Recent Municipal Infrastructure Initiatives

1. Canada Infrastructure Bank – Update

2. The Ottawa Light Rail Transit (OLRT1) Public Inquiry - Summary

April 24, 2023

The information and comments herein are for general information and are not intended as advice or opinion to be relied upon in relation to any circumstances. For application of the law to specific situations, you are encouraged to seek legal advice.

Heather Douglas
WeirFoulds LLP
416.947.5064
hdouglas@weirfoulds.com



Canada Infrastructure Bank ("CIB")

The CIB sees itself as a federal Crown corporation with a mandate that includes working with federal, provincial, territorial, municipal and Indigenous sponsors and private sector investors to explore innovative approaches to financing and delivering infrastructure projects in Canada that are in the public interest.



Legislation

- The CIB was established in 2017 pursuant to the *Canada Infrastructure Bank Act*.
- The statutory mandate of the CIB is to:

"Invest, and seek to attract investment from private sector investors and institutional investors, in infrastructure projects in Canada or partly in Canada that will generate revenue and that will be in the public interest by, for example, supporting conditions that foster economic growth or by contributing to the sustainability of infrastructure in Canada".



Legislation (cont'd)

- Specific powers of the CIB include the power to:
 - structure proposals and negotiate agreements.
 - invest in infrastructure projects and seek to attract investment from private sector investors.
 - receive unsolicited proposals.
 - support infrastructure projects.



Legislation (cont'd)

- act as a centre of expertise on infrastructure projects.
- provide advice to all levels of government.
- collect and disseminate data, in collaboration with the other levels of government to assess and advise on the state of infrastructure in Canada.
- perform any other functions prescribed from time to time.



Overview-External-International

- Most countries that are part of the Organization for Economic Cooperation and Development (OECD) countries have institutions comparable to the CIB.
- Recently international infrastructure banks have expanded their focus to include sustainability and green considerations.



Overview-External-International (cont'd)

- There are at least 28 green infrastructure banks across 12 OECD and non-OECD countries including in the U.K. and the U.S.
- A recent OECD report states that the CIB exhibits all the best-practice functions when compared with similar institutions in OECD countries.

Overview-External-International (cont'd)

According to OECD Secretary-General Mathias Cormann:

"The CIB is the only infrastructure bank we surveyed that engages relevant stakeholders at all levels of government in infrastructure finance, which is also a best-practice function."



Initial Funding

The CIB commenced with \$35 billion to invest in projects.

Current Priority Sectors with Long-term Sector Targets

Public Transit \$5B Broadband \$3B

Clean Power \$5B Trade & Transportation \$5B

Green Infrastructure \$5B Indigenous Peoples \$1B



Recent Completed CIB Financings other than for Ontario Municipalities and Related Entities (2022 onward)

Indigenous Peoples

- 1. landing infrastructures in Saskatoon
- 2. large scale clean power projects in Saskatoon
- expansion project to deliver clean power to an isolated microgrid in the Yukon
- 4. wastewater treatment plan in British Columbia
- 5. broadband infrastructure in Alberta
- 6. wind energy in Saskatoon
- 7. critical infrastructure required for commercial and residential development on reserve in Northern Ontario



Recent Completed CIB Financings other than for Ontario Municipalities and Related Entities (2022 onward) (cont'd)

Green Infrastructure

- building decarbonization retrofits with private sector partners Johnson Controls (across Canada), Dream Unlimited Corp. and others (Toronto and Saskatoon)
- 2. sustainable retrofit projects with Avenue Living Asset Management in low density residential buildings (across Western Canada)
- 3. sustainable retrofit projects with Noventa Energy Partners and with private capital from Ancala Partners (Toronto)
- 4. energy retrofits at the University of Toronto
- 5. charging and hydrogen refueling initiations across Canada



Recent Completed CIB Financings other than for Ontario Municipalities and Related Entities (2022 onward) (cont'd)

Clean Power

- 1. small modular reactor with Ontario Power Generation (OPG) in Ontario
- 2. district energy investment (British Columbia)

