternatives and the narrowing down process, what alternative provides, overall, the best balance of advantages and disadvantages to the environment;</p> <p>Private sector undertakings: Does the preferred undertaking provide, overall, an acceptable balance of advantages and disadvantages to the environment.</p>	<p>Explicit legislated two-level test for approval:</p> <p>Level 1 test: the project, taking into account mitigation, is not likely to cause any significant adverse environmental effects.</p> <p>Level 2 test: if the project, taking mitigation into account, is likely to cause significant adverse environmental effects, can these adverse effects "can be justified in the circumstances".</p>

CEAA provisions supporting integration. For infrastructure specifically, it is also important to be aware of CEAA provisions governing the provision of "block" project funding from the federal government to a province: section 54. Such projects may not trigger individual CEAA assessment where the government reaches agreement with a province that some kind of assessment of environmental effects will be carried out that is "in accordance" or "consistent" with the CEAA.

EAA provisions supporting integration. On the other hand, where a project is expected to involve federal proponentcy or receive major federal funding, the federal government or other proponent may seek to have the Ontario Minister of the Environment use the EAA powers to vary or dispense with EAA requirements where the Minister considers the requirements imposed by another jurisdiction to be "equivalent" to the requirements imposed under the EAA (s. 3.2). However, for reasons set out above, it may be difficult to assert that the CEAA regime is equivalent to the EAA because of their very different treatment of "alternatives".

2.1.4 Conclusions

At this time, despite decades of experience with Ontario and federal EA for infrastructure, and the existence of two, very distinctive EA processes that may each apply to infrastructure, Ontario continues to suffer from incomplete EA regulation. For very different reasons, both the Ontario and federal EA processes are overwhelmingly "procedural" and lack the identification or observance of "substantive" standards. This means that good and bad infrastructure projects can get Yes decisions under each process.

2.2 COMPARING LAND USE PLANNING WITH ONTARIO ENVIRONMENTAL ASSESSMENT PLANNING

2.2.1 History

Initially, following the passage of the EAA in 1975, it was generally the case that undertakings subject to the EAA were not subject to the PLA, and vice-versa. The EAA applied to provincial undertakings and the Province was not subject to the PLA. On the other hand, private sector developments subject to the PLA were not subject to the EAA unless they were specifically designated and such designations were rare.

However, this bright line separating these two regimes began to blur with the application of the EAA to municipal undertakings, beginning in 1980. Municipal undertakings subject to the EAA were also subject to the PLA, particularly the PLA provisions governing public works.

The second substantial change to the application of the EAA and the PLA occurred with the deregulation of the electricity sector. The distinction between the EAA and the PLA became important as soon as Ontario Hydro's electricity generation successor, Ontario Power Generation (OPG), was competing with private sector electricity generation facilities. Putting each under different regimes was considered contrary to the larger agenda of competitiveness. Over time, through this deregulation, OPG remained subject to the EAA but lost its exemption from the PLA, and private sector electricity generators became subject to the EAA as well as the PLA. This change became complete in 2001.

More recently, the Province has determined that the same "equalization" should occur in waste management. For this sector, the equalization occurred for municipal and private sector waste management undertakings. Regardless of sector, waste undertakings are now generally subject to both the EAA and the PLA.

It may also be noted that, in these two "equalization" schemes, the focus of planning under the EAA has been altered dramatically. Now, for many if not most projects in each sector, EA planning has moved away from consideration of alternatives and towards consideration merely of adverse environmental impacts. In short, these two recent Provincial sectoral regulations have made the Ontario EA process more like the federal EA process.

2.2.2 Comparison of Planning Principles

This paper's comparison of the *Planning Act* with the *Environmental Assessment Act* (in Part I, above) was intended to make the following points about each:

- (1) the *Planning Act* regime focuses on planning goals and standards, demanding cumulative attention to the goals and standards set out in the PLA itself as well as the PPSOC and official plans; and
- (2) the *Environmental Assessment Act* regime focuses on planning processes, permitting very different processes under the EAA itself, as well as Class EAs and sectoral EAs.

These points present a clear and obvious legal case for integration:

On the one side, the PLA regime is more about substance than process: it focuses on substantive content, but has very basic and traditional process requirements.

