Cassels

The Slow Road or Fast Track? Environmental Assessment Approval for Highway 413

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June 9, 2022

On June 2, 2022, the Ontario Progressive Conservatives (PCs) won Ontario's general election and formed their second-consecutive majority government. On May 24, 2022, the PCs announced that they will build Highway 413 — a 52-kilometre highway entirely within Ontario that will stretch across the Regional Municipalities of York, Peel, and Halton — as the centrepiece of their $86.6 billion transportation and transit infrastructure plan.[1]

On May 3, 2021, the federal Minister of Environment and Climate Change took the exceptional step of designating Highway 413, an intra-provincial highway project, for a federal environmental assessment.[2] The Ontario government objected to this designation and maintains that Highway 413 should undergo only a provincial environmental assessment process under the Ontario *Environmental Assessment Act*.[3] The schedule for federal and provincial environmental assessment approvals of Highway 413 will depend on the level of cooperation between the governments and engagement with Indigenous communities, municipalities, and other stakeholders. In our experience, these processes can take years to complete if full environmental assessments are required.

The Provincial and Federal Environmental Assessment Processes

It is currently proposed that the new Highway 413 will be subject to two concurrent environmental assessment processes – federal and provincial. The process is the latest step expected to challenge and inform our understanding of federal and provincial constitutional jurisdiction and cooperation.

The Federal Environmental Assessment Process

Federal impact assessments are required in three circumstances under the federal *Impact Assessment Act* (IAA).[4] First, every project under the IAA's Project List requires a federal assessment. Highway 413 is not on that list.[5] Second, a project located on federal lands or which requires approval by a federal authority will also trigger an impact assessment. Highway 413 is not located on federal lands and does not require a federal approval. Third, the federal Minister of Environment and Climate Change can designate projects for an impact assessment. The Minister can make that decision based on the proposed project's potential adverse effects or the public's concerns with those effects.[6] This is why the Federal Minster has triggered the assessment of Highway 413.

Highway 413 is currently in the planning stage of the impact assessment process, which can take up to 180 days to complete.[7] The next step is for Ontario to submit a project description to the Impact Assessment Agency of Canada (Agency).[8] Once Ontario submits its project description, the Agency will post the description publicly and begin a consultation process.[9] The Agency will then provide the Ontario government with a summary of issues with respect to Highway 413.[10] Then, Ontario must notify the Agency of how it intends to address those issues and provide a detailed description of the project.[11] Once Ontario submits its notice and detailed description, the Agency must decide whether a federal impact assessment is necessary for the project.[12]

The Ontario Environmental Assessment Process

Concurrently, the Ontario government is undertaking an Individual Environmental Assessment under the *Environmental Assessment Act*.[13] As of March 18, 2022, Highway 413 is in Stage 2 of its Environmental Assessment Study.[14] Stage 2 involves refining the project's study area, assessing alternative routes for the corridor, evaluating and selecting any preferred alternative routes, and examining any preliminary design alternatives.[15] After the Ontario government submits its environmental assessment, the Ontario Ministry of the Environment, Conservation and Parks (MECP) must coordinate the public's and the government's review of the assessment.[16] The MECP must then review the comments and publish its Ministry Review.[17] Afterwards, the MECP will either refer the matter to mediation, refer the matter to the Ontario Land Tribunal, approve the project, approve the project with conditions, or refuse the project.[18]

Notably, the Individual Environmental Assessment process has been historically lengthy. For context, Ontario completed its environmental assessments for the Bradford Bypass and the Highway 404 extension in 1993.[19] However, the former Minister of the Environment and Energy only approved the environmental assessments nine years later, in 2002.[20]

Analysis and Implications of the Federal Designation

Ultimately, the re-election of the Ontario PCs confirms that the Ontario government will remain committed to developing Highway 413. However, the project's future will remain subject to ongoing federal and provincial environmental assessment and consultation processes that will inform the road ahead.

If the project proceeds to a full federal impact assessment, the process could last years, may affect the project's proposed construction dates, and may extend the project into different federal or provincial government regimes.

Indigenous communities, municipalities, and other stakeholders will have the opportunity to submit comments and express their concerns about the development of Highway 413 during both environmental assessment processes. For example, the Mississaugas of the Credit First Nation and the Hiawatha First

Nation have both expressed their concerns with the project's impacts on their Aboriginal and treaty rights.[21] Several municipalities in the Greater Toronto Area, including the City of Toronto,[22] the Regional Municipality of Halton,[23] the Regional Municipality of Peel,[24] the City of Mississauga,[25] and the Town of Halton Hills,[26] have also expressed their opposition to the proposed development.

The designation by the federal government may continue the ongoing debate regarding the extent of federal authority for intra-provincial projects that were traditionally considered exclusively within the jurisdiction of provinces—in this case, the construction of highways. Indeed, the Alberta Court of Appeal recently found that the exercise of federal jurisdiction into matters of provincial concern using the IAA was unconstitutional, as detailed in our previous update.[27] Alberta's top court now considers Canada's federal environmental assessment law unconstitutional, and the federal government disagrees. Until the Supreme Court of Canada resolves this issue, we anticipate continued uncertainty regarding federal environmental assessments of intra-provincial projects, including Highway 413. As such, the extent to which the federal and provincial governments will cooperate in their respective environmental assessment processes remains unclear.

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[1] See PC Party of Ontario, "Only Doug Ford and the Ontario PCs Have a Plan to Build both Highways and Transit" (24 May 2022), online: <ontariopc.ca/only-doug-ford-and-the-ontario-pcs-have-a-plan-to-build-both-highways-and-transit/>; Province of Ontario, "Highway 413 is a proposed highway and transit corridor running through York, Peel and Halton Regions" (last visited 07 June 2022), online: *Highway 413* <highway413.ca/> ["Highway 413"].

