

Intelligence MEMOS



From: Brad Gilmour and Sander Duncanson
To: Major Project Watchers
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Re: **BILL C-5 – PROS, CONS, AND OPTIONS FOR DOMESTIC INVESTORS**

Pessimism about the ability to advance Canadian projects has made infrastructure investors wary.

Lack of confidence has grown from necessary yet increasingly uncertain and complicated environmental and regulatory approval processes, with multiple layers of federal, provincial, municipal governmental laws, mandates and policies. And when combined with political interference and unacceptable litigation risks, the result has turned off many potential investors. To turn this around there needs to be a greater emphasis on timeliness, process certainty and coordination between various level of government.

Last June, the federal government brought Bill C-5 (the “*Building Canada Act*”) into effect along with a change in tone that seems to recognize that capital can go elsewhere, and that clarity and confidence is key. Bill C-5 provides reason for investor optimism.

That said, there is still work to be done to clear the way for greater private participation, including greater options for domestic investors.

Under the new legislation, infrastructure projects are to be added to a special list if they meet the objective of urgently advancing “national interest projects” in consideration of economic, sovereignty and security, and energy security interests. Once a project is added to the list, there is a higher level of confidence that approvals will come faster.

There are many positive aspects to this new law. For starters, projects on the list will provide investors greater certainty because the bill’s provisions suggest a high likelihood of authorization. Next, there is the potential for significant reductions in timelines. And finally, there is one omnibus approval for all federal requirements, and a major projects office whose mandate is to streamline and accelerate regulatory processes, as well as to help with the structuring and co-ordination of financing projects.

Concerns, however, remain. For instance, there are some unique potential risks for projects on the list, particularly around Indigenous consultation, notwithstanding Ottawa’s pledge to facilitate an appropriate degree of Indigenous support.

And notably, the legislation doesn’t solve the root causes of infrastructure project approvals, creating two tiers of projects in Canada: one for projects that qualify as in the national interest and are fast-tracked, and then a second tier for projects that do not qualify. The latter must run the gamut of regulatory steps and procedures that Bill C-5 mostly recognizes as inefficient and ineffective.

In sum, greater investor certainty for listed projects has the potential to create a more attractive environment for investors. There is a range of risk appetite for various groups of domestic investors, including pension funds, who choose to allocate their investment capital in Canada or abroad. In doing so, they will be carefully considering the clarity and confidence they have in not only the approval process, regardless of which political party is in power, but also in operations of projects once underway.

For pension funds, which are active investors in some infrastructure projects, some types of projects under consideration may not be of interest, such as ports, energy corridors, critical minerals, etc., which may still carry too much risk. But large domestic institutional investors are still seeking out opportunities for domestic investment.

When deciding to invest domestically or abroad, Canada’s large institutional investors look for simplicity in regulatory oversight and to know which – ideally single – level of government they need to deal in case of operational issues. This reduces the complications of compliance that can come when they need to deal with different levels of government. Further, they look for clear dispute resolution mechanisms in cases of conflict.

In conclusion, Bill C-5 appears to be taking some important steps to improve the investment climate in Canada, even if it does not immediately fix the underlying range of federal and provincial legislative and regulatory complexities that exist for projects that do not qualify for the list. For domestic investors, risk appetite will vary. But all are seeking clarity and confidence in the set of rules for approvals and operations. For there to be a lasting impact on investment, Indigenous communities need confidence in the process, as well as be active investors in certain projects. In addition, there needs to be confidence that the rules that are put in place will last and not be subject to political shifts at any level of government.

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