On the other side, the EAA regime is more about process than substance: it has virtually no substantive content, but has a very broad range of alternative processes to precede approvals.

On this basis, integration may be considered both important and necessary. Integration is important because many initiatives trigger both regimes. Integration is necessary because each regime fails to address planning comprehensively – addressing substance and process.

Despite this obvious fit, there is now a more than 30-year tradition of doing Ontario EAs in isolation from land use planning. What is the problem? The most obvious problem is that the Province has produced very little guidance that integrates these regimes⁷. A second problem is that the Province has refused to demand that these regimes be integrated. A third problem is that these regimes are administered by different ministries (i.e., the Ministry of the Environment versus the Ministry of Municipal Affairs and

⁷ One exception is the Screening Criteria Checklist found in the guidance documents for EAs subject to the Electricity Projects EAA Regulation (O.Reg.116/01) and Waste Management Projects EAA Regulation (O.Reg.101/07), which specifically references the PPSOC and the requirement to be consistent with its terms.

Housing), and there appears to be no existing inter-agency arrangement to address integration.

However, today, as we face renewed interest from all governments in "infrastructure", and infrastructure is an area that clearly engages the PLA and the EAA (not to mention several other planning regimes), it seems important, if not essential, that legal integration proceed with haste.

The following section provides examples on how one may integrate *Planning Act* content with two types of EAA process. It has two sections. The first section focuses on integration using the traditional "alternatives" focus of Ontario EA. It has four subsections to address each of the four major "process" steps of this kind of EA and show how each step in a process of evaluating alternatives may incorporate input from the PLA (and other Ontario planning) regimes. The second section focuses on integration using the new "significance" focus of Ontario EA for the electricity and waste management sectors. This second section has the added benefit of illustrating how the PLA may assist CEAA assessments since the CEAA employs the same focus on significance as these two sectoral EAA regulations.

2.2.3 Integrating the Planning Act with EA Planning Focused On Alternatives

2.2.3.1 EA assessment of the need for new infrastructure

The topic of "need" is common to both land use planning and environmental assessment. In basic terms, the topic of need considers whether there is a gap between current and planned supplies and tomorrow's demands. If there is a gap, then there is "need". If not, there is no proven need and a decision-maker may turn a proposal down.

Need is relevant to virtually all sectors of human activity and may encompass such diverse matters as housing, employment lands, schools, recreation facilities, social service facilities, and infrastructure capacity respecting roads, transit, water, sewage, storm water management facilities, energy generation & transmission, and waste management & disposal.

The provincial policies and plans recognized in the *Planning Act* contain numerous examples of policies that address the topic of need. Consider, for example, the PPSOC:

- PPS policy 1.1.2 requires that sufficient land be made available for an appropriate mix of employment opportunities, housing and other land uses to meet projected needs for a time horizon of up to 20 years.
- PPS policy 1.1.3.3 requires planning authorities to determine the availability of suitable existing or planned infrastructure and public service facilities;
- PPS policy 1.4.1a. requires planning authorities to maintain the ability to accommodate residential growth for a minimum of 10 years.
- PPS policy 1.6.1 provides that infrastructure and public service facilities shall be provided in a coordinated, efficient and cost-effective manner to accommodate projected needs.

- PPS policy 1.6.2 provides that the use of existing infrastructure and public service facilities should be optimized, wherever feasible, before consideration is given to developing new infrastructure and public service facilities.
- PPS policy 2.3.5.1 provides that, for lands within prime agricultural areas, lands may be excluded only where there is a “demonstrated need” for additional land to be designated to accommodate the proposed use.
- PPS policy 2.5.2.1 provides that, as concerns aggregate resources, demonstration of “need” shall not be required.

The PPSOC also addresses need for specific sectors, such as transportation need (e.g., Policies 1.2.2d, 1.6.1) and alternative and renewable energy need (e.g., Policy 1.8.3).

By themselves, these policies do not address need; however, where decision-makers generate information to make decisions that are consistent with these aspects of the PPSOC, such decision-makers are also generating information that addresses EAA requirements to establish the need for new facilities.

Thus, provincial policies and plans provide an array of requirements for land use planning that should generate information that will also address requirements to demonstrate need under the EAA.

