Written Submission to Standing Senate Committee on Transport and Communications
Re Bill S-245

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To accompany oral submissions of 8 May 2018

This written submission seeks to provide further background and citations related to the comments I will offer to the Committee on 8 May 2018. It has been prepared on a very short timeline in light of an invitation to the Committee on an urgent matter and seeks to assist the Committee in its contemplation of Bill S-245. I will be happy to attempt to try to answer any questions and/or to provide further information to the Committee after the hearing if there are further matters on which I am reasonably positioned to do so.

Background/Credentials

I appear as an individual but with the background of extensive work as a law professor working on pertinent areas. These include:

- work on constitutional law generally (having co-authored a thousand-page treatise on *The Law of the Canadian Constitution* (LexisNexis), 1st edn in 2013 and 2nd edn in 2017);
- specific work on jurisdictional issues related to natural resource development and infrastructure (on which I authored a 2013 text on *Natural Resource Jurisdiction in Canada* (LexisNexis, 2013) and have also commented in my forthcoming book on *Mining Law of Canada* (LexisNexis, May 2018));
- work on the interaction of Indigenous rights with resource issues amongst other Indigenous rights topics (and on which I have published two books on the duty to consult doctrine that have been cited in dozens of court judgments and repeatedly in the Supreme Court of Canada, and on which I teach an annual course on Global Indigenous Rights and Resource Development); and
- service on the International Law Association (ILA) Committee on Implementation of the Rights of Indigenous Peoples, where I serve amongst a small number of international experts examining the status of Indigenous rights in international law.

In addition to this general background, I have been thinking extensively about the Trans Mountain situation in recent weeks. In addition to assisting various journalists examining different facets of the story, I have published several items on the present issues:
Introduction Concerning Context for and Objectives of Bill S-245

Bill S-245 would invoke the federal declaratory power contained in s. 92(10)(c) of the Constitution Act, 1867 in relation to the Trans Mountain Pipeline Project. It does so by declaring that “[t]he Trans Mountain Pipeline Project and related works are declared to be works for the general advantage of Canada” (s. 4). It does so in order to implement a previously made federal decision to approve the Trans Mountain Project in the face of issues related to federal versus provincial jurisdiction.

In this written submission, I will seek, first, to explain the constitutional availability and significance of such a step in providing further structure for federal action and in seeking to provide additional legal certainty for the Trans Mountain Pipeline Project and, indeed, the investment climate for infrastructure projects in Canada generally. Second, I will gesture toward some suggestions for possible amendments that could make the Bill more effective in helping to ensure implementation of the federal decision to approve the Trans Mountain Pipeline Project.

I turn to those points in the two sections that follow. However, some background will first be pertinent. The Trans Mountain Pipeline Project has of course received extensive media attention particularly over recent weeks. Many have noted that a very serious situation of intergovernmental conflict has emerged that has cast significant doubt on Canada’s ability to see through a legally approved project in which a proponent has already invested a billion dollars and that promises tens of billions of dollars in economic benefits for Canada. More generally, many have highlighted that the environment of uncertainty has cast significant doubt on future investments in Canadian infrastructure and economic development.

As I understand its objectives, Bill S-245 seeks to face up to addressing legal uncertainties on the Trans Mountain project. Like any use of the declaratory power from 92(10)(c), it is directed toward a single project. That direction minimizes its constitutional implications for any other
context in Canada, where governments have generally been able to work their way forward in a cooperative manner.¹

All reasonable legal opinion is in agreement that there is a fundamental federal jurisdiction over the approval and construction of an interprovincial pipeline, grounded in s. 92(10)(a) of the Constitution Act, 1867. While a province has always been able to carry out some limited legal regulation of local matters arising, some have tried to suggest that a province can take much further steps that regulate what goes through the pipeline and whether it can serve its purposes. Those suggestions are not in accord with extensive case law, and the federal government has the legal authority to proceed even without Bill S-245.² However, there are ways in which uncertainty is still being floated and perpetuated, and further federal legislative steps can more fully remove that uncertainty. In particular, further federal legislation can make clear that the federal government has made decisions on the pipeline that have paramountcy (a form of legal priority) over any provincial regulatory steps that would interfere.

Bill S-245, to be clear, addresses issues of federal versus provincial jurisdiction. As I have highlighted in my publications and media commentary on Trans Mountain, there are important Indigenous rights issues related to the pipeline that have been litigated in the courts in cases heard last fall at the Federal Court of Appeal (the set of cases grouped together with that pursued by the Tsleil-Waututh and heard in October 2017) and the British Columbia Supreme Court (the case brought by the Squamish and heard in November 2017). These cases will be decided by those courts in accordance with the duty to consult doctrine that is part of Canadian law under section 35 of the Constitution Act, 1982. Further steps on the project are obviously subject to those legally recognized rights and any implications they have following the judgments.

