

## The Alberta Sovereignty Act and the Rule of Law

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**Matter Commented On:** The Alberta Sovereignty Act and the [Free Alberta Strategy](#)

Last week, United Conservative Party (UCP) leadership hopeful Danielle Smith [announced](#) that, upon her election as Premier, she would introduce the Alberta Sovereignty Act, legislation described as the “cornerstone” of the [Free Alberta Strategy](#) (Strategy), published back in the fall of 2021 (see story [here](#)). Briefly, this law would purport to grant the Alberta Legislature the power “to refuse enforcement of any specific Act of Parliament or federal court ruling that Alberta’s elected body deemed to be a federal intrusion into an area of provincial jurisdiction” (Strategy at 22). [Legal academics](#) have dismissed the idea as one that would clearly offend Canada’s constitutional order, but to date mainstream media commentary has failed to acknowledge the fundamentally unlawful and undemocratic nature of this proposal.

This post situates the Alberta Sovereignty Act and Strategy within several fundamental features of Canada’s legal order: (i) the rule of law; (ii) the separation of powers between the executive, legislative, and judicial branches of government; and (iii) the division of law-making powers between the federal and provincial legislatures. In our view, the proposed Act and Strategy are fundamentally incompatible with all three of these core features, which are also interrelated and integral to each other as well as to ensuring a functional democratic system of governance.

### The Free Alberta Strategy

The Free Alberta Strategy describes the idea of an Alberta Sovereignty Act as follows:

#### Alberta Sovereignty Act

The Free Alberta Strategy requires that several pieces of new legislation be passed by the Government of Alberta. Our proposed cornerstone of the Free Alberta Strategy is the Alberta Sovereignty Act. This would provide Alberta’s Legislature with the authority to refuse enforcement of any specific Act of Parliament or federal court ruling that Alberta’s elected body deemed to be a federal intrusion into an area of provincial jurisdiction, or unfairly prejudicial to the interests of Albertans.

As an example, Alberta’s elected representatives could trigger the use of this legislation to override a federal attempt to regulate or decline a new energy project in Alberta. Once the provincial permit is granted for such a project, that business would be permitted to build and operate independently of any federal regulatory or judicial interference.

Similarly, as it relates to federal laws involving the possession of firearms, carbon taxes or restrictions over health care delivery, the Alberta government would have the unilateral authority to refuse enforcement of those federal laws within the Province of Alberta.

There are three primary methods that governments use to enforce their laws, regulations and judgments of courts. They are:

1. Enforcement against the person;
2. Enforcement against private property and land; and
3. Enforcement against financial assets.

Practically speaking, a law, regulation or court decision is operative only when it is enforceable within the jurisdiction it purports to exercise authority over. The governing body that controls enforcement, therefore, effectively controls what the law actually is for all intents and purposes.

Alberta already controls all enforcement over private property and land (other than lands owned by the Federal Crown or First Nations). This is primarily accomplished through the enforcement of the Province's Law of Property Act, Personal Property and Security Act, and Civil Enforcement Act. As the Provincial Government already oversees this area of enforcement, it is entirely able to ensure that any related provincial agencies or regulated bodies (Land Titles Office, Personal Property Security Registry, Bailiffs, etc.), comply with any Alberta Sovereignty Act directives, when mandated to do so by the Legislature. (at 22)

Before explaining why these ideas are fundamentally unlawful, it is worth pointing out that the Strategy appears to be partially based on the erroneous notion that "Alberta already controls all enforcement over private property and land." A few examples are sufficient. Fisheries and Oceans Canada, which implements various laws enacted under Parliament's power over seacoast and inland fisheries (including the regulation of impacts to fish and fish habitat throughout Canada), has its own [regional offices](#) throughout the country, as do [Environment and Climate Change Canada](#) (of particular relevance to oil sands and coal mining, for both of which [federal effluent regulations are currently in development](#)) and the [Impact Assessment Agency of Canada](#). So, too, does the [Canada Revenue Agency](#). While Canada and the provinces have, from time to time, entered into agreements to coordinate and streamline their various regulatory regimes (see e.g., [for the reporting of environmental spills](#)), few federal regimes actually depend on provincial assistance in enforcement.

From this perspective, the Alberta Sovereignty Act might be dismissed as insignificant. However, it is apparent that something more than mere non-enforcement by provincial agencies is being contemplated. The proposed Alberta Sovereignty Act would purport to grant the legislature the power to declare certain laws to be inapplicable to Albertans and Alberta businesses (e.g., the federal carbon price, impact assessment regime, or gun-related laws). It is this aspect of the Alberta Sovereignty Act that is fundamentally incompatible with Canada's constitution, including not just

the division of law-making authority between the federal and provincial governments, but also, and more critically, the rule of law and the separation of powers.

## The Rule of Law

The rule of law is integral to democratic governance. At its core, it is perhaps best understood by contrasting it with the alternative: rule by unchecked and unconstrained power held by individuals, historically associated with feudal systems and more recently with failed or failing states. Faced with the recent apparent disregard for international law by British prime minister Boris Johnson, *The Guardian* columnist Jonathan Freedland [reminded his readers](#) that the rule of law:

...is so basic, we take it for granted. It's the notion, spelt out in Magna Carta in 1215, that even those in power do not enjoy unlimited or unfettered authority, but are constrained by rules; that even the sovereign – the state – is subject to the law of the land. Only then can citizens feel relatively safe from the threat of arbitrary power, safe from a king – or prime minister – doing whatever the hell he likes. (emphasis added)

This same understanding of the rule of law as protective against arbitrary state power is reflected by the Supreme Court of Canada in *British Columbia v Imperial Tobacco Canada Ltd*, [2005 SCC 49 \(CanLII\)](#): “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power” (as para 58; see also *Reference re Secession of Quebec*, [1998 CanLII 793 \(SCC\)](#), [1998] 2 SCR 217 and *Reference re Manitoba Language Rights*, [1992 CanLII 115 \(SCC\)](#)).