2.2.3.2 EA assessment of "alternatives to" new infrastructure

As set out above, the EAA contains two tiers of requirements to describe and evaluate alternatives. The first, most general tier of such requirements is the EAA requirement to describe and evaluate “alternatives to” an undertaking or project.

There is a certain “chicken and egg” quality to this requirement. On the one hand, the language of the EAA itself in section 6.1(2) suggests that an environmental assessment should first identify the “undertaking” in order to then identify the “alternatives to” this undertaking.

On the other hand, the EA practice (also advocated by Ontario tribunals on this point) advises that an environmental assessment should, in sequence:

- (1) identify if there is “need” for some new action;
- (2) identify the various possible alternatives to address this need; and only then
- (3) evaluate the various possible alternatives to identify the preferred “alternative to”, which becomes the “undertaking”.

This latter approach incorporates into Ontario environmental assessments a “veil of ignorance” about the undertaking. Under this veil, the undertaking is not the starting point of planning; rather, it is the result of planning: it is revealed only after the EA has completed its description and evaluation of “alternatives to”, not before. Many approved Class EAs related to infrastructure also demand this latter approach. For example, the Municipal Class EA demands that an EA begin with the identification of need or opportunity, then describe and evaluate “alternative solutions” to addressing this need in order to conclude with a “preferred solution” which becomes the “project”.

On the other hand, several recent terms of reference for individual EAs appear to lift the veil of ignorance around the EAA requirements on “alternatives to an undertaking” by allowing a proponent to predict the preferred “alternative to” in order to prescribe requirements for describing and evaluating the second tier of EAA requirements to describe and evaluate alternatives, namely alternative methods of carrying out the undertaking.

In February 2005, a report produced by the executive group of an environmental assessment advisory panel convened by the then-Minister of the Environment suggested that the application of the EAA to transit and transportation, waste and energy sectors could address the “alternatives to” aspect of the EA process through the use of sector-specific policies⁸. The idea was that the “green” alternatives within any sector should be able to proceed more expeditiously than the “brown” or “black” alternatives within a sector. This approach clearly presumed that the “undertaking” was known in advance: otherwise, one would not know whether one was addressing a “green”, “brown”, or “black” undertaking. The basis for this leap forward was the view that the EAA requirement to address “alternatives to” an undertaking could be effectively and efficiently addressed by provincial policy. Provincial policy could declare which projects were “green” and which were “brown” or “black”. Following such an approach, a “green” undertaking that was supported by provincial policy should be “preferred” and thus a proponent of a green undertaking should not be subject to the time and expense of a detailed “alternatives to” analysis.

This approach to reforming the EAA was not adopted by the Ministry; however, the approach does provide independent, expert support for two novel views of addressing “alternatives to” within Ontario EA:

First, it introduced the view that use of provincial policy could justify the elimination of the veil of ignorance approach to “alternatives to” under Ontario EA. In some circumstances, it was not necessary to go through a three-phase, multi-step process just to identify an “undertaking” or “project”.

Second, it introduced the idea that provincial policy could express preferences about alternatives such that, within Ontario EA, provincial policies could scope or even entirely eliminate the requirements to describe and evaluate “alternatives to”.

In short, provincial policy could authorize a more efficient, less expensive EA process by avoiding months or years of study to identify a green project as the “preferred alternative”: where provincial policy provided support, an EA could move quickly to identify a green undertaking and be subject to only one tier of assessing alternatives – the tier of describing and evaluating alternative ways of carrying out the undertaking, such as alternative locations, routes or designs.

⁸ See Minister's Environmental Assessment Advisory Panel – Executive Group, *Improving Environmental Assessment in Ontario: A Framework for Reform* (February 2005), Volume 1, particularly recommendations 1 to 5 and related discussion. The writer was a member of the Executive Group that produced this report.

Reviewing current provincial policies and plans, there appear to be several examples of provincial guidance that could scope or eliminate the EAA requirements around “alternatives to” certain infrastructure. For example, as concerns transportation, the GGH Growth Plan provides:

- Policy 3.2.3.1 Public transit will be the first priority for transportation infrastructure planning and major transportation investments.
- 3.2.3.3b) Municipalities will ensure that pedestrian and bicycle networks are integrated into transportation planning to provide linkages between intensification areas, adjacent neighbourhoods, and transit stations, including dedicated lane space for bicyclists on the major street network where feasible.

