



# **WeirFoulds 2021 Municipal Infrastructure Webinar: Municipal Infrastructure Projects In The 2020s**

**April 19, 2021**

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# Agenda

## **Loan Program: Municipal Solutions for Housing, Long-Term Care & Broadband Projects**

Jennifer Hutcheon, Vice-President, Business Development, Infrastructure Ontario

Bernadette Chung, Director, Corporate Legal Services, Infrastructure Ontario

## **The Impact of Climate Change on Infrastructure Renewal and Development**

Scott Pasternack, Senior Solicitor, City of Toronto Legal Services Division

Jim Baxter, Director, Environment and Energy Division, City of Toronto

## **Indemnities and Insurance 101: Key Issues in All Projects**

Tina Gardiner, Manager, Risk Management Services, The Regional Municipality of York

Mark Dunn, Surety & Risk Transfer Analyst, The Regional Municipality of York

Moderator, Dan Ferguson, Partner, WeirFoulds LLP

# Loan Program

Municipal Solutions for Housing, Long-Term Care  
& Broadband Projects

**April 19, 2021**

Jennifer Hutcheon | Vice President, Loan Operations & Customer Relations  
Bernadette Chung | Director, Legal Services  
Infrastructure Ontario



**Infrastructure  
Ontario**

# Municipal Solutions for Housing, Long-Term Care & Broadband Projects

The IO Loan Program provides long-term financing to eligible public sector organizations including:

- **Municipalities**
- **Municipal Corporations**
- Local Services Boards
- Universities & Affiliated Colleges
- **Housing Providers**
- **Long-Term Care Homes**
- Hospices
- Aboriginal Health Access Centers
- Community Health & Social Service Hubs
- Professional Arts Training
- Sports & Recreation Organizations

Most depreciable capital expenditures are eligible for affordable, long-term financing, including:

- New construction, renovations and retrofits
- Water, wastewater and waste management
- Roads, bridges and public transportation
- **Housing**, hospice and **long-term care projects**
- Ambulances, fire trucks, transit vehicles, snow ploughs, garbage trucks and other rolling stock
- Accessibility and energy efficiency projects – local police, fire, admin and recreation facilities
- Land and facility acquisition

# Housing Providers Background

IO's mandate to provide financing to housing providers for infrastructure is set out in the Ontario Infrastructure and Lands Corporation Act, 2011. In order to be eligible, a provider must be;

- A corporation incorporated as a local housing corporation under Part III of the Social Housing Reform Act, 2000, or
- A co-operative housing provider or a non-profit housing provider that provides or will provide housing under a federally, provincially or municipally funded housing program in Ontario.
- **Municipally owned affordable housing is also eligible, and adjudicated under lending guidelines for municipal borrowers, recognizing the broader financial strength of a municipality.**

Since inception, the Loan Program has provided over \$1.8 billion in financing to support 123 housing projects across the province.

- Currently we have \$1.4 billion in loans outstanding to 31 Housing borrowers.

The Government of Canada is rolling out a new ten-year \$55B program, which will cascade down to provincially designed programs, through bi-lateral agreements with the federal government.

# Loan Program In Action – Non-Profit Housing

## Parkdale United Church Foundation

Renovation of an existing 136 unit affordable housing apartment building in Parkdale, Toronto

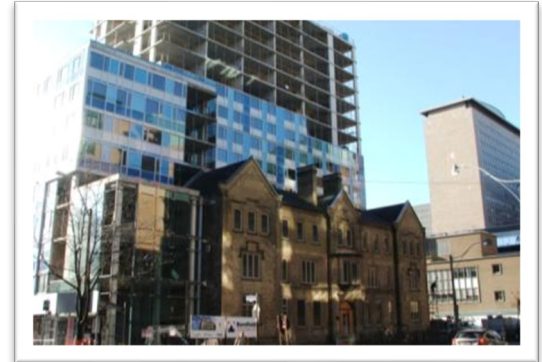
**Loan Value: \$1.2 million**



## YWCA Elm Centre

Construction of a 300-unit affordable housing apartment building in downtown Toronto

**Loan Value: \$38.8 million**



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# Long-Term Care (LTC) Background

IO's mandate to provide financing for infrastructure to long-term care (LTC) home providers is set out in *the Ontario Infrastructure and Lands Corporation Act, 2011*.

- In order to be eligible, a provider must be a non-profit LTC corporation and have an existing or approved license and funding agreement with the Ministry of Health and Long-Term Care (MOHLTC).
- **Municipally owned LTC facilities are also eligible, and adjudicated under lending guidelines for municipal borrowers, recognizing the broader financial strength of a municipality.**

Since inception, the Loan Program has provided over \$230 million in financing to support 37 LTC projects across the Province.