The duty to consult doctrine applicable in Canada frames the depth of consultation required across a range of circumstances (varying widely since its triggered hundreds of thousands of times per year).³ Despite claims by some to the contrary, those requirements do not extend to any present legal requirement of “free, prior, and informed consent” (FPIC) in Canadian law.⁴ The legal requirements are consultation requirements. Whether those have been met in the present circumstances will be determined by those court proceedings.

As I read it, the aim of Bill S-245, then, is to implement an existing federal approval and federal jurisdiction through special legislative steps in the context of attempts in some quarters to generate uncertainty about the effectiveness of that federal approval. It pertains to the implementation of a

¹ Thus, for instance, a s. 92(10)(c) declaration on the Trans Mountain pipeline has no implications in any other context, such as for the jurisdiction of the Quebec government, and is instead a finely tuned response to a particular situation: see Dwight Newman, Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares (Macdonald-Laurier Institute, April 2018).
² I have covered this point at length in my various publications on related issues.
⁴ I discuss this point in the chapter on international law in my second book on the duty to consult, Revisiting the Duty to Consult Aboriginal Peoples (Purich/UBC Press, 2014).
federal decision, subject of course to the Indigenous rights questions that have been litigated in the courts.

**Constitutional Availability and Significance of Using the Declaratory Power for Bill S-245**

Section 92(10)(a) of the *Constitution Act, 1867* provides a general federal authority over interprovincial (and international, which should be read as encompassed in my future references to “interprovincial”) transportation and communications. Long-established case law makes clear that this extends to interprovincial pipelines. And long-established case law makes clear that projects covered by the section receive significant constitutional protection from provincial interference.  

Section 92(10)(c) is an unusual provision under which the federal government may extend and/or reinforce its authority in relation to specific projects. It does so by making a declaration that the project at issue is “for the general advantage of Canada”.  

This declaratory power has been used hundreds of times. It continues in active use in relation to nuclear regulation. While most of the uses were made in a prior era of major infrastructure development, legal opinion is clear that it remains available as a special provision the federal Parliament may use on a particular project where it considers it appropriate to do so. There are very few legal constraints on its use, so long as that use reflects a *bona fide* judgment that a project (a “work”) is “for the general advantage of Canada”.

There have, of late, been a few academics contacted by the media who have opined on the spur of the moment that the wording of s. 92(10)(c) applies only to a work “situate within a province” and is thus not available on an interprovincial project. Although a surface read of the section could lead someone to think that, the claim is incorrect in light of the long-established usage of the section. I do not purport to provide any complete list, as I have made just a quick sampling of some of the instances of its use, but I have identified many instances in which the section has been used for interprovincial or international bridges or canals or railways or railway networks (amongst other types of works). It is wrong for academics to go about asserting a limit on the use of s.  

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5. I detail some of the case law (and counter some of the other views some have been floating) in Dwight Newman, *Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares* (Macdonald-Laurier Institute, April 2018).


7. For examples, see e.g. *Niagara Lower Arch Bridge Act*, S.C. 1956, c. 64; *Canadian National Railways Act*, S.C. 1955, c. 29; *Prescott & Ogdensburg Bridge Co. Act*, S.C. 1946, c. 77; *Sarnia-Port Huron Vehicular Tunnel Co. Act*, S.C. 1932-33, c. 59; *Lake of the Woods International Bridge Co. Act*, S.C. 1932, c. 59; *Cornwall Bridge Co. Act*, S.C. 1930, c. 55; *Canadian Transit Co. Act*, S.C. 1921, c. 57; *Lake of the Woods and Other Waters Act*, S.C. 1921, c. 38; *Montreal Ottawa and Georgian Bay Canal Co. Act*, S.C. 1894, c. 103; *Great Northern Railway Co. Act*, S.C. 1892, c. 40; *Niagara Falls Bridge Co. Act*, S.C. 1887 (50-51 Vict.), c. 96; *St Lawrence International Bridge Act*, 1892, S.C. 1892 (35 Vict.), c. 90. These are not based on any complete sampling but simply some quick consultation of different eras of use of the declaratory power to identify some instances across various decades to establish if there was consistency in this point over time.
92(10)(c) that does not exist. It is flexibly available for use in accordance with determinations of the federal Parliament.