These policies within the GGH Growth Plan may allow an Ontario EA to scope or eliminate requirements to describe and evaluate “alternatives to”. For example, with the GGH, it would appear to be consistent with the Growth Plan to move a transportation EA quickly through the “alternatives to” tier of work and documentation where:

- (1) the EA is proposed for an area within the GGH,
- (2) the EA alternatives include a transit corridor, and
- (3) the study area for the EA includes a corridor that is identified on Schedule 5 of the GGH Growth Plan.

2.2.3.3 EA Assessment of alternative routes/ technologies/ designs for new infrastructure

In Ontario EA, the second tier of alternatives analysis involves describing and evaluating alternative methods of carrying out an undertaking.

Unlike the statutory requirements for “alternatives to”, the statutory requirements for “alternative methods” do not involve a chicken and egg problem on the proper starting point for the EA. There is not a problem with knowing what the undertaking is to start this EA work. To the contrary, it is essential to know what the undertaking is in order to determine the most appropriate alternative methods to consider. For example, if the undertaking involves a facility, then alternative methods may consider alternative facility locations within a study area; however, if the undertaking involves a corridor to get from A to B, then alternative methods should consider alternative corridor locations between these two points.

Because of this specific statutory context, it is clearly possible for this tier of alternatives analysis to involve a veil of ignorance about the preferred method or methods. Under a veil of ignorance approach, the EA begins with the development of a framework of the key criteria to judge advantages and disadvantages. Once the framework is developed, the EA advances to assessing the advantages and disadvantages of each alternative according to the framework.

Yet provincial (or municipal) plans or policies may also provide major assistance to the evaluation of alternative methods. Depending on their terms, these plans or policies may scope or even eliminate alternative methods. For example, if a provincial plan shows a transit corridor along an existing road corridor, it may be reasonable if not preferable to eliminate consideration of alternative locations for the corridor and consider only alternative designs (i.e., integrated or segregated tracks) and technologies (i.e., bus, streetcar) for the corridor.

Similarly, a provincial (or municipal) plan may have an enormous influence on the evaluation of transit or multi-modal stations. If the plan showed the corridor only, then it would appear important for the EA to consider alternative station locations along the corridor and then subsequently consider alternative station designs. However, if the plan shows the corridor and stations, then it may be reasonable if not advisable to eliminate consideration of alternative station locations and move directly to consider alternative station designs.

Thus, at the level of “alternative methods”, land use policies may influence an Ontario EA in two ways:

- (1) most significantly, land use policies may direct attention *towards* specific areas, by, for example, designating corridors or stations; and
- (2) in the absence of specific guidance on where infrastructure should be located, land use policies may provide the rationale for EA criteria used to evaluate the advantages and disadvantages of various alternative methods.

Both of these approaches merit further consideration.

2.2.3.3(1) *Planning Act* policies that may guide choices among alternative locations for an undertaking

Reviewing current provincial policies and plans, the examples provided above of provincial guidance on transit appear to have a role in scoping or eliminating not only “alternatives to”, but also the EAA requirements around “alternatives methods”.

In particular, considering the policies identified above, it would be consistent with the PLA to move an EA quickly through certain “alternatives methods”, such as alternative corridor locations, where:

- (1) an EA is proposed for an area within a municipality that has an approved official plan which gives priority to transit;
- (2) the EA undertaking is a transit corridor; and
- (3) the study area for the EA includes a transit corridor that is identified on a schedule to the official plan.

2.2.3.3(2) *Planning Act* policies that may guide EA evaluation criteria for choosing among “alternative methods” of carrying out an undertaking

One of the most complex features of Ontario EA is the framework for assessing and comparing alternatives. The general approach is that an EA must set out its framework before carrying out the assessment so that the assessment is blind. The key components to an EA framework are its criteria.

Within Ontario EA, there are two kinds of criteria: (1) screening criteria; and (2) comparative criteria.

- * Ontario EA uses screening criteria to set a minimum standard for all alternatives. Screening criteria must be answered Yes or No. (e.g., Does land contain habitat of species at risk? Is site within a settlement area?) Either the alternative passes the criterion and can be considered further or it fails the criterion and gets eliminated from further consideration.

