

Running Afoul the Separation, Division, and Delegation of Powers: The Alberta Sovereignty Within a United Canada Act

By: Martin Olszynski and Nigel Bankes

Legislation Commented on: [Bill 1 – Alberta Sovereignty Within a United Canada Act](#)

On Tuesday, November 29, 2022, the provincial government unveiled its highly anticipated and controversial “Alberta Sovereignty Within a United Canada Act” (Bill 1). The promise to introduce some form of sovereignty legislation was *the* key plank of Premier Danielle Smith’s UCP leadership campaign this past summer and fall. An initial ABlawg [post](#) that drew from the general contours of the legislation, as found in a 2021 policy document called the “Free Alberta Strategy,” expressed concerns that “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.”

As this post and other commentary show (see e.g., [here](#) and [here](#)), such concerns have proven to be prescient. We start by describing the Bill and explaining its basic mechanics. We then set out three bases upon which the Bill could be challenged as unconstitutional – assuming it passes in its current form (the Premier has [recently expressed](#) a willingness to consider amendments): (1) the separation of powers (between the legislative, executive, and judicial branches); (2) the division of powers (whether Bill 1 actually falls within provincial legislative authority); and (3) the impermissible delegation of legislative authority (the so-called Henry VIII clause that has garnered most of the criticism to date). Perhaps the strongest arguments are those based upon the doctrine of the separation of powers as supported by s 96 of the [Constitution Act, 1867](#). Bill 1 represents a significant and unprecedented intrusion into the historical and core jurisdiction of Canada’s superior courts.

The Contents of Bill 1

Bill 1 is relatively brief. It consists of a 10-paragraph preamble and 10 operative sections. The operative sections contain:

- (1) a definition section,
- (2) an interpretive section,
- (3) a clause dealing with resolutions of the legislative assembly (which serves as a trigger for much of the balance of the Act),
- (4) the powers of the Lieutenant Governor in Council (which currently include amending laws and issuing directives),
- (5) a section dealing with the duration of the special measures and their renewal,
- (6) a section dealing with the effect of directives,

- (7) a section prescribing that the Crown is bound by the Act,
- (8) an immunity provision,
- (9) a provision dealing with the availability of judicial review, and
- (10) a regulation making power. We examine some of these provisions in more detail below.

The Preamble

Preambles in a statute serve to establish the premises on which the legislation is based (sometimes framed as describing the mischief that the statute was intended to address) as well as the purpose of the statute. The preamble in this case consists of nine paragraphs. The first two paragraphs aim to establish the supposed distinctiveness of the “unique culture and shared identity” of Albertans while the third and fourth preambular paragraphs reference Canada’s and Alberta’s key constitutional documents. They also proclaim that Alberta is not “subordinate to the Government of Canada”. Paragraphs 5 and 6 lay out the underlying mischief that Bill 1 seeks to address. This is identified as the alleged increasingly frequent federal infringements upon Alberta’s “sovereign provincial rights”, as well as the “unjustified and unconstitutional” infringements by the Parliament and Government of Canada with the rights and freedoms of Albertans under the *Canadian Charter of Rights and Freedoms*. Paragraphs 7 and 8 are linked with the two previous paragraphs insofar as they lay out the expectation of the “people of Alberta” that Canada will respect the constitution, including the *Charter*.

The final paragraph of the Preamble confirms that these grievances make it appropriate for the Legislative Assembly “to set out measures that the Lieutenant Governor in Council should consider taking in respect of actions of the Parliament of Canada and the Government of Canada that are unconstitutional or harmful to Albertans” (Preamble at para 9). This is the first indication that Bill 1 seeks to address not only those matters that the Legislative Assembly considers to be unconstitutional, but also measures that the Legislature considers may be “harmful to Albertans” – a much more fluid and subjective term.

Actual and Anticipated Federal Initiatives?