- Currently there are 16 LTC borrowers (non-municipally owned) with outstanding loans totaling \$134 million.

To address historical funding challenges, the Province has recently introduced a new Capital Development Funding Model to support LTC development, creating:

- An increase in the base construction funding subsidy, tailored to the needs and challenges of the community.
- A new development grant specific to the needs of each market segment, and payable upon the completion of construction.

# Loan Program In Action – Municipally Owned LTC's

## Northumberland County

Redevelopment of the Golden Plough Lodge in Cobourg, a new 180 bed long term care home.

**Loan Value: \$96.7 million**



## Prescott-Russell

Construction of a new three-story 224 bed long term care home located in Hawkesbury.

**Loan Value: \$70 million**





# Loan Program Summary

- Rates are the same for all borrowers, within each sector
- Municipal guarantees can assist non-profit borrowers in obtaining financing
- All capital expenditures for infrastructure purposes are eligible
- Hassle-free access to capital markets
  - No need to be rated, no minimum / no maximum
  - Affordable all-in blended rates
  - No additional transaction fees or commissions
- Longer terms than generally available elsewhere
  - One month construction loans and 5 to 25 year take-out financing
- Online application
  - Dedicated knowledgeable staff



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# Municipalities and Broadband Projects

- What do we mean by broadband internet?
  - Internet connectivity that is always on and faster than traditional dial up phone based access
  - Certain minimum upload and download speeds
  - CRTC's "universal service objective" of minimum 50 Mbps download and 10 Mbps upload in December 2016 for fixed wired internet access
- Many different ways to achieve this with different pros and cons and different price points
  - Fixed network
    - E.g. FTTH, FTTC, FTTN – less distance between the fibre optic leg and final destination, better the connection
  - Mobile (i.e. broadband cellular), fixed wireless, or wi-fi for wireless access
    - E.g. Cellular Broadband, LTE, 5G

# Municipalities and Broadband Projects

- Municipalities can borrow directly from IO to fund various infrastructure initiatives to bring broadband internet to its constituents
  - Borrow directly to purchase and install fibre optic cables for neighbourhoods
  - Borrow directly to install in-building WIFI access (Distributed Antenna System or DAS) for new construction and renovations
  - Borrow directly to provide funds to a municipally owned telco to expand fibre or wireless infrastructure
- Where the broadband asset is directly owned by the municipality, standard loan process applies

# Municipalities and Broadband Projects

-Municipalities may want or need to partner with private sector on broadband projects

- E.g. where broadband infrastructure is owned by third parties

-Need to be mindful of section 106 of the *Municipal Act, 2011* (the “Municipal Act”)

- Section 106 of the Municipal Act prohibits municipalities from providing “bonusing” to commercial enterprises.
- Often referred to in court decisions as situations that confer an “obvious undue advantage.”
- Recent court decisions have affirmed that a “liberal and benevolent interpretation” should be given to municipal powers, where there is a significant public benefit from the project.

-Section 110 of the Municipal Act is an exception to section 106 of the Municipal Act that can be leveraged.

# Municipalities, Broadband, and section 110 of the Municipal Act

Two ways that section 110 of the Municipal Act can facilitate municipal broadband infrastructure projects:

1. Section 110 allows municipalities to provide financial assistance to private sector partners to construct certain types of infrastructure projects. As long as the project meets certain criteria and the municipality follows process outlined by section 110, the municipality would be in compliance with the Municipal Act
2. Municipalities can also borrow directly to provide financial assistance to third parties for eligible projects as long as they follow the process outlined in section 110

# Municipalities, Broadband and section 110 of the Municipal Act

<b><u>Eligible Municipal Capital Facilities Under Section 110(3)(c) of the Act</u></b>		
<p>1. Facilities used by the council</p> <p>2. Facilities used for the general administration of the municipality</p> <p>3. Municipal roads, highways and bridges</p> <p>4. Municipal local improvements and public utilities</p> <p>4.1 Municipal facilities for the generation of electricity</p> <p>5. Municipal facilities related to the provision of telecommunications, transit and transportation systems</p> <p>6. Municipal facilities for water, sewers, sewage, drainage and flood control</p>	<p>7. Municipal facilities for the collection and management of waste and garbage</p> <p>8. Municipal facilities related to policing, fire-fighting and by-law enforcement</p> <p>9. Municipal facilities for the protection, regulation and control of animals</p> <p>10. Municipal facilities related to the provision of social and health services, including long-term care homes under Part VIII of the <i>Long-Term Care Homes Act, 2007</i></p> <p>11. Municipal facilities for public libraries</p> <p>12. Municipal facilities that combine the facilities described in paragraphs 1 to 11</p>	<p>13. Parking facilities ancillary to facilities described in any of paragraphs 1 to 12</p> <p>14. Municipal community centres (see also Appendix B, Item 1)</p> <p>15. Parking facilities ancillary to facilities described in paragraph 14</p> <p>16. Municipal facilities used for cultural, recreational or tourist purposes (see also Appendix B, Item 2)</p> <p>17. Municipal general parking facilities and parking facilities ancillary to facilities described in paragraph 16</p> <p>18. Municipal housing project facilities (see also Appendix B, Item 3)</p>