- * Ontario EA uses comparative criteria to consider the relative merits of different alternatives. The best comparative criteria demand numeric answers so that alternatives may be truly compared (e.g., compare the number of residential dwellings within 500m of the alternative). As set out in the example, they may assess benefits, not just impacts since a criterion on distance may assess benefits where one wants to maximize potential use of a facility (i.e., transitway) or impacts where one wants to minimize proximity to a facility (i.e., landfill).

Virtually every policy set out in provincial policy or a provincial plan is capable of providing a rationale for criteria used by an Ontario EA to screen out or compare alternatives. The reason for this inter-relationship between policies and criteria is that the EAA definition of the “environment” is very broad. It thus encompasses virtually every provincial interest set out in the *Planning Act* and its provincial policy statement, as well as the policies set out in provincial plans.

That a policy provides a rationale for an EA criterion does not mean, however, that an EA should include a criterion for every policy. For landfill EAs done in the early 1990s, the Province developed an EA framework that included multiple screening criteria across a broad array of ecological, social and cultural interests as well as dozens of comparative criteria across fourteen disciplines making up the “environment”. Such an approach is expensive and time-consuming, but also has the effect of making few criteria meaningful: with 100 criteria, each criterion provides only 1 percent of the rationale for a decision.

Today, it may not be necessary for an individual or class EA to purport to provide a “comprehensive” evaluation framework; rather, it would appear to be permissible and preferable to seek to provide a practical evaluation framework: a framework that address the key issues and not more. Consistent with this approach, every type of criterion should be supported by a specific, and not a formulaic, rationale. For example:

- * Does the criterion address a topic that should determine the fate of an alternative and thus should be a screening criterion? Or

- * Does the criterion address a topic that should clearly influence the outcome when comparing alternatives and thus should be a comparative criterion?

The 1996 reforms to the EAA make it possible to devise a binding EA framework. The reform to add approval for terms of reference for every individual EA means that such EAs can begin from an approved framework and not have the framework questioned down the road. Similarly, the reform to add a statutory framework for class EAs would allow every class EA to contain an approved framework of screening and comparative criteria that address the most important topics for any class or sub-class of undertakings.

Nevertheless, current EA practice is not taking advantage of these opportunities for more efficient and cost effective EAs. There are very few examples of EAs or Class EAs setting out this kind of detail in advance of the EA process. At this time, the only Ontario EAs that appear to be considering this level of detail are the Screening Criteria set out in the EA processes incorporated into the sectoral EA regulations for Electricity and Waste Management Projects (e.g., O.Reg.116/01 and 101/07) and these address a different EA emphasis (i.e., the emphasis on significance, as discussed below). These failings have the effect of increasing the time and cost of EA since each EA must then develop its framework during the EA process rather than prior to starting the EA process.

2.2.3.4 Integrated EA Planning for the Preferred Undertaking

In Ontario EA, there is still important work to be done after the two tiers of alternatives have been addressed. The final tier of EA is examining the undertaking and determining if its design can be improved and/or impacts avoided or mitigated. Thus, after completing the assessment of alternatives, Ontario EA demands a planning process that resembles the planning process required by the *Planning Act*.

This stage of Ontario EA is also amenable to assistance from provincial policies and plans. The broad view of “environment” should be considered for all anticipated impacts and, for areas of anticipated impact, provincial policy can provide some guidance on the significance of the impact. For example, considering impacts, the PPSOC provides that:

1.7.1 Long-term economic prosperity should be supported by:

“e. planning so that major facilities (such as airports, transportation/transit/rail infrastructure and corridors, intermodal facilities, sewage treatment facilities, waste management systems, oil and gas pipelines, industries and resource extraction activities) and *sensitive land uses* are appropriately designed, buffered and/or separated from each other to prevent *adverse effects* from odour, noise and other contaminants, and minimize risk to public health and safety;

This policy provides several impacts that should be considered by Ontario EA at the stage of evaluating final details of the undertaking, including noise, odour, and dust. It also provides a standard against which impacts can be assessed (i.e., what is required to *prevent* adverse effects?)

