Legislature passes Alberta Sovereignty within a United Canada Act: Overview and implications

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Introduction

On Nov. 29, 2022, the newly elected Premier of Alberta tabled as her first Bill the anticipated *Alberta Sovereignty within a United Canada Act* (the Act), which was passed on Dec. 7, 2022.[1] The Act embodies one of the Premier's central campaign promises to "shield" Alberta from federal incursions into provincial jurisdiction. The initial version of the Act granted Cabinet sweeping powers to amend laws and direct provincial entities in response to federal initiatives deemed by the Alberta Legislature to be unconstitutional or to cause harm to Alberta's interests.

Prior to its passage, the Act was amended to mitigate concerns relating to Cabinet's ability to circumvent the ordinary legislative process.[2] Nonetheless, it is still expected that the Act will remain the subject of considerable analysis as stakeholders seek to understand its legal and practical impacts. This article is intended to provide a brief overview of the Act and its potential legal and practical implications.

Background: Political context and operation of the Act

The main precursor to the Act was a discussion report entitled the "Free Alberta Strategy", which advocated for, among other things, the passage of the "Alberta Sovereignty Act, granting the Alberta Legislature absolute discretion to refuse any provincial enforcement of federal legislation or judicial decisions that, in its view, interfere with provincial areas of jurisdiction or constitute an attack on the interests of Albertans." Federal "nation-wide" initiatives, such as the federal *Greenhouse Gas Pollution Pricing Act*, the Impact Assessment Act, and a potential future legislative cap on carbon and methane emissions, appear to be primary catalysts of the Free Alberta Strategy and the eventual introduction of the Act.[3]

After nearly a year of spirited public debate, the Act was passed by the Legislative Assembly on Dec. 7, 2022. The Act's preamble embodies the general sentiment of the Free Alberta Strategy, stating that actions taken by Canada "have infringed on [Alberta's] sovereign provincial rights and powers with increasing frequency and have unfairly prejudiced Albertans". However, the Act departs significantly from the Free

Alberta Strategy in many key respects, and excludes some of its more controversial elements such as the purported power to refuse to enforce "judicial decisions designated as unenforceable" by Alberta.

To summarize, key features of the Act are as follows:

- ***Legislative resolutions & federal threshold*** . The tabled version of the Act permits a member of Executive Council to introduce a resolution in the Legislative Assembly that deems a federal initiative as unconstitutional, in violation of the Charter, or which "causes or is anticipated to cause harm" to Alberta. Each such resolution must set out the basis for deeming the federal initiative unconstitutional, the nature of its harm to Alberta, and what measures Cabinet should consider in response.[4] The Act has since been amended to clarify that the "harm" threshold noted above pertains to federal legislation that is deemed to be unconstitutional.
- ***Cabinet orders*** . Once a resolution is ratified, Cabinet can make orders pursuant to that resolution "to the extent that it is necessary or advisable". This includes, among other things: (1) directing a Minister to suspend or modify, by passing regulation, the application or operation of provisions of an enabling law without returning to the Legislative Assembly (colloquially known as a "Henry VIII clause"); and (2) directing a "provincial entity" to take various actions in respect of the federal initiative identified in the resolution. The tabled version of the Act controversially contained a Henry VIII clause which permitted Cabinet to unilaterally amend laws. The amended Act clarifies that Cabinet's powers in this regard are limited to amending regulations – amendment to provincial laws must be ratified through the normal legislative process.
- ***Directives to provincial entities*** . The amendments did not alter or clarify Cabinet's powers to direct provincial entities. The Act is somewhat vague with respect to how provincial entities might be directed to act (*e.g*,, ordered to not-enforce a law, or to outright violate it). The interpretation provisions appear to indicate that Cabinet may direct provincial entities to do both. Section 2 states that Cabinet may "not authorize 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." The express exclusion of "provincial entity" from a restriction to "act contrary to or otherwise in violation of any federal law" indicates that provincial entities may in fact be ordered to violate federal laws. However, we note that others have interpreted the Act as applying strictly to non-enforcement.[5]
- ***No cause of action clause*** . Section 8 of the Act contains a "no cause of action" clause, which purports to bar claims against "any other person or entity in respect of any act or thing done or omitted to be done in good faith under a directive issued under this Act". This clause appears to bar claims against provincial entities, including Crown corporations and their directors. Such a limitation, codified in provincial legislation, may not preclude causes of action that arise under federal laws.
- ***Judicial review*** . Section 9 permits judicial review of decisions and acts of "persons or bodies under" the Act. Applications for judicial review must be brought within 30 days. The Act provides that the standard of review for decisions under the Act is a "patent unreasonableness standard". This standard is considered to be highly deferential to the decision maker.