Simply put, Canada's constitutional order is supreme and binding, including on provincial legislatures. Those persons and groups advocating for an Alberta Sovereignty Act who publicly acknowledge that the Act may well be struck down by the courts as unconstitutional, but assert that such a court decision would be one that the Alberta legislature could ignore, are effectively rejecting the rule of law (see e.g., Tyler Dawson, “[UCP leadership contender Danielle Smith wants Alberta to ignore federal laws it doesn't like](#)”, *National Post* (17 June 2022)). Moreover, these positions are dangerous transgressions on the separation of powers between the executive, legislative, and judicial branches.

## The Separation of Powers

The rule of law depends on the separation of powers between the three branches of government: the legislative, executive, and judicial. As explained by the Supreme Court of Canada in *Ontario v Criminal Lawyers' Association of Ontario*, [2013 SCC 43 \(CanLII\)](#):

Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of

public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993 CanLII 153 \(SCC\)](#), [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada’s branches of government for our constitutional order, holding that “[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other” (at paras 28-29, emphasis added).

Thus, Canada’s constitutional order includes not only a *division* of law-making power between the federal and provincial governments (as discussed in the next section), but also a *separation* of powers between three distinct branches. Admittedly, our separation of powers is weaker than in the United States where the legislative branch (Congress) and the executive branch (the President) are distinct. In Canada, there is overlap between our legislative branch (Parliament or the provincial Legislatures) and the executive (essentially the Prime Minister or Premiers and their respective Cabinets). A sharp distinction between making and interpreting law is also more difficult to make than the separation of powers principle admits. Nonetheless, the proposed Alberta Sovereignty Act and the Strategy go much further than either of these ‘murky’ aspects in the separation of powers. They purport to elevate a legislature above the judiciary and grant it the power to exercise the latter’s core function in determining the validity and applicability of federal laws, a function that it has neither the competencies nor the accountabilities to assume (and such an arrangement would also contravene s 96 of the *Constitution Act, 1867* (see *Crevier v AG (Québec) et al*, [1981 CanLII 30 \(SCC\)](#), [1981] 2 SCR 220).

We hasten to add that this function has recently been exercised twice by Alberta’s Court of Appeal with respect to both carbon pricing and the federal impact assessment regime: see *Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#) (see post [here](#)) and *Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74 \(CanLII\)](#) (*GGPPA Reference ABCA*) (see post [here](#)). A functional and healthy democracy governed by the rule of law allows for reasoned disagreement and criticism of the reasoning reflected in those reference opinions, but it must be done within established frameworks for analysis, e.g. the role of judicial precedent. It is another thing entirely to outright reject or ignore the courts’ role in mediating such disputes, or to broadly disparage our courts, including the Supreme Court of Canada, in the way that the Strategy does (at 30 and 31).

## The Division of Law-Making Power

Finally, the proposed Alberta Sovereignty Act and Strategy fundamentally misconceive the nature of federal and provincial law-making authority. As explained by Justice Malcolm Rowe in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) (*GGPPA References SCC*) (in dissent but not on this point), “[t]he Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination between equal partners, not subordination” (at para 464, emphasis added). This point – of co-operative federalism being integral to our Constitutional order and federalist system of government – has been made numerous times by the Supreme Court of Canada (see e.g. *Reference re Securities Act*, [2011 SCC 66 \(CanLII\)](#): “It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another” (at para 7)).

Simply put, federal laws are directly applicable to all Canadians and Canadian businesses; they are not contingent on provincial approval or disapproval. Our constitutional law doctrine has also long been clear that federal legislation can – and indeed is expected to – impact provincial policies and preferences without being rendered invalid. The fundamental question always is whether a given law falls within the law-making authority of one level of government or the other, as set out in sections 91, 92, and 92A of the *Constitution Act, 1867 and 1982*. Suffice it to say, there is no authority in section 92 or section 92A to make a law that purports to invalidate federal laws or otherwise render them inapplicable within a province.

### Conclusion: Sovereignty at What Cost?

James Madison, one of the United States’ founding fathers, once observed that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny” (*Federalist Papers No 47*). In our view, the Alberta Sovereignty Act sets a dangerous course in that direction. It would usurp the role of Canada’s judiciary in mediating jurisdictional disputes and place the legislature above our Constitution, which is to say above the law.

Disagreements over federal-provincial division of powers are as old as the Constitution itself. In particularly difficult confrontations, these disagreements have led some to advocate for separation, and indeed [some are](#). The Supreme Court has addressed how separation may occur within the confines of our legal order: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

Likewise, it is open for some to advocate for a constitutional amendment in response to federal-provincial disputes, as was (sort of) done with the [provincial referendum on the federal government’s equalization program](#).

But the Alberta Sovereignty Act is altogether different: it promises essentially the same result through an attempted legal sleight of hand. In our view, however, the clearest and most immediate

effects of such ideas is not sovereignty, nor changes to the confederation bargain, but rather a damaging blow to the rule of law and the basic building blocks of democratic governance.

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