It is also possible to use provincial policy to consider benefits of an undertaking. For example, considering benefits, the GGH Growth Plan provides that:

3. Municipalities will ensure that pedestrian and bicycle networks are integrated into transportation planning to:

...

provide linkages between intensification areas, adjacent neighbourhoods, and transit stations, including dedicated lane space for bicyclists on the major street network where feasible.

This policy provides several possible benefits that could or should be considered by Ontario EA for a new road, a road/ transitway or a transit station. Further, the question of benefits could be framed as what is feasible, but could also ask what is preferable.

2.2.4 Integration of the Planning Act with EAs focused on "significance"

By comparison to integrating the PLA with EAs that involve consideration of alternatives, the integration of the PLA with EAs that focus on significance is relatively straightforward.

An EA focused on "significance" involves a four-step process:

- (1) Identification of applicable criteria for significance (i.e., what constitutes a significant adverse environmental effect?);
- (2) Gathering of data and formulation of expert opinion on the potential and likely effects of a project on the "environment" (as defined);
- (3) Determining if any potential or likely adverse effects are significant; and
- (4) Applying feasible mitigation measures to determine if any or all significant effects have been rendered "not significant" (i.e., considering the "net" significance of effects).

The key step to this kind of EA is the first step as it sets out the framework for all subsequent EA planning. In particular, it should result in conclusions on what kinds of project effects have the potential to be significant and thus merit specific study. Conversely, it should allow a proponent to scope out of consideration the study of effects that do not have potential significance according to the framework.

The *Planning Act* provides several types of guidance that may assist development of the EA framework of significance. In particular, it provides guidance through the PPSOC, official plans, and zoning and other land use by-laws. Legally speaking, these different standards do not have the same weight. For example, zoning by-law standards and official plan policies may be amended by appealing to the Ontario Municipal Board. On the other hand, the PPSOC policies cannot be amended. In law, the PPSOC standards thus have great weight as they cannot be altered by a proponent's planning or approval process. It is also important to distinguish between PPSOC policies that provide absolute standards (i.e., no development or site alteration is permitted in) and those policies which depend on further study or support by expert opinion. Considering other PLA standards, it may also be advisable to give official plan policies and zoning by-law standards important weight as they cannot be amended except by winning at an appeal before a tribunal, which involves risk as well as a longer and more expensive approvals process.

A leading example of the use of the PLA framework to guide EA planning and perhaps its criteria for significance is the "Screening Criteria Checklist" found in Schedule I to the Guide to Environmental Assessment Requirements for Waste Management Projects, incorporated into EAA Regulation 101/07. A similar approach is found in the Guide associated with Electricity Projects, incorporated into EAA Regulation 116/01. This guidance is still fundamentally lacking, however, since it is not explicit on how the listed screening criteria give rise to criteria for significance: it is therefore left up to proponents, planning project-by-project, to develop their own criteria. This results in Ontario EAs that have the same weakness as federal EAs identified above (Section 2.1.2).

PART III: CONSIDERATION OF POSSIBLE HURDLES TO INTEGRATED PLANNING

The previous sections have set out the many advantages and potential applications of integrated planning for transportation projects.

To fully address integrated planning, it is also necessary to consider planning or legal hurdles that prevent or restrict integrated planning. For example:

- (1) Process concerns: are there any process restrictions that may affect integrated planning?
- (2) Substantive concerns: are there any substantive standards within Ontario planning regimes that may affect integrated planning?

3.1 POSSIBLE PROCESS HURDLES

One clear example of a process hurdle is a statutory provision that affects the timing of integrated planning. Key examples are set out below.

3.1.1 EAA Timing

The EAA contains a very significant clause respecting the timing of environmental assessment in relation to other approvals.

12.2

....

(2) No person shall issue a document evidencing that an authorization required at law to proceed with the undertaking has been given until the proponent receives approval under this Act to proceed with the undertaking. 1996, c.27, s.3.

....

(4) The Crown or a Crown agency shall not give or approve a loan, grant, subsidy or guarantee with respect to the undertaking until the proponent receives approval to proceed with the undertaking. 1996, c. 27, s. 3.