Bill 1’s key definitions are “federal initiative” and “provincial entity.” Bill 1 defines “federal initiative” exceedingly broadly. The term is not confined to a federal law or regulation but extends to a “program, policy, agreement or action, or a proposed or anticipated federal law, program, policy, agreement or action” (emphasis added). An example of a proposed law might be the federal government’s still-under-development [greenhouse gas \(GHG\) emissions cap for the oil and gas sector](#), but the inclusion of the term “anticipated” would seem to contemplate virtually anything that a member of the legislature can conjure up, including the spectre of a [since-debunked federal ban on fertilizer use](#). In the age of [meme politics](#), this definition is essentially unbound.

Similarly, “provincial entity” is defined to include a broad range of entities including regulatory agencies, health authorities, school boards, municipalities and universities but also “an entity that receives a grant or other public funds from the Government that are contingent on the provision of a public service”. This, for example, would include many charitable organizations in many

different fields that have a grant agreement with the province. The power to issue directives extends beyond the entity itself to the members, officers, and agents of that entity.

Non-Enforcement or Non-Compliance?

There has been much discussion, and considerable uncertainty, about whether Bill 1 is merely about provincial non-enforcement of federal laws and regulations, or something more problematic. The answer appears to lie in section 2, which purports to set out three principles of interpretation:

Nothing in this Act is to be construed as

- (a) authorizing any order that would be contrary to the Constitution of Canada,
- (b) authorizing any directive to a person, other than a provincial entity, that would compel the person to act contrary to or otherwise in violation of any federal law, or
- (c) abrogating or derogating from any existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the Constitution. (emphasis added)

In an entire legislative scheme that is constitutionally suspect, subsection 2(a) amounts to a constitutional fig leaf, especially when the provision is merely directed at interpretation (“nothing ... is to be construed”). Subsection 2(b) is more significant: in our view, this wording clearly *does* contemplate something more than mere non-enforcement of federal laws and regulations, e.g., a future directive compelling provincial entities to engage in an act that would be contrary to federal law. While we are aware of [analysis](#) that suggests otherwise, we find it unpersuasive. The authors, Sigalet & Hartery, claim that this exemption merely directs provincial entities “in their executive capacity, to contest the reach of federal laws should that be necessary.” But no additional directives are necessary to enable a provincial entity to contest the validity of a federal law in court – it happens all the time. That said, we do agree with these authors that, ultimately, the Bill “cannot authorize provincial nullification of federal laws.”

Resolutions, Measures, and Powers

Section 3 controls the scope of the Act insofar as it establishes the conditions for triggering the extraordinary powers laid out in the balance of the legislation. These powers are triggered by the adoption, by the Legislative Assembly (i.e., legislature) of a resolution that acknowledges that it “is made in accordance with this Act” (at s 3(a)). The resolution must recite that the legislature is of the opinion that “a federal initiative” is either unconstitutional or that it causes, or may cause, “harm to Albertans” (at s 3(b)(ii)).

The legislature may deem a law to be unconstitutional either on the basis that it “intrudes into an area of provincial legislative jurisdiction”, or on the basis that it “violates the rights and freedoms of one or more Albertans under the *Canadian Charter of Rights and Freedoms*.” (at s 3(b)(i)) We will refer to these triggers as the federalism and *Charter* triggers. In the case of the “harm” trigger (actual or anticipated), the resolution must also set out the nature of the harm. In the case of the federalism and *Charter* triggers, there is no need for further elaboration; a mere opinion that a particular federal statute “intrudes into an area of provincial jurisdiction”, or violates the *Charter* rights or freedoms of one or more Albertans will suffice.

In each case, the resolution should also identify “a measure or measures that the Lieutenant Governor in Council should consider taking in respect of the federal initiative” (at s 3(d), emphasis added). So long as such a resolution fulfils these limited conditions precedent, then the Lieutenant Governor in Council (which is to say, the provincial cabinet) “may take the actions described in section 4.”

Section 4 contemplates that cabinet, “to the extent that it is necessary or advisable in order to carry out a measure that is identified in the resolution” (at s 4(1), emphasis added), may direct a Minister responsible for an Act to do any of the following things “by order”:

- (i) suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that the Lieutenant Governor in Council may prescribe, or
 - (ii) specify or set out provisions that apply in addition to, or instead of, any provision of an enactment, subject to the approval of the Lieutenant Governor in Council.
- (at s 4(1)(a))

Cabinet may only take action under paragraph (a) of s 4(1) to the extent that it “is satisfied that doing so is in the public interest”.

