Federal Loyalty in Canadian Law: Mitigating Intergovernmental Conflict During the Trans Mountain Pipeline Expansion Project

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ABSTRACT

Intergovernmental conflicts in Canada have intensified over the construction of new interprovincial pipelines designed to transport the country's abundant oil and gas reserves to consumer markets. This thesis examines the intricate intergovernmental interactions at the policy, governance, constitutional, and regulatory levels in the pipeline context, using the Trans Mountain Expansion Project as a case study. It seeks to mitigate opposition between governments by proposing that courts be equipped with additional constitutional tools to promote cooperative behaviour. Specifically, this thesis advocates for incorporating a principle of federal loyalty into Canadian constitutional law. This principle could offer a normative foundation for the Supreme Court's recent support of cooperative federalism by establishing rules to manage conflicts arising from intergovernmental collaboration. It would require federal partners to consult and cooperate with each other when exercising their otherwise legitimate powers to prevent harming or generating negative externalities for the other partners.

RÉSUMÉ

Les conflits intergouvernementaux au Canada se sont intensifiés autour de la construction de nouveaux oléoducs interprovinciaux destinés à transporter les abondantes réserves de pétrole et de gaz du pays vers les marchés de consommation. Cette thèse examine les interactions intergouvernementales complexes au niveau de la politique, de la gouvernance, de la constitution et de la réglementation dans le contexte des oléoducs, en utilisant le projet d'agrandissement du réseau de Trans Mountain comme étude de cas. Elle cherche à atténuer l'opposition entre les gouvernements en proposant que les tribunaux soient dotés d'outils constitutionnels supplémentaires pour promouvoir un comportement coopératif. Plus précisément, cette thèse préconise l'intégration d'un principe de loyauté fédérale dans le droit constitutionnel canadien. Ce principe pourrait offrir un fondement normatif au soutien récent de la Cour suprême au fédéralisme coopératif en établissant des règles pour gérer les conflits découlant de la collaboration intergouvernementale. Il exigerait des partenaires fédéraux qu'ils se consultent et coopèrent entre eux lorsqu'ils exercent leurs pouvoirs par ailleurs légitimes, afin d'éviter de nuire aux autres partenaires ou de générer des externalités négatives pour eux.

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INTRODUCTION

Despite being well positioned to become a global energy superpower, Canada has struggled to transport its vast reserves of oil and gas to international markets.[1] Crucial to this effort is the need for Canada's oil pipelines to reach tidewater.[2] Achieving this requires agreements between the federal government and various provincial governments to allow energy-producing provinces access to the Atlantic or Pacific shores, even if it means crossing provinces that may not approve of having pipelines on their territory. However, intergovernmental conflicts in Canada have flared up on these issues and have been characterized by acrimonious disagreements.[3]

The federal order of government and the provinces have frequently clashed over the scope of their respective roles in energy production and environmental protection throughout Canadian history.[4] However, some argue that we are now facing "a time of generational, if not unprecedented conflict over energy and, in particular, oil sands related infrastructure in Canada."[5] In fact, three major pipeline projects intended to transport Albertan oil to consumer markets have not been realized in recent years.[6] Only one major pipeline project, the Trans Mountain Expansion Project ("**TMX Project**" or "**Project**"), has been successfully completed. Constructed in 1953, the Trans Mountain Pipeline originally extended 1,147 kilometers from Edmonton, Alberta, to Burnaby, British Columbia.[7] As the only major route for transporting crude petroleum and refined products

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[1] Peter Forrester, Kent Howie & Alan Ross, "Energy Superpower in Waiting: New Pipeline Development in Canada, Social Licence, and Recent Federal Energy Reforms" (2015) 53:2 Alta L Rev 419 at para 1 (QL); Kurtis Reed et al, "Timing of Canadian Project Approvals: A Survey of Major Projects" (2016) 54:2 Alta L Rev 311 at paras 1, 3 (QL).
[2] Jennifer Hocking, "The National Energy Board: Regulation of Access to Oil Pipelines" (2016) 53:3 Alta L Rev 777 at paras 1—5 (QL). See also Forrester, Howie & Ross, *supra* note 1 at para 4.
[3] Susan Blackman et al, "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32 Alta L Rev 511 at 2 (pdf) (QL).
[4] George Hoberg, "Pipelines and the Politics of Structure: Constitutional Conflicts in the Canadian Oil Sector" (2018) 23:1 Rev Const Stud 53 at 72 (HeinOnline).
[5] Andrew Leach, "The No More Pipelines Act?" (2021) 59:1 Alta L Rev 7 at para 2 (QL).
[6] *Ibid*. These pipeline projects were Enbridge's Northern Gateway pipeline as well as TransCanada's Energy East and Keystone XL pipelines.
[7] Canada, *National Energy Board Report – Trans Mountain Expansion Project* (Calgary: NEB, May 2016) at 1, online (pdf): <https://iaac-aeic.gc.ca/050/documents/p80061/114562E.pdf> [Initial Recommendation Report]; Amanda C.C.

to the Canadian West Coast, the TMX Project was designed to expand this infrastructure. It involved "twinning" the pipeline system along the existing route, adding 987 kilometers of new pipeline.[8] This expansion nearly tripled its capacity, increasing the daily output from 300,000 barrels to 890,000 barrels of oil products.[9]

Despite its eventual successful completion, the TMX Project has, in the words of Gareth Morley and Christopher Jones, "divided Canadians on regional, generational and ideological lines."[10] British Columbia strongly opposed the Project due to concerns about its potential environmental impact within its borders. In Alberta, the repeated delays and rising costs associated with the pipeline, along with perceived attacks on its oil industry, fostered a sense of western alienation. These conflicting interests between British Columbia and Alberta escalated into increasingly heated rhetoric and hostile exchanges, including a trade war between the two provinces. The Project also faced major legal challenges, with its approval by the federal government being overturned by the Federal Court of Appeal.[11] It was eventually reapproved in early 2019 following a second environmental assessment.[12] Additionally, British Columbia's strong opposition to the pipeline expansion resulted in two significant federalism and division of powers disputes: *Reference re Environmental Management Act*[13] and *British Columbia (AG) v Alberta (AG)*.[14]

Wickett, "The Trans Mountain Pipeline Expansion Project: Pipeline Politics and the Rule of Law" (2020) 14 JPPL 479 at 480—81 (WL Can).

[8] Initial Recommendation Report, *supra* note 7 at 1.

[9] *Ibid* at 2; Wickett, *supra* note 7 at 481.

[10] Gareth Morley & Christopher Jones, "The Overflowing Ditch: When Do Provincial Environmental Laws Apply to Federal Undertakings?" (2022) 106 SCLR (2d) 151 at para 11 (QL).

[11] *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153, additional reasons, 2018 FCA 155, leave to appeal to SCC refused, 38379 (2 May 2019) [*Tsleil-Waututh Nation*].

[12] The federal government's second approval of the TMX Project was upheld by the Federal Court of Appeal in *Coldwater First Nation v Canada (AG)*, 2020 FCA 34 at para 64, leave to appeal to SCC refused, *Coldwater Indian Band, et al v Canada (AG), et al*, 39111 (2 July 2020) [*Coldwater*].

[13] 2020 SCC 1 [*EMA Reference (SCC)*].

[14] 2019 ABQB 550 [*BC v Alberta (ABQB)*]. This case was then pursued in the Federal Courts: *British Columbia (AG) v Alberta (AG)*, 2019 FC 1195 [*BC v Alberta (FC)*], rev'd 2021 FCA 84 [*Alberta v BC (FCA)*].

Thus, as "federalism and energy policy once again dominate the national discussion,"[15] what is different this time around is the emergence of the environment as a matter of paramount importance. This shift has complicated the debate and raised issues that, according to Brendan Downey et al, "contemporary Canadian federalism jurisprudence may not be able to adequately answer."[16] Recent decisions dealing with federalism and environmental policy illustrate this, highlighting ongoing jurisdictional uncertainty about the extent to which federal undertakings (including pipelines) should be exempt from provincial and local environmental regulations.[17]

In any case, since environmental regulation is a shared jurisdiction, there will be numerous interactions between the federal and provincial governments. Both orders of government have powers and responsibilities to address environmental concerns arising from these major pipeline projects.[18] Recognition of shared and overlapping jurisdictional responsibilities aligns with the Supreme Court's recent jurisprudence, which strongly champions and extols the virtues of cooperative federalism. However, a peculiar paradox has emerged. On the one hand, the Supreme Court relies on cooperative federalism to accommodate overlapping jurisdiction and to encourage intergovernmental cooperation by minimizing constitutional and legal obstacles to coordinated action. On the other hand, when governments choose not to cooperate, the Court has been reluctant to provide cooperative federalism with normative force, opting not to address issues arising from the lack of collaboration.[19] This is particularly problematic in the context of interprovincial

[15] Brendan Downey et al, "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 Alta L Rev 273 at para 3 (QL).
[16] *Ibid*.
[17] See Morley & Jones, *supra* note 10.
[18] See Wickett, *supra* note 7 at 494. Although it is inaccurate to refer to the division of powers as being between the federal and provincial "governments", for the sake of readability, this thesis employs the terms "federal government" and "provincial government" in a general sense. This thesis does not differentiate between the different branches of government, except where specified.
[19] Professor Johanne Poirier has written extensively on this subject. See Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 RDUS 47 [Poirier, "Armes à feu"] ; Johanne Poirier, "Taking Aim at Cooperative Federalism: The Long-Gun Registry Decision by the Supreme Court of Canada"

pipeline development due to the complex division of powers and regulatory processes involved. Major disagreements between the parties can result in deadlock, significantly delaying Canadian pipeline projects and having an impact on Canada's oil and gas role as a leading global exporter.

This thesis seeks to mitigate animosity and conflict in the pipeline context by exploring mechanisms to improve coordination between governments involved in major interprovincial pipeline projects that benefit the national interest, while still acknowledging provincial and local environmental concerns. To achieve this, it proposes that courts be equipped with additional constitutional tools to address uncooperative behaviour by governments. Specifically, it suggests importing a principle of federal loyalty into Canadian constitutional law to improve intergovernmental relations by creating more space for genuine dialogue between the federal order of government and the provinces, as well as among the provinces themselves. Federal loyalty can provide a normative foundation for the Supreme Court's recent endorsement of a cooperative vision of federalism by establishing the "rules of engagement" for resolving disagreements that inescapably result from intergovernmental collaboration.[20] This thesis proposes that these "rules of engagement" would include: (1) a "negative duty" to refrain from using a legitimate constitutional power to interfere with or harm another order of government, and (2) a "positive duty" to consult and cooperate in good faith with another order of government when pursuing an otherwise lawful action that could produce adverse effects for that order of government.[21]

(15 April 2015), Intl J Const L Blog (I-Connect), online (blog): <https://ssrn.com/abstract=2808684> [Poirier, "Taking Aim"]; Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 391; Johanne Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020) 94 SCLR (2d) 85 [Poirier, "Dualist Federalism to the Rescue"].

[20] Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const 1 at 14 [Gaudreault-DesBiens, "Cooperative Federalism"].

[21] This thesis' exploration of what federal loyalty might entail in the Canadian context draws on the interpretations of this principle put forward by Professors Paul Daly and Jean-François Gaudreault-DesBiens. See Paul Daly,

To explore this issue, I will use doctrinal, interdisciplinary and comparative methods by canvassing legislation, jurisprudence, and scholarly literature in both the legal and political science fields. More particularly, I will use the hotly contested and deeply divisive Trans Mountain Expansion Project as a case study to contextualize my research. This thesis focuses specifically on the intergovernmental relations between the federal authority and the provinces, as well as between the provinces themselves. Although numerous complex legal questions arise concerning pipelines and environmental regulation, including how to better account for the concerns of Indigenous groups and local communities, these matters fall outside the scope of this thesis.

While it is uncertain whether recognizing a duty of federal loyalty in Canadian constitutional law would significantly mitigate the intergovernmental conflicts experienced during the TMX Project, as this would depend on the scope and strength given to the principle by the courts, this thesis's examination of its potential implications remains important. In particular, federal loyalty could offer an additional framework for managing how constitutional powers are exercised, requiring federal partners to consider each other's interests and engage in consultation and cooperation with the other partners when exercising powers that could adversely affect them. This would align with the Supreme Court's recent emphasis on the importance of cooperative federalism and be especially relevant to the interprovincial pipeline approval process, which demands extensive collaboration among Canada's federal partners.

This thesis is structured into four chapters. Chapter 1 provides an overview of the controversy surrounding the TMX Project. It then documents the western alienation experienced

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"L'abolition du registre des armes d'épaule: le rôle potentiel des principes non écrits" (2014) 23:4 Const Forum Const 41 at 46 [Daly, "Abolition du registre"]; Jean-François Gaudreault-DesBiens, "The Ethos of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship between Aboriginal and Non-Aboriginal Governments: A Thought Experiment" in Ghislain Otis & Martin Papillon, eds, *Fédéralisme et gouvernance autochtone / Federalism and Aboriginal Governance* (Québec: Presses de l'Université Laval, 2013) 51 at 77—78 [Gaudreault-DesBiens, "Ethos"]. See also Poirier, "Armes à feu", *supra* note 19 at 97ff.

by Alberta and the inadequacies of Canada's intergovernmental relations in addressing tensions between federal partners during the Project. Chapter 2 outlines the constitutional and legal framework governing pipelines. It begins with a discussion of the general division of powers related to intergovernmental pipelines, then examines the operability and applicability of provincial and local regulations to the TMX Project. It concludes with an overview of the regulatory and environmental approval process for the Project. Chapter 3 explores the normative force of cooperative federalism, analyzing the dichotomy between the Supreme Court's encouragement of cooperation and its refusal to address non-cooperation. Chapter 4 offers a comparative analysis of the principle of federal loyalty, drawing on its features developed in other jurisdictions. It then explores the implicit recognition of aspects of federal loyalty in Canadian constitutional law and considers how such a principle might be applied in the Canadian context. Finally, the potential impact of a federal loyalty principle on the intergovernmental conflict related to the TMX Project will be analyzed.

CHAPTER 1 – Policy and Governance Challenges Facing the TMX Project

In Canada, interactions between the various components of the federation are not mandated or governed by the Constitution, but rather occur in an ad hoc manner in most cases.[22] These interactions will occur to address issues at the forefront of national discourse, or at different intergovernmental forums that have varying levels of institutionalization, from forums at the premier level such as First Ministers' Meetings (or First Ministers' Conferences) and the Council of the Federation, to sectoral ones like the Energy and Mines Ministers' Conference and the Canadian Council of Ministers of the Environment.[23] These various intergovernmental forums have had various levels of success throughout the years. While governments are able to cooperate in situations in which their interests are relatively aligned, as soon as their interests diverge, these mechanisms of collaboration, given their ad hoc and informal nature, break down and are insufficient. The TMX Project case study is the perfect example of this.

1.1 TMX Project

1.1.1 TMX Project Approval: The Calm Before the Storm

In the early days of the TMX Project, in 2016, while British Columbia, Alberta and the federal government all tried to protect their respective jurisdictions, a spirit of collaboration permeated their actions and the tone of these interactions remained amicable. In its final written submission to the National Energy Board ("**NEB**" or "**Board**") panel reviewing Trans Mountain's[24] application for a certificate of public convenience and necessity pursuant to Part III

[22] See Marc-Antoine Adam, Josée Bergeron & Marianne Bonnard, "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Don Mills: Oxford University Press, 2015) 135 at 140 ; Jean-Philippe Gauvin & Martin Papillon, "Intergovernmental Relations in Canada: Still an Exclusive Club?" in Alain G. Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montreal: McGill-Queen's University Press, 2020) 336 at 340.
[23] See Adam, Bergeron & Bonnard, *supra* note 22 at 146.
[24] Trans Mountain Pipeline ULC as General Partner of Trans Mountain Pipeline LP (collectively "**Trans Mountain**"). Trans Mountain Pipeline ULC is a subsidiary of Kinder Morgan Cochin ULC ("**Kinder Morgan**").

of the *National Energy Board Act*,[25] British Columbia affirmed that the five requirements laid out in the province's *Technical Analysis: Requirements for British Columbia to Consider Support for Heavy Oil Pipelines*[26] must be met. Only then would the province consider supporting the construction and operation of a heavy oil pipeline within its borders.[27] These requirements included commitments to mitigate environmental risks, respect Aboriginal and treaty rights, and ensure that the province receives a share of the Project's economic benefits.[28] British Columbia asserted that the province was unable to support Trans Mountain's application at the time, given that the evidence submitted by Trans Mountain in the proceeding was insufficient to allay the province's concerns with respect to the proponent's terrestrial and marine oil spill prevention, response and recovery plan.[29]

On January 12, 2016, the day after British Columbia submitted its written submission, Alberta submitted its own final argument to the NEB, albeit in support of the TMX Project.[30] The submission, penned by then Alberta Premier Rachel Notley, argued that there was great economic

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[25] RSC 1985, c N-7, as repealed by *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c 28, s 44 [*NEBA*].

[26] Government of British Columbia, *Technical Analysis: Requirements for British Columbia to Consider Support for Heavy Oil Pipelines* (Victoria: BC, 23 July 2012) at 3, online (pdf): <https://www2.gov.bc.ca/assets/gov/environment/air-land-water/spills-and-environmental-emergencies/docs/technicalanalysis-heavyoilpipeline_120723.pdf>.

[27] See *Trans Mountain Expansion Project* (16 December 2013), OH-001-2014 (Final Argument, Province of British Columbia, 11 January 2016) at para 3, online (pdf): CER <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451398/2904855/C289-13-2_-_Province_of_BC_Final_Argument_-_Jan._11%2C_2016_-_A4X3T3.pdf?nodeid=2905841&vernum=-2>; British Columbia, Ministry of Environment and Climate Change Strategy, News Release, 2016ENV0001-000020, "Province Reaffirms Trans Mountain Pipeline Must Meet Five Conditions" (11 January 2016), online: <https://news.gov.bc.ca/releases/2016ENV0001-000020>.

[28] British Columbia, Ministry of Environment and Climate Change Strategy, News Release, 2014ENV0005-000154, "Province Seeks Intervenor Status in NEB Review of Pipeline Expansion Project" (7 February 2014), online: <https://news.gov.bc.ca/releases/2014ENV0005-000154>.

[29] See *Trans Mountain Expansion Project*, Final Argument, Province of British Columbia, *supra* note 27 at paras 5—7 ; British Columbia, News Release, 2016ENV0001-000020, *supra* note 27.

[30] See *Trans Mountain Expansion Project* (16 December 2013), OH-001-2014 (Final Argument, Government of Alberta, 12 January 2016), online (pdf): CER <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451168/2904870/C142-2-2_-_Final_Argument_-_A4X4G6.pdf?nodeid=2905513&vernum=-2>.

need for the Project, since limited market access for western Canadian crude oil meant that Canadian oil was being sold at a significant discount relative to world prices, as it was being exported almost exclusively to the United States. Thus, developing additional tidewater capacity would improve western Canadian crude oil's access to international markets. In turn, this increased market access and diversification would ensure that Canadians receive a fair market value for their resources.[31] In addition, Premier Notley highlighted Alberta's new *Climate Leadership Plan*,[32] which she argued "establishe[s] Alberta as one of the most environmentally responsible energy producers in the world."[33] In a news release accompanying the final argument, Premier Notley acknowledged British Columbia's five conditions and encouraged Kinder Morgan to work with both British Columbia and the federal government to respond to these issues and to get the pipeline expansion approved.[34]

On May 29, 2016, the NEB recommended approval of the TMX Project, subject to 157 conditions. Later that year, on November 29, 2016, Prime Minister Justin Trudeau approved the TMX Project. Premier Notley released a statement thanking the Prime Minister for approving the Project, which she described as being "critically important to the economic future of the people of Alberta."[35] Interestingly, she praised British Columbia for its climate leadership, saying that "B.C.

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[31] *Ibid*.

[32] See Alberta Climate Change Office, *Climate Leadership Plan – Progress Report 2017-18* (Edmonton: Alberta Climate Change Office, 2019), online (pdf): <https://open.alberta.ca/dataset/854af86e-309a-4727-90f9-6bba947dc66e/resource/99d69865-ceba-4cf2-908a-ab98a2559b4a/download/goa-climate-leadership-plan-progress-report-2017-18.pdf>. The *Climate Leadership Plan* was repealed in 2019 and replaced by the *Technology Innovation and Emissions Reduction (TIER) System* (see Government of Alberta, "Climate Technology Task Force" (last modified 16 April 2020), online: <https://www.alberta.ca/climate-technology-task-force>).

[33] *Trans Mountain Expansion Project*, Final Argument, Government of Alberta, *supra* note 30 at 2.

[34] See Government of Alberta, News Release, "Premier Notley's Statement on Alberta NEB Submission Supporting Trans Mountain Pipeline" (12 January 2016), online: <https://www.alberta.ca/release.cfm?xID=400802FC5EF19-D292-2199-500FDA03E09B4106>.