To be clear, many of the past uses have been in the context of so-called “private legislation”, which is legislation making special determinations in the context of particular persons, bodies, or areas rather than public policy more generally. Using s. 92(10)(c) in such a context is not unusual but, indeed, the norm. And, indeed, the Senate has traditionally had a very large role with such legislation, in initiating it and/or in studying it in careful detail so as to save time in the House of Commons. Thus, while pieces of legislation on major issues of public policy are more commonly initiated in the House of Commons, pieces of legislation to implement federal authority in relation to projects in the national interest are very appropriately initiated in the Senate.8

The constitutional significance of making the declaration that applies s. 92(10)(c) is to put something into federal jurisdiction even if it had been provincial before. In the context of something that is already an interprovincial project under s. 92(10)(a), it would appear to reinforce the federal jurisdiction. There is a symbolic effect to it. It makes clear that the federal government is working to implement its jurisdiction. And it arguably also has the legal effect of reinforcing the exclusivity of federal jurisdiction over the project. The case law on s. 92(10)(c) supports the interpretation that a project under s. 92(10)(c) is under a more specifically exclusive federal jurisdiction.9 That may well count on its own and may help to confirm that federal paramountcy ousts various forms of provincial interference in the project.

**Giving Further Effect to Bill S-245: Possible Amendments Based on Past 92(10)(c) Uses**

While Bill S-245 as it is presently drafted could already help to provide a basis for ongoing federal action, it would be possible to take immediate steps to bolster its legal effect.

In some uses of s. 92(10)(c), there is then a piece of legislation that provides a full regulatory code on a topic—this is true, for instance, of its ongoing use in the nuclear regulatory context.

In others, there have been specific determinations within the legislation itself. For example, in many of the pieces of railways legislation that have used 92(10)(c), there are then specific sections in the legislation that authorize construction by the railway company of construction along a particular route.

In others, there are other kinds of provisions facilitating implementation of the federal jurisdiction and decision. Some of the legislation on canals, bridges, and railways contains other kinds of provisions that create regulatory powers to facilitate further implementation or that create offences so as to protect construction from interference.

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8 On the Senate’s historically significant role on private legislation during the era when the declaratory power was in very active use, see F.A. Kunz, *The Modern Senate of Canada, 1925-1963* (Toronto: University of Toronto Press, 1965) at 207-211.

9 See especially the Supreme Court of Canada decision in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327.
In some of my writing on Trans Mountain, I have suggested what I have called the adoption of a “legal project code” as a legal route forward for the federal government if it wishes to ensure legal certainty for the construction of Trans Mountain.\(^\text{10}\) The suggestion is not that the legislation seek to set out every detail on a project that has already been subject to extensive study and conditions. Rather, it is to make clear that the federal government is “covering the field” and equipped to make decisions about local issues that arise along the pipeline route as needed (I have suggested that this be in the context of opportunities for submission of information by the province and municipalities and in full cooperation with the project’s Indigenous advisory committee).

Drawing on other legislation using s. 92(10)(c), I will just conclude that if the Committee wants to make Bill S-245 have effects even more clearly beyond the symbolic, it could include provisions such as some or all of the following (albeit with the recommendation to have this drafting examined and appropriately adjusted by legislative drafting experts familiar with contemporary bilingual drafting):

**Authorization of construction and operation**

5 The project proponent as identified in Order in Council P.C. 2016-1069 of November 29, 2016 may construct and operate the Trans Mountain Pipeline Expansion Project pursuant to the approval granted by Order in Council P.C. 2016-1069 of November 29, 2016.

**Regulation**

5 (a) The Governor in Council shall have power to make and enforce such regulations as the Governor in Council may from time to time consider necessary, advisable, or expedient to prescribe and ensure that the aforesaid works shall at all times be constructed, maintained, improved, repaired, and operated in such manner as to secure at all times the general advantage of Canada.

(b) The Governor General in Council shall have power to make and enforce such regulations as the Governor in Council may from time to time consider necessary, advisable, or expedient to facilitate the construction of the aforesaid works including but not limited to regulations creating offenses that prohibit actions that would interfere with construction of the works.

(c) The Governor in Council may by the aforesaid regulations prescribe penalties of fine or imprisonment, or both, for any contravention of those regulations, provided that such penalties to be so prescribed shall not exceed one hundred thousand dollars and six months’ imprisonment for any one offence.

(d) Any regulations made by the Governor in Council under authority of this Act shall be published in the *Canada Gazette* and shall from the date of such publication have the force and effect of law as if herein enacted.