In addition, cabinet may “direct a Minister to exercise a power, duty, or function of the Minister, including by making a regulation under an enactment for which the Minister is responsible” (at s 4(1)(b)), or cabinet may “issue directives” to “a provincial entity and its members, officers and agents, and the Crown and its Ministers and agents, in respect of the federal initiative” (at s 4(1)(c)).

We note that the phrase “in respect of the federal initiative” as currently drafted only qualifies the power to issue directives to provincial entities etc. It does not qualify the power to issue directives to ministers under paragraphs (a) or (b). This appears to be a drafting error in the sense that the whole point of the Act is to target federal initiatives. This is a matter that may require clarification. It is also curious that while the power to issue a directive under paragraph 4(a) is subject to an additional public interest consideration, there is no such condition precedent that must be fulfilled before a directive can be issued under paragraphs (b) or (c). This too may well be a drafting error.

We also emphasize that cabinet’s section 4 powers, including the power to amend laws and regulations, are only constrained to the extent that cabinet deems them “necessary or advisable in order to carry out a measure identified in the resolution.” (at s 4(1)) In other words, there is nothing in the Bill that requires the section 3 resolution to set out clearly which of the section 4 powers will be used or in which way. A “measure” could be narrowly drafted or very broadly. And while the term “necessary,” on its own, may have imposed some restraints on those powers, the term “advisable” is very broad and subjective.

As to the legal effect of such a directive, s 4(3) provides that

- (3) Where there is a conflict or inconsistency between
 - (a) an order made or an order that is directed to be made . . . , and

(b) a provision of an enactment to which the order relates,
the order prevails to the extent of the conflict or inconsistency. (emphasis added)

In other words, a directive is a very powerful legal instrument. Indeed, the kind of mechanism set out in section 4 is frequently referred to as a Henry VIII clause (further discussed below). A directive may be valid for up to two years and may be extended once for a further two-year period (at s 5). Section 6 further clarifies the legal effect of a directive issued to a provincial entity “and its members, officers and agents” insofar as it requires that such persons must comply with the terms of any directive. While much may depend upon the terms of any particular directive, it is entirely possible that such a directive might, for example, prescribe that compliance is also essential for continued receipt of provincial funding.

Attempts to Confer Immunity and Restrict Judicial Supervision

Section 8 of the Bill seeks to protect anybody implementing the Act or a directive from any possible civil liability (“cause of action”). While legislatures generally have the authority to confer such immunities (see e.g. s 27 of the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#)), there is case law that suggests that such a conferral of immunity will not be effective to the extent that the law authorizing the directive, or the directive itself, is beyond the power of the provincial legislature: *Amax Potash Ltd Etc v The Government of Saskatchewan*, [1976 CanLII 15 \(SCC\)](#). It follows that any person thinking that they will be protected by section 8 should proceed cautiously and should seek legal advice.

Section 9 expressly addresses the availability of judicial supervision (“judicial review”) of the exercise of the large powers to issue directives described in section 4. It provides as follows:

- 9(1) An originating application for judicial review in relation to a decision or act of a person or body under this Act must be filed and served within 30 days after the date of the decision or act.
- (2) In an application for judicial review to set aside a decision or act of a person or body under this Act, the standard of review to be applied by the court is that of patent unreasonableness.
- (3) Nothing in this section is to be construed as making a decision or act of the Legislative Assembly subject to judicial review.

Several observations are in order. First, subsection (1) changes the general rule of section 3.15.1 of the [Alberta Rules of Court](#), which provides that an application for judicial review must be commenced within six months of the relevant decision or exercise of a statutory power.