Trade & Transportation

- 1. zero emission buses in Calgary
- 2. zero emission school buses with school bus operators in Québec
- 3. Zero emission school buses with school bus operators in British Columbia



Ontario Municipal CIB Loan Agreements

- Ontario municipalities were expressly authorized to enter into loan agreements with the CIB (O. Reg 653/05 under the Municipal Act, 2001 and Reg 610/06 under the City of Toronto Act, 2006).
 - expressly authorize Ontario municipalities to enter into conditional loan agreements with the CIB.
 - prescribe conditions that apply to the agreements.
 - mandate the inclusion of a levy provision in the authorizing by-laws.



Recent Completed Financings for Ontario Municipalities and Related Entities

District Energy System

(Clean Power)

• CIB and CIBC each invested \$135,000,000 in Markham District Energy Inc.'s thermal networks (Financial Close - November 2022).



Recent Completed Financings for Ontario Municipalities and Related Entities (cont'd)

Zero Emission Buses (ZEBs)

(Trade & Transportation)

- CIB invested up to \$400,000,000 for the purchase of up to 450 ZEBs with the City of Brampton through the Region of Peel (Financial Close April 2022).
- CIB invested up to \$380,000,000 for the purchase of up to 446 ZEBs with the City of Ottawa Financial Close (August 2022).
- CIB Invested up to \$136,000,000 for the purchase of up to 180 ZEBs with The Regional Municipality of York Financial Close (March 2023).
- CIB invested up to \$62,000,000 for the purchase of up to 98 ZEBs with The Regional Municipality of Durham Financial Close (March 2023).



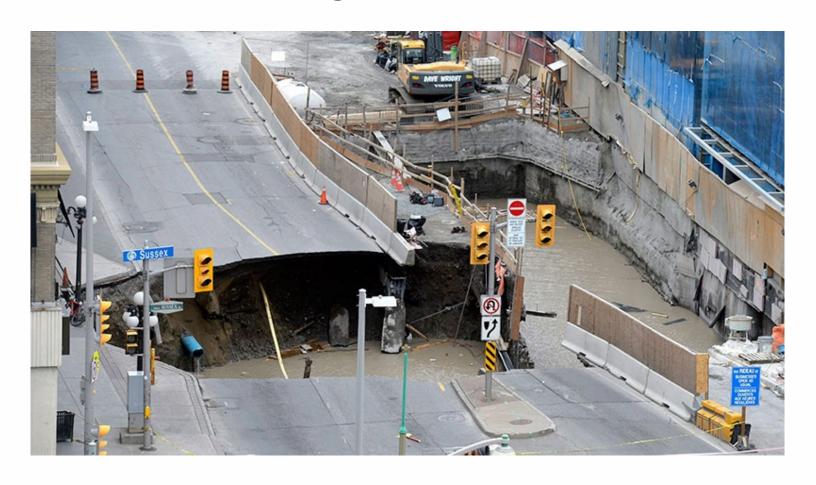
CIB Review

- The Act requires a review of the CIB operations for the first five years.
- Review is underway.
- A final report is expected to be tabled in June 2023.



<u>Summary of Final Report of the Ottawa Light Rail Transit (OLRT1) Public Inquiry - November 2022</u>

The Honourable William Hourigan, Commissioner





Background Chronology

- 2010 Ottawa approves the first stage of a state-of-the-art Light Rail Transit (OLRT1) project.
- Project structured as a P3 with Rideau Transit Group (RGT) as main contractor.
- Fixed price of \$2.1 billion, completion date 24 May 2018.
- Project completed 16 months late and significantly over budget.

Background Chronology (cont'd)

- Disputes, delays, derailments and a sinkhole.
- Completed project unreliable and frustrating to ratepayers.



Commission of Inquiry

- December, 2021 Ontario Government (a major financial contributor to the project) appoints Ont. C.A. Justice William Hourigan as a commissioner under *Public Inquiries Act, 2009*, to investigate every aspect the project from start to finish.
- 30 November, 2022 Commission delivers comprehensive final report - comprising more than 630 pages.

