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Bill C-5: Move Fast and Make Things, or Move Fast and Break Things?

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Bill Commented On: Bill C-5 - An Act to enact the Free Trade and Labour Mobility in Canada Act and the Building Canada Act

On Friday, June 6th, the new Carney Government tabled Bill C-5, Part II of which consists of the *Building Canada Act*. This proposed legislation is intended to follow through on a promise to speed up resource development and streamline federal project approvals (see also the recent Speech from the Throne). Tabling of the Bill follows the recent First Ministers' meeting, where there was discussion of potential major projects such as "highways, railways, ports, airports, oil pipelines, critical minerals, mines, nuclear facilities, and electricity transmission systems" (see federal Backgrounder here). The Bill enters today's broader context of threats to Canada's economic security and sovereignty due to developments south of the border such as tariffs and expressed imperialist ambitions, and the associated shockwaves rumbling through global economic and political orders.

This post begins with an overview of the basic structure and approach of the *Building Canada Act* before then offering some initial reflections and commentary. Overall, while there are some surprising and disconcerting features in the proposed law (in addition to, and likely because of, the concerning rushed drafting and parliamentary processes), much will come down to how the Act is implemented. It may be the case that this new law doesn't change very much in a practical sense. Projects will still be proposed, reviewed, and built in compliance with binding federal regulatory authorizations and associated approval conditions.

However, the proposed law does provide a new legal foundation for at least a small number of projects to proceed more swiftly – and some might say recklessly – than before. Whether such an approach unfolds as 'move fast and make things' or 'move fast and break things' remains to be seen. Cautionary tales in the Canadian context suggest that rushing and narrowing review processes for major resource and infrastructure projects can lead to backlash (e.g. Idle No More), cost overruns, lengthy legal battles, and, in worst case scenarios, devastating impacts to human and ecosystem health.

Process Proposed by Bill C-5

Notwithstanding preambular attention to environmental protection and the rights of Indigenous peoples, the proposed legislation is laser focused on "an accelerated process that enhances regulatory certainty and investor confidence" (s 4). The primary way of achieving this is, to adopt the government's phrasing, shifting the process from "whether" a project should be build to "how". The linear structure of the proposed process is relatively simple, premised primarily on providing

project proponents with an early green light from the federal government and limiting any chance of a late-stage red light (but note the s 5(4) and 5(5) twist discussed below).

First, based on five explicit but non-exhaustive factors, a project is identified and included on the Schedule 1 as "national interest project" (NIP). Second, all federal determinations and findings that have to be made with respect to the listed NIP (e.g the decision to issue a *Fisheries Act* authorization for impacts to fish habitat) are deemed to have been made in favour of the project being carried out (s 6(1)). Third, the NIP proponent must take all measures necessary to satisfy those same federal authorizations, and potentially affected Indigenous communities must be consulted (the timing and duration of this third step is unclear and will most certainly vary between projects). Fourth, the Minister must subsequently issue to the NIP proponent an all-authorizations-in-one document that is deemed to be all required authorizations; this document must include conditions with respect to applicable federal authorizations. The following elaborates on these four steps, and then considers the remaining provisions in the Bill related to federal life-cycle regulators, an exceedingly broad executive law making – and amending – power, and a reporting requirement.

Identifying and Listing National Interest Projects

At the heart of the proposed law is the creation of a list of NIPs. Under s 5(1) the Governor in Council (i.e. federal Cabinet) may, on recommendation from the Minister, add a NIP (along with a short description) to Schedule 1, which is essentially the master NIPs list. A NIP's name and description can be continually amended (5(3)) and, perhaps surprisingly, a NIP can even be deleted until the moment that it has received its s 7 decision document (ss 5(4) and 5(5)).