Second, subsection (2) is a direction to the courts, in the event of a legal challenge, to be very deferential to the exercise of statutory powers under the Act, including a challenge to the issuance of directives under section 4. The leading Canadian judicial authority on the question of the deference to be owed by the courts (known as the “standard of review”) is *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) (*Vavilov*). According to *Vavilov*, the presumptive standard of review is that of “reasonableness.” Under that standard, a court would only strike down a decision, or the exercise of a statutory power, if it concluded that the decision-

maker had not adequately justified its decision in terms of both the internal logic of the decision and the broader statutory and evidentiary context for the decision (at paras 99 – 101).

Vavilov set out two important caveats to the presumption of reasonableness as the standard of review. Both are relevant here.

First, the Supreme Court conceded that the courts should give effect to a legislature’s decision to establish a different standard of review if it so prescribed in a relevant statute (*Vavilov* at paras 35 – 52). On its face, Bill 1 prescribes a more deferential standard of review, such that a court may only intervene if it can be demonstrated that the exercise of the statutory power was “patently unreasonable.” We can think of this as a type of decision that no reasonable person could have concluded that they had the authority to make. Another way of thinking about this is that the unreasonableness of the decision has to be plain or obvious.

Second, the Supreme Court confirmed that respect for the rule of law required that some matters must be subject to review on the non-deferential “standard of correctness.” Under this standard, the court does not just consider whether the relevant decision or action is reasonable; the court must agree with the decision, i.e. the statutory decision-maker must be correct. The *Vavilov* Court listed three matters that should be subject to correctness review: constitutional questions, general questions of law of central importance to the legal system as a whole, and questions relating to jurisdictional boundaries between two or more different agencies or tribunals (*Vavilov* at paras 55 – 64; the Supreme Court has since added a fourth category of correctness review but that is not relevant here).

The question for present purposes relates to the interaction between these two exceptions in the context of Bill 1. To the extent that the decisions or actions in question do not engage any of the rule of law categories (above), the legislature is free to prescribe a standard of review other than the presumptive standard of reasonableness; for example, much of judicial review in British Columbia is subject to such [prescribed standards](#). But to the extent that such legislation conflicts with the rule of law exceptions, the correctness standard of review will prevail. This result is grounded in the constitutional protection afforded to the core competence of superior courts by section 96 of the *Constitution Act, 1867: Crevier v Attorney General of Quebec*, [1981 CanLII 30 \(SCC\)](#). The point is significant here because although judicial review will be limited to the exercise of Bill 1’s section 4 powers and not the resolutions made under section 3 (as further explained in the next paragraph), we suspect that many of the questions that will come before the courts in this context will nevertheless raise rule of law type questions, including questions of constitutional law.

Section 9(3) (quoted above) affirms the principle that the legislative process itself cannot be the subject of judicial review. This itself (somewhat ironically in the present context) is founded on the constitutional principle of the separation of powers. Hence, while an interested party may be able to attack the constitutional validity of section 3, the resolution process of section 3 cannot itself be the subject of judicial review.

In sum, section 9 attempts to limit judicial supervision by establishing short timelines for judicial review, by emphasising that the legislative process of section 3 is largely insulated from review

provided that any resolution fulfills the basic pre-conditions outlined above, and by seeking to establish a very deferential standard of review (which in our view will only be partly successful).

Analysis

The Separation of Powers

The initial post on the Alberta Sovereignty Act emphasized that the rule of law depends on the separation of powers between the three branches of government: legislative, executive, and judicial. As noted by Justice Suzanne Côté in *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) (*Reference re: GGPPA*) (in dissent but not on this point):

Like parliamentary sovereignty and the rule of law, the separation of powers is “a fundamental principle of the Canadian Constitution” (*Provincial Judges Reference*, at para. 138)... time and time again this Court has recognized the separation of powers as “an essential feature of our constitution”, “a cornerstone of our constitutional regime”, “[o]ne of the defining features of the Canadian Constitution” and a “backbone of our constitutional system”... [citations omitted]

As an abstract theory, the separation of powers may embody three dimensions: the same persons should not form part of more than one branch, one branch should not control or intervene in the work of another, and one branch should not exercise the functions of another (E. C. S. Wade and G. G. Phillips, *Constitutional Law* (3rd ed. 1946), at p. 18) [emphasis added/in original]

...