[35] PC 2016-1069, (2016) C Gaz I, Supplement, vol 150, no 50 [2016 OIC]; Government of Alberta, News Release, "Statement on the Trans-Mountain and the Enbridge Line 3 Pipelines: Premier Notley" (29 November 2016), online: <https://www.alberta.ca/release.cfm?xID=44923F4E4C731-BA6D-41C6-1C1D6D7F96EECED2>.

was an early leader on addressing climate change. The rest of us are now catching up to you."[36] As we will see shortly, Premier Notley's tone will drastically change from praising British Columbia to castigating it for stalling the development of the Project.

On January 11, 2017, in announcing her support for the TMX Project, British Columbia Premier Christy Clark affirmed that it has met the five conditions.[37] However, despite this, the TMX Project's approval was met with great disapproval in the province, particularly over environmental concerns and the Project's impact on Indigenous communities.[38] Seeking to take advantage of this opposition, and with an election looming, the provincial New Democratic Party ("**NDP**") promised that if elected, it would "use every tool in [the] toolbox to stop the project from going ahead."[39] This pledge prompted the first hints of Alberta's growing impatience on getting its oil to tidewater. While she does not mention British Columbia by name, Premier Notley stated that she "fundamentally disagree[s] with the view that one province … can hold hostage the economy of another province, or in this case, the economy of our entire country."[40] Further, she asserted that "there are no tools available for a province to overturn, or otherwise block, a federal government decision to approve a project that is in the larger national interest," echoing British Columbia NDP leader John Horgan's earlier campaign comments.[41]

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[36] Government of Alberta, News Release, "Statement on the Trans-Mountain and the Enbridge Line 3 Pipelines: Premier Notley", *supra* note 35.
[37] See British Columbia, Office of the Premier, News Release, 2017PREM0002-000050, "Five Conditions Secure Coastal Protection and Economic Benefits for All British Columbians" (11 January 2017), online: <https://news.gov.bc.ca/releases/2017PREM0002-000050>.
[38] See Downey et al, *supra* note 15 at para 80.
[39] British Columbia New Democratic Party, "Working for You: Our Commitment to Build a Better BC" (2017) at 62, online (pdf): <https://www.bcndp.ca/sites/default/files/platform-book-v2-updated.pdf>. See also *ibid*.
[40] YourAlberta (Government of Alberta), "Alberta Granted Intervener Status on Trans Mountain Pipeline" (16 May 2017) at 00h:2m:29s, online (audio): <https://www.alberta.ca/release.cfm?xID=46931B8CC3E4E-05F5-1203-490C12379414BD16>.
[41] *Ibid* at 00h:2m:46s.

1.1.2 British Columbia's Proposed Restriction on the Transport of Diluted Bitumen Through the Province: Escalating Tensions

On June 29, 2017, the British Columbia Liberals were defeated in a non-confidence vote in the provincial legislature. After forming a minority NDP government with the help of the Green Party, John Horgan became British Columbia's new premier.[42] In an agreement outlining how they would work together over the next four years, the two parties pledged to "immediately employ every tool available to the new government to stop the expansion of the Kinder Morgan pipeline, the seven-fold increase in tanker traffic on our coast, and the transportation of raw bitumen through our province."[43] Correspondingly, on January 30, 2018, British Columbia announced a proposal to restrict the transport of diluted bitumen in the province until further scientific study was conducted on the risks of spilled bitumen in marine environments.[44] The announcement came along with a series of other proposed regulations under British Columbia's *Environmental Management Act*[45] seeking to improve preparedness, response and recovery from potential oil

[42] See Justin McElroy, "NDP Leader John Horgan to Be Next Premier of British Columbia", *CBC* (29 June 2017), online: <https://www.cbc.ca/news/canada/british-columbia/horgan-government-guichon-2017-1.4185204>; Downey et al, *supra* note 15 at para 81.

[43] Canada, BC Green Caucus & the BC New Democrat Caucus, "2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus" (29 May 2017), online: <https://www.bcndp.ca/latest/its-time-new-kind-government-british-columbia>. See Richard Zussman & Karin Larsen, "NDP-Green Alliance to Focus on Electoral Reform, Stopping Kinder Morgan and Banning Big Money", *CBC News* (30 May 2017), online: <https://www.cbc.ca/news/canada/british-columbia/ndp-green-alliance-to-focus-on-electoral-reform-stopping-kinder-morgan-and-banning-big-money-1.4138290>; Downey et al, *supra* note 15 at para 81.

[44] See British Columbia, Ministry of Environment and Climate Change Strategy, News Release, 2018ENV0003-000115, "Additional Measures Being Developed to Protect B.C.'s Environment From Spills" (30 January 2018), online: <https://news.gov.bc.ca/releases/2018ENV0003-000115>. See also Carol Linnitt, "B.C. Deals Blow to Kinder Morgan Oilsands Pipeline with Demand for Scientific Inquiry into Spills", *The Narwhal* (30 January 2018), online: <https://thenarwhal.ca/b-c-deals-blow-kinder-morgan-oilsands-pipeline-demand-scientific-inquiry-spills/>; "B.C. Creates More Uncertainty for Trans Mountain With Bitumen Restriction", *CBC News* (30 January 2018), online: <https://www.cbc.ca/news/canada/british-columbia/b-c-creates-uncertainty-for-transmountain-with-bitumen-restriction-1.4510839>.

[45] SBC 2003, c 53 [*EMA*].

spills.[46] Premier Horgan stated that "[w]e believe we have every right to protect our marine environment and our economy."[47]

While this was not Premier Horgan's first move targeting the TMX Project, it certainly escalated the enmity between Alberta and British Columbia.[48] Premier Notley slammed British Columbia's proposal, calling it unconstitutional. She made the following remarks to reporters in Edmonton:

> Having run out of tools in the tool box the government of B.C. is now grasping at straws. The B.C. government has every right to consult on whatever it pleases with its citizens. It does not have the right to rewrite our Constitution and assume powers for itself that it does not have. If it did, our Confederation would be meaningless.[49]

The following day, on January 31, 2018, Premier Notley called an emergency cabinet meeting to consider her government's response to British Columbia's proposal.[50] She announced that Alberta would be suspending talks to purchase electricity from British Columbia in a bid to fight the province's efforts to block the TMX Project. She indicated that British Columbia would be missing out on $500 million annually.[51] In a line that she would come to repeat frequently in the coming months, Premier Notley emphasized that "this is not a dispute between BC and Alberta. It is a dispute between BC and Canada."[52]

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[46] See British Columbia, Ministry of Environment and Climate Change Strategy, News Release, 2018ENV0003-000115, *supra* note 44; Linnitt, *supra* note 44.
[47] Angela Jung, "Timeline: Everything You Want to Know about the Pipeline Feud between Alberta and B.C.", *CTV News* (19 April 2018), online: <https://edmonton.ctvnews.ca/timeline-everything-you-want-to-know-about-the-pipeline-feud-between-alberta-and-b-c-1.3893041>.
[48] *Ibid*.
[49] "Notley Slams B.C. Proposal to Restrict Shipments of Diluted Bitumen as Unconstitutional", *CBC News* (30 January 2018), online: <https://www.cbc.ca/news/canada/edmonton/b-c-notley-bitumen-alberta-kinder-morgan-1.4510884>.
[50] Jung, *supra* note 47.
[51] Julia Parrish & Kiera Lyons, "Premier Says Alberta Suspending Electricity Purchase Talks with B.C.", *CTV News* (1 February 2018), online: <https://edmonton.ctvnews.ca/premier-says-alberta-suspending-electricity-purchase-talks-with-b-c-1.3785928>.
[52] *Ibid*. See e.g. YourAlberta (Government of Alberta), "Premier Rachel Notley Speaks to Calgary Steel Workers and Media" (9 February 2018) at 00h:06m:01s, online (audio): <https://soundcloud.com/your-alberta/premier-rachel-notley-media-availability-feb-09-2018>; YourAlberta (Government of Alberta), "Premier Notley: Alberta Supports Federal Pipeline Purchase" (29 May 2018) at 00h:03m:47s, online (audio): <https://soundcloud.com/your-alberta/premier-notley-media-avail-alberta-supports-federal-pipeline-purchase>.

Tensions between the two provinces only mounted when a few days later, on February 6, 2018, Premier Notley announced that the Alberta Gaming and Liquor Control Board would stop importing wine from British Columbia.[53] Alberta adopted other retaliatory measures, including the creation of a task force of influential Canadians to respond to what it called "B.C.'s unconstitutional attack on the Trans Mountain Pipeline,"[54] as well as the launch of an online campaign encouraging Canadians to express their support for the Project.[55] Premier Notley stated that in her belief, these measures have helped get Ottawa's attention and let it know that Alberta is serious.[56]

On February 22, 2018, tensions between the two provinces eased when Premier Notley announced that she would suspend the retaliatory measures until further notice. This was in response to Premier Horgan announcing that he would not proceed with his government's proposed restriction on the transport of diluted bitumen through the province. Instead, his government would first be launching a reference case before the British Columbia Court of Appeal on the question of whether his government has the constitutional authority to move forward with the proposed regulation.[57]

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[53] Julia Parrish, "AGLC to Halt Imports of B.C. Wine Following Proposals from B.C. Gov't", *CTV News* (6 February 2018), online: <https://edmonton.ctvnews.ca/aglc-to-halt-imports-of-b-c-wine-following-proposals-from-b-c-gov-t-1.3792254>.

[54] Government of Alberta, News Release, "Premier Notley: Further Measures to Defend Alberta" (9 February 2018), online: <https://www.alberta.ca/release.cfm?xID=52389DF7A690D-0626-F431-10F8D00BBA6AE467>.

[55] Government of Alberta, News Release, "New Tools to Keep Canada Working" (13 February 2018), online: <https://www.alberta.ca/release.cfm?xID=52399A4800233-BE77-BBAA-F5660E59FDB8357C>. The "Keep Canada Working" campaign can be accessed at the following website: https://keepcanadaworking.ca/.

[56] Mia Rabson, "Canada Will Do What It Must to Keep B.C. From Blocking Trans Mountain: Carr", *CBC News* (12 February 2018), online: <https://www.cbc.ca/news/politics/carr-trans-mountain-bc-1.4531962>.

[57] Dirk Meissner, "Alberta Suspends Ban on B.C. Wine after Horgan Backs Down on Restricting Bitumen", *Global News* (22 February 2018), online: <https://globalnews.ca/news/4042334/albertas-rachel-notley-expected-to-announce-next-steps-in-trade-dispute-with-b-c/>; Julia Parrish, "Notley Lifts Ban on B.C. Wine Imports in Alberta", *CTV News* (22 February 2018), online: <https://edmonton.ctvnews.ca/notley-lifts-ban-on-b-c-wine-imports-in-alberta-1.3815465>.

1.1.3 Kinder Morgan's Deadline: Tensions Peak at "Emergency Meeting"

Notwithstanding the foregoing, on April 8, 2018, tensions were brought to a head when Kinder Morgan announced it was suspending all "non-essential" activities on its TMX Project due to the uncertainty created by British Columbia's continued opposition to the Project.[58] Kinder Morgan stated that it "will consult with various stakeholders in an effort to reach agreements by May 31st that may allow the Project to proceed."[59]

This May 31st deadline prompted Prime Minister Trudeau to interrupt an overseas trip and return to Ottawa for an emergency meeting with Premiers Horgan and Notley on April 15, 2018, in an attempt to "calm overheated rhetoric" and to lay out the federal government's upcoming plans to get the pipeline built.[60]

Shortly after the meeting, all three leaders held separate press conferences. Premier Horgan stated that while British Columbia's stance on moving bitumen from Alberta to the British Columbian coast had not changed,[61] the three leaders had a "frank and fair discussion."[62] When asked about the consequences of the meeting for cooperative federalism, he replied that "it was a collegial meeting among peers"[63] and that "it is issues like this that strengthen our confederation."[64] Premier Notley echoed this sentiment of having a good, frank discussion.[65] However, she accused British Columbia of "engag[ing] in esoteric jurisdictional debates with the

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[58] Kinder Morgan Canada Limited, News Release, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project" (8 April 2018), online: <https://www.prnewswire.com/news-releases/kinder-morgan-canada-limited-suspends-non-essential-spending-on-trans-mountain-expansion-project-300626072.html>. See also Jung, *supra* note 47.
[59] Kinder Morgan Canada Limited, *supra* note 58.
[60] "Trans Mountain Dispute: PM Meets with B.C. and Alberta Premiers" (15 April 2018) at 00h:02m:36s, online (video): <https://www.cpac.ca/episode?id=13f23995-05a4-4682-b5bf-68a1cac636d1&title=trans-mountain-dispute-pm-meets-with-bc-and-alberta-premiers->.
[61] *Ibid* at 00h:20m:02s.
[62] *Ibid* at 00h:26m:42s.
[63] *Ibid* at 00h:25m:30s.
[64] *Ibid* at 00h:27m:55s.
[65] *Ibid* at 00h:45m:48s.

purposes of harassing a project to death."[66] She also stated that she is a big believer in cooperative federalism and that in her view, the TMX Project has been "the poster child for cooperative federalism."[67] However, she observed that "if cooperative federalism means we never … make a decision, well I don't think that that is a cooperative federalism that any Canadians think is in the best interest of the country."[68]

When it finally came time for the Prime Minister to address the media, he stated that both Premiers "remain at an impasse, which only the Government of Canada has the capacity and the authority to resolve."[69] While at times adopting a conciliatory tone, he blamed the current impasse on British Columbia's continued opposition to the Project and made it clear in no uncertain terms that "[the TMX Project] will be built."[70]

Andrew Scheer, Leader of the Opposition at the time, questioned why the Prime Minister waited so long to call this meeting. According to Scheer, "[h]ad [Prime Minister Trudeau] seen the lay of the land politically in British Columbia and quickly referenced any jurisdictional questions to the Supreme Court back in the fall, … we very well might not be under the May 31st" deadline."[71] In fact, the government of British Columbia had invited the federal government to work with it to send the province's reference question directly to the Supreme Court, but the federal government declined to do so.[72] Sending the reference question directly to the Supreme Court would have saved time and judicial resources, and it might have prevented Kinder Morgan's May

[66] *Ibid* at 00h:54m:57s.
[67] *Ibid* at 00h:51m:33s.
[68] *Ibid* at 00h:52m:03s.
[69] *Ibid* at 01h:29m:19s.
[70] *Ibid* at 01h:27m:55s.
[71] *Ibid* at 00h:36m:58s.
[72] British Columbia, Office of the Premier, Freedom of Information Request, *All Correspondence in the Executive Branch Relating to the Decision by the Federal Government to Re-Approve the Trans Mountain Pipeline Expansion (Date Range for Record Search: From 06/17/2019 to 06/19/2019)* (6 May 2021) at 23, online (pdf): <http://docs.openinfo.gov.bc.ca/Response_Package_OOP-2019-93643.pdf>.

31st deadline. However, waiting to call an emergency meeting when tensions were already at an all-time high and when the parties were entrenched in their positions was not conducive to productive discussions.

Correspondingly, despite the talk of fair and frank discussions and of the benefits of cooperative federalism, the day after the emergency meeting, the Alberta government introduced Bill 12, *Preserving Canada's Economic Prosperity Act*.[73] This Act could have raised gas prices in British Columbia by giving Alberta's energy minister the power to restrict the export of natural gas, crude oil, and refined fuels from the province.[74] Premier Notley stated that "[t]he bill sends a clear message: we will use every tool at our disposal to defend Albertans [and] to defend our resources."[75]

On the same day, Federal Minister of Environment and Climate Change Catherine McKenna penned an open letter to her British Columbian counterpart, Minister George Heyman, proposing a joint Scientific Expert Advisory Panel to further study the behaviour of oil in different environments in order to improve spill response measures.[76] Premier Horgan seemed to welcome this initiative, stating that it "demonstrates that cooperative federalism has been going on, despite the confrontation we've seen on some days when this issue arises."[77] Nonetheless, he announced

[73] 4th Sess, 29th Leg, Alberta, 2018 (assented to 18 May 2018), SA 2018, c P-21.5 [Bill 12]. See Jung, *supra* note 47; Diego Romero, "Alberta Proposes Bill to Control Oil, Gas Exports", *CTV News* (16 April 2018), online: <https://edmonton.ctvnews.ca/alberta-proposes-bill-to-control-oil-gas-exports-1.3887505>.
[74] See Jung, *supra* note 47; Romero, *supra* note 73.
[75] *Ibid*.
[76] Open Letter from Minister Catherine McKenna to Minister George Heyman (26 April 2018), online: <https://www.canada.ca/en/environment-climate-change/news/2018/04/dear-minister-george-heyman.html>.
[77] Peter Zimonjic, "McKenna Pens Open Letter to B.C. Proposing Joint Panel to Study Oil Spills, Response Measures", *CBC News* (26 April 2018), online: <https://www.cbc.ca/news/politics/mckenna-heyman-joint-science-panel-1.4637275>.

that British Columbia had filed its heavy oil reference question in the British Columbia Court of Appeal.[78]

On May 16, 2018, Federal Finance Minister Bill Morneau announced that the federal government was financially backing the TMX Project in order to ensure its ongoing survival.[79] Speaking at a press conference later that day, Premier Notley applauded the move and announced that the Alberta legislature would be passing Bill 12, *Preserving Canada's Economic Prosperity Act*, into law by the end of the day.[80] Amid the escalating tensions between British Columbia and Alberta, she made her most direct threat to British Columbia to date : "Albertans, British Columbians and the rest of Canada should understand that if the path forward for the pipeline through B.C. is not settled soon, I am ready and prepared to turn off the taps."[81] In issuing this stark warning, Premier Notley cited the significant economic impact created by the price differential on the province's oil.[82] In response, Premier Horgan called the Alberta law "provocative" and said that "[i]nstead of asking how can we work together on this, they took

[78] British Columbia, Office of the Premier, News Release, 2018PREM0019-000742, "Province Submits Court Reference to Protect B.C.'s Coast" (26 April 2018), online: <https://news.gov.bc.ca/releases/2018PREM0019-000742>. See section 2.2.4, *below*, for an analysis of the holding in this reference case.
[79] Rachel Aiello, "Feds' Pledge to Financially Back Trans Mountain Pipeline Won't Eliminate All Risk: Carr", *CTV News* (16 May 2018), online: <https://www.ctvnews.ca/politics/feds-pledge-to-financially-back-trans-mountain-pipeline-won-t-eliminate-all-risk-carr-1.3931827>.
[80] Dean Bennet, "Alberta Passes Bill That Could Cut Oil to B.C. in Trans Mountain Pipeline Fight", *CTV News* (17 May 2018), online: <https://bc.ctvnews.ca/alberta-passes-bill-that-could-cut-oil-to-b-c-in-trans-mountain-pipeline-fight-1.3934507>. On April 23, 2018, the Government of Saskatchewan introduced Bill 126, *An Act respecting Energy Exports*, 2nd Sess, 28th Leg, Saskatchewan, 2018 (assented to 30 May 2018), SS 2018, c E-9.100001, which "establishes a permitting process for individuals or corporations seeking to export such products outside the province." It is thus similar to Alberta's legislation and was introduced to "respon[d] to the inaction by the federal government to assert its jurisdictional authority to ensure the Trans Mountain Expansion Project proceeds." The Act expired on January 31, 2019 (See Government of Saskatchewan, News Release, "Government Introduces Bill to Safeguard Saskatchewan's Energy Interests" (23 April 2018), online: <https://www.saskatchewan.ca/government/news-and-media/2018/april/23/bill-126-safeguard-energy-interests>).
[81] Geoffrey Morgan, "'Ready and Prepared to Turn off the Taps': Notley Issues Stark Warning to B.C. as Pipeline Fight Escalates", *Financial Post* (16 May 2018), online: <https://financialpost.com/news/ready-and-prepared-to-turn-off-the-taps-notley-issues-stark-warning-to-b-c-as-pipeline-fight-escalates>.
[82] *Ibid*.

aggressive action."[83] In a letter sent to his Albertan counterpart, British Columbia Attorney General David Eby outlined his concerns about Alberta's legislation.[84]

On May 22, 2018, British Columbia filed a lawsuit against Alberta in Alberta's Court of Queen's Bench.[85] British Columbia argued that Bill 12 contravenes sections 92A(2) and 121 of the *Constitution Act, 1867*.[86] Section 92A(2) limits provincial authority over interprovincial exports to the "primary production from non-renewable natural resources," excluding products resulting from refining crude or upgraded heavy crude oil,[87] and prohibits price and supply discrimination between provinces. Section 121 provides for the free admission of all articles of growth, produce and manufacture of one province into another. This legal challenge to Bill 12 was dismissed on February 22, 2019, when Hall J. held that the claim was premature as the bill had not yet been proclaimed in force.[88] It is important to note that, throughout the history of Confederation, it was unprecedented for one province to challenge the constitutionality of another province's statute in such a manner.[89]

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[83] Bennet, *supra* note 80.
[84] Letter from British Columbia Attorney General David Eby to Alberta Justice Minister Kathleen Ganley (16 May 2018), online: <https://fr.scribd.com/document/379433838/David-Eby-Letter#download&from_embed>. See also Richard Zussman, "B.C. Government Threatens to Sue Alberta over 'Turn off the Taps' Legislation", *Global News* (16 May 2018), online: <https://globalnews.ca/news/4213380/b-c-c12-reaction/>.
[85] Julia Parrish, "B.C. Files Lawsuit against Alberta Government over Bill 12", *CTV News* (22 May 2018), online: <https://edmonton.ctvnews.ca/b-c-files-lawsuit-against-alberta-government-over-bill-12-1.3940570>.
[86] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. See *BC v Alberta (ABQB)*, *supra* note 14 at para 2.
[87] *Constitution Act, 1867*, Sixth Schedule, s 1(a)(ii).
[88] *British Columbia (AG) v Alberta (AG)*, 2019 ABQB 121 at paras 15, 22—23.
[89] *BC v Alberta (ABQB)*, *supra* note 14 at paras 5, 24; *BC v Alberta (FC)*, *supra* note 14 at paras 77—80; *Alberta v BC (FCA)*, *supra* note 14 at para 165; Downey et al, *supra* note 15 at para 120.