Summary of Report's Key Findings

1 – Budget Process

- Contract fixed price of \$2.1 billion based on estimate provided by City staff to Council in 2009, before municipal election of 2010.
- Estimate not intended to be actual budget but not updated, resulting in cost constraints which adversely affected the system's service reliability.



2 – Procurement

- Commissioner found no issue with City's bidding process, it was found to be "fair and reasonable" and "consistent with best practices."
- However, inflexibility of budget adversely affected design choices.
- Transit vehicles were supplied by Alstom, a reputable international supplier. However, the vehicles chosen were new, untested and based on unproven technology resulting in the attributable to the "inevitable start-up problems with the introduction of new technology."



3 – Delivery Model

- Delivery model known as DBFM (Design, Build, Finance, Maintain).
- RTG agreed to deliver a fully operational LRT system at a fixed price and then maintain the system for 30 years. RTG's responsibilities were fulfilled through related sub-contractors.



3 - Delivery Model (cont'd)

- Delivery model very advantageous to the City in two respects:

 (i) its costs were fixed; and (ii) virtually all risks were shifted to its contract partner RTG.
- Result was no incentive to cooperate in solving problems.
 Relationship adversarial, dysfunctional and litigious, leading to further delays.

3 - Delivery Model (cont'd)

• P3s are appropriate for all kinds of infrastructure projects, the devil is in the details. However, the delivery model should be a "true partnership arrangement", where risks and rewards are shared on a realistic basis given project expectations. Different horses for different courses, not a "zero-sum game."



4 - Management

- Delivery model left City with little control over RTG's work.
- RTG and subcontractors failed to ensure integration of roles.
- Subcontractor arrangements were complex and uncoordinated.



5 – Execution

- Misleading information on progress from RTG passed on by the City to the public-"unconscionable".
- RTG and its subcontractors provided inadequate maintenance resources, causing service delays and general system unreliability.
- Full service was opened to the public without a "soft start" start-up issues were worked out during initial operations.



Conclusion



Commissioner Hourigan pulled no punches. While some interested parties may disagree with some of the conclusions contained in the report, the staff of any municipality contemplating embarking on a large, complex infrastructure project would be well advised to give the report a careful reading. WeirFoulds

Important Caselaw for Municipalities in Expropriation

April 24, 2023

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Chris Tzekas
WeirFoulds LLP
416.947.5039
ctzekas@weirfoulds.com



 A decision of the Supreme Court of Canada which dealt with the issue of constructive takings.



- In a 5-4 decision, the Court held that Annapolis' allegation of a constructive taking could go to trial.
- The minority would have upheld the Court of Appeal's decision to summarily dismiss Annapolis' constructive taking claim.



 Both the majority and the minority considered the SCC's earlier decision in *Canadian Pacific Railway* Co. v. Vancouver (City), 2006 SCC 5 [2006] 1 S.C.R. 227 ("CPR").



- CPR had established a two-part test for determining whether a constructive taking had occurred:
 - i. was there an acquisition of a beneficial interest in the property or flowing from it; and,
 - ii. was there a removal all reasonable uses of the was property.



- The majority sought to "... illuminate CPR, not overrule it" (para. 41).
- It interpreted "beneficial interest" as being an "advantage" flowing to the state, not an actual acquisition.



- The majority also held that public authority's intention is not an *element* of the test for constructive takings at common law (para. 52).
- This did not mean, however, that intention is irrelevant to the inquiry (para. 53).
- Intent may constitute a "material fact" in the context of a constructive taking claim.