The basis for identifying NIPs is set out in 5(6), which includes the following non-exhaustive list of factors that may be considered: (a) strengthen Canada's autonomy, resilience and security; (b) provide economic or other benefits to Canada; (c) have a high likelihood of successful execution; (d) advance the interests of Indigenous peoples; and (e) contribute to clean growth and to meeting Canada's objectives with respect to climate change. Additionally, s 5(7) requires that before recommending a NIP be added to the list, the Minister "must consult with any other federal minister and any provincial or territorial government that the Minister considers appropriate and with Indigenous peoples whose rights recognized and affirmed by section 35 of the *Constitution Act, 1982* may be adversely affected by the carrying out of the project to which the order relates".

It is notable that there are no timelines or other prescriptive procedural obligations imposed on the listing process. This leaves much latitude for government and proponents, and presumably this will vary on a case-by-case basis. One key aspect to watch is the extent to which the present rush to identify and list compromises meaningful consultation with Indigenous peoples. Indigenous governments and leaders have already expressed concerns. How can the Crown fulfill its consultation obligations (let alone obtain consent) with respect to a large-scale nation-building project within the short timelines that seem to be envisioned by government and proponents? The answer is not entirely clear. Perhaps the only way is for the first batch of NIPs to only include projects that are already entirely supported by Indigenous peoples who may be adversely affected by the project. This complex area will be the focus of a separate post.

Deemings and Approvals

By virtue of a NIP being added to the list, it receives an early green light for any federal regulatory approvals that may be required. Section 6(1) provides that all federal "determinations and findings" that have to be made in order for an authorization to be granted with respect to the listed NIP are deemed to have been made in favour of the project being carried out. However, that deeming "does not exempt the proponent of a project from the requirement to take all measures that they are required to take… in respect of an authorization" (6(2)). Again, this shifts the process from a "whether" to a "how" by effectively guaranteeing that an authorization will be provided while still requiring that the proponent actually do what is required to obtain that authorization. For example, a NIP proponent may be assured that they will obtain the necessary *Fisheries Act* s 35 authorization to cause the harmful alteration, disruption, or destruction of fish habitat (HADD), but they still have to apply for said authorization in accordance with the relevant regulations.

Before recommending a NIP for listing, the Minister must consult with any other federal minister and any provincial or territorial government that the Minister considers appropriate, and further to the above point, must consult with "with Indigenous peoples whose rights recognized and affirmed by section 35 of the *Constitution Act*, 1982 may be adversely affected by the carrying out of the project to which the order relates" (s 5(7)). How meaningful consultation with Indigenous communities can happen at this stage is a mystery given that consultation is very fact and context specific, yet at this early stage many of the facts and details about the project would still be unknown. Again, the only fathomable shortcut is a context where the Indigenous community is prepared to provide full, free, prior, informed, and explicit consent and deem Crown consultation to be fulfilled at this early stage.

All-in-One Authorizations and Conditions Document

Once all authorizations are obtained and merged pursuant to s 6, the Minister is required to provide the NIP proponent with a document that is "deemed to be each authorization that is specified in the document in respect of the project" (7(1)). This all-authorizations-in-one document can only be issued after three conditions are met (7(2)): proponent has taken all measures in respect of each applicable federal authorization; the Minister has consulted on approval conditions with the minister responsible for each of the federal authorizations; and Indigenous peoples have been consulted regarding potential adverse effects. The document must also set out conditions that apply with respect to each federal authorization (7(5)). Those conditions are linked to their respective specific federal authorization (7(5) and 7(6)), presumably to ensure sound jurisdictional and constitutional footing. Conditions and authorizations can be amended (s 8(1) and (2)), provided the minister fulfills any further consultation requirements (8(3)). Schedule 2 of the proposed Act sets out the relevant federal statutes and regulations pursuant to which authorizations may be required, such as the *Fisheries Act*, the *Canadian Navigable Waters Act*, and the *Species at Risk Act*.