On May 29, 2018, Minister Morneau announced that the federal government would buy the TMX Project for $4.5 billion.[90] In support of the Project, Alberta pledged to cover up to $2 billion worth of unforeseen costs that may arise during construction.[91]

1.1.4 Quashing of the TMX Project's Initial Approval and Subsequent Reapproval

On August 30, 2018, the Federal Court of Appeal quashed the federal government's approval of the TMX Project.[92] In response, Premier Notley expressed her frustration at the ongoing hurdles being thrown at the Project, stating that "Albertans are angry. I'm angry. Alberta has done everything right and we have been let down."[93] She announced that she was pulling out of the federal climate plan, and went on to say that "let's be clear – without Alberta, that plan isn't worth the paper it's written on."[94] In addition, she called on the federal government to launch an appeal to the Supreme Court of Canada and to call an emergency session of Parliament to fix the NEB process so that construction on the TMX Project could restart.[95]

The heated debate between the two provinces was further enflamed when United Conservative Party of Alberta ("**UCP**") Leader Jason Kenney was sworn in as Alberta's new premier on April 30, 2019. During his campaign, he had repeatedly promised that if he were to become premier, he would proclaim Bill 12 into force "within one hour" of being sworn in.[96]

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[90] *Share and Unit Purchase Agreement between Kinder Morgan Cochin ULC and Her Majesty in Right of Canada, as represented by the Minister of Finance* (29 May 2018), online: <https://www.sec.gov/Archives/edgar/data/1714973/000110465918037678/a18-14647_1ex10d1.htm>; Julia Parrish, "'It Will Be Built': Ottawa Paying $4.5B for Trans Mountain Pipeline", *CTV News* (29 May 2018), online: <https://edmonton.ctvnews.ca/it-will-be-built-ottawa-paying-4-5b-for-trans-mountain-pipeline-1.3949807?%3Fadfa=>. The federal government purchased the pipeline through creation of the Trans Mountain Corporation, a federal Crown corporation that is a subsidiary of the Canada Development Investment Corporation.

[91] Government of Alberta, News Release, "Alberta Supports Federal Pipeline Purchase" (29 May 2018), online: <https://www.alberta.ca/release.cfm?xID=56026BB95BB10-CB98-88A9-37280EFD5F193EB2>.

[92] *Tsleil-Waututh Nation v Canada*, *supra* note 11. See section 2.3, *below*, for further discussion of this case.

[93] Government of Alberta, News Release, "Trans Mountain Pipeline: Premier Notley" (30 August 2018), online: <https://www.alberta.ca/release.cfm?xID=585428633B909-DEF9-2B91-6773792AA5DA51A9>.

[94] *Ibid*.

[95] *Ibid*.

[96] Emma Graney, "'This Law Is Unconstitutional': B.C. to Take Alberta to Court after Kenney Proclaims 'Turn off the Taps' Legislation", *Edmonton Journal* (1 May 2019), online: <https://edmontonjournal.com/news/politics/this-

Premier Kenney stuck to his word and the *Preserving Canada's Economic Prosperity Act* was proclaimed into force at his new government's first cabinet meeting on April 30.[97]

He stated that British Columbia's "campaign to land lock Alberta's resources … has been economically devastating and has contributed to the jobs crisis in this province."[98] He warned that "[o]ne province claiming to have the power to block exports from the rest of Canada would undermine one of the principles of our Confederation, the economic union between our provinces."[99] He also described Albertans' "deep frustration" at the fact that they have massively contributed to the other provinces through fiscal transfers, and in their "time of trial" the rest of Canada has not been stepping up to help them.[100] British Columbia immediately refiled an action in court challenging Bill 12's constitutionality.[101] While the Federal Court granted British Columbia's motion for an interlocutory injunction and dismissed Alberta's motion to strike British Columbia's claim, this decision was overturned on appeal.[102] The Federal Court of Appeal ruled that British Columbia's application was premature because Alberta had not yet put into effect an

law-is-unconstitutional-b-c-to-take-alberta-to-court-after-kenney-proclaims-turn-off-the-taps-legislation#:~:text=%E2%80%9CWe%20did%20not%20proclaim%20this,protecting%20Canada's%20vital%20economic%20interests>.

[97] Jason Kenney, "Premier Jason Kenney to British Columbians: 'We Will Never Be Afraid to Stand Up for Alberta'", *Vancouver Sun* (1 May 2019), online: <https://vancouversun.com/opinion/op-ed/premier-jason-kenney-we-will-never-be-afraid-to-stand-up-for-alberta>; Government of Alberta, News Release, "Defending Alberta's Economy, Resources and People" (1 May 2019), online: <https://www.alberta.ca/release.cfm?xID=63826888E0559-0542-D660-938C03BE09B445CA>. However, he stated that "[i]t is not [his government's] intention to reduce shipments or turn off the tap at this time" (Graney, *supra* note 96).

[98] YourAlberta (Government of Alberta), "Premier Kenney Proclaims Bill 12" (1 May 2019) at 00h:01m:13s, online (video): <https://www.youtube.com/watch?v=lb-p4Xz2XeM&t=1s>.

[99] *Ibid* at 00h:03m:45s.

[100] *Ibid* at 00h:05m:41s.

[101] *BC v Alberta (ABQB)*, *supra* note 14. The Court however stayed the action, concluding that the Federal Court was the proper forum for this dispute (*ibid* at para 55). This case was then pursued in the Federal Courts. See also Vaughn Palmer, "Horgan Hints at Way Out of Alberta Impasse on Gas Costs, TMX Expansion", *Vancouver Sun* (2 May 2019), online: <https://vancouversun.com/opinion/columnists/vaughn-palmer-horgan-hints-at-way-out-of-alberta-impasse-on-gas-costs-tmx-expansion>; Michael A Marion, Clay Jacobson & Brett Carlson, "Federal Court of Appeal Lifts Injunction on Alberta's 'Turn off the Taps' Legislation" (17 May 2021), online: *Borden Ladner Gervais LLP* <https://www.blg.com/en/insights/2021/05/federal-court-of-appeal-lifts-injunction-on-alberta>.

[102] *BC v Alberta (FC)*, *supra* note 14, rev'd *Alberta v BC (FCA)*, *supra* note 14.

operational licensing scheme, resulting in no current restrictions on the export of natural gas, crude oil, or refined fuels to British Columbia.[103]

On June 18, 2019, the Governor in Council again approved the TMX Project and Trans Mountain Corporation announced on August 21, 2019, that it would restart construction on the Project within the next month.[104] The path to completion was further secured when the Supreme Court dismissed several Indigenous groups' application for leave to appeal from a Federal Court of Appeal judgment that had dismissed their challenge to the TMX Project's second approval.[105]

1.2 Western Alienation: Alberta's Frustration with Perceived Attacks on Its Oil Industry

Even though the TMX Project crisis has passed, the "deep frustration" of Albertans described by Premier Kenney remains.[106] A sense of western alienation has been growing over what Premier Kenney has deemed to be Ottawa's attack on Alberta's oil industry (despite Ottawa's salvaging of the TMX Project).[107] This perceived affront to its energy and natural resources sectors spurred Alberta to launch two constitutional references to the Alberta Court of Appeal within

[103] *Alberta v BC (FCA)*, *supra* note 14 at paras 181—82, 188. See also Marion, Jacobson & Carlson, *supra* note 101. The Act has since expired due to a built-in sunset clause of two years but was then reintroduced with some minor changes (Bill 72, *Preserving Canada's Economic Prosperity Act*, 2nd Sess, 30th Leg, Alberta, 2021 (assented to 17 June 2021), SA 2021, c P-21.51; Government of Alberta, News Release, "Protecting Albertans' Energy Resources" (25 May 2021), online: <https://www.alberta.ca/release.cfm?xID=7823672536349-049C-8C75-B57361B7BBC21818>).

[104] PC 2019-820, (2019) C Gaz I, Supplement, vol 153, no 25; Emma McIntosh & Stephanie Wood, "Trans Mountain to Restart Pipeline Construction within 30 Days", *Canada's National Observer* (21 August 2019), online: <https://www.nationalobserver.com/2019/08/21/news/trans-mountain-restart-pipeline-construction-within-30-days>.

[105] *Coldwater*, *supra* note 12.

[106] See Government of Alberta, News Release, "A Fair Deal Now for Alberta within Canada: Premier Jason Kenney's Speech at the Manning Centre's *What's Next?* Conference" (9 November 2019), online: <https://www.alberta.ca/release.cfm?xID=6608502355B7E-A6AE-7F2E-6A20884E613662CC>.

[107] Sarah Rieger, "Alberta's Legal Challenge of Bill C-69 Is Part of a List of Grievances against Ottawa", *CBC News* (23 February 2021), online: <https://www.cbc.ca/news/canada/calgary/kenney-madu-impact-assessment-act-1.5924814>. See also Thomas O. Hueglin, *Federalism in Canada : Contested Concepts and Uneasy Balances* (Toronto: University of Toronto Press, 2021) at 194.

months of each other.[108] Alberta argued that both the federal carbon tax[109] and Bill C-69,[110] which enacts the *Impact Assessment Act*,[111] constitute federal overreach into areas of exclusive provincial jurisdiction. In addition, Alberta provided two Métis organizations more than $372,000 from the province's Indigenous Litigation Fund Grant to fund their legal challenge of Bill C-48, the *Oil Tanker Moratorium Act*,[112] which would formalize the prohibition of oil tankers off of British Columbia's northern coast.[113] Premier Kenney said that Bill C-48 is "a prejudicial, discriminatory attack" on Alberta[114] as it singles out "a major export product of only one province – the province of Alberta – with only one product that is produced in Canada – bitumen, produced only in Alberta."[115]

On June 10, 2019, six premiers sent a letter to the Prime Minister asking him to amend or eliminate Bills C-69 and C-48, writing that "[o]ur governments are deeply concerned with the federal government's disregard, so far, of the concerns raised by our provinces related to these bills. As it stands, the federal government appears indifferent to the economic hardships faced by provinces."[116] For his part, Premier Kenney characterized Bills C-69 and C-48 as part of "a series

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[108] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, rev'd 2021 SCC 11; *Reference re Impact Assessment Act*, 2022 ABCA 165, rev'd in part 2023 SCC 23 [*IAA Reference (ABCA)*].
[109] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.
[110] Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019 c 28.
[111] SC 2019, c 28, s 1 [*IAA*].
[112] Bill C-48, *An Act respecting the regulation of vessels that transport crude oil or persistent oil to or from ports or marine installations located along British Columbia's north coast*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019 c 26.
[113] "Alberta to Fund Potential Legal Challenge of B.C. Oil Tanker Ban by 2 Metis Nations", *CTV News* (15 November 2021), online: <https://edmonton.ctvnews.ca/alberta-to-fund-potential-legal-challenge-of-b-c-oil-tanker-ban-by-2-metis-nations-1.5667112>.
[114] YourAlberta (Government of Alberta), "Premier Kenney Speaks about Bills C-69 and C-48" (21 June 2019) at 00h:01m:11s, online (video): <https://www.youtube.com/watch?v=sEjn3ZodhBI>.
[115] *Ibid* at 00h:00m:55s.
[116] David Akin, "In 'Urgent Letter,' 6 Premiers Tell Trudeau National Unity Would Be Threatened if Bills C-48, C-69 Become Law", *Global News* (10 June 2019), online: <https://globalnews.ca/news/5374642/ford-kenney-moe-pallister-higgs-letter-to-trudeau/>. The six premiers who penned the letter were Ontario Premier Doug Ford, New Brunswick Premier Blaine Higgs, Manitoba Premier Brian Pallister, Saskatchewan Premier Scott Moe, Alberta Premier Jason Kenney and Northwest Territories Premier Robert McLeod. All of these premiers belonged to the

of federal policies that have attacked our vital economic interests and killed jobs and growth here in Alberta and other parts of Canada."[117] He threatened that their passage would push his government to call a referendum on equalization payments,[118] which it eventually did in conjunction with the province's October 2021 municipal elections.[119] Elections Alberta reported that almost 62% of Albertans voted in favour of removing section 36(2) from the *Constitution Act, 1982*, which commits the federal government "to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation."[120] Albertans have usually paid more into the federal program than they have received back due to their higher incomes.[121] Premier Kenney remarked that "Albertans cannot be expected to continue to pay the freight in the Canadian federation, if the same federation continues to block our ability to develop and get a fair price for our resources."[122] While the section cannot be changed without the consent of two-thirds

conservative party in their respective provinces, with the exception of Premier McLeod. In the Northwest Territories' consensus-style government, candidates run as independents rather than under a party affiliation (see "Premier Bob McLeod wins seat again in Northwest Territories general election", *CityNews* (23 November 2015), online: <https://vancouver.citynews.ca/2015/11/23/premier-bob-mcleod-wins-seat-again-in-northwest-territories-general-election/>).

[117] YourAlberta (Government of Alberta), "Alberta Premier Provides Update on Legal Challenge of Bill C-69" (23 February 2021) at 00h:01m:58s, online (video): <https://www.youtube.com/watch?v=mb76XBor_cE>.

[118] Emily Mertz, "Alberta Government Asks Court of Appeal Whether Bill C-69 Is Constitutional", *Global News* (10 September 2019), online: <https://globalnews.ca/news/5883602/alberta-government-asks-court-of-appeal-whether-bill-c-69-is-constitutional/>.

[119] Michelle Bellefontaine, "Albertans Support Bid to Change Equalization, Narrowly Turn Down Year-Round Daylight Time", *CBC News* (26 October 2021), online: <https://www.cbc.ca/news/canada/edmonton/referendum-alberta-equalization-daylight-time-senate-1.6225309#:~:text=Elections%20Alberta%20reported%20nearly%2062,per%20cent%20checked%20%22no.%22>.

[120] *Constitution Act, 1982*, s 36(2), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]. See *Ibid*. It is estimated that approximately 39 per cent of eligible voters participated.

[121] Sean Amato, "'Stirring Up Sentiment': Trudeau Pours Cold Water on Kenney's Equalization Vote", *CTV News* (21 October 2021), online: <https://edmonton.ctvnews.ca/stirring-up-sentiment-trudeau-pours-cold-water-on-kenney-s-equalization-vote-1.5632841>.

[122] YourAlberta (Government of Alberta), "Premier Kenney Speaks about Bills C-69 and C-48", *supra* note 114 at 00h:08m:50s

of the provinces with at least fifty per cent of the population of all the provinces,[123] Premier Kenney called the referendum a "powerful statement" to the federal government.[124]

Alberta's disenfranchisement with Ottawa culminated in the *Alberta Sovereignty within a United Canada Act*, which received royal assent on December 15, 2022.[125] This Act allows the Alberta cabinet, when authorized by the legislative assembly, to direct provincial entities to not enforce federal laws or policies that interfere with provincial jurisdiction, that violate Charter rights[126] or that are harmful to Albertans.[127] The Act would also shift the burden to the federal government to legally challenge any refusal by Alberta to enforce federal laws it deems unconstitutional or harmful.[128] Recently sworn-in Alberta Premier Danielle Smith had strong words for the federal government, saying that this Act "is the first step in standing up for Albertans and pushing Ottawa back into its own lane"[129] and that she was committed to fighting "an out of control federal government in Ottawa that sees Alberta and all provinces as its subordinate rather than its partner."[130] The Premier specifically instructed her cabinet ministers to prepare resolutions to push back on federal laws that seek to "[r]egulate and control Alberta's natural resources and economic development (i.e., Bill C-69)" and to "[p]enalize the province's energy and agricultural

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[123] *Constitution Act, 1982*, s 38(1).
[124] Bellefontaine, *supra* note 119. For an analysis critiquing Premier Kenney's grievances regarding the inequity of equalization, see Hueglin, *supra* note 107 at 157—58.
[125] SA 2022, c A-33.8 [*Alberta Sovereignty Act*].
[126] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].
[127] Government of Alberta, "Alberta Sovereignty within a United Canada Act" (last visited 7 September 2023), online: <https://www.alberta.ca/alberta-sovereignty-within-a-united-canada-act.aspx>; Government of Alberta, "Information Sheet for Albertans - Alberta Sovereignty within a United Canada Act" (8 December 2022), online (pdf): <https://www.alberta.ca/system/files/custom_downloaded_images/alberta-sovereignty-within-a-united-canada-act-info-sheet.pdf#search=alberta%2Dsovereignty%2Dwithin%2Da%2Dunited%2Dcanada%2Dact%2Dinfo%2Dsheet%2Epdf>.
[128] Government of Alberta, "Information Sheet for Albertans - Alberta Sovereignty within a United Canada Act", *supra* note 127.
[129] YourAlberta (Government of Alberta), "Standing Up for Alberta" (29 November 2022) at 00h:01m:58s, online (video): <https://www.youtube.com/watch?v=i43AVYBd_J4>.
[130] *Ibid* at 00h:04m:26s.

sectors."[131] Saskatchewan passed its own sovereignty bill, *The Saskatchewan First Act*,[132] which asserts the province's jurisdiction over matters exclusively assigned to it by the *Constitution Act, 1867*, particularly in relation to its natural resources.[133]

As Professor Bruce Pardy observed, the two sovereignties acts adopted by Alberta and Saskatchewan have limited use as legal tools.[134] As such, "[t]he Saskatchewan bill won't change the way the Constitution is interpreted. The Alberta statute could create administrative tangles for the federal government but will not block its jurisdictional reach."[135] However, he went on to highlight that "[t]hey are not primarily legal tools but political moves in a culture war waged by Ottawa."[136] This new legislation is the "latest twist in [the] long story of western alienation" that has seen both provinces vigorously defend themselves against what they perceive to be unfair treatment and economic exploitation by the federal government and Central Canada (as well as by British Columbia in the context of the TMX Project).[137] Likewise, Professor Loleen Berdahl suggested that federal-provincial disputes about pipelines are "symptoms of a deeper cultural malaise" and that addressing the profound perceptions of unfair treatment within the western provinces is crucial to mitigating discontent in the region.[138]

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[131] Government of Alberta, "Information Sheet for Albertans - Alberta Sovereignty within a United Canada Act", *supra* note 127. Premier Smith invoked the Act for the first time to contest the federal government's plan to achieve a net-zero emitting electricity grid by 2035 (David Baxter, "Alberta uses Sovereignty Act for 1st time. What happens now?", *Global News* (28 November 2023), online: <https://globalnews.ca/news/10118035/alberta-sovereignty-act-explained/>).
[132] SS 2023, c 9.
[133] Government of Saskatchewan, News Release, "Province Passes Saskatchewan First Act" (16 March 2023), online: <https://www.saskatchewan.ca/government/news-and-media/2023/march/16/province-passes-saskatchewan-first-act-adds-house-amendments>.
[134] Bruce Pardy, "Sovereignty Bills Are Symbols of Discontent in Today's Canada", *Fraser Institute* (7 January 2023), online: <https://www.fraserinstitute.org/article/sovereignty-bills-are-symbols-of-discontent-in-todays-canada>.
[135] *Ibid*.
[136] *Ibid*.
[137] Lisa Young & Loleen Berdahl, "Standing Up to Ottawa: Western Alienation Shifts into Prairie Constitutional Challenges", *Policy Options* (14 December 2022), online: <https://policyoptions.irpp.org/magazines/december-2022/western-alienation-constitutional-challenges/>.
[138] Loleen Berdahl, "The Persistence of Western Alienation", *Centre of Excellence on the Canadian Federation* (27 May 2021), online: <https://centre.irpp.org/research-studies/the-persistence-of-western-alienation/>.