 "... it is well-established in our law that zoning which effectively preserves private land as a public resource may constitute a "beneficial interest" flowing to the state, as contemplated in CPR, where it has the effect of removing all reasonable uses of that land." (para. 58)



• "In our view, all reasonable uses of land may be shown to have been eliminated where a permit needed to make reasonable use of the land is refused, such that the state has effectively taken away all rights of ownership." (para. 72)



• "A refusal to up-zone, standing alone, will not generally remove all reasonable uses of vacant land." (para. 75)

 "Annapolis claims that Halifax has effectively transformed its Lands into a public park." (para. 75)

• "...Halifax may defeat Annapolis' constructive taking claim by showing a single reasonable use of the property." (para. 75)



- The minority disagreed that "an acquisition of a beneficial interest in the property or flowing from it" should be replaced with the much broader notion of an "advantage".
- It said that the Court should retain the CPR test for a de facto taking, which insists that a propriety interest be acquired.
- The interest must be proprietary, not merely an "advantage" (para. 110).



- It also disagreed with the view that the public authority's "intention" is a material fact in a claim for a de facto taking.
- The material facts for a de facto taking claim concern the effects of the public authority's regulatory activity, not its intention.



- The minority concluded that Halifax had not acquired any beneficial interest in the Annapolis lands or flowing from them. Halifax had simply refused to up-zone the lands (para. 90).
- It also concluded that Annapolis had not been deprived reasonable uses, let alone all reasonable uses (para. 90).



 "...[the majority opinion] risks radically changing the complexion of municipal planning law by providing, in like up-zoning contexts, a windfall to developers who speculate at municipal taxpayers' expense." (para. 91)



- The minority concluded that CPR is settled law and there is no reason to change it.
- It also said that departing from CPR will expose municipalities across Canada to significant financial liability in regulating land use.



 An application for an interim injunction to stop Metrolinx's construction of the Osgoode Hall station, as part of the Ontario Line.



 The interim injunction was sought to ensure there was time for further investigation and consideration of alternative sites for this station.



 The SJO refused the injunction, concluding that reasonable consultations had taken place and that Metrolinx had taken all necessary lawful steps in the planning of this work.



 The Court also concluded that the LSO had not established that there was a serious issue to be tried and that the balance of convenience favoured Metrolinx.



In the result, the LSO failed to meet the test for an interlocutory injunction set out in RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.



 Also an application for an interim injunction brought by the HDI, to prevent the removal of 11 trees.



 At the heart of the application were certain conflicts that had arisen between the HDI and Metrolinx as to the HDI's exercise of Indigenous rights in this major public work.



 The SCJ concluded that the HDI was seeking a renewed or better engagement relationship with Metrolinx, but this did not give rise to the need for injunctive relief; there was no duty on Metrolinx to "adequately engage" (para. 21).



 The Court also found there was no irreparable harm and the balance of convenience favoured Metrolinx.



 the Court of Appeal declined to hear the appeal, because the refusal to grant the injunction related to an interlocutory, not final order.



Recent Environmental Law Changes that Impact Municipal Infrastructure Projects

April 24, 2023

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Janet Bobechko WeirFoulds LLP 416.947.5073 jbobechko@weirfoulds.com



 Update on the On-Site and Excess Soil Management Regulation and Rules

 Update on Municipal Class Environmental Assessments



Refresher – Excess Soil – Phased Approach

O.REG. 406/19: ON-SITE AND EXCESS SOIL MANAGEMENT



O.Reg. 406/19

Soil Rules

December 2020 Amendments

Excess Soil Quality Standards (ESQS)

O.Reg. 153/04 Brownfield Regulation

O.Reg. 351/12 (June 2020 amendment)

O.Reg. 347 Waste Regulation



January 1, 2021

In Force – Reuse Rules, ESQS, waste designations and approvals (s. 1-7,17, 18, 20, 21, 23-28)



January 1, 2023

Paused provisions reinstated Registry resumes (if

applicable)



January 1, 2025

Restrictions on landfilling (s. 22)

Up to Table 2.1 residential, parkland or institutional uses

Planning for pre-Jan 1, 2022 "grandfathered contracts"



January 1, 2021

Requirements for Planning Documents, Tracking & Registration NEW (s.8-16)



Large Reuse Site (s.19)

Grandfathered contracts begin



January 1, 2022

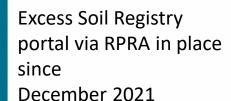
April 2022 Temporary "Pause" until January 1, 2023

November 2022 ERO019-6240

Removing reuse planning requirements from low-risk projects

Special Provisions Grandfathered Contracts end (s. 8.(2))

January 1, 2026





 "excess soil" means soil, crushed rock or soil mixed with rock or crushed rock, that has been excavated as part of a project and removed from the project area for the project.