While this new process would be moving very quickly up to the point of adding a NIP to Schedule 1, it would then presumably slow down as it will unavoidably take time for the proponent to gather information, make submissions for regulatory approvals, and work with regulators throughout these specific federal regulatory processes. Such a slowing down at this multi-faceted stage would, however, be tempered by the creation of a new "Major Projects Office", which will serve as a single point of contact (and is explicitly referred to at s 20, "Office"). Through this approach, the Minister ultimately issues a single all-in-one document rather than multiple ministers issuing individual regulatory decisions.

Relation to Other Federal Review Processes

Sections 9 – 18 of the Bill set out how the proposed NIP regime would interface with other existing federal regulators that engage in project review processes. This is because some NIPs may fall under the authority of these other regulators, including the Nova Scotia and Newfoundland offshore regulatory boards, the Canadian Nuclear Safety Commission, and the Canada Energy Regulator. The basic approach under the Bill is to require the Minister designated under the *Building Canada Act* to consult with those regulators prior to issuing a section 7 document, to consult with them again prior to amending any conditions in a section 7 document, and in all cases to only issue a section 7 document for such projects if certain conditions are met (these vary from regulator to regulator but generally include human safety and regard for relevant international obligations). Beyond that, the NIP regime leaves undisturbed the processes and decision-making regimes administered by these federal bodies, with the overriding difference being that all determinations and findings are deemed to favour project approval.

The Bill also recognizes that some (perhaps most) NIPs may also be designated projects under the federal *Impact Assessment Act* (IAA). The IAA process would still apply, but with one significant modification – elimination of the 180-day planning phase (IAA ss 9 to 17 and subsections 18(3) to (6)) (*Building Canada Act* s 19). For those with an interest in robust public participation and belief in the logic of the planning phase providing the time and space to build relationships and social license, this is a significant step backward. The government could temper this regression by targeting NIPs that are already well advanced, including significant past engagement and involvement with members of the public and Indigenous communities.

Finally, it is implicit based on the text of the Bill that processes established under modern treaties and self-government agreements do not change. For example, a project that triggers application of the *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, the *Mackenzie Valley Resource Management Act*, SC 1998, c 25, or the *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 2 would still have to be assessed under those statutes. However, it is possible that the location of a NIP is within the geographical area covered by those statutes and associated modern treaties. In such a case, the *Building Canada Act* could still apply as a way for the federal government to centralize and expedite the federal authorizations aspect of the project (e.g. a *Fisheries Act* authorization). Once such example would be the Grays Bay port and road, discussed in this context in this article. To be clear, however, the *Building Canada Act* would not – and constitutionally could not – oust the applicable northern assessment regime. Rather, one way to conceptualize the proposed new landscape is that the northern assessment regimes that are rooted

in constitutionally protected modern treaties actually oust much of the approached envisioned in the *Building Canada Act*.

Henry VIII clause

Though not referred to in the Bill's summary, and a marked departure from the government's talking points about not diminishing environmental protections, the combined effect of sections 21, 22 and 23 give Cabinet an unconstrained ability to make regulations that not only alter the application of other federal *regulations* to NIPS, either by amending them or excluding their application altogether, but also to alter the operation of virtually all *laws* duly passed by Parliament, including outright exemption.

Such executive law-making powers are referred to as Henry VIII clauses, as Olszynski and Bankes explained when Premier Danielle Smith initially sought such powers for herself under Alberta's sovereignty legislation: "A Henry VIII clause is a provision in a statute that delegates to a subordinate body the authority not simply to pass regulations or the like under the statute, but to amend the statute itself." As was the case there – before Premier Smith backed down and restricted Cabinet to the power to amend regulations – Bill C-5 contains an extraordinarily broad version of a Henry VIII clause insofar as it authorizes regulations to modify and even exempt the application of the federal statutes listed in Schedule 2, which schedule already includes many of Canada's most important environmental laws but can also be further amended, without limitation, pursuant to section 21. This aspect of Bill C-5 appears totally unjustified and is ripe for amendment as it works its way through the Parliamentary process. This aspect will also be discussed in a related ABlawg post by Nigel Bankes.