The Court’s concern for protecting the core functions of each branch from intrusion is perhaps most well developed in the judicial sphere. Grounded in the judicature provisions of the *Constitution Act, 1867*, both legislative and executive bodies are incapable of intruding upon the core jurisdiction of superior courts or infringing upon the independence of the judiciary [citations omitted, emphasis added]. This core judicial function includes the duty to maintain the rule of law and protect citizens from arbitrary action by supervising state action... (at paras 279-280, 285)

Concerns about “parallel” or “shadow” court systems lie at the heart of the jurisprudence and principles surrounding section 96 of the *Constitution Act, 1867*, one of Canada’s more arcane constitutional provisions. While on its face it seems to be concerned with the appointment of judges (i.e. the Constitution assigned this role to the federal cabinet), the jurisprudence confirms that section 96 is also the principal legal and constitutional protection for the separation of powers principle. Section 96 provides as follows:

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The jurisprudence on section 96 has largely focused on provincial attempts to confer the powers of federally-appointed superior court judges (in Alberta, the judges of the Court of King’s Bench

and the Court of Appeal) on *provincially* created and appointed courts and tribunals. But in our view this case law and the relevant principles can equally be brought to bear on any attempt by the legislative branch to arrogate to itself the core judicial functions of the judicial branch as represented by section 96 courts.

The case law on the authority of provincial legislatures to enhance the authority of provincial courts and provincial tribunals has turned on the application of two key principles that are highly relevant here: the principles of national unity and the rule of law. As explained by the majority in *Reference re Code of Civil Procedure (Que)*, art 35, [2021 SCC 27 \(CanLII\)](#):

...Although s. 96 may on its face appear to relate solely to the federal government’s power to appoint judges, it has been interpreted by this Court as guaranteeing a nucleus to the superior courts... In this way, s. 96 forms a safeguard against erosion of the historic compromise. This means that neither the provinces nor the federal government may confer functions reserved to the superior courts on other courts to which s. 96 does not apply... If a province or the federal government could, by statute, confer the essential functions of the superior courts on another court, the role of the superior courts as the cornerstone of the judicial system would evidently be eroded and the system’s unitary nature would, in turn, be undermined...

...

One of the main objectives of the historic compromise reflected in s. 96 is to reinforce the national character of the Canadian judicial system... The superior courts form a network of related courts whose role is to unify and ensure the uniformity of justice in Canada...

...

The rule of law is maintained through the separation of judicial, legislative and executive functions... In keeping with the principle of the separation of powers, the task of interpreting, applying and stating the law falls primarily to the judiciary.

...

In light of Canada’s constitutional architecture, the superior courts are in the best position to preserve the various facets of the rule of law. Because of their independence and national character, they are best suited to resolving disputes over the division of powers between the provinces and the federal government and ensuring that government actions do not conflict with the fundamental rights of citizens... Moreover, the superior courts’ existence and status enjoy constitutional protection against legislative interference...

(at paras 41, 43, 46, 49, emphasis added)

Over time, these principles have led to the development of two tests, the first designed to preserve the superior courts’ “historical” jurisdiction, the second designed to preserve their “core” jurisdiction. Both are intended to give effect to the “prohibition against the creation of parallel courts that usurp the functions reserved to superior courts, as such parallel courts would eviscerate the protection afforded by s 96” (*Reference re Code of Civil Procedure (Que)*, at para 54).

The first test asks whether the jurisdiction transferred to a provincial court or tribunal conforms to a jurisdiction that was dominated by superior courts at the time of Confederation in the context of a judicial function. If so, such a transfer will only be saved if it is subsidiary or ancillary to an administrative function or necessarily incidental to the achievement of a broader policy goal (*Reference re Code of Civil Procedure (Que)*, at para 59). With respect to “core jurisdiction,” the question is “whether the legislation has the effect of removing any of the attributes of the superior courts’ core jurisdiction... Core jurisdiction includes ‘critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system’” (at para 65). More specifically, it includes “the review of the legality and constitutional validity of laws” (at para 68, emphasis added).