Key Reminders s. 3, 4 and 5 - O. Reg 406/19



Excess soil is a waste unless all conditions are met:



1. Excess soil must be transported <u>directly</u> to a reuse site from a project area, a Class 1 or 2 soil management site or a local waste transfer facility



2. The owner or operator of a reuse site has <u>agreed in writing</u> to accept the excess soil at the reuse site



3. There is a <u>beneficial reuse</u> for the quality and quantity of excess soil consistent with the beneficial reuse



4. Excess soil is dry and remains dry (if liquid soil- need instrument at reuse site for acceptance)



Implications for Municipalities

- Municipalities as project leaders
- Infrascture definition
- Form of contracts
- Excess Soil Registry
- Reuse site consent
- Site alteration by-laws
- By-law restrictions on import of excess soil from outside municipality



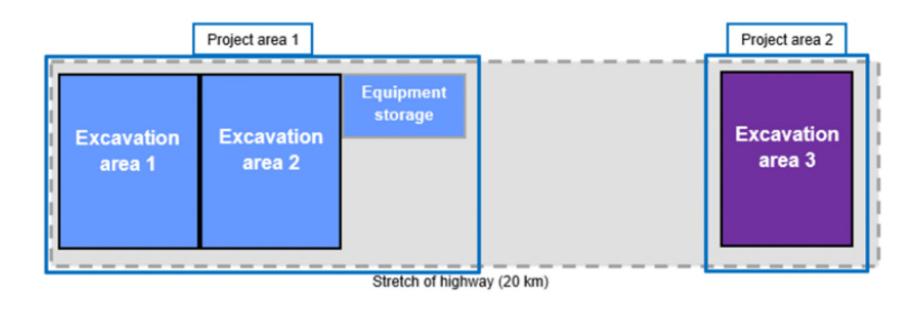
Frequently Asked Questions and Answers

3. What constitutes maintenance in a fit state of repair for an infrastructure project?

- In general, maintaining in a fit state of repair would involve repairing infrastructure or replacing existing infrastructure with similar infrastructure; it would not result in increased capacity or a different alignment, although some minor widening or realigning may be appropriate (for e.g., to meet updated standards)
- In scope examples may include culvert replacement, roadbed repair or pipe replacement, including temporary infrastructure that is part of the maintenance process, such as a by-pass pipe or a minor road diversion or replacing a pipe by laying a new parallel pipe to allow the old one to stay in service until the new one is finished
- Out of scope examples include new construction such as building a road, or a transit right of way, digging a tunnel for a new subway or digging a new sewage/watermain pipe, re-aligning (vertically or horizontally), twinning, or adding capacity or widening of a pipe or road.



Scenario 3: Linear infrastructure project – highway maintenance



In this scenario, there may be two project areas:

- Excavation area 1 and 2, as well as the equipment storage area, will be considered
 one project area, as they are contiguous and have an area of continuous operations
- Excavation area 3 may be considered a separate project and project area, even if it is under the same contract, as this is a separate work location