# Municipalities, Broadband and section 110 of the Municipal Act

The following steps would need to be completed in order for the project to be eligible for IO financing:

- 1) The municipality must pass a by-law authorizing the municipality to enter into an agreement under section 110 of the Municipal Act and sign that agreement with the third party entity.
- 2) The municipal clerk must provide notice to the Minister of Finance of the passing of the above-noted by-law.

While there is no particular form for a section 110 agreement, in order to tie the project to IO's lending program requirements, IO would need this agreement to state:

- a. that the project is for the benefit of the municipality, and
- b. that the municipality considers the project to be a municipal capital facility.

To facilitate municipal borrowing under IO's lending program, IO offers a template section 110 agreement.



# Municipalities, Broadband and section 110 of the Municipal Act

Examples of section 110 Municipal Act Broadband Financing:

- *1085489 Ontario Ltd. v. Prince Edward County (Municipality)*, [2005] O.J. No. 3471
- Municipality borrows directly to fund its share of a regional broadband project, where the asset is not owned by the municipality
- Municipality partners with private sector to design and implement a broadband network to connect various public facilities



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# The Impact of Climate Change on Infrastructure Renewal and Development

**April 19, 2021**

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# Climate Change Impacts

## ***More frequent storm surges***

- Flooding subways, street cars, roads, basements
- Overwhelming wastewater treatment plants

## ***Intense heat; drought***

- Electrical blackouts and brownouts
- Water resources
- Agricultural resources
- Human health

## ***Ice storms and freezing rains***

- Above grade electrical and cable lines
- Heating systems

# Municipal Legal Framework: Policies and Programs

## ***Strategies and plans***

- COTA, s. 212; MA, s. 270
- TransformTO; Resilient City

## ***Funding agreements***

- COTA, s. 7; MA, s. 9
- Green Muni. Fund; Can. Infr. Bnk.

## ***Grants and loans***

- COTA, s. 83; MA, s. 107
- Sustainable Energy Fund Financing; Live Green Toronto

## ***Local Improvement Charges***

- O. Regs. 586/06, 596/06
- HELP Program; TowerWise Program

## ***Development approvals***

- Official Plan; zoning by-law; COTA, s. 114
- Toronto Green Standard

## ***Long-term energy planning***

- COTA, s. 105.3; MA s. 147 consultations; advocacy

# Municipal Legal Framework: ByLaws

“environmental well-being . . . including respecting climate change” (COTA s. 8; MA s. 10)

➤ *e.g.* commercial recycling mandate; single-use plastics

“respecting the protection or conservation of the environment that requires buildings to be constructed in accordance with provisions of the building code under the Building Code Act, 1992 that are prescribed under that Act, subject to such conditions and limits as may be prescribed under that Act” (COTA, s. 108.1; MA s. 97.1)

➤ *e.g.* green roofs; district energy backup

# Provincial Legal Framework

*Conservation Authorities Act, s. 40 (when proclaimed)*

*Electricity Act, s. 25.29*

*Environmental Assessment Act*

*Infrastructure for Jobs and Prosperity Act, 2015*

*Ontario Water Resources Act, s. 34.6(5)*

*Resource Recovery and Circular Economy Act, 2016*

# Infrastructure for Jobs and Prosperity Act, 2015

- Section 2 – Infrastructure Definition -> broad
- Section 3 – Principles
  - Province and broader public sectors (including municipalities) to undertake infrastructure planning
- Section 4 – Long-Term Infrastructure Plans
  - Ministry responsibility
- Section 6 -- Infrastructure Asset Management Plans
  - municipal responsibility
- O. Reg. 588/17 -- Asset Management Planning for Munic. Infrastr.