1.3 Canada's Intergovernmental Relations: Tensions Exacerbated by the Dominance of the Executive Branch and Institutional and Ideational Constraints

Despite the need to address these feelings of unfair treatment, Canada's institutions appear unable to bring all of the federation's components to the table and instil in them a sense of loyalty to one another and to the nation as a whole in order to counter these perceptions. For instance, Premier Notley chose not to attend the 2018 Western Premiers' Conference, saying that her time was better spent in Edmonton making sure that the TMX Project moves ahead.[139] Some officials involved in the meeting said that her decision to back out came after the provinces failed to agree on the content of the joint communiqué to be released after the meeting, with Alberta wanting stronger language about market access for resources. However, officials in Alberta deny this.[140] Premier Notley tweeted that "[i]t would be surreal and exceptionally tone deaf for anyone to think we could politely discuss pharmacare and cannabis when one of the players is hard at work trying to choke the economic lifeblood of the province and the country."[141] She stated that pharmacare is an important issue and that deputy premier and Minister of Health Sarah Hoffman will be attending on her behalf. However, she added that "[w]hile they are at the premiers meeting talking about how to spend that kind of money, I'll be here in Alberta talking about how we can earn that kind of money."[142] While relations were more cordial at the following Western Premiers' Conference,

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[139] "Alberta Refuses to Sign Statement at Contentious Western Premiers Meeting", *CityNews* (23 May 2018), online: <https://vancouver.citynews.ca/2018/05/23/notley-to-skip-western-premiers-meeting-today-but-slams-leader-whos-there/>.

[140] Richard Zussman, "Alberta Premier Rachel Notley Backs Out of Western Premiers' Conference over Pipeline Spat", *Global News* (21 May 2018), online: <https://globalnews.ca/news/4222207/alberta-premier-rachel-notley-backs-out-of-western-premiers-conference-over-pipeline-spat/>.

[141] Rachel Notley, "It would be surreal and exceptionally tone deaf for anyone to think we could…" (21 May 2018), online: <https://twitter.com/RachelNotley/status/998691756479725568?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E998691756479725568%7Ctwgr%5E79f0abbd6eff17a2ba9e455f14be04b22287be63%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fcalgaryherald.com%2Fnews%2Fpolitics%2Fnotley-to-skip-premiers-conference-as-pipeline-deadline-looms>. See also *Ibid*.

[142] Colette Derworiz, "Notley to Skip Premiers Conference so She Can Focus on Pipeline Deal", *CTV News* (21 May 2018), online: <https://www.ctvnews.ca/politics/notley-to-skip-premiers-conference-so-she-can-focus-on-pipeline-deal-1.3939240>.

this can be explained by the fact that a Conservative sweep in the country dramatically changed the constitution of the meeting[143] and by the fact that the TMX Project had been reapproved by the federal government earlier that same month. Thus, the efficacy of these conferences is highly dependent on the political climate of the day and on the actors involved.

The same can be said of First Ministers' Meetings, whose success remains heavily dependent on the leaders who are in power at the moment.[144] Take for instance the federal government's establishment of a national carbon tax. Justin Trudeau's Liberals formed a majority government on October 19, 2015, and shortly thereafter called a First Ministers' Meeting to discuss Canada's climate change strategy ahead of COP21.[145] A few months later, the First Ministers issued the *Vancouver Declaration on Clean Growth and Climate Change*.[146] In this Declaration, the First Ministers agreed to develop a climate plan to achieve Canada's Paris Agreement target of a 30 per cent reduction of 2005 greenhouse gas emission levels by 2030.[147] Accordingly, on December 9, 2016, all of Canada's provinces and territories, except for the province of Saskatchewan, signed onto the new *Pan-Canadian Framework on Clean Growth and Climate Change* ("**PCF**").[148] The PCF was "rooted in the principles of a collaborative approach outlined

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[143] Jesse Snyder, "Alberta and B.C. Put On Positive Front amid Trans Mountain Spat, but Remain Fundamentally Divided", *National Post* (27 June 2019), online: <https://nationalpost.com/news/canada/alberta-and-b-c-put-on-positive-front-amid-trans-mountain-spat-but-remain-fundamentally-divided>.

[144] For a discussion on the need to revitalize First Ministers' Meetings, see Michael Kaczorowski, "After Years of Neglect, We've Lost a Key Element of Federal-Provincial Negotiation", *Policy Options* (10 January 2023), online: <https://policyoptions.irpp.org/magazines/january-2023/effective-first-ministers-meetings/>.

[145] Canada, Office of the Prime Minister, News Release, "Prime Minister Hosts First Ministers' Meeting" (23 November 2015), online: <https://www.pm.gc.ca/en/news/news-releases/2015/11/23/prime-minister-hosts-first-ministers-meeting>.

[146] Canadian Intergovernmental Conference Secretariat, *Vancouver Declaration on Clean Growth and Climate Change* (Vancouver: CICS, 3 March 2016), online: <https://scics.ca/en/product-produit/vancouver-declaration-on-clean-growth-and-climate-change/#:~:text=We%20will%20grow%20our%20economy,of%20rights%2C%20respect%20and%20cooperation>.

[147] *Ibid*.

[148] Canadian Intergovernmental Conference Secretariat, *Pan-Canadian Framework on Clean Growth and Climate Change* (Ottawa: CICS, 9 December 2016), online (pdf): <https://www.canada.ca/content/dam/themes/environment/documents/weather1/20161209-1-en.pdf>. Manitoba did not initially sign on to the PCF, but eventually did so on February 23, 2018 (Government of Manitoba, News Release,

in the Vancouver Declaration to reduce GHG emissions" and reaffirmed Canada's commitment to meeting or surpassing its 2030 climate change target.[149] Carbon pricing was identified as its "central component."[150] While the plan highlighted provincial leadership on carbon pricing, it included the federal government's benchmark for carbon pricing.[151]

According to Professor Kathryn Harrison, "the PCF keystone was Alberta, which consented to match the federal benchmark of $50/tonne only in exchange for federal approval of a pipeline to gain access to new markets for Alberta oil."[152] As previously mentioned, after federal approval of the TMX Project was quashed by the Federal Court of Appeal, Premier Notley pulled out of the national climate plan in protest.[153] Following her government's defeat in May 2019, the first piece of legislation introduced by the newly elected UPC was *An Act to Repeal the Carbon Tax*, which ended Alberta's carbon tax.[154] This prompted the federal government to impose its own carbon tax pursuant to the *Greenhouse Gas Pollution Pricing Act*.[155] All five provinces where the federal carbon tax was imposed were governed by conservative parties[156] and "[t]he federal government's unilateralism met with vehement provincial opposition."[157] This led to Alberta, Saskatchewan and Ontario all challenging the federal government's carbon pricing plan. Ultimately, the Supreme Court upheld the *Greenhouse Gas Pollution Pricing Act*'s

"Canada Welcomes Manitoba to the Pan-Canadian Plan for Clean Growth and Climate Action" (23 February 2018), online: <https://news.gov.mb.ca/news/index.html?archive=&item=43197>).

[149] Canadian Intergovernmental Conference Secretariat, News Release, "Communiqué of Canada's First Ministers" (9 December 2016), online: <https://scics.ca/en/product-produit/communique-of-canadas-first-ministers/>.

[150] Canadian Intergovernmental Conference Secretariat, *Pan-Canadian Framework on Clean Growth and Climate Change*, *supra* note 148 at 7.

[151] Kathryn Harrison, "Federalism and Climate Governance in Canada" in Alan Fenna, Sébastien Jodoin & Joana Setzer, eds, *Federalism and Climate Governance* (Cambridge, UK: Cambridge University Press, 2023) 64 at 75.

[152] *Ibid* at 76.

[153] See the text accompanying note 94.

[154] SA 2019, c 1.

[155] *Supra* note 109. See "Alberta Makes It Official: Bill Passed and Proclaimed to Kill Carbon Tax", *CBC News* (5 June 2019), online: <https://www.cbc.ca/news/canada/edmonton/alberta-carbon-tax-repealed-1.5162899>.

[156] Harrison, *supra* note 151 at 78.

[157] *Ibid* at 77.

constitutionality.[158] Therefore, in Canada's federation, collaboration is very temporal and subject to political and economic whims. While the federal government had managed to get widespread approval of the PCF, ultimately many of the parties reneged on it, which shows how "collective agreements are as good as the good will of the participating governments."[159]

Thus, the prospects for nationwide collaboration on Canada's climate action seem bleak, as "[w]illingness on the part of new governments to build collaborative relationships can rapidly evolve into zero-sum political battles as tensions and disagreements arise."[160] Jean-Philippe Gauvin and Professor Martin Papillon identified two characteristics of Canada's intergovernmental relations that exacerbate such tensions: the dominance of the executive branch of government and the lack of institutionalization of such relations.[161] First, executive federalism in Canada is characterized by "strict party discipline that concentrates power in the hands of executives leading majority governments."[162] This is conducive to political sparring and hinders the ability of governments to foster a political culture founded on frequent, stable and cooperative discussions as "[t]here is no electoral reward for a provincial government if voters perceive that it sacrificed provincial interests in the development of a national strategy."[163] Executive federalism

[158] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GHG Reference*].
[159] Nicole Bolleyer, *Intergovernmental Cooperation: Rational Choices in Federal Systems and Beyond* (Oxford: Oxford University Press, 2009) at 72.
[160] Gauvin & Papillon, *supra* note 22 at 337.
[161] *Ibid* at 336, 339—44. In their article, the authors examined three other features of Canada's intergovernmental relations that, in their view, offer a more "nuanced" assessment of the system: (1) sectoral diversification in intergovernmental relations trends; (2) the consolidation of these intersectoral variations at the administrative level; (3) the increased presence of Indigenous organizations in intergovernmental meetings.
[162] Julie M. Simmons, "Canadian Multilateral Intergovernmental Institutions and the Limits of Institutional Innovation" (2017) 27:5 Regional & Federal Studies 573 at 577.
[163] *Ibid*. Professor Julie Simmons goes on to affirm that "[t]here remains little political or financial incentive for premiers to chisel sovereignty from their legislatures, pooling the resulting fragments through more binding intergovernmental processes" (*ibid* at 583). See also Gauvin & Papillon, *supra* note 22 at 336, 341—44.

also engenders a lack of transparency and democratic accountability, as intergovernmental agreements are rarely negotiated in public or submitted for parliamentary debate.[164]

Second, as previously discussed, intergovernmental relations in Canada are "still only very loosely institutionalized."[165] Professor Nicole Bolleyer explained that "[c]ompared to other federal countries, IGR in Canada remains highly fluid and ad hoc."[166] For instance, First Ministers' Meetings depend on the discretion of the prime minister, and he or she unilaterally sets the agenda of those meetings.[167] While the Council of the Federation does have more formalized rules established by its founding agreement,[168] it is first and foremost a forum for provinces to facilitate dialogue, share information and create a unified front on common issues in order to increase their bargaining power with the federal government. Therefore, it has been successful on issues where provincial interests were similar, such as campaigning for more federal funding, and on issues of an interprovincial nature like labour mobility.[169] However, the Council has had limited success in policy fields in which provincial interests diverge.[170] Accordingly, Marc-Antoine Adam, Josée Bergeron and Marianne Bonnard characterized the Council's achievements as "fragile, little known, and contingent on the individual leaders involved."[171] To add to this, intergovernmental

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[164] Gauvin & Papillon, *supra* note 22 at 342. See also Donald V. Smiley, "An Outsider's Observations of Federal-Provincial Relations among Consenting Adults" in Richard Simeon, ed, *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979) 105 at 105—06.

[165] Gauvin & Papillon, *supra* note 22 at 340.

[166] Bolleyer, *supra* note 159 at 90.

[167] See Adam, Bergeron & Bonnard, *supra* note 22 at 146.

[168] *Council of the Federation Founding Agreement* (5 December 2003), online (pdf): <https://canadaspremiers.ca/wp-content/uploads/2013/03/cof_founding-agreement.pdf>.

[169] Gauvin & Papillon, *supra* note 22 at 340, 352—54; Adam, Bergeron & Bonnard, *supra* note 22 at 148—49. See also Simmons, *supra* note 162 at 574, 582.

[170] For a discussion on the factors restricting the Council of the Federation's ability to strengthen interprovincial collaboration, see Bolleyer, *supra* note 159 at 76—78; Simmons, *supra* note 162 at 575, 577, 589—590.

[171] Adam, Bergeron & Bonnard, *supra* note 22 at 149. In fact, the federal government has shown a preference for concluding bilateral agreements with individual provinces, thus breaking any common fronts formed between provinces against federal initiatives and leading to greater de facto asymmetry in federal-provincial relations. Conversely, in certain situations, individual provinces might benefit from circumventing multilateral bargaining and choose to conclude their own separate agreements with the federal government (see *ibid* at 141; Bolleyer, *supra* note 159 at 73—75).

agreements, even ones that can be considered legally binding as contracts or that have been given legislative force, can always be unilaterally repudiated by one of the parties through legislation by virtue of the principle of parliamentary sovereignty.[172]

In addition to these institutional constraints, Gauvin and Papillon argued that ideational factors also impede the possibility of greater formalization and institutionalization of Canada's intergovernmental relations:

> Disagreements concerning the very nature of the Canadian federation and what role [intergovernmental relations] should play within such system continue to limit the possibility of institutional reform in the direction of further formalization. While some provinces, particularly Quebec, remain committed to the dualistic conception of Canadian federalism, where each level of government is sovereign in its area of legislative authority, the federal government and most provinces are likelier to adopt a more integrated approach to federalism. For them, [intergovernmental relations] tend to be less about managing interdependencies between co-ordinate levels of government than about developing a shared vision of the nation and policies that are consistent with this vision through the pooling of resources and expertise. Under such a model, the federal government logically has a predominant role, thanks in part to its spending power.[173]

Both institutional and ideational constraints were fully present during the TMX Project saga. As described above, intergovernmental relations between Alberta, British Columbia and the federal government led to a stalemate, in which neither government had any incentive to back down from the stance they had adopted in their electoral campaigns. The ad hoc nature of Canada's intergovernmental relations meant that Premiers Horgan and Notley continued to engage in heated

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[172] Johanne Poirier & Jesse Hartery, "Para-Constitutional Engineering and Federalism: Informal Constitutional Change through Intergovernmental Agreements" (2022) 20:2 Intl J Const L 758 at 776; Gauvin & Papillon, *supra* note 22 at 342. However, Professor Poirier affirmed that "in most cases, agreements enjoy a very high degree of effectivity, regardless of their formal status" (Johanne Poirier, "Intergovernmental Relations in Federal Systems: Ubiquitous, Idiosyncratic, Opaque, and Essential", *50 Shades of Federalism*, Research blog of the Center for the Study of Federalism, Canterbury Christchurch University, September 2018, online: <https://50shadesoffederalism.com/theory/intergovernmental-relations-in-federal-systems-ubiquitousidiosyncratic-opaque-and-essential>).

[173] Gauvin & Papillon, *supra* note 22 at 341. However, there is a lack of consensus on whether greater institutionalization of Canada's intergovernmental relations is a positive thing (see Adam, Bergeron & Bonnard, *supra* note 22 at 166).

rhetoric, trade wars, and litigation instead of being encouraged to negotiate a mutually beneficial solution. It was only when tensions came to a head, in the face of Kinder Morgan's imposed deadline, that Prime Minister Trudeau resorted to calling an emergency meeting with the two premiers, at which point it was too late because both parties were already entrenched in their positions. On the ideational front, Alberta's perception of being treated unfairly by the rest of the federation accrued during the conflict and culminated in its adoption of the *Alberta Sovereignty Act*. However, while we may not be able to completely eliminate these institutional and ideational constraints "without a major overhaul of the federation,"[174] the introduction of the principle of federal loyalty may help bring all the parties to the table and negotiate in good faith in future intergovernmental conflicts.

[174] Gauvin & Papillon, *supra* note 22 at 337.

CHAPTER 2 – Constitutional and Legal Framework Governing Interprovincial Pipelines in Canada

As a dualist federal state, Canada's Constitution allocates legislative power and responsibility to both the federal Parliament and the provincial legislatures. The municipalities' powers do not derive from the Constitution, but rather depend entirely on power delegations from the provinces.[175] This division of powers between the federal and provincial governments means that both orders of government have jurisdiction to regulate certain aspects of major interprovincial pipeline projects.[176] While regulatory diversity can be an important advantage of federalism,[177] it also can cause legal and political challenges. This is particularly true when the advantages and disadvantages of a pipeline project are unevenly dispersed among the provinces, as was the case with the TMX Project – Alberta would receive the majority of the financial benefits from the Project, whereas British Columbia would be exposed to the greatest environmental risks.

This chapter explores the constitutional jurisdiction of the federal and provincial governments with respect to interprovincial transportation and the environment. It then analyzes the operability and applicability of provincial and local regulations to the TMX Project, highlighting the ongoing uncertainty about the extent to which federal undertakings are shielded from provincial and local environmental laws. The chapter concludes with a review of the Project's regulatory and environmental approval processes.

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[175] *Constitution Act, 1867*, s 92(8). See Ashley Saad & Arnaud Hoste, "Canadian Federalism and Environmental Protection: What Makes it Work (or Not!)" (Second Place Winners of the Baxter Family Competition on Federalism, Faculty of Law, McGill University, 2023) at 1 [unpublished].

[176] Wickett, *supra* note 7 at 486.

[177] Bundesrat, "A Constitutional Body within a Federal System" (last visited 6 November 2023), online: <https://www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html>.

2.1 Constitutional Jurisdiction

2.1.1 Interprovincial Transportation

The constitutional basis for federal jurisdiction over interprovincial pipelines in Canada is the transportation power set out in paragraph 92(10)(a) of the *Constitution Act, 1867*. This paragraph "applies to works and undertakings in the areas of transportation and communication, several of which are specifically enumerated and others, notably pipelines, are included within its scope by inference."[178]

At the time of Confederation, the framers had the difficult task of balancing "the general interests of the Confederacy as a whole" and "local interests" in assigning the different heads of power to the two orders of government.[179] Railways (and the telegraph lines which usually accompanied them) were "a central motivation of Confederation" as they were crucial to connecting the different parts of the new country.[180] Given their importance, the framers paid particular attention to which order of government should be given authority to make laws to govern them.[181] Thus, as a general rule, "Local Works and Undertakings" fell under provincial jurisdiction.[182] However, subsection 91(29) of the *Constitution Act, 1867* grants Parliament the

[178] Steven A. Kennett, "Jurisdictional Uncertainty and Pipelines: Is a Judicial Solution Possible?" (1996) 35 Alta L Rev 553 (pdf) at 4 (QL). In *Campbell-Bennett v Comstock-Midwestern*, [1954] SCR 207, the Supreme Court of Canada determined that interprovincial pipelines were subject to federal jurisdiction under paragraph 92(10)(a) of the *Constitution Act, 1867*.

[179] *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*, 2009 SCC 53 at para 33 [*Consolidated Fastfrate*].

[180] Morley & Jones, *supra* note 10 at para 21. See also Dwight Newman, *Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares* (Macdonald-Laurier Institute, April 2018) at 3, online (pdf): <https://macdonaldlaurier.ca/files/pdf/MLICommentary_April2018_Newman_FWeb.pdf> : "Section 145 of the *British North America Act (BNA Act)* through which Confederation was achieved – later to be renamed the *Constitution Act, 1867* – committed the Government of Canada to constructing an intercolonial railway from the St. Lawrence River through to Halifax, as 'essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick.'"

[181] Morley & Jones, *supra* note 10 at para 23.

[182] Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "Works and Undertakings, Communications and Transportation, and Labour Relations: Works and Undertakings" (IX.1) at HCL-175 "Public Works and Undertakings" (2023 Reissue).

power to make laws in relation to "Classes of Subjects" that are "expressly excepted" from the classes of subjects assigned exclusively to the legislatures of the provinces under section 92 of the *Constitution Act, 1867*.[183] Subsection 92(10) provides three such exceptions to the provincial legislatures' exclusive jurisdiction over "Local Works and Undertakings":[184]

> **92** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, …
>
> **10.** Local Works and Undertakings other than such as are of the following Classes:
>
> **(a)** Lines of Steam or other Ships, Railways, Canals, Telegraphs, *and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:*
>
> **(b)** Lines of Steam Ships between the Province and any British or Foreign Country:
>
> **(c)** Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

In *Consolidated Fastfrate*, Rothstein J. expounded on the historical context and underlying purpose of paragraph 92(10)(a), observing that "[t]he works and undertakings specifically excepted in s. 92(10)(*a*) include some of those most important to the development and continued flourishing of the Canadian nation."[185] He went on to state as follows:

> [W]hile works and undertakings such as an interprovincial railway system were of particular importance to the new nation, this did not displace the fact that jurisdictional diversity was seen as the general path to economic development of the nation. *In my view, having regard to the historical context of s. 92(10) and its underlying purpose, the preference for diversity of regulatory authority over works and undertakings should be respected, absent a justifiable reason that exceptional federal jurisdiction should apply*.[186]

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[183] Wickett, *supra* note 7 at 487.
[184] *Ibid*.
[185] *Supra* note 179 at para 36.
[186] *Ibid* at paras 37, 39 [emphasis added].