The EAA permits limited exceptions to these two prohibitions, as follows:

- (1) Before a proponent receives approval to proceed with an undertaking, a person may,
 - (a) take any action in connection with the undertaking that may be necessary to comply with this Act;
 - (b) acquire property or rights in property in connection with the undertaking;
 - (c) prepare a feasibility study and engage in research in connection with the undertaking;
 - (d) establish a reserve fund or another financing mechanism in connection with the undertaking. 1996, c. 27, s. 3.

The effect of these provisions is that the EAA is, in planning terms, first in line: no one can obtain another planning approval for an undertaking subject to the EAA before the required EAA approval is obtained, whether by Individual EA or Class EA.

These provisions thus affect integrated planning: they demand that any integrated planning for an undertaking subject to the EAA must start with the EAA requirements. Thus, environmental assessment is the first opportunity to carry out integrated planning.

The major challenge presented by this requirement is undertakings where the application of the EAA is not clear. For such undertakings, a proponent could proceed through numerous other approvals and planning processes, yet all would be subject to revocation if the undertaking was subject to the EAA and an EA was not approved before these other approvals.

3.1.2 Planning Act timing

The *Planning Act* also contains a significant provision that affect the timing of planning initiatives.

24. (1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith. R.S.O. 1990, c. P.13, s. 24 (1); 1999, c. 12,

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with it if the amendment comes into effect. 2006, c. 23, s. 12.

These provisions make the important timing point that, if an undertaking is contrary to an applicable official plan, and the undertaking may be considered a “public work”, it is illegal to proceed with the undertaking.

Recent caselaw on this provision makes two points:

- (1) silence about an undertaking or part of an undertaking in an official plan may not meet the test of conformity with the official plan: in particular, the inclusion of part of a transportation corridor within an official plan, but not the entire corridor may be contrary to this provision; and
- (2) an undertaking by an upper-tier municipality is subject to this requirement for an official plan by a lower-tier municipality.

Notably, these provisions do not appear to apply to provincial undertakings. The *Planning Act* definition of “public work” is limited to undertakings “within the jurisdiction of a municipality or a local board”. It also notable that provisions similar to PLA s.24 appear in the other provincial planning regimes set out above in respect of each of their respective provincial plans.

3.1.3 Other statutory requirements that affect timing

A third statutory regime that can be very relevant to timing issues is the *Consolidated Hearings Act* (CHA). The CHA makes provision for a single, consolidated hearing of all approvals required by an undertaking. Initially, this statute permitted the proponent of an undertaking to trigger the Act at its choosing and regardless whether it was at the beginning or end of planning or other approval processes. The idea was that a proponent could circumvent the many procedures set out in various statutes in favour of moving expeditiously to a hearing before a joint board established under the CHA. Litigation in the early 1990s set aside restrictions that one joint board sought to impose on a proponent that sought to have a hearing very early in the planning stages of the undertaking; however, subsequently, Ontario appears to have amended some laws and regulations to re-insert some restrictions on when the CHA is applicable to an undertaking⁹.

3.2 POSSIBLE SUBSTANTIVE HURDLES

A substantive hurdle appears to arise where different regimes mandate requirements that conflict.

The law on conflicts between and among different legal regimes has evolved considerably in the past decade. In environmental matters, the current caselaw provides a very restrictive test of conflict so that conflicts do not arise easily. This current test replaced a broader test of conflict which meant that conflicts could arise regularly. The current test provides that a conflict arises only where one regime advises that a person must do “X” and another regime advises that a person must not do “X”¹⁰. Conflict exists because it is not possible to comply with both regimes. Applying this test of conflict, courts have upheld municipal by-laws in situations where there have been provincial laws and even federal laws on the same topic because it was possible to comply with all such laws.

Where a conflict arises, the law also provides rules on which regime is paramount. Two general rules are:

- (1) a special Act prevails over a general Act; and
- (2) a newer Act prevails over an older Act.

Additionally, numerous regimes provide specific provisions on conflict and paramountcy. The *Planning Act*, for example, has a conflicts and paramountcy clause as follows:

71. In the event of conflict between the provisions of this and any other general or special Act, the provisions of this Act prevail.

⁹ See, for example, PLA, s.22(7.0.1) to (7.0.3) respecting official plan amendments, and PLA, s.34(11.0.1) to (11.0.3) respecting zoning by-law amendments, and R.R.O.Reg.173, s.2 respecting environmental assessments.