[2] See Province of Ontario, "Highway 413: Process and Timeline" (last visited 07 June 2022), online: *Highway 413* <highway413.ca/processandtimeline/> ["Highway 413: Process and Timeline"].

3 See The Honourable Jonathan Wilkinson, Minister of Environment and Climate Change Canada, "Letter from the Honourable Jeff Yurek, Minister of the Environment, Conservation and Parks dated May 4, 2021" (04 May 2021), online (pdf): *Highway 413* <highway413.ca/wp-content/uploads/2021/05/357-2020-1430-signed-letter.pdf>.

4 SC 2019, c 28 [*Impact Assessment Act*].

5 See Government of Canada, "Justice Laws Website: Basic Search" (last modified 27 May 2022), online: *Justice Laws Website* < laws.justice.gc.ca/Search/Search.aspx?txtS3archA11=Highway+413&txtT1tl3=%22Designated+Classes+of+Projects+Order%22&h1ts0n1y=0&ddC0nt3ntTyp3=Regulations>.

6 *Impact Assessment Act*, *supra* note 5, s 9(1).

7 See Government of Canada, "The Impact Assessment Process: Timelines and Outputs" (last modified 24 March 2021), online: *Government of Canada* <canada.ca/en/impact-assessment-agency/services/policy-guidance/the-impact-assessment-process-timelines-and-outputs.html>.

8 *Impact Assessment Act*, *supra* note 5, s 10(1).

9 *Ibid*, ss 10(1)–(12); see "Highway 413: Process and Timeline", *supra* note 2.

[10] *Impact Assessment Act*, *supra* note 5, s 14(1).

[11] *Ibid*, s 15(1).

[12] *Ibid,* s 16(1).

[13] RSO 1990, c E 18 [*Environmental Assessment Act*]; see "Highway 413: Process and Timeline", *supra* note 2.

[14] See Province of Ontario, "Environmental Assessment (EA) History - Highway 413" (last visited 07 June 2022), online: *Highway 413* <highway413.ca/2022/03/18/ea-history/>.

[15] See "Highway 413: Process and Timeline", *supra* note 2.

[16] See Ontario Ministry of the Environment, Conservation and Parks, "Preparing environmental assessments" (last modified 06 June 2022), online: *Province of Ontario* <ontario.ca/page/preparing-environmental-assessments#section-2>.

[18] *Ibid*.

[19] See Ontario Ministry of the Environment, Conservation and Parks, “Highway 400 - Highway 404 Extension Link (Bradford Bypass)” (last modified 12 October 2021), online: *Province of Ontario* <ontario.ca/page/highway-400-highway-404-extension-link-bradford-bypass#section-1>.

[20] *Ibid*.

[21] See Chief Stacey R Laforme, Mississaugas of the Credit First Nation, “GTA West Highway and Transmission Corridor Project, Highway 413” (30 March 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54148/30%20March%202021%20GTA%20West%20Project%20-%20MCFN%20statement%20to%20IAAC.pdf>; Hiawatha First Nation, “From Hiawatha First Nation to the Impact Assessment Agency of Canada - Comments Regarding the GTA West Project” (18 February 2021), online: *Impact Assessment Agency of Canada* <iaac-aeic.gc.ca/050/evaluations/proj/81381/contributions/id/54374>.

[22] See City of Toronto, “From the City of Toronto to the Impact Assessment Agency of Canada - Council Motion Supporting the Greenbelt and Opposing Highway 413” (10 March 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54172/MIN%20277321%20-%20Attachment%201.pdf>.

[23] See The Regional Municipality of Halton, “Halton Region – March 24, 2021 Regional Council Resolution Regarding the Proposed GTA West Project” (24 March 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54170/Motion_Designation_Request_for_the_Proposed_GTA.PDF>.

[24] See The Regional Municipality of Peel, “From Peel Region to the Hon. Jonathan Wilkinson, Minister of Environment and Climate Change - Region of Peel Resolutions Regarding GTA West Highway Corridor” (14 April 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54208/Region%20of%20Peel%20-%20GTA%20West%20Motions%20-April%2014,%202021_Redacted.pdf>.

[25] See City of Mississauga, “From the City of Mississauga to the Impact Assessment Agency of Canada - Letter regarding the Designation Request for the GTA West Project” (02 March 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54139/From%20the%20City%20of%20Mississauga%20to%20the%20Impact%20Assessment%20Agency%20of%20Canada%20-%20Letter%20regarding%20the%20Designation%20Request%20for%20the%20GTA%20West%20Project.pdf>.

[26] See Town of Halton Hills, “Town of Halton Hills Motion to Oppose Further Investment by the Province of Ontario in the GTA West Corridor Project” (04 March 2021), online (pdf): *Impact Assessment Agency of Canada* <registrydocumentsprd.blob.core.windows.net/commentsblob/project-81381/comment-54384/TownofHaltonHillsMotiontoOpposeFurtherInvestmentbytheProvinceofOntariointheGTAWestCorridorProject.pdf>.

[27] *Reference re Impact Assessment Act*, 2022 ABCA 165 (CanLII); see “Alberta Court of Appeal: Climate Change Not A Basis ‘To Tear Apart The Constitutional Division Of Powers’” (12 May 2022), online: *Cassels* <cassels.com/insights/alberta-court-of-appeal-climate-change-not-a-basis-to-tear-apart-the-constitutional-division-of-powers/>.

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