Thus, federal jurisdiction over works and undertakings such as communications and transportation infrastructure was a "limited carve-out"[187] from the provinces' general jurisdiction over industry and transportation.[188] Such an exception was deemed necessary by the framers to regulate works or undertakings that were of national importance, such as those that cross interprovincial or international boundaries.[189] Interprovincial pipelines are a form of "undertaking physically operating or facilitating carriage across interprovincial boundaries" and thus clearly fall within the scope of paragraph 92(10)(a).[190]

The exception set out in paragraph 92(10)(c) of the *Constitution Act, 1867* with respect to works "declared by the Parliament of Canada to be for the general Advantage of Canada" may also apply to interprovincial pipelines. Even though paragraph 92(10)(c) refers only to works "wholly situate within the Province," the paragraph has been interpreted broadly by the courts.[191] In addition, while the paragraph refers only to "works", it has been interpreted flexibly in that Parliament can also declare "undertakings" to be for the general advantage of Canada.[192]

Thus, the generous interpretation of the declaratory power allows Parliament to declare interprovincial works and undertakings to be for the general advantage of Canada.[193] While using the declaratory power may appear superfluous when it comes to interprovincial pipelines, as they already fall under federal jurisdiction by virtue of paragraph 92(10)(a), the power can be used to

[187] *Ibid* at para 28.
[188] Morley & Jones, *supra* note 10 at para 24.
[189] *Ibid*.
[190] Wickett, *supra* note 7 at 488.
[191] *Ibid*; *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 370 [*Ontario Hydro*].
[192] *Quebec Railway, Light and Power Co. v Beauport (Town of)*, [1945] SCR 16. See also Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "Works and Undertakings, Communications and Transportation, and Labour Relations: Works and Undertakings: Section 92(10)(c)" (IX.1(2)) at HCL-179 "Works for the General Advantage of Canada" (2023 Reissue); Wickett, *supra* note 7 at 489.
[193] Wickett, *supra* note 7 at 488—89.

reinforce federal jurisdiction.[194] This was in fact attempted by Senator Douglas Black in the context of the TMX Project. On February 15, 2018, he introduced Bill S-245, *An Act to declare the Trans Mountain Pipeline Project and related works to be for the general advantage of Canada* to the Senate of Canada.[195]

At the Second Reading of Bill S-245 in the Senate, Senator Black opined that even though the federal government has clearly established authority over interprovincial pipelines, invoking the federal declaratory power contained in paragraph 92(10)(c) of the *Constitution Act, 1867* is necessary to put the federal government "in the position to take what action is required to get the pipeline built."[196] In his view, the Bill would reaffirm federal jurisdiction and effectively bring "all local roads, local bridges, power connections, storage facilities and anything related to the construction, operation or maintenance of the pipeline" under federal jurisdiction.[197] Consequently, the Bill would shield the TMX Project from what he described as British Columbia's strategy to "wear Kinder Morgan down" through endless legal challenges.[198]

It should be noted that the declaratory power is not without its critics.[199] In response to Senator Black's comments, Senator André Pratte affirmed that while he believed that the TMX Project is for the general advantage of Canada, "Bill S-245 is not a solution; it's an illusion. It would do nothing to resolve the legal issues involved and it would intensify the political crisis."[200]

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[194] See Dwight Newman, "Written Submission to Standing Senate Committee on Transport and Communications Re Bill S-245" (8 May 2018) at 5, online (pdf): <https://sencanada.ca/content/sen/committee/421/TRCM/Briefs/Brief_DwightNewman_e.pdf>.
[195] 1st Sess, 42nd Parl, 2018 [Bill S-245].
[196] "Bill S-245, An Act to declare the Trans Mountain Pipeline Project and related works to be for the general advantage of Canada", 2nd Reading, *Senate Debates*, 42-1, No 190 (27 March 2018) at 1740 (Hon Douglas Black), online: <https://sencanada.ca/en/content/sen/chamber/421/debates/190db_2018-03-27-e?language=e#78>.
[197] *Ibid* at 1730.
[198] *Ibid* at 1740.
[199] See e.g. Andrée Lajoie, *Le pouvoir déclaratoire du Parlement : augmentation discrétionnaire de la compétence fédérale au Canada* (Montreal : Les Presses de L'Université de Montréal, 1969).
[200] "Bill S-245, An Act to declare the Trans Mountain Pipeline Project and related works to be for the general advantage of Canada", 2nd Reading, *Senate Debates*, 42-1, No 193 (17 April 2018) at 1650 (Hon André Pratte), online:

The federal government already has jurisdiction over interprovincial works and undertakings under paragraph 92(10)(a). This includes any local work or undertaking that is "functionally integrated and subject to common management, control and direction" with a federal project, or any local work or undertaking is "essential, vital and integral" to such a project.[201] Thus, in Senator Pratte's view, "the declaratory power is not immune to litigation" and the adoption of Bill S-245 "would be providing a whole new array of delay tactics and stratagems for the Government of British Columbia to take advantage of."[202]

Ultimately, these debates about the need for Bill S-245 became purely theoretical because while the Bill was passed by the Senate without amendment on May 22, 2018, it was subsequently defeated in the House of Commons on October 24, 2018.[203]

2.1.2 The Environment

In 1867, the framers of the Constitution did not consider that the protection of the environment would develop into one of the most pressing issues of our times. Consequently, "environmental protection" was not included as a clearcut competency falling under the jurisdiction of a specific order of government.[204] Instead, jurisdiction over environmental matters is shared between the federal and provincial governments, with each order of government intervening indirectly through other related powers. The federal government has jurisdiction over federally-owned public property (subsection 91(1A)), navigation and shipping (subsection

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<https://sencanada.ca/en/content/sen/chamber/421/debates/193db_2018-04-17-e#91> [*Senate Debates*, Hon André Pratte].

[201] *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 46, 49. See also Lindsay Bec, Emily Chan & Matthew D. Keen, "Jurisdiction over the Coastal GasLink project" (August 2019), online: *Norton Rose Fulbright LLP* <https://www.nortonrosefulbright.com/fr-ca/centre-du-savoir/publications/0753ec21/jurisdiction-over-the-coastal-gaslink-project>; *ibid* at 1640.

[202] *Senate Debates*, Hon André Pratte, *supra* note 200 at 1640.

[203] "Bill S-245, An Act to declare the Trans Mountain Pipeline Project and related works to be for the general advantage of Canada", 2nd reading, *House of Commons Debates*, 42-1, No 341 (24 October 2018) at 1805—10 (Hon Geoff Regan), online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-341/hansard>.

[204] See Saad & Hoste, *supra* note 175 at 1—2.

91(10)), the sea coast and inland fisheries (subsection 91(12)), Indians and lands reserved for Indians (subsection 91(24)), criminal law (subsection 91(27)), interprovincial and international works and undertakings (subsections 91(29) and 92(10)), and laws for the peace, order and good government of Canada (section 91 preamble). The provinces can make laws in relation to the management of provincially-owned public lands (subsection 92(5)), municipal institutions (subsection 92(8)), local works and undertakings (subsection 92(10)), property and civil rights within the province (subsection 92(13)), matters that are of a local or private nature (subsection 92(16)) and various matters related to the development of non-renewable resources and the generation of electricity in the province (section 92A).[205] Each of these heads of power could be relevant with regard to regulating interprovincial pipeline projects.[206]

In response to the burgeoning environmental movement in the 1960s and 1970s, provinces began to enact pollution control and environmental assessment laws.[207] Provincial authority to adopt general pollution laws has not been seriously contested since the Ontario High Court's decision on the matter in 1973.[208] However, the debate regarding the extent of federal jurisdiction over environmental protection endures and remains contentious to this day.[209]

Recently, a new wave of federalism jurisprudence concerning jurisdictional wrangling over environmental protection policy has arisen. In the *GHG Reference*, the Supreme Court of Canada upheld a federal statute setting minimum standards of greenhouse gas pricing under the federal government's power to legislate for the peace, order and good government of Canada.[210] Conversely, in the *Reference re Impact Assessment Act*, the Supreme Court ruled that a large

[205] See Wickett, *supra* note 7 at 489; Downey et al, *supra* note 15 at paras 36—37; *ibid* at 2.
[206] See Wickett, *supra* note 7 at 489.
[207] *EMA Reference*, *supra* note 13 (Factum, Appellant at para 49 [FOA]); Morley & Jones, *supra* note 10 at para 50.
[208] *Regina v Lake Ontario Cement Ltd et al*, [1973] 2 OR 247 (ONSC). Provincial pollution legislation has even been held to apply to spills caused by interprovincial pipelines, see *R v B. Cusano Contracting Inc et al*, 2011 BCPC 348.
[209] FOA, *supra* note 207 at para 49; Morley & Jones, *supra* note 10 at para 50.
[210] *Supra* note 158.

portion of the new federal environmental assessment process was *ultra vires* as it constituted an instance of federal overreach into provincial jurisdiction.[211] The courts have also recently considered the interaction between provincial and municipal environmental regulations and interprovincial pipelines in the context of the TMX Project, which will be further discussed in the following section.

2.2 TMX Project Decisions: Operability and Applicability of Provincial and Local Regulations to the TMX Project

The constitutionality of federal and provincial laws is first assessed by determining the validity of each law under the pith and substance doctrine.[212] Then, doctrines like federal paramountcy and interjurisdictional immunity address conflicts arising from jurisdictional overlap. Federal paramountcy concerns the "operability" of legislation, while interjurisdictional immunity addresses its "applicability."[213]

The modern doctrine of federal paramountcy, as established in *Canadian Western Bank*[214] and reaffirmed in *Moloney*,[215] applies when two types of conflicts arise: "(1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."[216] With respect to the first branch of the paramountcy test, an operational conflict can only be found where "where one enactment says 'yes' and the other says 'no,'" that is where

[211] 2023 SCC 23 [*IAA Reference*].
[212] *Alberta (AG) v Moloney*, 2015 SCC 51 at para 17 [*Moloney*].
[213] Wickett, *supra* note 7 at 491. Since municipalities derive their powers from provincial governments, "there is no formal distinction between the two in terms of constitutional division of powers" (Benoît Frate & David Robitaille, "A Pipeline Story: The Evolving Autonomy of Canadian Municipalities" (2021) 34 J L & Soc Pol'y 94, n 51). Therefore, any conclusions regarding the application of the federal paramountcy and interjurisdictional immunity doctrines in the context of provincial and federal jurisdiction also apply to municipalities, and vice versa.
[214] *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*].
[215] *Supra* note 212. See also Martin Z. Olszynski, "Testing the Jurisdictional Waters: The Provincial Regulation of Interprovincial Pipelines" (2018) 23:1 Rev Const Stud 91 at 95.
[216] *Moloney*, *supra* note 212 at para 18.

"compliance with one is defiance of the other."[217] As for the "frustration of federal purpose" branch, "it is useful to characterize the federal regime as merely permissive or as conferring a positive entitlement or right. Permissive regimes … are more tolerant of supplementation by stricter provincial regimes, whereas those that confer a positive entitlement are less so."[218]

In the presence of either type of conflict, "the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility."[219] As a result, "the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists."[220] Courts should be cautious in identifying such conflicts, as the principle of cooperative federalism urges that federal law be interpreted in a manner that allows both statutes to coexist whenever possible.[221]

The current understanding of interjurisdictional immunity, initially outlined in *Canadian Western Bank* and then reiterated in *Rogers*,[222] is that it "protects the 'core' of a legislative head of power from being impaired by a government at the other level."[223] While the Supreme Court has suggested that interjurisdictional immunity could be used to uphold provincial jurisdiction,[224] it has predominantly been applied to shield federal powers from provincial interference.[225] The

[217] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191.
[218] Olszynski, *supra* note 215 at 96. See also *Moloney*, *supra* note 212 at para 26.
[219] *Canadian Western Bank*, *supra* note 214 at para 69.
[220] *Moloney*, *supra* note 212 at para 29.
[221] Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "Constitutional Interpretation: Pith and Substance, Double Aspect, Paramountcy and Interjurisdictional Immunity: Federal Paramountcy" (IV.7) at HCL-101 "Two Branches" (2023 Reissue). See also *Saskatchewan (AG) v Lemare Lake Logging Ltd.*, 2015 SCC 53 at paras 20—21; *Canadian Western Bank*, *supra* note 214 at para 75.
[222] *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 [*Rogers*]. See Olszynski, *supra* note 215 at 96.
[223] *Rogers*, *supra* note 222 at para 59.
[224] Kerry Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity" (2019) 52:2 UBC L Rev 697 at 714 (HeinOnline), referring to, among others, *Canadian Western Bank*, *supra* note 214 at paras 34—35, 67; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 65. Professor Wilkins argued, however, that a more effective approach is to view the interjurisdictional immunity doctrine as safeguarding only federal cores of power from provincial encroachment (*ibid* at 717—23).
[225] *Canadian Western Bank*, *supra* note 214 at para 45.

application of this doctrine consists of two steps, as explained by Justice Guy Régimbald and John J. Wilson:

> The first step is to determine whether the provincial law trenches on the protected "core" of a federal competence. If it does, the second step is to determine whether the provincial law's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity. The test is whether the subject comes within the essential jurisdiction — the "basic, minimum and unassailable content" — of the legislative power in question. The core of a federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred". Under these circumstances, the provincial law is held to be inapplicable to the extent that it impairs the vital part of the federal subject-matter.[226]

In *Canadian Western Bank*, Binnie and Lebel JJ. suggested that interjurisdictional immunity should be applied with reserve[227] as it runs counter to the "dominant tide" of Canadian federalism, which favours overlapping federal and provincial powers.[228] Accordingly, it should not be "a doctrine of first recourse in a division of powers dispute,"[229] but rather "should in general be reserved for situations already covered by precedent."[230] This approach does not exclude its application to interprovincial pipelines, as the doctrine has an extensive record of being applied to federal undertakings falling under subsection 92(10) of the *Constitution Act, 1867*.[231]

However, legal scholars have grappled with the jurisdictional uncertainty surrounding the interplay between provincial environmental protection legislation and federal undertakings.[232] For instance, after conducting a comprehensive historical review of the case law dealing with the application of provincial laws to federal undertakings, Morley and Jones concluded that the

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[226] Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "Constitutional Interpretation: Pith and Substance, Double Aspect, Paramountcy and Interjurisdictional Immunity: Interjurisdictional Immunity" (IV.8) at HCL-104 "Origin" (2023 Reissue).
[227] *Canadian Western Bank*, *supra* note 214 at para 42. See also *Rogers*, *supra* note 222 at para 60.
[228] *Canadian Western Bank*, *supra* note 214 at paras 36—37, citing *OPSEU v Ontario (AG)*, [1987] 2 SCR 2 at 18 [emphasis added].
[229] *Canadian Western Bank*, *supra* note 214 at para 47.
[230] *Ibid* at para 77.
[231] Olszynski, *supra* note 215 at 97.
[232] Saad & Hoste, *supra* note 175 at 2.

Supreme Court has been inconsistent in how it immunizes federal undertakings from provincial and local regulations.[233] It has alternatively relied on different doctrinal tools, such as paramountcy and interjurisdictional immunity, without a clear justification as to why it chose one over the other.[234] For their part, Downey et al argued that courts have struggled to solve conflicts between national natural resource development and provincial or local environmental concerns.[235] This creates "legal and regulatory uncertainty."[236]

In the following paragraphs, the operability and applicability of provincial and local regulations to federal undertakings applied by the NEB and the courts in the context of the City of Burnaby and British Columbia's opposition to the TMX Project will be examined. I will then summarize the current state of the law concerning the operability and applicability of provincial and local regulations to federal undertakings and the ongoing ambiguities that persist.

2.2.1 Ruling No 40

As part of the application process for a Certificate of Public Convenience and Necessity under the *NEBA*,[237] Kinder Morgan informed the NEB that its preferred routing for the TMX Project was through Burnaby Mountain.[238] Consequently, the Board informed Kinder Morgan that geotechnical, engineering, socio-economic and environmental studies would be required before the Board can make its recommendation to the Governor in Council.[239] Kinder Morgan attempted to obtain Burnaby's permission before entering onto its land to conduct geophysical surveys and

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[233] Morley & Jones, *supra* note 10 at para 68.
[234] *Ibid*.
[235] Downey et al, *supra* note 15 at paras 123—24.
[236] *Ibid* at para 85.
[237] *Supra* note 25.
[238] *Application for the Trans Mountain Expansion Project* (23 October 2014), Ruling No 40 at 2, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2541380/A97%2D1_%2D_Ruling_No._40_%2D_Trans_Mountain_notice_of_motion_and_Notice_of_Constitutional_Question_dated_26_September_2014_%2D_A4D6H0.pdf?nodeid=2540944&vernum=-2> [*Ruling No 40*].
[239] *Ibid*.

to drill two geotechnical bore holes, even though paragraph 73(a) of the *NEBA* gives the company the power to access land for survey and examination purposes without the landowner's consent.[240] However, after a month of unsuccessful communications with Burnaby, Kinder Morgan started its work. Shortly thereafter, its employees were issued an Order to Cease Bylaw Contraventions and a Bylaw Notice for violations of the *Burnaby Parks Regulation Bylaw 1979*[241] and the *Burnaby Street and Traffic Bylaw 1961*.[242] The *Parks Bylaw* prohibits damage to parks, and the *Traffic Bylaw*, among other things, prohibits the excavation in or the construction of works upon highways. In response, Kinder Morgan filed a motion with the Board seeking an order that directs the City of Burnaby to permit temporary access to its land so that the company can conduct the required geotechnical surveys and examinations.[243]

In its decision, the NEB granted the order and decided that both the doctrines of federal paramountcy and interjurisdictional immunity render the *Parks Bylaw* and the *Traffic Bylaw* inoperative and inapplicable to the extent that they prevent Trans Mountain from exercising its powers under paragraph 73(a) of the *NEBA*. With respect to the *Parks Bylaw*, the NEB wrote:

> In the Board's view there is a clear conflict between the Parks Bylaw and paragraph 73(a) of the NEB Act. Section 5 of the Parks Bylaw states that "no person shall cut, break, injure, damage, deface, destroy, foul or pollute any personal property or any tree, shrub, plant, turf or flower in or on any park". … While the Board accepts that the Parks Bylaw has an environmental purpose, the application of the bylaws and the presence of Burnaby employees in the work safety zone had the effect of

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[240] *Ibid* at 3. In *Ruling No 28*, the Board confirmed that Trans Mountain's power under paragraph 73(a) of the *NEBA* to "make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline" included "the power to enter into and on Burnaby land without Burnaby's agreement" (*Application for the Trans Mountain Expansion Project* (19 August 2014), Ruling No 28 at 5, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2498607/A73%2D1_%2D_Ruling_No._28_%2D_A4A2V2.pdf?nodeid=2498824&vernum=-2>). See also Olszynski, *supra* note 215 at 99.

[241] City of Burnaby, by-law No 7331 [*Parks Bylaw*].

[242] City of Burnaby, by-law No 4299 [*Traffic Bylaw*]. Soon thereafter, Burnaby sought an interlocutory injunction from the British Columbia Supreme Court to enjoin Trans Mountain from violating its by-laws. However, the application was dismissed (*Burnaby (City) v Trans Mountain Pipeline ULC*, 2014 BCSC 1820, leave to appeal to BCCA refused, 2014 BCCA 465. Burnaby continued in its efforts to stop Trans Mountain's engineering work, and to this end, filed an application to vary the order of Neilson J.A., which was denied (*Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCCA 78).

[243] *Ruling No 40*, *supra* note 238 at 1.

