Submission to the Standing Senate Committee on Transport and Communications (TRCM)

Wednesday, May 8, 2024

By: Emmett Macfarlane, Professor, University of Waterloo

Constitutional/Legal considerations

1. Bill S-273 is a valid exercise of the federal declaratory power under section 92(10)(c) of the *Constitution Act, 1867*. The Chignecto Isthmus Dykeland System falls firmly within the recognized category of "works" historically applied under the declaratory power. An ongoing legal question arises as to whether the dykes are already federal jurisdiction, and this may depend largely on whether they are viewed as a single coherent cross-border system or separate systems that meet at the border. Depending on how that legal question is answered, the use of the federal declaratory power may be regarded as redundant in some sense, but that would not implicate its validity or constitutionality.

2. The use of the declaratory power does not legally obligate the federal government to proceed with any activity, or to fully fund the development of, the Dykeland System. The declaratory power allows Parliament to assume federal jurisdiction over a work that might otherwise be considered a local work within a province. But jurisdictional authority is exactly that: the power to make laws or policy decisions relating to the matter at hand. Jurisdictional authority would continue the existing options of assuming or not assuming the full cost of the project, and to engage in negotiations with Nova Scotia and New Brunswick over the question of costs before any projects proceed.

3. Further to this point, it is worth noting the broader the background context, including the reference question posed to the Nova Scotia Court of Appeal. Committee members may be wondering whether Bill S-273 affects that litigation or may itself be subject to judicial review. It is important to understand that the answers the courts provide on jurisdiction will not result in financial obligations. The dominant strand of modern federalism jurisprudence is one that emphasizes flexibility and the co-operative nature of federalism. The division of powers is considered an exhaustive code for the allocation of sovereignty in Canada, but there are many spheres of overlapping concern. Co-operative federalism has emerged as a robust aspect of political practice in intergovernmental relations, and courts will generally not intervene to enforce implied or even *established* funding agreements. In simpler terms, the division of powers is about jurisdiction, not spending. Were Parliament to pass Bill S-273, it is very unlikely to have any *legal* implications for government spending.

4. Finally, there has been some discussion of the importance of consultations with affected Indigenous communities. It is important to state explicitly that the constitutional rights of Indigenous peoples under section 35 of the Constitution Act, 1982, are obligations owed by both the federal and provincial orders of government. Both must respect "Aboriginal and treaty rights," and within that vein, whichever level of government holds jurisdictional authority over a project holds the constitutional duty to consult and accommodate

Indigenous interests for those First Nations whose lands or rights may be affected. While I'm not in a position to declare that any particular government has a better record upholding these obligations in practice, as a constitutional matter, whether the provinces or the federal government holds jurisdiction does not change the nature of those rights obligations.