Sunset and Reporting

Pursuant to section 5(2), the NIPS regime expires 5 years after the coming into force of the legislation. Within that time, section 24 requires the designated Minister to complete "a review of the provisions and operation of this Act…and of the efficacy of the federal regulatory system in relation to projects that are in the national interest," and to present it to Parliament. This is a laudable requirement – the whole debate about the merits of impact assessment is currently transpiring in what might be described as a 'fact-free zone' – but this provision would benefit from greater specificity (for example, the review should be done, or at least supplemented, at arm's length by the federal Commissioner of the Environment and Sustainable Development).

Commentary

Impact assessment is the logical starting point for bringing into focus the changes that would be brought in through Bill C-5. As described in *Oldman*, impact assessment is "a planning tool that is . . . an integral component of sound decision-making" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3, at 71). The basic idea of environmental assessment is that "certain proposed activities should be scrutinized in advance from the perspective of their possible environmental consequences (Reference re *Impact Assessment Act*, 2023 SCC 23 (CanLII) at para 10, citing J. Benidickson, *Environmental Law* (5th

ed. 2019), at 257). Colloquially, this is often called a "look before you leap" approach (see here for example).

The regime proposed by Bill C-5 is not impact assessment. Far from it. The new NIPs approach would turn the system on its head. It would be a 'leap before you look' approach. Instead of an integrated assessment process for careful, informed decision-making about major projects, this would be an initial affirmative decision without a robust informational basis, along with a cluster of siloed and expedited regulatory decisions, all done without sufficient statutory space to see the big picture. The only integration that seems to be proposed is bundling all the specific regulatory authorizations into the final all-in-one authorizations and conditions document. No substantive coherence or collaboration between federal departments is required en route to that final point.
And so, on one hand it is important to simply recognize that C-5 is not at all about impact assessment, even though impact assessment is a useful benchmark. Bill C-5 is about what it says it is about: an accelerated process aiming to provide project proponents and investors with early and ongoing certainty that a project will receive federal approval.

But at what cost? Frankly, it is too early to tell. Trade-offs and downsides will hinge entirely on what projects are added to the list initially and into the future. In a smooth case scenario, a NIP would be in a context where there has already been meaningful public and Indigenous engagement, there is consent from affected Indigenous communities (and perhaps ownership), the project triggers the IAA such that there will still be a federal impact assessment within prescribed timelines, and any applicable provincial or territorial assessment processes proceeds in parallel and fills in any gaps. With some hesitation and many blind spots, we acknowledge that the enormous offshore wind project touted by Nova Scotia Premier Tim Houston is in this range.

There ought to be concern, however, because it is rare for so many stars to align when it comes to infrastructure and resource extraction projects of this magnitude. A more difficult (and foreseeable) scenario would be one where a NIP is not a designated project under the IAA, there are very few opportunities for meaningful public engagement, Crown consultation efforts are approached with a narrow interpretation of Indigenous rights and interests, federal departments work in isolated lanes, and applicable provincial assessments are expedited or superficial (or in Ontario's case, perhaps completely absent). The fact that C-5 would create space for such a scenario could lead to major legal problems (e.g. legal challenges brought by affected rights-holders), not to mention poor outcomes if a project actually proceeds. One need only look at projects like Northern Gateway, Site C, Muskrat Falls and Energy East for cautionary tales (see discussion of these here).

Conclusion

It is precarious times for Canada. On that most would agree. And many would probably also agree that present conditions are right for concerted major infrastructure building across the country. So the question is not so much whether to embark on this path, but how. Given the features and concerns we outline above, it is not clear that this effort aimed at shifting from 'whether' to 'how' is actually the 'how' that should be pursued. Time will tell if the *Building Canada* Act, if enacted, leads to moving fast and making things or just moving fast and breaking things. The stakes could hardly be higher.

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