# Federal Legal Framework

- Greenhouse Gas Pollution Pricing Act
- Budget Implementation Act, 2017
- Impact Assessment Act; Canada Energy Regulatory Act
  - “the extent to which the effects of the designated [project/power line] hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change”

# The Impact of Climate Change on Infrastructure Renewal and Development

**April 19, 2021**

Jim Baxter  
Director, Environment and Energy Division  
City of Toronto

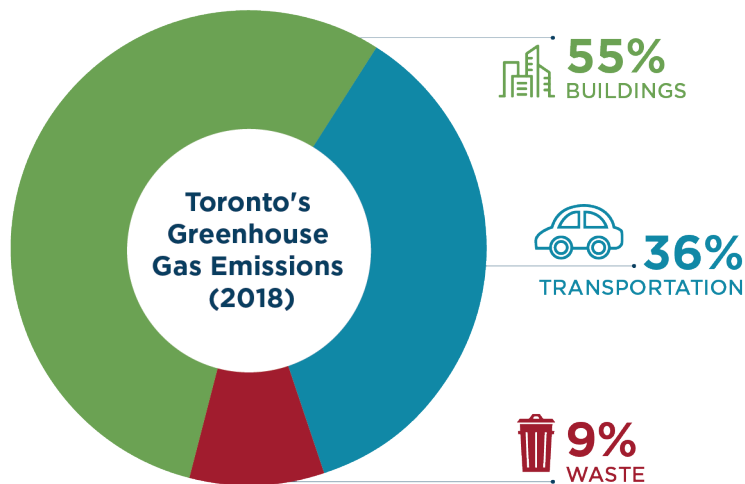
# Climate Emergency Declaration

## October 2, 2019

City Council endorse a net zero greenhouse gas emissions target that is in line with keeping global average temperature rise below 1.5 degrees Celsius, immediately strengthening **Toronto's goal of becoming net zero before 2050...**