In our view, strong arguments can be made that the Bill 1 regime infringes on the historic jurisdiction of the superior courts. There can be no doubt that opining on the constitutional validity of a law was a jurisdiction exclusively exercised by the superior courts at the time of Confederation. Nor is there any doubt that the jurisdictional transfer at issue here is more than a subsidiary or ancillary feature of Bill 1 – it is the heart of the legislation, the trigger for all the machinery that follows. This is clear from both the preamble and from section 3. As noted above, preambular paragraphs 5 and 6 lay out the underlying mischief that Bill 1 seeks to address, namely the alleged and increasingly frequent federal infringements upon Alberta’s “sovereign provincial rights” as well as the “unjustified and unconstitutional” infringements by the Parliament and government of Canada with the *Charter* rights and freedoms of Albertans. Paragraphs 7 and 8 are linked to these paragraphs insofar as they lay out the expectation of the “people of Alberta” that Canada will respect the constitution including the Charter.

That the section 3 resolutions on federalism and *Charter* grounds are not merely ancillary is also clear from the [government policy document](#) accompanying Bill 1:

If passed, the act will provide a legislative framework to:

- Protect Albertans from federal legislation or policies that are unconstitutional or harmful to our province, our people or our economic prosperity.
- Enforce the Canadian Constitution’s division of powers in recognition of both the federal and provincial government’s respective exclusive and sovereign areas of constitutional jurisdiction...
- Shift the burden to the federal government to legally challenge Alberta’s refusal to enforce unconstitutional or harmful federal laws or policies instead of Alberta having to initiate legal challenges and waiting years for a decision while those same federal laws or policies harm Albertans day in and day out. (emphasis added)

While Bill 1 may not *remove* a core jurisdiction from a section 96 court to determine the constitutional validity of a federal law, it very clearly contemplates the creation of a parallel court, the existence of which would politicize and ultimately undermine the superior courts. For example, a matter may come before a section 96 court in a situation in which the Legislative Assembly has already passed a resolution opining that that federal law or other federal initiative, is unconstitutional. Or, as specifically envisioned by this scheme, a section 4 directive may be challenged before a section 96 court, which directive was triggered by a section 3 resolution of

unconstitutionality that no court has reviewed. It is untenable to suggest that such conflicts would not undermine public confidence in the superior courts. One need only look to the “[Free Alberta Strategy](#),” which was the inspiration for Bill 1, to get a sense for the potential dynamic here, where federally-appointed judges are accused of “blatant judicial activism and bias against the constitutionally enshrined jurisdictional rights of Alberta” (at 30).

Put bluntly, the separation of powers, as reinforced by section 96, does not contemplate that a legislative assembly could arrogate to itself the power to make a declaration as to the validity of a federal law – and for good reason. Legislatures are the embodiment of our democratic ideals, but they have neither the competence, independence, impartiality, nor accountabilities that are the hallmarks of our superior courts.

We also reject suggestions that a section 3 resolution is merely an opinion. As part of a “legislative framework” to “protect Albertans from federal legislation or policies that are unconstitutional,” these resolutions are qualitatively different from [ad hoc legislative motions](#) or a ministerial press release complaining that a federal law constitutes an unconstitutional invasion of provincial jurisdiction. In the case of Bill 1, the opinion of the legislature is the lynch pin that authorizes cabinet to take additional steps that themselves may resemble judicial remedies (recalling the possibility left open by section 2 in particular).

We take a different position in relation to the “harm trigger”. This is because we think that a determination to the effect that a federal initiative causes, or may cause, harm to Albertans is neither a determination of law, nor a determination of constitutional law. It is rather a political determination. As such it does not trespass upon the exclusive role accorded to the superior courts by section 96.

The Division of Powers

All legislation, whether federal or provincial, must be constitutionally anchored to an appropriate legislative head of power found in Part VI of the *Constitution Act, 1867*. The federal heads of power are laid out in section 91, and the provincial ones in sections 92 and 92A. Section 95 explicitly recognizes two concurrent heads of power: agriculture and immigration. Pursuant to the current division of powers analysis, a law must first be characterized (what is its true matter?) and then classified as falling within one of the heads of power available to the relevant legislature (*Reference re: GGPPA* at para 47).