Proposed Administrative Monetary Penalties – O. Reg. 406/19

O. Reg. 406/19: On-Site and Excess Soil Management

| Reference | Base Penalty Type | Base Penalty Range | Fixed Gravity Level (if applicable) | Fixed Gravity Amount (if applicable) |
|-----------|----------------------|-----------------------|---|--|
| s.6(5) | Type 1 | \$500 - \$3,000 | Less Serious | \$500 |
| 2.7 | Type 1 | \$500 - \$3.000 | Less Serious | \$500 |
| 8.8 | Type 3 | \$3.500 - \$15,000 | | |
| s.9 | Type 1 | \$500 - \$3.000 | ** | ** |
| S.15 | Type 1 | \$500 - \$3,000 | ** | ** |
| s.16 | Type 2 | \$2,000 - \$7,000 | ** | ** |
| s.17(3) | Type 2 | \$2,000 - \$7,000 | | ** |
| s.18 | Type 1 | \$500 - \$3,000 | ** | |
| s.19 | Type 2 | \$2,000 - \$7,000 | | |
| S20 | Type 1 | \$500 - \$3,000 | Less Serious | \$500 |
| s.21(5) | Type 1 | \$500 - \$3,000 | Less Serious | \$500 |
| S.22(1) | Type 2 | \$2,000 - \$7,000 | ** | ** |
| s.23 | Type 2 | \$2,000 - \$7,000 | ** | ** |
| S.24 | Type 2 | \$2,000 - \$7,000 | ** | ** |
| s.27 | Type 1 | \$500 - \$3,000 | Less Serious | \$500 |
| s28 | Type 1 | \$500 - \$3,000 | | |

Type 1 Penalty

- s. 6(5) Failure to provide reuse site with documentation of processed excess soils.
- s. 9 Failure to enter correct information or update information on the Registry.
- s.15 PL failed to retain a QP to prepare and update required reports/documentation.

Type 2 Penalty

- s. 16 PL failed to develop and apply required tracking system required prior to first movement of excess soils.
- s. 17(3) Owner and operator of vehicle transporting excess soil not designated as waste failed to ensure that the soil was collected and transported in accordance with outlined rules (e.g., transported w/o nuisance, safely, leakproof, etc.)

Type 3 Penalty

 s. 8 – Notice was not filed in the Registry setting out information listed in Schedule 1 (e.g., description, name, address of project area).



Excess Soil Fact Sheets from MECP

- 1. Excess soil management and reuse requirements for project areas: contains regulatory requirements for on-site management of excavated soil or crushed rock, and the management and reuse of excess soil from project areas.
- 2. <u>Bringing excess soil to a reuse site</u>: contains regulatory requirements for importing excess soil to a reuse site.
- 3. <u>Excess soil transportation</u>: contains the regulatory requirements for transporting excess soil.
- 4. Excess soil definitions: contains a list of definitions and commonly used terminology.



Reminder of Key Definitions

• "excess soil" means soil, crushed rock or soil mixed with rock or crushed rock, that has been excavated as part of a project and <u>removed</u> from the project area for the project.

• "Class 1 soil management site" - soil bank storage site or a soil processing site.

- "Class 2 soil management site" means a waste disposal site at which excess soil is managed on a temporary basis and that is,
- (a) located on a property owned by a public body or by the project leader for the project from which the
 excess soil was excavated, and (b) operated by the project leader for the project from which the excess soil
 was excavated.



Key Definitions

- "project" means any project that involves the excavation of soil and includes,
- (a) any form of development or site alteration,
- (b) the construction, reconstruction, erecting or placing of a building or structure of any kind,
- (c) the establishment, replacement, alteration or extension of infrastructure, or
- (d) any removal of liquid soil or sediment from a surface water body

• "project area" means, in respect of a project, a single property or adjoining properties on which the project is carried out.

• "project leader" means, in respect of a project, the person or persons who are ultimately responsible for making decisions relating to the planning and implementation of the project.