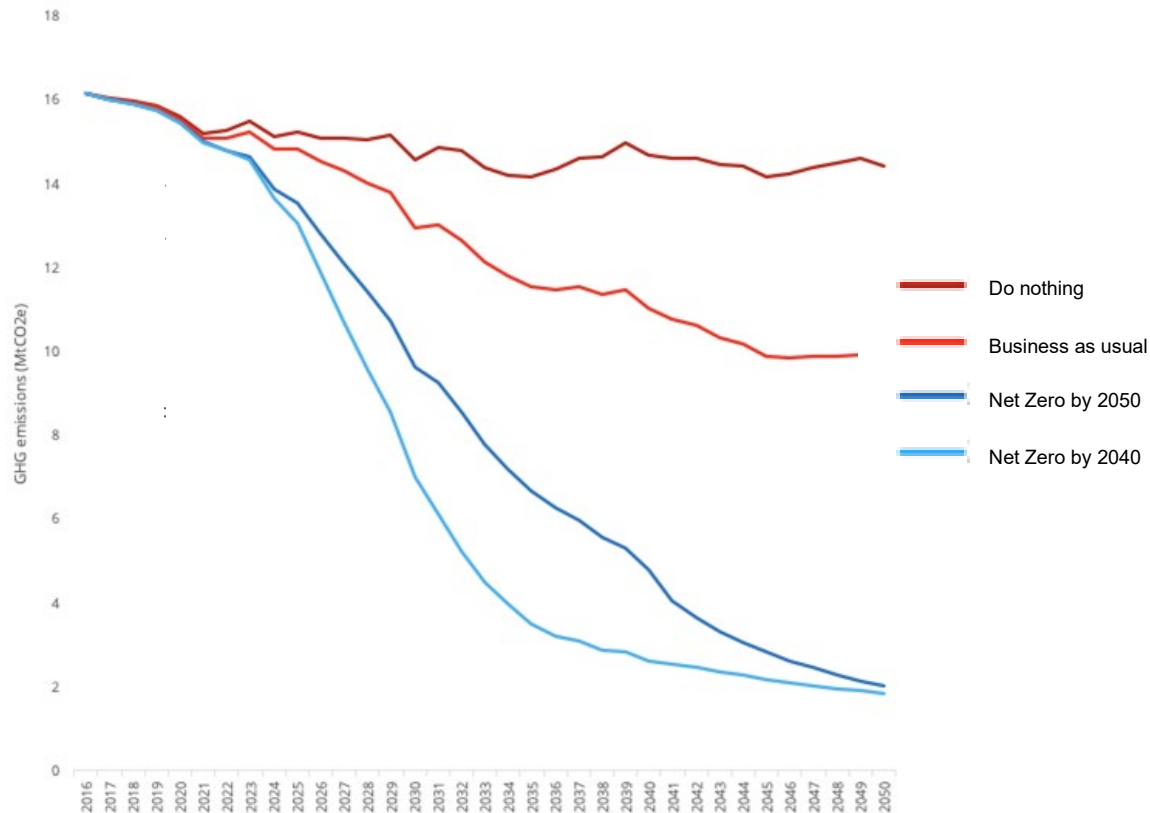
# Greenhouse Gas Emissions by Sector



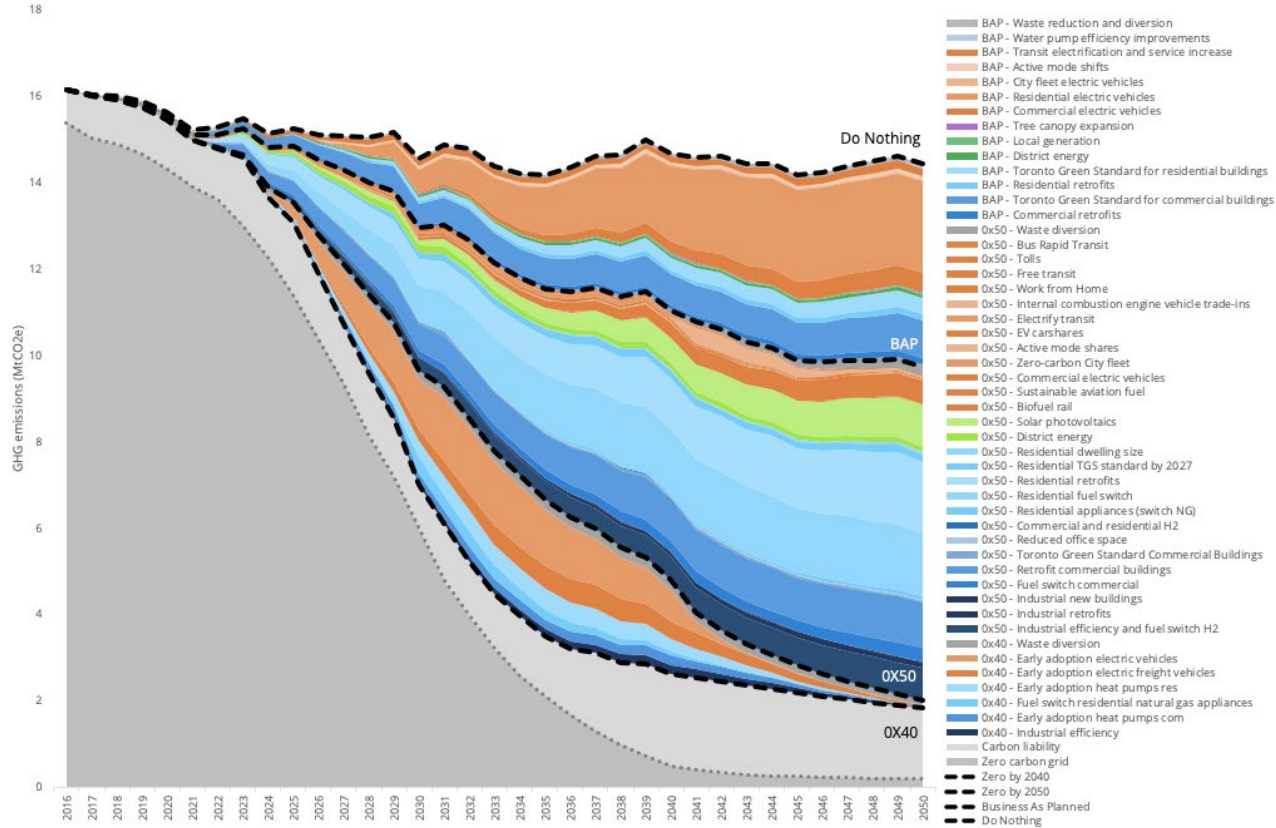
Current CO2 emissions: 16.2 MT

Reduction of 5 MT when the grid became coal-free at the end of 2014

# Preliminary Net Zero Modelling Results



# A Path to Net Zero

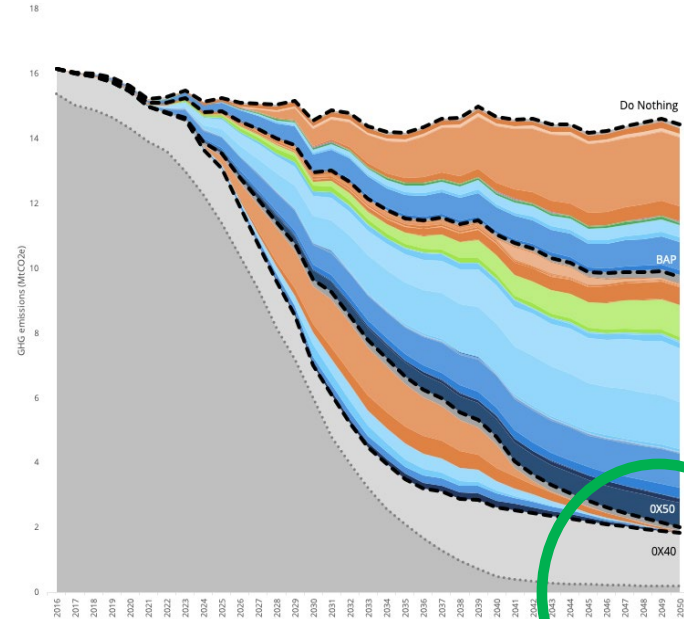


Toronto Environment & Energy Division

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Toronto

## Implication #1 – Clean the Grid

- Even with the most optimistic plan we won't meet our goal
- Due entirely to the plan of the Ontario government to add gas turbines to the generation mix
- We need to clean the electricity supply to Toronto
- Change in the way Toronto Hydro plans, designs and operates their system