In our view, an argument can be made that there is no provincial legislative authority for Bill 1. At its core, the matter of this legislation – its “pith and substance” – is to create a framework for passing constitutional judgment on federal initiatives and authorizing certain measures based on that judgment. Even if our characterization is not the only possible one, there is no reasonable characterization that ignores the central role that federal laws, regulations, and policies play in this legislation. In colloquial terms, Bill 1 is obsessed with federal initiatives.

When one looks at the catalogue of provincial powers, it is not clear to us how such a matter falls within any of the classes listed in section 92. To rely on section 92(14) (the Administration of Justice in the Province) would be to concede the section 96 separation of powers argument. The

only other heads of power that come remotely close would be section 92(13) (Property and Civil Rights in the Province) and section 92(16) (Generally all Matters of a Merely Local or Private Nature in the Province). But Bill 1 is inwardly oriented – it is meant to direct public institutions (“provincial entities”), and therefore is a poor fit for section 92(13). Its focus on federal initiatives also makes section 92(16) an awkward fit. By definition, federal laws are not merely local in nature.

While deeply ironic, such a result is not really surprising. It makes sense that in a federation such as Canada neither order of government would have legislative authority to interfere with, or pass judgment on, the laws of the other. The fact that there is a *separate* federal disallowance power outside of the Constitution’s division of powers provisions (s 90) is entirely consistent with this view, as is the fact that it has generally fallen into disuse.

The Delegation of Powers

Bill 1 is also vulnerable to attack on the basis that it constitutes a vast and unlawful delegation of authority to the executive (i.e. cabinet). Sections 3 and 4 of Bill 1 embody what is commonly understood as a Henry VIII clause. A Henry VIII clause is a provision in a statute that delegates to a subordinate body the authority not simply to pass regulations or the like under the statute, but to amend the statute itself.

The delegation process in Bill 1 is actually a three-step process.

Step 1 is the adoption of Bill 1 itself – the authorizing statute. In step 2, the authorizing statute empowers the legislature to proceed by way of resolution (s 3) to set out the circumstances in which a further delegation of power may occur. These circumstances are a “finding” of unconstitutionality or a finding of harm or anticipated harm and the identification of responsive measures. Any such finding authorizes cabinet to take a broad range of actions to operationalize those measures. Delegation occurs in step 3 when cabinet itself operationalize those measures (s 4), or where it directs a responsible Minister to take those measures. Measures to be taken by a Minister on such a direction include, as we have seen, the suspension and modification of existing enactments, and the substitution of new provisions for those enactments. Either way, section 4(3) of Bill 1 stipulates that step 3 delegation measures shall prevail over any inconsistent provision of “an enactment”.

What is crucial to note is that so long as the Legislative Assembly has made the necessary findings under section 3, then the operational steps that may be taken under section 4 may relate to any enactment, not just to the provisions of Bill 1, but any provincial enactment provided only that the operational steps authorized by cabinet are connected (“necessary or advisable”) to the measures identified in the relevant resolution of the Legislative Assembly. Furthermore and as we have observed above, the adoption of the resolution will be, for all practical purposes, completely shielded from judicial review. (Bill 1 at s 9(3))

This prompts two questions. The first question relates to the scope of this particular Henry VIII clause or set of clauses – is it unusually broad? The second question relates to the legality or validity of such a clause or set of clauses.

As to the first question, the scope of sections 3 and 4 is unusually broad. Most frequently, a Henry VIII clause in one enactment only allows the executive to take a measure that contradicts or supplements *that particular enactment*. For example, in the Northern Pipeline pre-build case, *Waddell v Governor in Council*, [1983 CanLII 189 \(BC SC\)](#), the Henry VIII provision in question dealt with the power of the National Energy Board, with the approval of the federal cabinet, to change the terms and conditions of the schedule attached to the original Northern Pipeline. It is clear that this is a far narrower delegation of authority than that found in Bill 1's Henry VIII provisions. Similarly, in Reference re: GGPPA, the clauses in question allowed the federal cabinet to amend provisions in the schedule to the GGPPA itself (see *Greenhouse Gas Pollution Pricing Act*, [SC 2018, c 12, s 186](#), ss 166(2), 166(4), 168(4) and 192).