> *frustrating the federal purpose* of the NEB Act to obtain necessary information for the Board to make a recommendation under section 52 of the NEB Act.[244]

The Board similarly concluded that there was an operational conflict between the *Traffic Bylaw* and the federal law on the basis of the paramountcy doctrine. The Board explained that dual compliance was impossible because while the *Traffic Bylaw* "does allow Burnaby Council to approve work along a highway or to impose conditions regarding such work, in this case… Burnaby refused to consider Trans Mountain's request."[245] However, the Board explicitly highlighted the following:

> *This is not to suggest that a pipeline company can generally ignore provincial law or municipal bylaws*. The opposite is true. *Federally regulated pipelines are required*, through operation of law and the imposition of conditions by the Board, *to comply with a broad range of provincial laws and municipal bylaws*.[246]

The Board also ruled in the alternative that the interjurisdictional immunity doctrine applied and the by-laws were inapplicable to Trans Mountain's surveying work, as the "routing of the interprovincial pipeline is within the core of a federal power over interprovincial pipelines."[247]

Burnaby sought leave to appeal this ruling to the Federal Court of Appeal, but that leave was denied without reasons.[248] Burnaby also sought to challenge the NEB's decision at the British Columbia Supreme Court.[249] That challenge was dismissed as an abuse of process.[250] Nevertheless, the Court proceeded to address the constitutional issues under dispute in case of further appeals,

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[244] *Ibid* at 12 [emphasis added].
[245] *Ibid* at 13.
[246] *Ibid* [emphasis added].
[247] *Ibid* at 14.
[248] *Ruling No 40*, *supra* note 238, leave to appeal to FCA refused, *City of Burnaby v The National Energy Board and Others*, 14-A-63 (12 December 2014). See also Olszynski, *supra* note 215 at 101.
[249] *Burnaby (City) v Trans Mountain Pipeline ULC*, 2015 BCSC 2140, aff'd 2017 BCCA 132 [*Burnaby v Trans Mountain*].
[250] *Ibid* at para 49.

and found that "Burnaby is precluded from seeking to apply its bylaws so as to impede or block any steps Trans Mountain must take in order to safely prepare and locate the Expansion Project."[251]

2.2.2 Coastal First Nations

In *Coastal First Nations*,[252] the British Columbia Supreme Court held that an equivalency agreement entered into between the British Columbia Environment Assessment Office ("**EAO**") and the NEB,[253] pursuant to which an environmental assessment by the NEB constituted an equivalent assessment under the provincial *Environmental Assessment Act*,[254] was "invalid to the extent that it purports to remove the need for an [environmental assessment certificate ("**EAC**")] pursuant to the *EAA*."[255] Justice Koenigsberg found that while provincial authorities could rely on the federal environmental assessment in accordance with the equivalency agreement, they cannot abdicate their own decision-making responsibility under the *EAA*.[256] Therefore, they must make their own determination as to whether to issue an EAC for the Northern Gateway pipeline project.

In the course of her reasons, Koenigsberg J. rejected Northern Gateway's argument that the entire *EAA* is invalid because the province can refuse to issue an EAC pursuant to section 17 of the *EAA*: "While I agree that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding, I do not agree with the extreme position of [Northern Gateway] that this invalidates the *EAA* as it applies to the Project."[257]

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[251] *Ibid* at para 81.
[252] *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 [*Coastal First Nations*].
[253] *Environmental Assessment Equivalency Agreement* (21 June 2010), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/agreement-with-the-national-energy-board/eao-neb-environmental-assessment-equivilancy-agreement.pdf> [Equivalency Agreement].
[254] SBC 2002, c 43 [*EAA*], as it appeared at the time of this decision. See *ibid*, art 2.
[255] *Coastal First Nations*, *supra* note 252 at para 183.
[256] See British Columbia, Office of the Premier, Freedom of Information Request, *Regarding the event involving Minister Polak and Premier Clark and news releases of Jan. 11, 2017 - Five conditions secure coastal protection and economic benefits for all British Columbians and Ministers issue environmental assessment certificate for Trans Mountain Pipeline Project (Date Range for Record Search: From 12/01/2016 to 01/11/2017)* (13 July 2017) at 151, online (pdf): <http://docs.openinfo.gov.bc.ca/Response_Package_OOP-2017-70216.pdf>.
[257] *Coastal First Nations*, *supra* note 252 at para 55.

She also distinguished *Ruling No 40* on several grounds, including the fact that the municipal bylaws in that case contained prohibitions and substantially affected the location and routing of the pipeline, both of which are at the core of the federal power over interprovincial undertakings.[258] Rather, she concluded that at this point in time, British Columbia's environmental assessment regime did not in any way prohibit or render the project inoperative.[259] She characterized the federal environmental assessment laws as "merely permissive"[260] and opined that "there are no obvious problems with the imposition of provincial environmental protection conditions."[261] In other words, "[w]hile the federal law says 'yes with conditions', the provincial law, if conditions were issued, could also say 'yes, with further conditions.'"[262] She added however that questions of paramountcy and interjurisdictional immunity cannot be effectively answered "unless and until specific conditions are imposed" by the province on the EAC.[263]

2.2.3 Reasons MH-081

Following *Coastal First Nations*, British Columbia issued an EAC for the TMX Project, which imposed 37 additional conditions.[264] Kinder Morgan then began to seek the diverse municipal permits that it required to construct the pipeline.[265] However, Burnaby remained

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[258] *Ibid* at paras 64—65. See also Olszynski, *supra* note 215 at 103.
[259] *Coastal First Nations*, *supra* note 252 at para 65.
[260] *Ibid* at para 71. As pointed out by Professor Martin Z. Olszynski, there is some disagreement as to this characterization of the NEB regime (Olszynski, *supra* note 215 at 110—11). The courts in *Burnaby v Trans Mountain*, *supra* note 249 at para 60, and *Vancouver (City) v British Columbia (Environment),* 2018 BCSC 843 at paras 29, 128—29, 142, 149, 171, described the regime as comprehensive. Similarly, in *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 51 [*EMA Reference (BCCA)*], Newbury J.A. asserted that Koenigsberg J.'s description of the federal legislation as "merely permissive" was "questionable."
[261] *Coastal First Nations*, *supra* note 252 at para 73.
[262] *Ibid*.
[263] *Ibid*. See also *ibid* at para 76.
[264] British Columbia, *Environmental Assessment Certificate E17-01*, issued by the Honourable Mary Polak, Minister of Environment and the Honourable Rich Coleman, Minister of Natural Gas Development (Victoria: EAO, 10 January 2017), online: <https://projects.eao.gov.bc.ca/api/document/5892318eb637cc02bea1647f/fetch/Certificate%20%23E17-01.pdf> [EAC E17-01].
[265] The NEB incorporated Kinder Morgan's commitment to obtain these municipal permits as a condition in the Certificate of Public Convenience and Necessity OC-064 it issued for the TMX Project. See Canada, National Energy Board, *Certificate of Public Convenience and Necessity OC-064* (Calgary: NEB, 1 December 2016) at 6, online:

strongly opposed to the Project and, according to Kinder Morgan, caused significant construction delays through its unreasonable permitting processes.[266] Thus, Kinder Morgan brought another motion before the NEB, this time asking it to determine if "the *implementation* of an otherwise applicable provincial or municipal regime [could] cause the regime to run afoul of the principles of paramountcy and interjurisdictional immunity."[267] The NEB answered in the affirmative.[268]

While the NEB concluded that there was no operational conflict under the first branch of the paramountcy doctrine, it held that Burnaby's unreasonable delays in processing the required permits frustrated the purpose of the NEB scheme under the second branch of the doctrine.[269] The NEB then went on to consider the doctrine of interjurisdictional immunity. It agreed with Kinder Morgan's argument that "the matters of *when and where* the Project can be carried out, and its orderly development, fall within the 'core' of federal jurisdiction over interprovincial undertakings, and are vital to the Project."[270] In doing so, the NEB highlighted that not all delays in provincial or municipal permitting processes will trigger the doctrine of interjurisdictional

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<https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2981674/3084359/A80871%2D3_NEB_%2D_Certificate_OC%2D064_%2D_Trans_Mountain_TMX_%2D_OH%2D001%2D2014.pdf?nodeid=3083938&vernum=-2> [Certificate OC-064]. Condition 2 of this Certificate reads: "Without limiting Conditions 3, 4 and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding."

[266] The NEB ultimately agreed with Kinder Morgan and concluded that Burnaby's process to review the permit applications was not reasonable (*Application for the Trans Mountain Expansion Project* (18 January 2018), Reasons for Decision – NEB Order MO-057-2017 at 13—14, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2981674/3350281/3422762/3433834/A89360-1_NEB_%E2%80%93_Trans_Mountain_%E2%80%93_TMX_%E2%80%93_NCQ_%E2%80%93_Reasons_for_Decision_-_A5Z3V6.pdf?nodeid=3436250&vernum=-2> [*Reasons MH-081*]). See also Olszynski, *supra* note 215 at 105.

[267] See Olszynski, *supra* note 215 at 105 [emphasis in original].

[268] The NEB issued Order MO-057-2017 on December 6, 2017 (*Application for the Trans Mountain Expansion Project* (6 December 2017), Order MO-057-2017, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2981674/3350281/3351088/3393185/A88474-3_NEB_-_Order_MO-057-2017_-_Trans_Mountain_Expansion_Project_-_NCQ_-_A5Y0K4.pdf?nodeid=3392526&vernum=-2>), and then released the written reasons for its decision on January 18, 2018 (*Reasons MH-081*, *supra* note 266).

[269] *Reasons MH-081*, *supra* note 266 at 23—24. See also Olszynski, *supra* note 215 at 106—07.

[270] *Reasons MH-081*, *supra* note 266 at 25.

immunity, but rather only those that "constitut[e] a sufficiently serious entrenchment on a protected federal power."[271]

Therefore, the NEB absolved Kinder Morgan from compliance with two sections of the City of the Burnaby's by-laws requiring the company to obtain preliminary plan approvals and tree-cutting permits before construction on the pipeline could begin.[272] Further, the NEB established a generic process that it will use to consider any future disputes relating to Kinder Morgan's compliance with provincial or municipal authorizations or permits for the TMX Project.[273] Once again, British Columbia sought leave to appeal to the Federal Court of Appeal, but the Court again denied such leave without reasons.[274]

We now come to the *EMA Reference* decision. Given that the Supreme Court summarily dismissed the appeal from the bench for the unanimous reasons of the British Columbia Court of Appeal,[275] we must look at this latter decision as the Supreme Court's own final pronouncement on the subject.[276]

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[271] *Ibid*. The NEB compared the TMX Project components at issue in the instance before it to those at issue in *Rogers*: "Just as the delay in *Rogers* prevented the company from constructing its federally approved network to the point of impairment, the Board finds a similar situation to exist here" (*ibid*).

[272] *Ibid* at 26. The impugned by-laws are City of Burnaby, by-law No 4742, *Zoning Bylaw* (1965), and City of Burnaby, by-law No 10482, *Tree Bylaw* (1996). See also Canada Energy Regulator, News Release, "NEB issues ruling on process for future permitting matters, and reasons for decision on Trans Mountain Expansion Project constitutional question" (18 January 2018), online: <https://www.canada.ca/en/canada-energy-regulator/news/2018/01/neb_issues_rulingonprocessforfuturepermittingmattersandreasonsfo.html>.

[273] *Application for the Trans Mountain Expansion Project* (18 January 2018), Board Decision – Notice of motion dated 14 November 2017 regarding future NEB process for permitting matters, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2981674/3436359/A89357-1_NEB_%E2%80%93_Trans_Mountain_%E2%80%93_TMX_%E2%80%93_Decision_on_Motion_-_A5Z3U5.pdf?nodeid=3435697&vernum=-2>, in response to Kinder Morgan's notice of motion requesting same.

[274] *Reasons MH-081*, *supra* note 266, leave to appeal to FCA refused, *City of Burnaby v Trans Mountain Pipeline ULC, et al*, 18-A-9 (23 March 2018), leave to appeal to SCC refused, 38104 (23 August 2018).

[275] *EMA Reference (SCC)*, *supra* note 13, aff'g *EMA Reference (BCCA)*, *supra* note 260.

[276] Morley & Jones, *supra* note 10 at para 91.

2.2.4 EMA Reference

As was discussed in chapter 1, amid the rising tensions surrounding the planned TMX Project, the Government of British Columbia filed a constitutional reference case before the British Columbia Court of Appeal on the issue of whether the province had the authority to move forward with its proposal to restrict the transport of diluted bitumen in the province. Specifically, the subject of the reference was the Government of British Columbia's proposed amendments to the *Environmental Management Act*,[277] which consisted of the addition of a Part 2.1 addressing "hazardous substance permits" ("**Proposed Amendments**").[278] Section 22.1 set out the dual objectives of the Proposed Amendments: (1) to protect British Columbia's environment and the human health and well-being of British Columbians from the adverse effects of hazardous substances; and (2) to implement the polluter pays principle.[279]

Section 22.3 of the Proposed Amendments provided as follows:

> (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so.
>
> (2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.[280]

Column 1 of the Schedule listed only "heavy oil" as a "Substance," which according to the definition based on density set out in Column 2, "includes most forms of heavy crude oil and all

[277] *EMA*, *supra* note 45.
[278] See *EMA Reference (BCCA)*, *supra* note 260 at para 37.
[279] *Ibid*, Schedule I, s 22.1.
[280] *Ibid*, Schedule I, s 22.3. A person who contravenes this section is subject to the enforcement mechanisms set out in sections 22.7 and 22.8. The Proposed Amendments do not apply to a substance on a ship. It would be difficult for the province to attempt to legislate on that subject, given that "Navigation and Shipping" fall under federal jurisdiction by virtue of subsection 91(10) of the *Constitution Act, 1867* (see *ibid* at para 42).

bitumen and blended bitumen products."[281] Column 3 defined the "Minimum Amount of Substance" as "[t]he largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017." Thus, any person who did not have possession, charge or control of heavy oil in the province between the years 2013 to 2017 would have been prohibited from possessing or controlling any amount of heavy oil in the province in the future without a hazardous substance permit.[282]

The Proposed Amendments provided that on application, a director may issue a hazardous substance permit to the applicant.[283] Before issuing the permit, the director may impose one or more of the requirements listed in subsection 22.4(2) on the applicant, including, for example, providing the director with information regarding the risks to human health or the environment that would result from a potential heavy oil spill.[284] In addition, the director may attach one or more conditions to the permit relating to the protection of human health or the environment or to the impacts of a heavy oil spill.[285] Pursuant to section 22.6, failure to abide by any such condition would have resulted in the suspension or cancellation of the permit.[286]

British Columbia referred the following three questions regarding the constitutionality of the Proposed Amendments to its Court of Appeal for consideration:

1. Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the [Proposed Amendments]?

2. If the answer to question 1 is yes, would the [Proposed Amendments] be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?

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[281] *Ibid* at para 41.
[282] *Ibid* at para 42.
[283] *Ibid*, Schedule 1, s 22.4(1). The term "director" is defined in subsection 1(1) of the *EMA*.
[284] *Ibid*, Schedule 1, s 22.4(2).
[285] *Ibid*, Schedule1, s 22.5.
[286] *Ibid*, Schedule 1, s 22.6.

3. If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the [Proposed Amendments] inoperative?[287]

Canada submitted "that Part 2.1 is aimed specifically at the TMX project."[288] In relying on the context surrounding the adoption of the Proposed Amendments as well as the text of its provisions, the federal government argued that the amendment was "designed primarily to frustrate the construction and operation of the TMX Project, an interprovincial undertaking whose purpose is to transport increased quantities of heavy oil produced in Alberta through BC for export overseas."[289] In fact, the Proposed Amendments would in effect only *actually apply* to the heavy oil that would be carried via the TMX Project.[290] Thus, Canada characterized the pith and substance of the proposed legislation as the "regulation of interprovincial undertakings that effect oil transportation between provinces,"[291] which falls within the federal government's exclusive constitutional jurisdiction.[292]

For its part, British Columbia argued that the purpose of the Proposed Amendments was to regulate the release of hazardous substances into the environment, which falls under the province's jurisdiction with respect to "Property and Civil Rights in the Province."[293] According to the province, any effect they may have on the TMX Project is "merely incidental."[294] The province also submitted that if the Court considered the Proposed Amendments to be *ultra vires*, their validity should be saved under the ancillary powers doctrine.[295] In addition, the province contended

[287] *Ibid* at para 47.
[288] *Ibid* at para 55.
[289] *Ibid*.
[290] *Ibid* at para 56.
[291] *Ibid* at para 57.
[292] *Constitution Act, 1867*, ss 92(10) and 91(29).
[293] *Ibid*, s 92(13). In its factum on appeal to the Supreme Court, British Columbia asserted that the subject matter of the Proposed Amendments also relates to public lands (subsection 92(5)), non-renewable natural resources and forestry resources (subsection 92A(1)), municipal institutions (subsection 92(8)) and matters of a local or private nature (subsection 92(16)) (FOA, *supra* note 207 at para 67).
[294] *EMA Reference (BCCA)*, *supra* note 260 at para 58.
[295] *Ibid* at para 60.

that the validity of the Proposed Amendments should be upheld pursuant to the double aspect doctrine.[296]

The Court of Appeal conducted an extensive analysis of the "complex web" of federal statutes that regulate the interprovincial transportation of petroleum in Canada[297] as well as the provincial statutes aimed at environmental protection.[298] It also undertook a review of the case-law dealing with the applicability of provincial laws to interprovincial undertakings.[299] Ultimately, the Court held that the Proposed Amendments were *ultra vires* because they were, in pith and substance, directed toward the regulation of "the carriage of heavy oil [through] an interprovincial undertaking."[300] The legislation thus falls under Parliament's jurisdiction in respect of federal undertakings pursuant to subsection 92(10) of the *Constitution Act, 1867*. Since the Court disposed of the reference on the basis of the validity question, it was unnecessary to address the applicability and operability of the legislation.

The Court relied on the 1988 *Bell Canada* trilogy,[301] which considered the application of the interjurisdictional doctrine, to address the question of when valid provincial environmental legislation crosses the line to impermissibly regulate a federal undertaking:

> In my view, Part 2.1 does cross the line between environmental laws of general application and the regulation of federal undertakings. Even if it were not intended to 'single out' the TMX pipeline, it has the potential to affect (and indeed 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and

[296] *Ibid* at para 61. In its factum on appeal to the Supreme Court, British Columbia argued that "[t]he Court of Appeal's characterization of the double aspect argument as being made in the alternative, and its failure to fully address the ancillary powers argument, suggests that it may not have recognized that these are two distinct arguments" (FOA, *supra* note 207 at para 105).
[297] *EMA Reference (BCCA)*, *supra* note 260 at paras 20ff.
[298] *Ibid* at paras 28ff.
[299] *Ibid* at paras 65ff.
[300] *Ibid* at para 105.
[301] *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749; *Canadian National Railway Co v Courtois*, [1988] 1 SCR 868; *Alltrans Express Ltd v British Columbia (Workers' Compensation Board)*, [1988] 1 SCR 897.