- Financing and ownership scenarios
- Regulatory implications



# Toronto Paramedics Stations 46 – Solar Photovoltaic systems + Tesla Powerwall storage



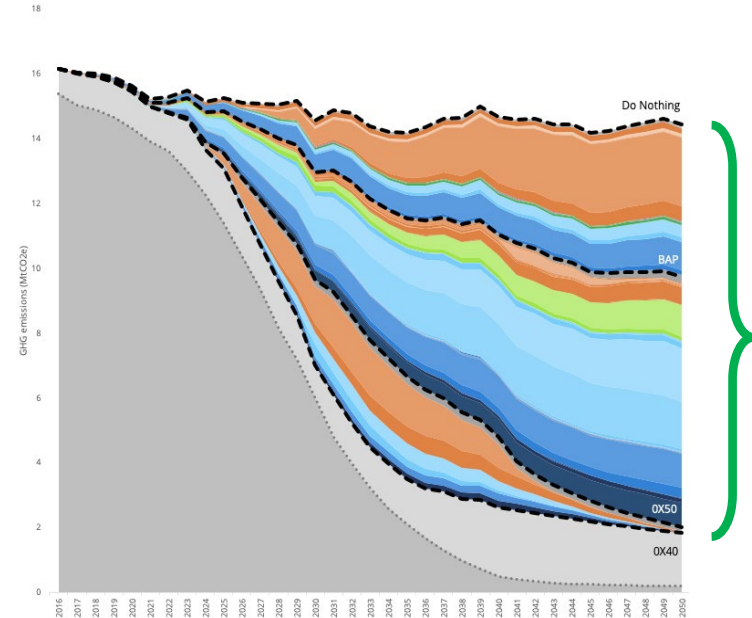


# Commercial Scales Now Available



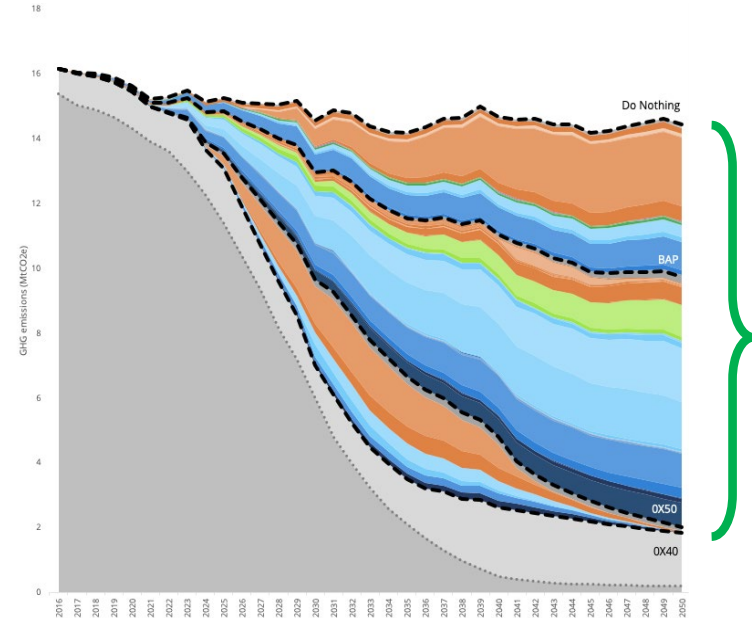
## Implication #2 – Fuel Switching

- Substitute clean electricity for hydrocarbon fuels – stationary and transportation markets
- Significant increase in electricity usage
- Change in the way Toronto Hydro plans, designs and operates their system
- Goes well beyond the conservation initiatives of the past
- Transformational change
  - status quo and intransigence presents the greatest risk
  - Great urgency
- Regulatory implications