Key Definitions

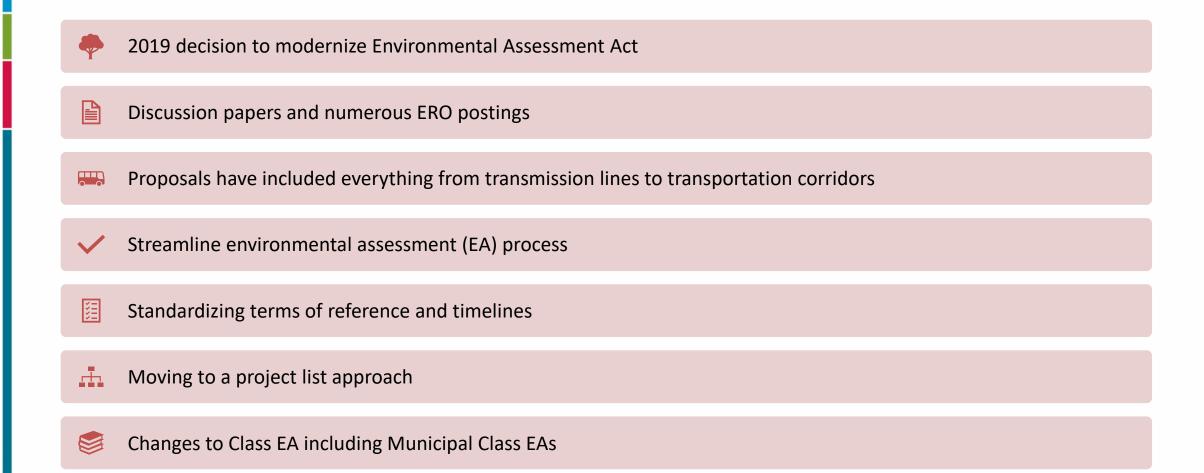
- "infrastructure" means all physical structures, facilities and corridors relating to,
- (a) public highways,
- (b) transit lines and railways,
- (c) gas and oil pipelines,
- (d) sewage collection systems and water distribution systems,
- (d.1) drainage works within the meaning of the *Drainage Act*,
- (e) stormwater management systems,
- (f) electricity transmission and distribution systems,
- (g) telecommunications lines and facilities, including broadcasting towers,
- (h) bridges, interchanges, stations and other structures, above and below ground, that are required for the construction, operation or use of the items listed in clauses (a) to (g), or
- (i) rights of way required in respect of existing or proposed infrastructure listed in clauses (a) to (h);



 Update on Municipal Class Environmental Assessments



Environmental Assessment - Ontario





Municipal Class Environmental Assessment (MCEA)

March 3, 2023 – bulletin posted to ERO advising of amendments to MCEA

Surprise!

More project now eligible for exemptions based on archaeological screening process (ASP)

New 245 page MCEA document



MCEA Change in effect March 3, 2023



18 projects types conditional shifted from Schedule B/C to Schedule A+ exemption based on the results of an archaeological screening process and 7 unconditional exemptions



Exempting projects that are needed because of an emergency



Updating cost thresholds, consistent with provisions in the existing MCEA and the *Environmental Assessment Act*



Exempting some transit projects that are already exempt through O. Reg. 231/08 (Transit Projects and Metrolinx Undertakings) to ensure consistency.



Improving the clarity of the list of projects by reorganizing the projects under subheadings and clarifying some project descriptions



Modernizing consultation requirements by allowing municipalities to develop their own custom notification procedures without a notification by-law



New Archaeological Screening Process (ASP)

New archaeological screening process that proponents will have to complete to determine if a low-risk project is exempt.

A proponent must either:

(i) carry out the process for a Schedule B/C project; or

(ii) complete the archaeological screening process and follow the directions set out in the screening process.



ASP – Based on 3 Questions



Does the project area include known or potential archaeological resources?



Based on the archaeological assessment(s), will the proposed project/undertaking have negative impacts (effects) to archaeological resources?



Based on the archaeological assessment(s), will any negative impacts (effects) be appropriately mitigated?



Municipal Class Environmental Assessment

- March 10, 2023 new ERO posting <u>019-6693</u>
- Evaluating municipal class environmental assessment requirements for infrastructure projects

Comments are open until May 9, 2023



New Consultation – what does it mean?

To evaluate the requirements for municipal road, water and wastewater projects that are currently subject to the MCEA

Revoke the new MCEA

Transition provisions would allow withdrawal from MCEA process

Similar private led projects would have no EA requirements



What else?

Not all municipal projects are covered by MCEA

Certain municipal expressways, waste, transit, electricity and waterfront projects have other existing and proposed EA requirements

Some projects may be impacted by a related EA modernization proposal related to the Comprehensive Project List Regulation



Q & A