> exporter of oil. It is legislation that in pith and substance relates to, and relates *only* to, what makes the pipeline "specifically of federal jurisdiction."[302]

British Columbia appealed the Court of Appeal's decision to the Supreme Court of Canada. In total, twenty different parties intervened in the proceedings, including the Provinces of Ontario, Quebec, Saskatchewan, and Alberta, as well as industry bodies, environmental groups, Indigenous groups and the cities of Burnaby and Vancouver.[303]

British Columbia argued that the Court of Appeal failed to consider the environmental aspect of the Proposed Amendments, which would fall under provincial jurisdiction.[304] In addition, the province claimed that the Court "did not address the constitutional doctrines used to coordinate between federal and provincial jurisdiction in areas of double aspect, namely interjurisdictional immunity and paramountcy."[305] If it had properly applied these doctrines, the Court would have found nothing in the Proposed Amendments that impaired the core of federal jurisdiction or conflicted with existing federal law.[306] In response, Canada reiterated the arguments it had presented at the Court of Appeal and complemented them with that Court's reasons.[307]

As previously mentioned, only thirty minutes after the end the hearing, the Supreme Court dismissed the appeal for the same reasons as the British Columbia Court of Appeal.[308] According to Downey et al, the speed with which the Supreme Court dismissed the reference "may be a message that we're nearing the limits of cooperative federalism" and that the flexible interpretation

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[302] *EMA Reference (BCCA)*, *supra* note 260 at para 101 [emphasis in original]. See also Downey et al, *supra* note 15 at para 100.
[303] See Downey et al, *supra* note 15 at para 102.
[304] FOA, *supra* note 207 at para 45.
[305] *Ibid* at para 46.
[306] *Ibid*.
[307] *EMA Reference*, *supra* note 13 (Factum, Respondent at para 105).
[308] *EMA Reference (SCC)*, *supra* note 13. See Downey et al, *supra* note 15 at para 106.

of the division of powers does not go so far as to allow the provinces "to chip away at the seemingly well-established federal jurisdiction over interprovincial undertakings."[309]

For their part, Morley and Jones would disagree with the qualification of federal jurisdiction over interprovincial undertakings as being "seemingly well-established." Rather, they argued that "[a]mbiguities abound"[310] and they lamented the fact that the Supreme Court did not take the occasion to clarify this complicated field of law.[311] For instance, they pointed out that despite the court explicitly rejecting the "enclave" theory,[312] one sentence "seems to be enclave-in-all-but name":[313] "Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated."[314] Morley and Jones theorized that "since Newbury J.A. denied she was reviving Chief Justice Laskin's enclave theory *or* applying an interjurisdictional immunity one, *some provincial laws must surely be acceptable*."[315]

By dismissing British Columbia's appeal without substantive reasons, the Supreme Court failed to shed light on which provincial laws would be acceptable. The narrow interpretation of the case is that the Proposed Amendments were held to be unconstitutional because, on the facts of the case, they impermissibly discriminated against the TMX Project.[316] However, Newbury J.A.'s comments can also be used to justify a broader understanding of the case, namely that "a need for 'uniformity' restricts almost any provincial environmental law from applying to federal

[309] Downey et al, *supra* note 15 at para 106.
[310] Morley & Jones, *supra* note 10 at para 92. It should be noted that both Morley and Jones participated in British Columbia's litigation team in *EMA Reference (SCC)* (see *ibid*, n 2).
[311] *Ibid* at paras 16, 93, 98.
[312] *EMA Reference (BCCA)*, *supra* note 260 at para 93.
[313] Morley & Jones, *supra* note 10 at para 92.
[314] *EMA Reference (BCCA)*, *supra* note 260 at para 101.
[315] Morley & Jones, *supra* note 10 at para 92 [emphasis added]. British Columbia also makes this argument in its factum on appeal to the Supreme Court (FOA, *supra* note 207 at paras 91—92).
[316] Morley & Jones, *supra* note 10 at paras 14, 93. See *EMA Reference (BCCA)*, *supra* note 260 at paras 101, 103.

transportation operations."[317] Consequently, the status of the interjurisdictional immunity doctrine remains unclear.[318] While it was invoked in the 1988 *Bell Canada* trilogy,[319] and briefly revived in *COPA*,[320] it was only contemplated as an alternative in both *Lacombe*[321] and *Rogers*.[322] The Court of Appeal in *EMA Reference* explicitly warned against conflating the determination of a law's "pith and substance" with deciding whether the law "impairs" a "vital part" of the federal jurisdiction over interprovincial undertakings pursuant to the interjurisdictional immunity doctrine.[323] However, the Court did not seem to heed its own advice. Instead, it invoked the language of both pith and substance and interjurisdictional immunity in conducting its analysis, making it "difficult to identify the interpretive approach it found the most compelling."[324] Thus, as Morley and Jones astutely pointed out:

> Unfortunately, after a century and a half of case law, it is hard to see how we are any wiser than we started. The simple rule that provincial laws about property and civil rights, including environmental laws, do not apply to federal undertakings was contrary to the practice right from the beginning and has never been endorsed. But provincial laws are often found not to apply, and there is no clear doctrinal explanation for when or why.[325]

However, despite there being a consensus that the current constitutional framework is not satisfactorily addressing these issues, legal scholars do not agree on the best approach to resolving the jurisdictional uncertainty regarding the extent to which federal undertakings are immunized from provincial environmental laws.[326] Morley and Jones took up this conceptual challenge of

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[317] Morley & Jones, *supra* note 10 at para 15, see also para 91. See *EMA Reference (BCCA)*, *supra* note 260 at para 101.
[318] *Ibid* at para 97.
[319] *Supra* note 301.
[320] *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39.
[321] *Quebec (AG) v Lacombe*, 2010 SCC 38.
[322] *Rogers*, *supra* note 222.
[323] *EMA Reference (BCCA)*, *supra* note 260 at para 92.
[324] Downey et al, *supra* note 15 at para 101.
[325] Morley & Jones, *supra* note 10 at para 98.
[326] Saad & Hoste, *supra* note 175 at 3.

addressing the question of how provincial laws apply to federal undertakings. They proposed a compelling legal test in which "a default presumption that provincial laws apply" to federal undertakings should exist, with two exceptions to this presumption.[327] The first exception is where the federal government clearly and explicitly immunizes the federal undertaking from provincial laws.[328] The second exception is where the provincial law singles out the federal undertaking and treats it in a discriminatory manner compared to similar provincial projects.[329]

To conclude, the constitutional division of powers between the federal and provincial governments with respect to the regulation of interprovincial pipelines is complicated, to say the least. As described by Morley and Jones, the Judicial Committee first decided that provincial laws applied to federal undertakings, unless the provincial statute discriminated against the federally-regulated industry or "sterilized" its federal status.[330] Subsequently, the Supreme Court introduced the concept of interjurisdictional immunity, which it then backed away from and instead emphatically endorsed cooperative federalism and its emphasis on the overlapping nature of federal and provincial jurisdiction.[331] In more recent cases, the Supreme Court has been "grappling with how to analyze conflicts between national projects and provincial or local environmental rules."[332] It has shown a "strong concern" for immunizing federal undertakings from provincial and local regulations.[333] However, as mentioned earlier, Morley and Jones observed that the Supreme Court "has not hit on a single doctrinal way of doing this. It has relied in turn on

[327] Morley & Jones, *supra* note 10 at para 188.
[328] *Ibid*.
[329] *Ibid*.
[330] *Ibid* at paras 46—47.
[331] *Ibid* at paras 48ff, 62ff.
[332] *Ibid* at para 19.
[333] *Ibid* at para 68.

paramountcy, interjurisdictional immunity and validity analysis in turn, without any clear principle as to why it has chosen one doctrinal route rather than another."[334]

Through it all, we can see that where interprovincial pipelines are concerned, there will be a myriad of interactions between the federal and provincial governments, as both orders of government have jurisdiction and responsibilities with respect to environmental concerns arising out of these large-scale infrastructure projects. The numerous interactions between both orders of government are also evident at the regulatory level, which will be examined next.[335]

2.3 Regulatory and Environmental Approval of the TMX Project

In Canada, interprovincial pipeline initiatives must navigate a complex web of regulatory and environmental approval processes, with both the federal and provincial governments involved. This section offers a summary of the federal regulatory approval process,[336] alongside the federal and provincial environmental approval processes, that applied to the TMX Project.

On August 28, 2019, both the *Canadian Energy Regulator Act*[337] and the *Impact Assessment Act*[338] came into force and substantially altered the operation of Canada's environmental assessment process as well as its regulation of energy projects.[339] The *CERA*

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[334] *Ibid*.
[335] See Wickett, *supra* note 7 at 494.
[336] This thesis only summarizes the federal regulatory approval process under the *NEBA*. Other possible federal permits and approvals required before construction on an interprovincial pipeline project can begin are beyond the scope of this thesis. These permits and approvals may include permits issued by the Canadian Transportation Agency under the *Railway Relocation and Crossing Act*, RSC 1985, c R-4; permits issued by Transport Canada under the *Canada Shipping Act, 2001*, SC 2001, c 26; permits issued by Parks Canada under the *Canada National Parks Act*, SC 2000, c 32; and others. See Wickett, *supra* note 7 at 502—03.
[337] SC 2019, c 28, s 10, s 183 [*CERA*].
[338] *IAA*, *supra* note 111.
[339] Leach, *supra* note 5 at para 1. A detailed review of the federal government's new regulatory and environmental review processes is beyond the scope of this thesis. See generally Meinhard Doelle, "Bill C-69: The Proposed New Federal Impact Assessment Act (IAA)" (9 February 2018), online (blog): <https://blogs.dal.ca/melaw/2018/02/09/bill-c-69-the-proposed-new-federal-impact-assessment-act/>.

repealed and replaced the *NEBA*,[340] while the *IAA* repealed and replaced the *CEAA*.[341] However, as mentioned earlier, the Supreme Court very recently ruled that the "designated projects" portion of the new federal environmental assessment scheme was unconstitutional.[342] The TMX Project was subject to the regulatory and environmental approval processes established under the *NEBA* and the *CEAA*. As such, those are the processes that will be described in this section.

The NEB was the federal authority responsible for assessing the TMX Project, as the regulation of interprovincial and international pipelines fell within the scope of its primary functions.[343] On December 16, 2013, Trans Mountain filed its application for a Certificate of Public Convenience and Necessity ("**Certificate**") with the NEB pursuant to section 32 of the *NEBA*,[344] formally initiating the start of the regulatory approval process under the *NEBA*.[345] On April 2, 2014, the NEB released Hearing Order OH-001-2014, which delineated the public hearing process and furnished participants with information regarding the timeline for the hearings, the procedure for filing documents, and submission deadlines.[346] It also incorporated the List of Issues

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[340] *Supra* note 25.

[341] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 s 52, as repealed by *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c 28, s 9 [*CEAA*].

[342] *IAA Reference*, *supra* note 211 at paras 6, 135—36, 204. In response to the Supreme Court's decision, the federal government issued a statement announcing the interim policy measures that will apply until the *IAA* is amended to comply with the Court's decision (Canada, "Statement on the Interim Administration of the *Impact Assessment Act* Pending Legislative Amendments" (26 October 2023), online: <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/statement-interim-administration-impact-assessment-act-pending-legislative-amendments.html>).

[343] Wickett, *supra* note 7 at 495. Following the enactment of the *CERA*, the NEB was succeeded by the Canada Energy Regulator.

[344] As pointed out by Wickett, most references incorrectly stated that the application was to be made under section 52 of the *NEBA*. However, she opined that "[s]uch references presumably stemmed from the pre-2012 wording of section 52" (*ibid*, n 74).

[345] *Ibid* at 505.

[346] *Application for the Trans Mountain Expansion Project* (2 April 2014), Hearing Order OH-001-2014, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445930/A15%2D3_%2D_Hearing_Order_OH%2D001%2D2014_%2D_A3V6I2.pdf?nodeid=2445615&vernum=-2>.

that the Board would consider during the hearings.[347] As part of the application process, the NEB determined who would be allowed to participate in the hearing and what their method of participation would be. Of the 2118 Applications to Participate reviewed by the NEB, 400 requested intervenor status and were granted intervenor status; 798 requested commenter status and were granted commenter status; 452 requested intervenor status and were granted commenter status; and 468 were denied.[348] Thus, 78 per cent of applicants were granted some form of participation status.[349] Intervenors encompassed a diverse group, including Indigenous groups, businesses, communities, landowners, individuals and both governmental and non-governmental organizations.[350]

Once the list of participants was finalized, the NEB established a schedule of three rounds of oral hearings, each specifically allotted to a distinct participant group: (i) Indigenous group intervenors; (ii) Trans Mountain, as the proponent; and (iii) the remaining intervenors (including the provinces of Alberta and British Columbia). These hearings generated a total of 39 volumes of evidence, comprising tens of thousands of pages.[351]

In addition to the federal regulatory review and approval process, federal environmental assessments were required with respect to "designated projects," which included "[t]he

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[347] *Ibid*, Appendix I. See also Katherine Zmuda, *Evaluation of the Regulatory Review Process for Pipeline Expansion in Canada: A Case Study of the Trans Mountain Expansion Project* (Vancouver: Simon Fraser University, 2017) at 40, online (pdf): <https://rem-main.rem.sfu.ca/theses/ZmudaKatherine_2017_MRM675.pdf>.

[348] *Application for the Trans Mountain Expansion Project* (2 April 2014), Hearing Order OH-001-2014, Ruling on Participation at 1, online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445932/A14%2D1_%2D_Letter_%2D_Application_for_Trans_Mountain_Expansion_Project_%2D_Ruling_on_Participation_%2D_A3V6I5.pdf?nodeid=2445819&vernum=-2>. The NEB decided that the participation test set out in section 55.2 of the *NEBA* put the burden on the person applying to participate to show "that they are either directly affected by a proposed project or are in possession of relevant information or expertise" (*ibid* at 4).

[349] *Ibid* at 9; Wickett, *supra* note 7 at 145.

[350] Initial Recommendation Report, *supra* note 7 at 4; Zmuda, *supra* note 347 at 41.

[351] Zmuda, *supra* note 347 at 44; Wickett, *supra* note 7 at 507—08.

construction and operation of a new pipeline… with a length of 40 km or more."[352] The "responsible authority" charged with conducting the environmental assessment process of oil and gas pipelines, including the TMX Project, was the NEB.[353] In accordance with paragraph 79(2)(b) of the *CEAA*, the NEB disclosed a description of the factors to be considered in the environmental assessment under the *CEAA*, along with the scope of those factors.[354]

However, as previously discussed, both the federal and provincial governments have authority to legislate with respect to environmental matters. Consequently, large-scale interprovincial pipelines, though subject to federal jurisdiction, often trigger provincial environmental assessment laws. Moreover, as described by the Alberta Court of Appeal, "[t]o reduce overlap and duplication of environmental assessments, the federal government and individual provincial governments have entered into various accords.[355] For the purposes of this thesis, this section will focus on the equivalency and cooperation agreements entered into by the federal government and the two provinces involved with the TMX Project, namely the provinces of Alberta and British Columbia.

The *Canada-Alberta Agreement on Environmental Assessment Cooperation*[356] aims to "achieve greater efficiency and the most effective use of public and private resources"[357] by

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[352] See *CEAA*, *supra* note 341, ss 2(1), 13; *Regulations Designating Physical Activities*, SOR/2012-147, Schedule 1, s 46.
[353] See *CEAA*, *supra* note 341, ss 15(b), 22. It is now the Impact Assessment Agency of Canada ("**IAAC**").
[354] *Application for the Trans Mountain Expansion Project* (2 April 2014), Hearing Order OH-001-2014, Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), online: NEB <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449981/2445374/A13%2D1_%2D_Letter_%2D_Application_for_Trans_Mountain_Expansion_Project_%2D_Factors_and_Scope_of_the_Factors_for_the_Environmental_Assessment_pursuant_to_the_Canadian_Environmental_Assessment_Act%2C_2012_%2D_A3V6J1.pdf?nodeid=2445281&vernum=-2>.
[355] *IAA Reference (ABCA)*, *supra* note 108 at para 50.
[356] The latest iteration of this bilateral agreement is the *Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)* (17 May 2005), online: <https://www.canada.ca/en/impact-assessment-agency/corporate/acts-regulations/legislation-regulations/canada-alberta-agreement-environmental-assessment-cooperation-2005.html> [Canada-Alberta Agreement].
[357] *Ibid*, Recitals, para 7.

providing for federal-provincial cooperation where a project requires both a federal environmental assessment under the *CEAA* and a provincial environmental assessment under Alberta's *Environmental Protection and Enhancement Act*.[358] The Canada-Alberta Agreement establishes a "Lead Party" that is responsible for the administration of the cooperative environmental assessment.[359] In accordance with section 6.2 of the Canada-Alberta Agreement, the Lead Party takes the lead with regard to the environmental assessment process, and the other party adjusts its procedures and practices to align with the Lead Party's process. As a result, the "parties coordinate regarding the analysis of [environmental assessment] information, evaluation of environmental effects, and the timing of decisions."[360] For projects requiring federal approval(s), such as the TMX Project, the Lead Party is the federal government, or more specifically, the federal regulator.[361] A distinct environmental assessment by Alberta is not obligatory for such projects.[362]

Meanwhile, in British Columbia, at the material time in relation to the TMX Project, the *EAA*[363] mandated an environmental assessment for "reviewable projects" as outlined in the *Reviewable Projects Regulation*.[364] In accordance with Part 4 of the Regulations, the TMX Project was classified as a "reviewable project" under the *EAA* and thus required an environmental assessment.[365] Like Alberta, British Columbia also entered into an environmental assessment harmonization agreement with Canada, specifically the *Canada-British Columbia Agreement on*

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[358] RSA 2000, c E-12.
[359] The term "Lead Party" is defined in article 1.0 of the Canada-Alberta Agreement. See also Canada-Alberta Agreement, *supra* note 356, art 5.1.
[360] Zmuda, *supra* note 347 at 34.
[361] Canada-Alberta Agreement, *supra* note 356, art 5.1; *Sub-Agreement on Environmental Assessment*, pursuant to the *Canada-Wide Accord on Environmental Harmonization* (29 January 1998), art 5.6.1, online <https://faolex.fao.org/docs/pdf/can83340.pdf>. In the context of the TMX Project, the federal regulator was initially the NEB and is now the IAAC.
[362] Wickett, *supra* note 7 at 503.
[363] *Supra* note 254. On December 16, 2019, the *EAA* was repealed and replaced with a new *Environmental Assessment Act*, SBC 2018, c 51.
[364] BC Reg 370/2002 [Regulations]. On December 16, 2019, the Regulations were repealed and replaced with the *Reviewable Projects Regulation*, BC Reg 243/2019.
[365] See *EAA*, *supra* note 254, ss 1 (definitions of "assessment" and "reviewable project"), 5.

Environmental Assessment Cooperation.[366] Additionally, in 2010, the EAO and NEB entered into an Equivalency Agreement.[367] As already explained, under the terms of the Equivalency Agreement, the environmental assessment process undertaken by the NEB was deemed to constitute an equivalent assessment under the *EAA*.[368] However, in *Coastal First Nations*, the British Columbia Supreme Court ruled that the Equivalency Agreement could not obviate the need for the provincial authorities to decide whether to issue an EAC under the *EAA*.[369] Thus, following that decision, "interprovincial pipeline projects in British Columbia… continued to require an [EAC] from [the] EAO."[370]

On May 19, 2016, the NEB submitted its Initial Recommendation Report to the Governor in Council. In the Report, the NEB extensively detailed its findings with respect to the TMX Project, including the results of its environmental assessment.[371] Ultimately, the NEB "finds that the Project is in Canada's public interest, and recommends the [Governor in Council] approve the Project and direct the Board to issue the necessary [Certificate]" in compliance with section 52 of the *NEBA*.[372] This approval was subject to 157 conditions, 49 of which were related to environmental considerations.[373] The Governor in Council approved the TMX Project and directed

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[366] *Canada-British Columbia Agreement on Environmental Assessment Cooperation (2004)*, online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/agreements-with-the-canadian-environmental-assessment-agency/canada-bc-agreement-on-environmental-assessment-cooperation.pdf>. This agreement has since been replaced by the *Impact Assessment Cooperation Agreement Between Canada and British Columbia* (26 August 2019), online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/agreements-with-the-canadian-environmental-assessment-agency/impact_assessment_cooperation_agreement_signed.pdf> [Impact Assessment Agreement]. The new Impact Assessment Agreement reaffirms both governments' commitment to the principle of "one project, one assessment" (see Recitals, para 6).
[367] *Supra* note 253.
[368] See section 2.2.2, *above*, for more on this topic.
[369] *Ibid*.
[370] Wickett, *supra* note 7 at 505.
[371] For an extensive review of the NEB's conclusions regarding its environmental assessment under the *CEAA*, see Initial Recommendation Report, *supra* note 7 at 159—236. See also Wickett, *supra* note 7 at 509—10.
[372] Initial Recommendation Report, *supra* note 7 at xv.
[373] See Wickett, *supra* note 7 at 510.

the NEB to issue a Certificate, subject to the NEB's proposed 157 conditions, on November 29, 2016.[374] The NEB issued the Certificate to Trans Mountain on December 1, 2016.[375]

After the initial approval of the TMX Project, several judicial review applications contesting the NEB's recommendation report and the 2016 Order in Council ("**OIC**") approving the TMX Project were submitted to the Federal Court of Appeal and consolidated.[376] On August 30, 2018, the Court quashed the 2016 OIC, thereby "rendering the [Certificate] approving the construction and operation of the Project a nullity."[377] The Court found that the NEB erred by unjustifiably excluding Project-related marine shipping from the scope of the TMX Project and that the Government of Canada failed to adequately discharge Phase III of its duty to consult with Indigenous groups. The Court remitted the matter back to the Governor in Council for redetermination.[378]

Following the Court's instructions,[379] the federal government directed the NEB to reconsider its recommendation to account for the environmental impacts of Project-related marine shipping and its adverse impacts on species at risk.[380] With respect to the duty to consult, the

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[374] See 2016 OIC, *supra* note 35. See also Trans Mountain, "How We Got Here" (18 June 2019), online: <https://www.transmountain.com/news/2019/how-we-got-here>: Wickett, *supra* note 7 at 511.

[375] Certificate OC-064, *supra* note 265. As previously mentioned, on January 10, 2017, the British Columbia EAO issued an EAC for the TMX Project (EAC E17-01, *supra* note 264). The EAO was subject to 37 conditions, which "are in addition to and designed to supplement the 157 conditions required by the [NEB]." These additional conditions "respond to concerns that have been raised by Aboriginal groups during consultation undertaken for the [TMX Project] and address key areas of provincial jurisdiction and interest, such as: vegetation and wildlife, parks and protected areas, greenhouse gas emissions and terrestrial and marine spills" (British Columbia, Ministry of Environment and Climate Change Strategy, News Release, 2017ENV0001-000047, "Trans Mountain Expansion Project Granted Environmental Assessment Approval" (11 January 2017), online: <https://news.gov.bc.ca/releases/2017ENV0001-000047>).

[376] *Tsleil-Waututh Nation*, *supra* note 11. See Wickett, *supra* note 7 at 511.

[377] *Tsleil-Waututh Nation*, *supra* note 11 at para 768.

[378] *Ibid* at paras 4—7, 764—68.

[379] *Ibid* at paras 769—72.