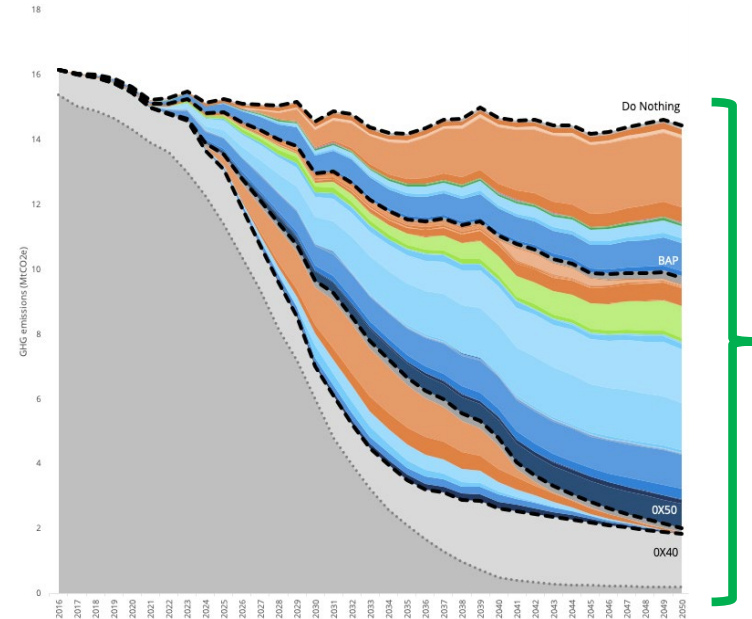
## Implication #2 – Fuel Switching

- Market Driven
  - EV demand
- Existing Technology
  - Conservation
  - Heat Pumps
- Battery Storage Technology
  - Technology developing very quickly
- Not the old utility Energy Conservation and Demand Programs
- Carbon Pricing
  - Federal
  - Provincial (?)



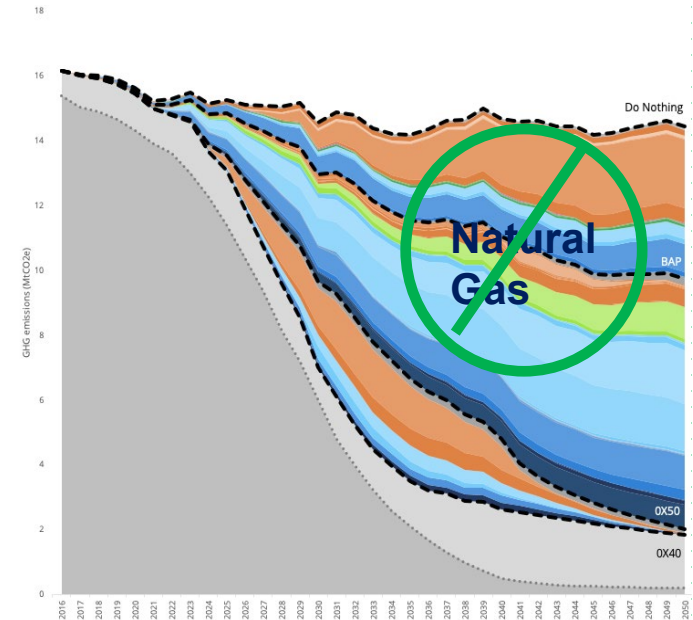
## Implication #3 – Renewables

- Substitute renewable energy for hydrocarbon fuels – stationary
  - Photovoltaic
  - Batteries
  - Low Carbon District Energy
  - Heat Recovery
- Transformational change
  - status quo and intransigence presents the greatest risk
  - Great urgency
- Regulatory implications
  - Utility role
  - Ownership
    - Rate base



## Implication #4 – Gas System

- As energy substitutions take place, gas usage will decrease – significantly
  - Net Zero means Zero
- Options to keep the pipes full (Renewable Natural Gas, Hydrogen) won't change the situation
- Regulatory implications
  - Compensation for investments stranded by public policy?
  - Recreating the gas mandate to an energy mandate?



