What Bill 197 changes – Overview

The Environmental Assessment Act currently requires the Ontario Ministry of the Environment, Conservation and Parks ("MECP") to consider the environmental impacts of Ministry of Transportation ("MTO") projects.

Alongside the July 8th introduction of Bill 197 and its major amendments to the Ontario Environmental Assessment Act (EAA), the Province announced a package of numerous EAA instruments proposing additional changes to the EA regime, including a future regulation to exempt specific MTO projects – all highways - from the EAA. The MTO has identified these as "priority projects", a characterization that is expressly noted in their proposed exemptions. The provincial government says that these exemptions will be made subject to conditions.

Details of the MTO exemptions

Exempted projects:

- The Bradford Bypass. This project entails the design and construction of a new 16.2 km rural 4-lane controlled access freeway, along the northern edge of the GTA. The project previously went through an individual environmental assessment ("EA")
process and was approved on August 28, 2002. However, this project has had a bumpy history, with different governments making different decisions about whether it would get built. It has not yet been implemented.

- Several MTO Provincial Transportation Facilities Class EA projects. These include:
  - **Northern Ontario.** Modifications to Highway 69 the Muskoka area and the Highway 11 interchange at South Mary Lake Road.
  - **Northwest Ontario.** Modifications to Highway 11/17 in the Dorion region and a new commercial facility inspection.
  - **West Ontario.** Modifications to Highway 3 in Essex County; various Highway 401 and Highway 4 interchanges and underpasses near London, Ontario; Highway 7 New Kitchener to Guelph; and various projects related to Highway 401 in Wellington County, Halton Region, Chatham-Kent Region, London Region, and specifically, between Tilbury to London.
  - **Central Ontario.** Modifications to Highway 401 in the North York Region; Highway 400 in the Innisfil Region; and the Highway 5 and 6 interchange in Hamilton.
  - **East Ontario.** Modifications to Highway 17 between Arnprior to Renfrew; and, Highway 7 in the Perth, Lanarak, Kaladar, Actinolite, and Haveloc regions.

The class EA projects have likewise undergone their class EAs, but have not yet been implemented.

Currently, all of the above projects are subject to additional requirements under the Environmental Assessment Act. The July 8th notice seeks exemptions for all of them.

**The Bradford Bypass - Details**

The Bradford Bypass is subject to the conditions of its EA Notice of Approval. Condition 4 makes the design and construction of the highway subject to the MTO Class EA. Currently, the MTO is required to prepare a Transportation Environmental Study Report ("ESR") for the preliminary design and a Design and Construction Report(s) ("DCR") for the detailed design of the Bradford Bypass.

The purpose of the ESR is to outline: (1) the potential environmental impacts associated with the project; (2) mitigation measures to address these impacts; and (3) consultation that occurred during the development of the ESR and how the consultation changed the project to address concerns. One or more DCR(s) must be prepared to document the development of detail design and other project implementation issues.
The government is proposing a regulation to exempt this project from certain requirements of the Environmental Assessment Act and its notice of approval.

The proposed exemption would excuse the proponent, MTO, from Condition 4 of its EA Notice of Approval. As a result, MTO would not need to prepare an ESR or DCR(s), nor complete the associated 30-day consultation period. MTO would also be exempt from other technical design commitments made in the environmental assessment, including the completion of:

- a stormwater management plan and groundwater protection plan;
- a detailed noise report prior to the start of construction;
- commitments from the EA related to further work such as consultation requirements with agencies, avoidance principles through sensitive areas, and other similar work; and
- a Stage 3 archaeological assessment.

The exemption would include conditions that require the MTO to:

- notify the MECP, any other interested stakeholders, and Indigenous communities of proposed changes to the project within the study area assessed in the approved EA (changes beyond this area would appear not to be included);
- prepare annual reports on its progress with respect to those conditions; and
- continue Indigenous community consultation.

It also appears that the future exemption regulation may contain additional conditions that are not stated in the current public notice. The government further states that the proposed regulation will have a process to permit the construction of parts of the project to proceed ahead of others, leading to staggered permits and construction times.

**MTO provincial transportation facilities class EA projects - Details**

The July 8th notice also identifies a number of proposed MTO projects that have completed the MTO Class EA process, including ESRs, but have not been implemented. These include (1) projects that are new provincial transportation facilities, excluding new freeways ("Group A" projects); and (2) projects that are major improvements to existing provincial transportation facilities ("Group B" projects). Typically, if a project has not been implemented within five years of completing an ESR, the proponent is required to complete an addendum. Addendums consider any significant changes which have taken place since the submission of the original Class EA. The changes may include new conditions in the study area, new government policies, new engineering standards, or new
technologies for mitigating measures.

The government's proposed regulation would exempt these projects from the Environmental Assessment Act. As a result, the MTO would no longer be required to complete the addendum process, and there would be no opportunity for the public to review an addendum. Importantly, consistent with July 21st amendments to the Environmental Assessment Act, there would also be no opportunity for the public to submit future Part II Order requests to bump up the project to an individual EA unless the request alleges an impact on Indigenous rights).

The proposed exempting regulation would include conditions that require the MTO to:

- begin the construction of these projects within 10 years of the regulation;
- continue consultation with Indigenous communities;
- fulfill conditions of a Minister’s decision on Part II Order requests that have already been submitted for these projects, as applicable; and
- proceed with the detail design for these projects and obtain project-specific permits and approvals.

**Implications with respect to environmental oversight of specific MTO projects**

As presently described, the government's proposed exemptions will reduce environmental review and management of several MTO highway projects. The proposed regulation would exempt MTO from considering current environmental policies, conditions, or issues prior to implementing these projects, and also eliminate opportunities for public consultation and involvement. Specifically:

- Exempting the Bradford Bypass from Condition 4 of its EA Notice of Approval would eliminate the requirement on MTO to undergo an updated assessment to factor in new changes and alternatives or mitigation measures that may be available now but were not at the time of its EA Notice of Approval. With a gap of almost two decades since its EA, these changes could be significant.
- Similarly, exempting the Bradford Bypass from Condition 4 would also remove the 30-day consultation period that would otherwise follow an ESR or DCR(s), and thereby also eliminate public input on the project as it now stands, 18 years after its initial approval.
- Exempting the listed Class EA projects from the addendum process removes the requirement for the MTO to consider new government policies, new engineering standards, and/or new technologies for mitigating measures that may be considered
to impose new conditions on the project. As with the Bradford Bypass, this eliminates the opportunity to address any important changes to the projects or their mitigation options since their ESRs', some of which were completed as long as 16 years ago.

- Finally, the result of the exemption of the Class EA projects from the addendum process is to remove what is typically the final opportunity for the public to express concerns with such projects (noting that statutory amendments have virtually eliminated the availability of any Part II order).

Final details on the exemptions and their conditions will be set out in the anticipated regulation.

Related Environmental Litigation, COVID-19: How will coronavirus impact your business?

Authors

Anna Côté
Associate - Toronto

Email
anna.cote@gowlingwlg.com

Phone
+1 416-369-6691

vCard
Anna Côté

Larissa Parker
Summer Law Student - Toronto

Email
Larissa.Parker@gowlingwlg.com

Phone
+1 416-814-5619
<table>
<thead>
<tr>
<th>vCard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larissa Parker</td>
</tr>
</tbody>
</table>