Potential legal & practical implications

At its core, the Act sets out a procedure enabling Cabinet to expedite decision making in response to federal laws deemed to be unconstitutional or causing harm to Alberta's interests. Because of this, the full extent of the Act's legal and practical effects will not be known unless and until Cabinet issues an order pursuant to a resolution tabled in the Legislative Assembly. With that said, both the procedural mechanisms contained in the Act, as well as the Premier's stated intended uses of the Act, offer some insight as to how it may practically unfold in the coming months and years. This may, for example, include the following.

1. Potentially impacted sectors

As noted above, Cabinet may issue a directive to a wide range of provincial entities. These entities include all public agencies spanning virtually every domain legislated by the Province of Alberta, as well as regulatory agencies, Crown corporations, regional health authorities, public post-secondary institutions, education boards, municipalities, municipal and regional police, and entities receiving provincial funding to provide public services.

The Premier's public comments indicate that the Act may be invoked in response to the following federal initiatives: (1) existing federal restrictions on resource development, including the *Impact Assessment Act* and the *Greenhouse Gas Pollution Pricing Act*; (2) future restrictions or legislative "caps" on carbon emissions and fertilizer use; (3) areas of shared jurisdiction, such as health care, where federal funding is subject to conditions on provincial delivery of services; and (4) the federal confiscation and restrictions on certain firearms.[6] The precise implications of the above, again, cannot be known until a resolution is tabled and Cabinet releases an order. Further, the implications of such orders, including its constitutionality, would depend on whether they direct provincial entities to merely not enforce a federal rule or law, or to expressly violate it.

In considering the potential impacts on the policy areas above, it is important to note that an order under the Act only applies to public entities, not private entities or individuals. This means the Province's ability to curtail a federal policy will be necessarily limited to functions of that public entity. This may arise in scenarios where a provincial entity is instructed to not enforce a federal law. For example, Cabinet may direct law enforcement to not enforce firearms restrictions under the *Criminal Code*, or may direct a regulatory agency to authorize a project or activity notwithstanding that the Impact Assessment Act requires a federal review. Both uses of the Act are likely to cause some uncertainty which may lead directly affected parties (either the provincial entity or individuals impacted by the decision) to seek judicial review of Cabinet's order.

Directives under the Act may also inadvertently impact liability and indemnity of directors of Crown corporations. For example, certain directives may create risk for directors in scenarios where a public entity is ordered to violate or disregard an otherwise applicable federal law that is properly within Parliament's legislative competence. In the event that a federal law creates a statutory cause of action, or is criminal in nature, it is difficult to see how directors would be protected by the "no cause of action" provision in the Act that purports to shield directors from claims against them in carrying out a Cabinet directive. This is because such a clause, enacted by a provincial legislature, would have no application to causes of action arising from a federal statute. Directors and officers of Crown corporations should review applicable

statutory liability and indemnity provisions as well as insurance coverage to ensure that failure to comply with federal law would not have indirect liability consequences.

2. Constitutionality of the Act

A key question is whether the Act itself would survive a constitutional challenge. This question has been the subject of significant debate in recent days, with divided opinions amongst academics and practitioners. Without the benefit of reviewing an operational order under the Act, it is not a forgone conclusion that the Act itself is unconstitutional. This is because the Act is largely procedural and without an Order from Cabinet on a specific subject area, a proper assessment of the Act's legal and practical effects remains elusive. If a challenge were brought to only the Act itself, this reality could potentially give rise to a "prematurity" argument, which has restrained parties seeking declarations of invalidity in similar cases.[7]

Putting aside these practical limitations, we may see parties seeking standing to challenge the Act on the basis that it enables the province to violate federal laws that are not only deemed (by the province) to be unconstitutional, but also deemed to possibly cause "harm" to the province. Some have argued, conversely, that the Act's interpretation provisions in Section 2 limit the ambit of its application to mere "non-enforcement" of federal laws by provincial entities and thus lower the risk of a court finding that it is unconstitutional. This will likely be a live issue in any future challenge.

Some authors have also argued that the Act could be challenged on the grounds that the Henry VIII clause embodied in Section 4 of the Act violates the constitutional separation of powers between the executive and legislative branches by granting Cabinet broad powers to unilaterally amend laws. Henry VIII clauses, while not typically viewed fondly by courts, are not uncommon and have generally been upheld by courts.[8] However, the judiciary is not unanimous on this point, as evidenced by Justice Côté's recent dissent in the *Greenhouse Gas Pollution Pricing Act Reference*, which suggested that the constitutionality of such a clause is an unsettled issue and is incompatible with parliamentary sovereignty and the "rule of law".[9] With that said, the amendments to the Act narrowed the Henry VIII clause to apply only to amending regulations. Accordingly, the clause itself is likely more constitutionality palatable.