# Climate Action

- Climate Change is real
- We have to act – now
  - Business
  - Personally



# Municipal Infrastructure Projects in the 2020s

## Indemnities and Insurance 101: Key Issues in All Projects

**April 19<sup>th</sup>, 2021**

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# York Region Risk Management

- Before: review agreements/PTEs, Design/EA RFPs, liaise with outside parties, attend planning/bidder meetings
- During: review RFTs for indemnities and liabilities, insurance, performance security: letters of credit, bonding
- Confirm Certificates of Insurance, WSIB, bonds
- Adjust claims, communicate with project team and public
- Have an RM plan, empower all parties to follow the plan, update the plan, learn and improve for each new project



# What is an Indemnity Clause?

“A duty to make good any loss, damage, or liability incurred by another.” *Black’s Law Dictionary*

Three key elements of an indemnity clause:

- Preamble: “hold harmless” means on-going defence
- Damages condition: “from and against”
- Condition precedent: “resulting from”, “arising out of”

# Main Types of Indemnity Clauses

Standard (Bare): Very broad, includes Indemnatee negligence, lack of specificity can be detrimental

Reverse: Contractor indemnifies Owner for Owner's own negligence, very onerous and uncommon

Limited: Owner's own negligence 'carved out'

Third Party: Specifically includes claims by third parties

Mutual: "Each party..." pays for their own negligence

# Indemnity Clauses: Tips and Traps

- Gross Negligence vs Negligence
- Performance of Work vs Obligations of Contract
- ‘Triggers’ (conditions precedent): easily identifiable
- Ensure enforceability through plain language
- Indemnity not capped and separate from limitation on liability
- Watch for ‘carve outs’ and restrictions

# Indemnity and Insurance Together

- Indemnity clause creates duty to defend *and* duty to pay for losses whether insurance is applicable or not
- Insurance is a risk transfer mechanism shifting above duties from Indemnitor (Contractor) to their Insurers
- Indemnity clause creates obligations for Insurers through Additional Insured(s) added to insurance

# Construction Insurance: Basic Policies

## Builder's Risk or Installation Floater

- 1st Party damage for all parties with 'insurable interest'
- Replacement cost, incl equipment supplied by Owner
- 'In transit', temporary structures, clean-up/salvage
- Equipment Breakdown (Boiler & Machinery) if applicable
- Installation Floater: not just materials, labour costs too

## Contractor's Equipment Floater

- Physical damage to equipment owned / leased by Contractor
- No specific limit stated in contract documents

# Construction Insurance: Basic Policies

## Commercial General Liability

- Claims for bodily injury and property damage to third parties
- Excess / Umbrella Liability acceptable up to required limits
- Additional Insureds: Owner, Consultant, Conservation Authority

## Automobile Liability

Environmental / Pollution Liability: Contractor

Professional Liability: Consultant or Design-Builder

# What is an OCIP? And is it worth it?

## Owner Controlled Insurance Program (“OCIP”)

- Builder’s Risk and Wrap-Up Liability purchased by Owner
- Covers all parties: Owner, Contractor, Subs-, Consultants
- Contractor: Auto, Equipment, CGL (off-site, post-Substantial)
- Pollution: may be Owner or Contractor depending on exposures
- All deductibles paid by Contractor: \$25,000 to \$250,000+
- Claims adjusted and paid by Region or OCIP insurer are ‘back-charged’ to Contractor through Payment Certificate process
- Claims Reports provided by Risk to Contractor and project team

# OCIP vs Traditional Contractor Insurance

## OCIP "Pros"

- Project-specific: limits not exhausted by losses on other projects
- Owner knows coverages, exclusions, no lapses/non-payments
- Better pricing: volume buying, no contractor mark-ups ("O&P")
- Owner has improved control of claims process, customer service

## OCIP "Cons"

- More administration work and expertise required from Owner
- Contractors / Broker pushback: less control over claim payments



# OCIP at York Region: Stats and Tips

- Large Capital Projects \$10M+: roads/pipes, transit, buildings
- Since 2008: 70+ projects, total value \$3B+, saving Region \$6M+
- Improved claims service: claimants no longer calling councillors, Risk staff connected to Project team, contractors all covered by same policies so 'back to work' after claims is much faster
- Build understanding and consensus *before* first OCIP: involve and educate *all* stakeholders early and often, train Project Managers, liaise with Contractors and their associations, budget resources and train Risk staff on policy placements *and* claims

# Limitations and Exclusions of Liability

- Overall trend by Consultants towards lower limits / harder caps
- Engineering, Accounting, IT, Equipment Manufacturers/Suppliers following Architects lead of 'proceeds of insurance' liability
- Narrowing damages to 'direct costs' and capping to 'fees paid'
- New CCDC 2 (2020) carving out indirect and consequential damages, for Owner and Contractor only: T/P claims still limitless
- Important for Municipalities to 'hold the line' on liability language
- Legal counsel should remain current on case law interpreting indirect / consequential damages ; indemnity ("true essence")

# Questions and Discussion

Thank you very much for attending!



Thank you for joining us!

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