¹⁰ Note that, occasionally, in constitutional law only, courts have also considered laws to be in conflict where there is conflict in the purposes of different regimes. Thus, if one regime demands “X” and another regime demands “Xplus”, there could be a conflict if the demand for “Xplus” conflicts with the purposes of the first regime.

As concerns the EAA and the PLA, the above rules on paramountcy are significant because the EAA has no provision analogous to s.71 of the PLA.

The opportunity for conflict arises from two aspects of the current PLA regime:

- the possibility that the Provincial Policy Statement is law, not merely policy; and
- the requirement that all decisions affecting a planning matter be consistent with the Provincial Policy Statement.

3.2.1 Legal Status of the Provincial Policy Statement

This topic requires a more extensive review than will be provided in this paper¹¹; however, there are several reasons why the provincial policy statement could be considered law, with the principal reason being its capacity to fit within the legal definition of a “regulation” under Ontario law. Ontario defines a regulation as:

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council...".

Considering this definition:

- the Provincial Policy Statement is an "order", namely "Order in Council 140/2005";
- it is of a "legislative nature" since it applies to all decisions and comments by numerous bodies across Ontario;
- it was made under an Act of the legislature, namely s.3 of the *Planning Act*; and
- it was approved by the Lieutenant Governor in Council.

On this basis, perhaps the appropriate acronym for the provincial policy statement is not the “PPS”, but rather the “PPSOC” to emphasize its legal status as an Order in Council.

3.2.1 Conflict with the Provincial Policy Statement

If the PPSOC is law, the potential for legal conflict to arise in relation to the PPSOC arises from s.3(5) of the PLA. It reads as follows:

3. (5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter, shall be consistent with policy statements issued under subsection (1).

¹¹ The writer provided a more detailed discussion of this topic in a dinner meeting of the Municipal Law Section of the Ontario Bar Association on March 27, 2008, *The Provincial Policy Statement 2005: Three Years On...A Look at Legal and Planning Issues and Perspectives*

Since the EAA would seem to involve “the exercise of any authority that affects a planning matter”, many decisions under the EAA would appear to be subject to this provision. This would include decisions by the Minister of the Environment under the EAA as well as decisions by a proponent that is a ministry, minister, or provincial agency.

3.2.3 Implications

If the PPSOC is law, then it is possible for there to be legal conflict involving its terms; if it is not law, then the possibility of conflict is limited to other aspects of the PLA.

Considering the terms of the PPSOC and the terms of the EAA, the potential for conflict arises in two places:

- (1) from the terms of the EAA applied to individual undertakings through an approved terms of reference; and
- (2) from the terms of approval of a class EA.

It remains for a court or tribunal to address these legal issues.

3.3 CONCLUSIONS ON POSSIBLE HURDLES TO INTEGRATION

This review of the possible hurdles to integrated planning has identified both procedural and substantive hurdles to integrated planning; however, neither hurdle is insurmountable. Many are not even complex. To the contrary, once the various types of hurdles are understood, there appear to be some straightforward options on how to address them.

OVERALL CONCLUSIONS

This paper has presented for discussion a detailed review of the possibility and desirability of integrating the Ontario and federal EA planning processes with the planning processes and requirements of the *Planning Act*.

The integration of these planning regimes could serve two very significant needs for Ontario infrastructure. First, integration would promote greater effectiveness in how various levels of government in Ontario do infrastructure planning because the resulting "planning decision" would be consistent with all planning regimes, not merely the single regime which triggered the process. Second, integration would promote greater efficiency in planning and infrastructure decision-making since one planning process does the work of two separate processes that might otherwise proceed sequentially. This second need is clearly consistent with exercising a wise and economic use of public sector resources.

A third need served by such integration is the promotion of planning integration between and among other planning regimes, including the multiple regimes providing Ontario infrastructure plans. If this paper may make the case for integrated planning between the PLA and the EAA, future work may more easily make the case for integrated planning among all of the large array of plans and planning regimes across Ontario. Thus, although this point is not directly addressed by this paper, the paper also supports investigation of the integration of the EAA with many of the plans now demanded for all infrastructure sectors.

With these advantages of integration, it also appears timely to address all possible legal hurdles to integration.