3. Judicial reviews and future challenges

Assuming that the Act itself survives a constitutional challenge, we expect that future Cabinet orders are also likely to face constitutional scrutiny. This is most likely to come in the form of a judicial review application brought in response to a specific decision by Cabinet or a provincial entity pursuant to an order.[10] Judicial review is the process by which affected parties can turn to the courts to review government action and determine whether it meets legal and constitutional standards. Parties wishing to bring an application for judicial review must satisfy the tests of either "personal interest standing" or "public interest standing".[11] Section 9 of the Act permits judicial review of ministerial orders on a "patent unreasonableness" standard. As stated above, this is a highly deferential standard that would limit a court to opining on the reasonableness of Cabinet's directive, not whether it is was correct.

However, judicial reviews of an order under the Act will invariably involve constitutional questions, which ordinarily attract a "correctness" standard. While courts will typically

defer to the statutory standard of review,[12] the "rule of law requires courts to apply the standard of correctness" for constitutional questions, including those related to the "division of powers between Parliament and the provinces".[13] Courts must preserve this function given that "a legislature cannot alter the scope of its own constitutional powers through statute."[14]

Conclusion

The Act comes at a particularly important time in Canadian constitutional history. Competing policy visions over resource development, environmental regulation, and health policies, along with divergent regional and political interests, have invited different regions and levels of government to test the boundaries of their respective constitutional jurisdiction. In the domain of energy and the environment, this has triggered significant constitutional litigation against both provincial and federal legislation, including Canada's Impact Assessment Act and Greenhouse Gas Pollution Pricing Act as well as British Columbia's proposed amendments to the *Environmental Management Act* and Alberta's Preserving Canada's Economic Prosperity Act, among others.

While much remains unknown at this stage, and until these constitutional issues are resolved by the courts or consensus between jurisdictions, the Act will likely contribute to existing regulatory uncertainty in Canada, particularly with respect to resource development. We will closely monitor the Premier's comments and orders made under the Act and update this article accordingly.

Footnotes

[1] Bill 1, *Alberta Sovereignty within a United Canada Act*, 4th Sess, 30th Leg, Alberta, 2022 (first reading 29 November 2022) (the Act).

[2] Dean Bennett, "Changes coming to Alberta's proposed Sovereignty Act after concerns over powers given to cabinet," *CBC News* (4 December 2022) (Bennett, *CBC News*).

[3] Press conference by Danielle Smith & Tyler Shandro (29 November 2022) on Government of Alberta, "Alberta Sovereignty within a *United Canada Act*," (the Smith 29 Nov 2022 Press Conference).

[4] In addition, section 5 of the Act provides that resolutions can be rescinded by the Legislative Assembly at any time, and expire after two years, unless the legislature exercises a one-time ability to renew it for another two years.

[5] Goeffrey Sigalet & Jesse Hartery, "Opinion: The Alberta Sovereignty Act appears to be constitutional," *The Hub* (1 December 2022) (Sigalet & Hartery, *The Hub*).

[6] Smith 29 Nov 2022 Press Conference; see also, for example "List of areas the Alberta government accuses Ottawa of overreaching," *CTV News* (1 December 2022); Bill Graveland, "Justice minister's mandate includes Alberta sovereignty act, protection for the unvaccinated," *CBC News* (10 November 2022).

[7] See *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 at para 22; *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 at para 188, reversing *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195. We note that this limitation may be less present if a constitutional reference case is launched by Alberta or Canada, where the more stringent test for declaratory relief is not used.

[8] See, for example, the Supreme Court of Canada's decision in *Re George Edwin Gray* (1918), 57 SCR 150, where a Henry VIII clause were upheld in the context of wartime legislation. This case has been the primary basis to uphold more modern Henry VIII clauses, including in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 85-88, Wagner C.J.C., writing for the majority (*Greenhouse Gas Reference*).

[9] *Greenhouse Gas Reference* at para 269, Côté J., dissenting.

[10] Section 9 of the Act expressly permits judicial review of the orders emanating from this Act, and allows applicants to bring such applications within 30 days.

[11] For a discussion of standing, see Nadia Effendi & Teagan Markin, "Challenging government action in Canada," Borden Ladner Gervais LLP (2 July 2020) (under the heading "Who can seek judicial review?").

[12] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 36 (*Vavilov*).

[13] *Vavilov* at paras 53, 55.

[14] *Vavilov* at para 56.

By

Brett Carlson, Matti Lemmens, Alan Ross

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World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

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F 613.230.8842

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200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

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Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
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Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
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