The second question concerns the validity of Henry VIII clauses in general, and this one in particular. This issue was recently the subject of discussion by the Supreme Court of Canada in the *Reference re: GGPPA*. The majority observed that the delegation of authority by parliament was an everyday occurrence in the modern administrative state, and that such a delegation was lawful provided that parliament retained the authority to revoke such a delegation. Furthermore, the majority, per Chief Justice Richard Wagner, considered that “the constitutionality of Henry VIII clauses is settled law ...” (at para 87). The Chief Justice went on to observe that the actual exercise of the Henry VIII clauses in question was not insulated from judicial review and that the powers to amend the schedule must be exercised in a manner consistent with the object and purpose of the GGPPA (at paras 87 – 88). That said, and as recent litigation in the Alberta Court of Appeal attests, the standard of review for the exercise of regulation making powers following the Supreme Court of Canada decision in *Vavilov* needs to be definitively settled by that Court: see *TransAlta Generation Partnership v Alberta (Minister of Municipal Affairs)*, [2022 ABCA 381 \(CanLII\)](#), and *Auer v Auer*, [2022 ABCA 375](#).

In *Reference re: GGPPA*, however, Justice Côté wrote a strong dissent on the validity of Henry VIII clauses, observing that the “excessively broad delegation of power removes the regulation of GHGs from the legitimizing forum of the legislature and places it into the hands of the few” (at para 237) and that the GGPPA as “currently written, employs a discretionary scheme that knows no bounds” (at para 240). One might be forgiven for thinking that Justice Côté was writing about Bill 1, since, as noted above, the Henry VIII clauses in the GGPPA are at least confined to conferring on the executive the power to amend the schedule of the GGPPA itself. Nevertheless, perhaps the most important takeaway from Justice Côté’s judgment is that legislatures should be wary of relying upon the old authority of *Re George Edwin Gray* (1918), 57 SCR 150 (conscriptio in World War I) when seeking to justify sweeping Henry VIII clauses outside the context of an emergency. Chief Justice Wagner relies heavily, and perhaps somewhat blindly, on *Gray* in his judgment; one can imagine that if the Court were to be confronted with a Henry VIII provision that has the potential to sweep across the entire statute book, other Justices on the Court might see the need for a second and hard look.

In sum, Bill 1 contains an extraordinarily broad version of a Henry VIII clause insofar as it authorizes cabinet directives that may require the suspension, modification, or substitution for, any enactment in the statute book. As many have noted, this is contrary to democratic principles and ideas of transparency and accountability. That said, recent authority has endorsed the use of Henry

VIII clauses, at least as applied to that particular statute. It is less clear how the Supreme Court would respond to Henry VIII clauses that reach far beyond the home statute.

Conclusion

In our view Bill 1, as originally drafted, is clearly vulnerable on constitutional grounds. First, it is vulnerable because it represents a direct attack on the separation of powers insofar as it authorizes the legislature to trespass upon the exclusive authority of section 96 courts to make legally significant determinations as to the constitutional validity of federal laws and other initiatives. Second, it is vulnerable on division of powers grounds insofar as Bill 1, at its core, is directed at assessing the validity of federal legislation. If that part of the Bill is removed there is nothing left. And third, the Henry VIII provisions of Bill 1 are vulnerable insofar as the Henry VIII clauses in Bill 1 have the potential to sweep across the entire statute book.

We understand that the government is considering introducing amendments to Bill 1 to address concerns as to the Henry VIII provisions and the harm trigger, but these amendments will do nothing to address our most significant concerns, which relate to the legislature's claim that it, along with the courts, can make legally significant findings as to the constitutional validity of federal initiatives.

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