Fast-Track Legislation Raises Concerns Over Indigenous Consultation

Canadian governments' new project fast-track laws accelerate approvals but risk bypassing meaningful consultation with Indigenous nations, especially by limiting thorough environmental assessments.

Summary of article:

Canadian federal and provincial governments have introduced legislation aimed at fast-tracking major projects to counteract US trade policies, focusing on deregulation and expedited approvals. These laws include the federal Building Canada Act (BCA), Ontario's Special Economic Zones Act (SEZA), and British Columbia's Infrastructure Projects Act (IPA), each enabling streamlined project approvals with reduced regulatory hurdles. However, these fast-track measures risk undermining meaningful consultation with Indigenous nations, particularly by bypassing environmental assessments crucial for addressing Indigenous concerns about project impacts.

It is frequently observed that US President Trump has succeeded in uniting Canadians in defence against his own trade policies. He has also united diverse Canadian governments around a single economic policy. While controlled by different political parties with ostensibly different economic perspectives, the governments of Canada (Liberal), British Columbia (NDP) and Ontario (Conservative) are all seeking to combat the US trade aggression with the same tactic: the deregulation of major projects.

Canada's primary legislation in that regard is the *Building Canada Act* (***BCA***) which was passed June 26, 2025 as part of Bill C-5. Under it, the Governor in Council (ie the federal Cabinet) is empowered to designate projects as being in the national interest, which are then deemed to have received all favourable determinations, findings and opinions required for federal authorizations, and the Minister responsible for the BCA must issue those authorizations, with any applicable conditions.

The *BCA* fast-tracks projects deemed to be in the national interest not by entirely dispensing with the application of relevant legislation, but rather by requiring that such projects be approved under such legislation. The *Fisheries Act*, *Species at Risk Act* and *Impact Assessment Act*, for instance, will still apply, and proponents will need to meet their procedural requirements (except for the planning phase of the Impact Assessment Act, which is dispensed with for national interest projects). But the outcome is pre-ordained once the national interest designation is made: the authorizations will be granted, subject to conditions. As the federal government stated in its backgrounder on Bill C-5, under the *BCA* the focus of the review is "on 'how' to get the project built, instead of 'whether' it should be built."[1]

The approach taken by Ontario in Bill 5 is somewhat similar. Among many other legislative changes, the bill enacted the *Special Economic Zones Act, 2025* (***SEZA***), which grants the Lieutenant Governor (ie the Ontario Cabinet) broad, ill-defined powers to designate, by regulation, areas of the province as special economic zones, and empowers the Minister of Economic Development, Job Creation and Trade to designated trusted proponents or designated projects to which the *SEZA* would apply. The Lieutenant Governor is authorized to then exempt such trusted proponents or designated projects within a special economic zone from the requirements of any Ontario legislation.

[1] https://www.canada.ca/en/intergovernmental-affairs/news/2025/06/implementation-of-bill-c-5-one-canadian-economy.html.

British Columbia's Bill 15 – the *Infrastructure Projects Act* (***IPA***) – has more modest deregulation ambitions. For infrastructure projects spearheaded by the new Ministry of Infrastructure, and private projects the Lieutenant Governor in Council (ie BC's Cabinet) deems to be "provincially significant, the IPA empowers the government to streamline approval processes through prioritized provincial permitting, expedited environmental assessments, and/or the reduction in local governments regulatory requirements.

Despite each government's assurances to the contrary, each of these legislative approaches raises the stakes for First Nations that face fast-tracked projects in their territories. The general risk is that, empowered by these legislative frameworks, and spurred on by the drumbeat of "build, baby, build", these governments will approve projects regardless of their impacts on Indigenous nations.

The more specific risk is that the question of *whether* a project should be built is often of the greatest concern to affected Indigenous nations, and yet the *BCA* and *SEZA* seek to skip past that question in their haste to address *how* the project should be built.

While the governments have tried to assure Indigenous nations and organizations that they will consult before deeming a project to be in the national interest or designating a special economic zone, they will lack essential tools to make that consultation meaningful. For most major projects, consultation runs alongside an environmental assessment, and benefits from both its structure and the information arising from it. If, for instance, a concern is the project's impact on a species of importance to the Indigenous nation, then the assessment of the likely effect on that species is essential to meaningful consultation – including on whether those effects can be better mitigated, whether the Indigenous can be accommodated in some other way, and whether the project should move forward at all. But under the *BCA* and *SEZA*, the question of whether a project should be deemed to be in the national interest, or of whether a special economic zone should be designated, will answered without an environmental assessment having been conducted. The governments will not have environmental assessment frameworks to assist them. How will they seriously consult Indigenous nations on those questions? There is great potential the consultation will be superficial and performative, and projects will be designated without serious considerations of Indigenous nations' rights.

The fast-track legislation thereby holds much peril for Indigenous nations. It threatens to undercut norms of consultation that Indigenous nations have fought hard to establish over the last two decades since the Supreme Court of Canada recognized the duty to consult in the *Haida Nation*.[2] And they reverse direction from Canada's and BC's forward movement in adopting the *UN Declaration on the Rights of Indigenous Peoples* in legislation.

Indigenous nations, however, are far from powerless in this new legislative environment. Aboriginal and Treaty rights are guaranteed by s. 35 of the *Constitution Act, 1982*, which is superior to legislation. As the Supreme Court of Canada observed in *Clyde River*, "irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative."[3] That is, while the governments may seek to skirt the question of whether a project should process, and

[2] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.
[3] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para 24.

while the *BCA* and *SEZA* dispense with frameworks traditionally used to answer the question, the governments' duties to meaningfully consult Indigenous nations on that question remain.

It may be that the *BCA* and *SEZA* infringe s. 35 by jettisoning those frameworks and thereby sidestepping the duty to consult. Alderville First Nation and eight other Indigenous nations have launched a constitutional challenge to the two statutes on just that basis.

That litigation will likely take years to resolve. Even if the statutes are ultimately upheld, however, Indigenous nations will continue to hold powerful tools to protect their rights. Again, those questions of whether a specific project is in the national interest and so should be approved, and whether a specific special economic zone should be designated, will in many cases require deep consultation. The Crown will struggle to fulfill that duty, because it will not have available the framework or information it has needed in the past for meaningful consultation. Indigenous nations opposed to such projects moving ahead will be powerful adversaries in court, if they have the necessary intent, resources and legal expertise to do.

This legislation thereby also raises great risk to the Crown's ambitions to get projects built. If the Crown is not able to fulfill its consultation obligations – particularly on the foundational question of whether a project is in the national interest, or whether a special economic zone should be declared – then not only could its decision be set aside, but it also set those projects years back from being approved and built. Given the Crown's constitutional duty to consult, attempts to fast-track projects risk in fact delaying them for years.

On behalf of Indigenous nations, JFK Law has led many challenges against legislation and project approvals: the challenge against the Harper government's Bill C-69 (which similarly sought to deregulate project approvals),[4] the successful fight against the Northern Gateway Pipeline,[5] the Tŝilhqot'in Nation's victorious battle against Taseko's New Prosperity mine, the relevance of UNDRIP in defining the scope of the duty to consult and accommodate,[6] and ongoing litigation against the licensing of hydroelectric dams.[7]

[4] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765.
[5] *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418.
[6] *Kebaowek First Nation v. Canadian Nuclear Laboratories*, 2025 FC 319.
[7] *Chaboyer v Saskatchewan Power Corporation*, 2025 SKCA 31.