[380] PC 2018-1177, (2018) C Gaz I, 3274; Statement by the Honourable Amarjeet Sohi on the Government of Canada's Path Forward on the Trans Mountain Pipeline Expansion Project (21 September 2018), online: <https://www.canada.ca/en/natural-resources-canada/news/2018/09/statement-by-the-honourable-amarjeet-sohi-on-the-government-of-canadas-path-forward-on-the-trans-mountain-pipeline-expansion-project.html>.

federal government announced that it would not appeal the Federal Court of Appeal's judgment.[381] Instead, it would be re-initiating consultations with all 117 Indigenous groups affected by the Project. Former Supreme Court of Canada Justice Frank Iacobucci was appointed to oversee this consultation process.[382]

On February 22, 2019, the NEB delivered its Reconsideration Report to the Minister of Natural Resources.[383] In this Report, the NEB reiterated its belief that the TMX Project is in the Canadian public interest and should be approved, subject to 156 conditions.[384] The Reconsideration Report concluded that the TMX Project "is likely to cause significant adverse environmental effects. Specifically, Project-related marine shipping is likely to cause significant adverse environmental effects on the Southern resident killer whale, and on Indigenous cultural use associated with the Southern resident killer whale."[385] The Board also found that Project-related marine vessels are likely to emit significant amounts of greenhouse gases, and that in the

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[381] Natural Resources Canada, News Release, "Government Announces Part II of Path Forward on the Trans Mountain Expansion Project" (3 October 2018), online: <https://www.canada.ca/en/natural-resources-canada/news/2018/10/government-announces-part-ii-of-path-forward-on-the-trans-mountain-expansion-project.html>.

[382] *Ibid*. For the results the federal government's re-initiation of its Phase III consultations, see Canada, *Trans Mountain Expansion Project Crown Consultation and Accommodation Report* (June 2019), online (pdf): <https://www.canada.ca/content/dam/nrcan-rncan/site/tmx/TMX-CCAR_June2019-e-accessible.pdf>.

[383] Canada, *National Energy Board - Reconsideration Report – Trans Mountain Pipeline ULC - MH-052-2018* (Calgary: NEB, February 2019), online (pdf): <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3614457/3751789/3754555/A98021%2D1_NEB_%2D_NEB_Reconsideration_Report_%2D_Reconsideration_%2D_Trans_Mountain_Expansion_%2D_MH%2D052%2D2018_%2D_A6S2D8.pdf?nodeid=3754859&vernum=-2> [Reconsideration Report].

[384] The NEB modified some of its previous conditions and made 16 new recommendations to the Government of Canada. See *ibid* at 1, 5; Canada Energy Regulator, "Reconsideration Report – Trans Mountain Expansion Project" (last modified 29 September 2020), online: <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/trans-mountain-expansion/reconsideration-report-trans-mountain-expansion-project.html>. On February 24, 2022, the British Columbia Ministers issued an order amending the EAC in accordance with the recommendations of the EAO (British Columbia, *Reconsideration of Certificate E17-01*, issued by the Honourable George Heyman, Minister of Environment and Climate Change Strategy and the Honourable Bruce Ralston, Minister of Energy, Mines and Low Carbon Innovation (Victoria: EAO, 24 February 2022), online: <https://www.projects.eao.gov.bc.ca/api/public/document/6217f57f9f70b7002226d2e5/download/TMX_Letter_Order.pdf>).

[385] Reconsideration Report, *supra* note 383 at 1.

unlikely event of a spill, the resulting environmental effects would be severe.[386] The Board indicated that while these effects "weighed heavily" in its reconsideration of the TMX Project, it "recommends that, in light of the considerable benefits of the Project and measures to mitigate the effects, the [Governor in Council] find that they can be justified in the circumstances."[387]

On June 18, 2019, acknowledging the environmental implications highlighted by the NEB and having determined that the re-initiated Phase III consultation process met the guidance set out in *Tsleil-Waututh Nation*, the Governor in Council, once again, approved the TMX Project and directed the NEB to issue a Certificate, subject to the amended conditions proposed by the NEB.[388] On June 21, 2019, the NEB issued the Certificate to Trans Mountain.[389]

After the TMX Project's second approval, twelve groups challenged the Governor in Council's decision, on the basis of environmental concerns and the Crown's failure to adequately consult Indigenous groups. In September 2019, the Federal Court of Appeal granted leave for six of those applications for judicial review to proceed and limited the issues on appeal to the adequacy of the re-initiated Phase III consultations.[390]

In *Coldwater*, the Federal Court of Appeal ruled that the Governor in Council's decision to approve the TMX Project a second time was reasonable and dismissed the judicial review

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[386] *Ibid*.
[387] *Ibid*.
[388] PC 2019-820, *supra* note 104. See Wickett, *supra* note 7 at 516.
[389] Canada, National Energy Board, *Certificate of Public Convenience and Necessity OC-065* (Calgary: NEB, 21 June 2019), online: <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3781699/3781613/3797079/C00061%2D3_NEB_Certificate_OC%2D065_%2D_Trans_Mountain_%2D_Trans_Mountain_Expansion_%2D_A6V4G1.pdf?nodeid=3797180&vernum=-2>.
[390] *Raincoast Conservation Foundation v Canada (AG)*, 2019 FCA 224, leave to appeal to SCC refused, *Olivier Adkin-Kaya, et al v Canada (AG), et al*, 38900 (5 March 2020), leave to appeal to SCC refused, *Federation of British Columbia Naturalists carrying on business as BC Nature v Canada (AG), et al*, 38887 (5 March 2020), leave to appeal to SCC refused, *Tsleil-Waututh Nation v Canada (AG), et al*, 38894 (5 March 2020), leave to appeal to SCC refused, *Squamish Nation v Canada (AG), et al*, 38898 (5 March 2020), leave to appeal to SCC refused, *Raincoast Conservation Foundation, et al v Canada (AG), et al*, 38892 (5 March 2020). Only four out of the six parties that were granted leave proceeded with their appeals before the Federal Court of Appeal. See Wickett, *supra* note 7 at 516.

applications.[391] On July 2, 2020, the Supreme Court refused leave to appeal the *Coldwater* decision, thereby overcoming the Project's regulatory approval hurdles.[392]

As this chapter has demonstrated, federal and provincial governments must collaborate on multiple fronts for the completion of major pipeline projects. Cooperative federalism is therefore essential to a project's success.[393] The following chapter will analyze the normative force of cooperative federalism within Canadian constitutional law.

[391] *Coldwater*, *supra* note 12.
[392] See Wickett, *supra* note 7 at 517.
[393] *Ibid* at 494.

CHAPTER 3 – Normative Force of Cooperative Federalism

Chapter 1 of this thesis oversaw the extensive collaboration required on the part of governments in the context of pipeline projects. This is overlayed by the complex division of powers and regulatory processes related to pipelines, as discussed in chapter 2 of this thesis. We will now examine how this "rich *practice* of intergovernmental collaboration collides with the fundamentally dualist nature of the Canadian federal architecture."[394] This chapter outlines the Supreme Court's endorsement of cooperative federalism, emphasizing its support for and protection of intergovernmental cooperative schemes. However, the chapter then analyzes how, amid the increasing tension between dualism and cooperative federalism, the Supreme Court has been wary about giving cooperative federalism normative force by sanctioning non-cooperation.

3.1 Judicial Endorsement of Cooperative Federalism

As already mentioned, Canada is formally a dualist federation.[395] Its Constitution allocates exclusive executive and legislative powers to two orders of government, that is the federal government and the provinces. Both orders of government adopt and implement legal norms "in a parallel fashion," and the official structure is consequently "compartimentalised" or "pillarized."[396] Thus, contrary to integrated federal systems[397] where constituent units formally contribute to federal law-making by implementing legislation devised by central authorities, the interaction between federal partners in a dualist federation is not inherently imbedded in the

[394] Gaudreault-DesBiens & Poirier, *supra* note 19 at 392 [emphasis in original].
[395] Except for criminal law and the administration of justice which, pursuant to subsections 91(27) and 92(14) of the *Constitution Act, 1867*, represents the only case of formally recognized "administrative" federalism (see Poirier, "Dualist Federalism to the Rescue", *supra* note 19, n 7).
[396] Gaudreault-DesBiens & Poirier, *supra* note 19 at 394.
[397] These federal systems may also be described as "administrative", "executive" or "cooperative" (*ibid*).

overarching constitutional framework.[398] Rather, as we have seen in chapter 1, intergovernmental relations occur on a more ad hoc and informal basis.

In fact, "with the advent of the welfare state in the 1950s, members of the federation started to engage in intergovernmental schemes that went against the grain of the classically exclusive division of powers."[399] It had quickly become apparent that the division of powers established in the mid 19th century, on a largely exclusive basis, would need to be nuanced to accommodate the public policy requirements of an increasingly modern and complex society. Accordingly, while the courts continued to interpret and enforce the constitutional boundaries between exclusive heads of power, they also showed considerable tolerance toward intergovernmental cooperative schemes.[400] These schemes involved different cooperative techniques, such as model legislation, legislation by reference, conditional legislation, administrative inter-delegation, joint organs with regulatory powers and intergovernmental agreements.[401] For instance, we have already seen that to reduce duplication and increase efficiency, both Alberta and British Columbia concluded agreements with the federal government that provide for cooperation and coordination in the conduct of environmental assessments.[402]

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[398] *Ibid* at 394—95. For a broader analysis of the differences between dualist and integrated federal systems, see Johanne Poirier & Cheryl Saunders, "Conclusions: Comparative Experience of Intergovernmental Relations in Federal Systems" in Poirier, Saunders & Kincaid, *supra* note 22 at 445—47; Johanne Poirier & Cheryl Saunders, "Comparing Intergovernmental Relations in Federal Systems: An Introduction" in Poirier, Saunders & Kincaid, *supra* note 22 at 5—6.

[399] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 88.

[400] *Ibid*. See also Poirier, "Armes à feu", *supra* note 19 at 70ff.

[401] See Gaudreault-DesBiens & Poirier, *supra* note 19 at 398—99. Professor Poirier has argued that "[t]he result of this intergovernmentalism ... has been a partial, informal and largely opaque transformation of the dualist regime into an *ad hoc* partially integrated one" (Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 89 [emphasis in original]). For a discussion of the difficulties that this de facto transformation creates, see Poirier, "Armes à feu", *supra* note 19 at 62ff.

[402] See section 2.3, *above*, for more on this topic.

In parallel to this, and especially since the mid-2000s, the Supreme Court has fervently endorsed the concept of "cooperative federalism."[403] In *Canadian Western Bank*, Binnie and Lebel JJ. strongly championed cooperative federalism, stating that one of the fundamental objectives of federalism is "to foster co-operation among governments and legislatures for the common good."[404] They went on to write that pursuant to the "dominant tide"[405] of modern constitutional interpretation, the Court "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[406] Therefore, "[i]n the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."[407] Similarly, a few years later, in the 2011 *Securities Reference*, the Court said that this "more flexible view of federalism . . . accommodates overlapping jurisdiction and encourages intergovernmental cooperation."[408] More recently, in *Comeau*, the Court described cooperative federalism as allowing "different levels of government [to] work together on the ground to leverage their unique constitutional powers in

[403] See Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 89; *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 17 [*Long-Gun Registry Decision*]. See also Dave Guénette, "Le Fédéralisme Coopératif et les Administrations Publiques au Canada: Terminologies, Modalités, Métaphores" (2022) 16 JPPL 633 at 641 (WL Can); Warren J. Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76 SCLR (2d) 67 ("particularly over the past decade, the [Supreme Court] moved from an ostensibly neutral view on what form federalism, as a normative concept, should take, to one of not just tolerating but actively encouraging flexible and cooperative federalism" at 67); Kate Glover, "Structural Cooperative Federalism" (2016) 76 SCLR (2d) 45 ("[r]ecent case law shows that cooperative federalism is invoked as 'the guiding principle' when applying the division of powers doctrines" at 48).
[404] *Canadian Western Bank*, *supra* note 214 at para 22.
[405] *Ontario (AG) v OPSEU*, *supra* note 228 at para 27.
[406] *Canadian Western Bank*, *supra* note 214 at para 37 [emphasis in original].
[407] *Ibid*. See also *IAA Reference*, *supra* note 211 at para 228; *Long-Gun Registry Decision*, *supra* note 403 at para 17; *Saskatchewan (AG) v Lemare Lake Logging Ltd*, *supra* note 221 at paras 21—22; *Canada (AG) v PHS Community Services Society*, *supra* note 224 at para 63; *Lacombe*, *supra* note 320 at paras 118—19; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 139, 152 [*Assisted Human Reproduction Act Reference*].
[408] *Reference re Securities Act*, 2011 SCC 66 at para 57 [*2011 Securities Reference*]. See also *IAA Reference*, *supra* note 211 at para 122; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18 [*2018 Securities Reference*]; *Rogers*, *supra* note 222 at paras 38, 85; *Moloney*, *supra* note 212 at paras 15, 104.

tandem to establish a regulatory regime that may be *ultra vires* the jurisdiction of one legislature on its own."[409]

However, according to Professor Noura Karazivan, the expression "cooperative federalism" is "polysemic" and has been described "as a principle 'allowing for interplay and overlap between federal and provincial legislation,' a guiding principle, an underlying (constitutional) principle, an interpretive presumption, an executive practice, and a modality of the federal principle."[410] Similarly, Justice Alexander Pless examined the uses of the term "cooperative federalism" and found that "there is no single concept the term describes."[411] Rather, he explained that "[t]racing its use in the jurisprudence is a random walk, not an evolution. The term has been used in at least four, maybe five, different senses."[412]

For the purposes of this thesis, I find it helpful to differentiate between what can be called the judicial principle and the descriptive concept of cooperative federalism.[413] Professor Karazivan described the two different meanings of the term. The first meaning of cooperative federalism is a constitutional interpretive principle used to provide flexibility in the application of the doctrines

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[409] *R v Comeau*, 2018 SCC 15 at para 87. See also *2018 Securities Reference*, *supra* note 408 at para 19.

[410] Noura Karazivan, "Cooperative Federalism vs Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments, and Governments" in Poirier & Gagnon, *supra* note 22 at 293 [footnotes omitted]. See also Guénette, *supra* note 403 at 639—40.

[411] Alexander Pless, "Uncooperative Thoughts About Cooperative Federalism" (2020) 99 SCLR (2d) 135 at para 1 (QL). See also Guénette, *supra* note 403 at 641.

[412] Pless, *supra* note 411 at para 81, see also paras 32—33. Justice Alexander Pless argued that to avoid confusion, courts should employ the term "federalism" or "flexible federalism" to describe the constitutional interpretative principle used to allow a greater degree of legislative overlap. The term "cooperative federalism" should be reserved to describe instances of actual intergovernmental cooperation. Further, he rejected the claim that flexibility necessarily leads to more intergovernmental cooperation. Rather, he contended that "a flexible interpretation of the classes of subjects, leading to overlapping scope of powers, actually obviates the need for cooperation" (*ibid* at para 46) and that "[p]rotecting autonomy has done more to preserve the Canadian federation than requiring cooperation" (*ibid* at para 83). Others have also questioned whether cooperative federalism effectively fosters cooperation among Canada's governing bodies and whether such cooperation is a meaningful objective to pursue (see Scott A. Carrière, "The Emergence of a Normative Principle of Co-Operative Federalism and its Application" (2021) 58:4 Alta L Rev 897 at paras 46, 52 (QL)).

[413] *Long-Gun Registry Decision*, *supra* note 403 at para 17; Guénette, *supra* note 403 at 641; Glover, *supra* note 403 at 47. Scott A. Carrière refers to these two branches of cooperative federalism as, respectively, "conjunctive co-operation" and "coordinative co-operation" (Carrière, *supra* note 412).

relating to the division of powers to allow for a greater degree of overlap between federal and provincial jurisdiction. More specifically, the principle calls for a broad application of the double aspect, pith and substance, ancillary powers, and incidental effects doctrines and a corresponding restrictive application of the federal paramountcy and interjurisdictional immunity doctrines.[414] Furthermore, Professor Karazivan noted that "[t]he use of cooperative federalism, under this scenario, is detached from actual cooperation among federal partners. The result, however, may very well be an enticement to cooperate in the future."[415] The second meaning of cooperative federalism, which she referred to as "*executive* cooperative federalism," is "the description of an actual practice of intergovernmental cooperation."[416] Although both meanings of the term are interrelated in many respects, the following sections will primarily focus on the second meaning of cooperative federalism. The first meaning has already been addressed in chapter 3's description of the division of powers with respect to interprovincial pipelines.

3.2 Growing Tension between Dualism and Cooperative Federalism

While the Supreme Court has embraced a facilitative role in recent years,[417] there have been "deep disagreements about what this facilitative role entails in individual cases" involving intergovernmental conflict.[418] For instance, even though the Supreme Court seems committed to encouraging intergovernmental cooperation, as seen in the *2011 Securities Reference*,[419] and to

[414] Karazivan, *supra* note 410 at 293. See also Pless, *supra* note 411 at para 33.
[415] Karazivan, *supra* note 410 at 293.
[416] *Ibid*.
[417] Professor Wade K. Wright described the Supreme Court's facilitative role as one in which "the Court appears to be concerned, primarily, with encouraging the federal and provincial governments to work out their own mutually acceptable allocations of jurisdiction, and rewarding them where they do so, and only secondarily with trying to clarify and enforce jurisdictional constraints" (Wade K. Wright, "Courts as Facilitators of Intergovernmental Dialogue: Cooperative Federalism and Judicial Review" (2016) 72 SCLR (2d) 365 at para 3 (QL)). He argued that there are various reasons to be skeptical of this facilitative role (*ibid*).
[418] *Ibid* at para 26. See also Mark S. Harding & Dave Snow, "From the Ivory Tower to the Courtroom: Cooperative Federalism in the Supreme Court of Canada" (2022) 53:1 J Federalism 106; W J Newman, *supra* note 403 at 75ff.
[419] *Supra* note 408.

avoid interfering with it where it occurs, as seen in *Pelland*,[420] *NIL/TU,O*[421] and the *2018 Securities Reference*,[422] it does not always concur on the normative scope and strength of cooperative federalism in relation to other constitutional principles like dualism and parliamentary sovereignty, especially when intergovernmental collaboration is lacking.[423] As a result, a peculiar paradox has emerged whereby the Court encourages intergovernmental cooperation by reducing constitutional and legal barriers to coordinated legislative and administrative action, but then subsequently declines to adjudicate any matters arising from this collaboration, as seen most recently in the *Long-Gun Registry Decision*.[424] This "conceptual waltz"[425] between the fundamentally dualist nature of Canada's federal system and the Supreme Court's recent endorsement of cooperative federalism will be explored in the following paragraphs.

3.2.1 The Supreme Court's Promotion and Defense of Intergovernmental Cooperative Schemes

According to Professor Wade K. Wright, the Supreme Court has consistently emphasized that intergovernmental discussions must be considered when assessing whether a collaborative scheme adheres to the division of powers, "implying that a more deferential standard of review is and will be applied where intergovernmental dialogue is involved."[426] Similarly Professors Jean-

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[420] *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20 [*Pelland*].
[421] *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45 [*NIL/TU,O*].
[422] *Supra* note 408.
[423] Wright, *supra* note 417 at paras 27—32. See also Harding & Snow, *supra* note 418 ("[t]he Court is often divided concerning the scope and strength of the principle, namely whether it can impose limits on existing federal and provincial authority enumerated in sections 91 and 92 of the [*Constitution Act, 1867*]" at 119).
[424] *Supra* note 403. See Gaudreault-DesBiens & Poirier, *supra* note 19 at 392; Jan Raeimon Nato, "Development of Duties of Federal Loyalty: Lessons Learned, Conversations to be Had" (Winner of Baxter Family Competition on Federalism, 2019) at para 14, online (pdf): *McGill* <www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf>.
[425] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 91.
[426] Wright, *supra* note 417 at para 39. See e.g. *2018 Securities Reference*, *supra* note 408 (cooperative federalism "discourages courts from interfering with cooperative regulatory schemes so long as they are not incompatible with the boundaries dictated by the *Constitution Act, 1867*" at para 18); *British Columbia (AG) v Lafarge Canada Inc.*, 2007 SCC 23 ("[t]he courts should not be astute to find ways to frustrate rather than facilitate such cooperation where it exists if this can be done within the rules laid down by the Constitution" at para 86); *Siemens v Manitoba (AG)*,

François Gaudreault-DesBiens and Johanne Poirier contend that the most robust demonstration of the normative influence of cooperative federalism lies in the Court's support for collaborative intergovernmental arrangements defended by the parties involved:

> [C]ooperative federalism appears to have a substantial normative effect only when nongovernmental parties challenge cooperative measures elaborated by different orders of government, when the latter defend their cooperative arrangement. In those cases, courts tend to rely on the principle of cooperative federalism to reject arguments that some (often long-standing) intergovernmental schemes contravene certain more "traditional" rules of public law.[427]

For instance, in *Grisnich*, the Supreme Court appeared to accept diminished administrative accountability as an acceptable the price to pay for the benefits and practicalities of a national milk marketing scheme.[428] Similarly, in *Reference re Agricultural Products Marketing*, Pigeon J. stated that "when after 40 years a sincere cooperative effort has been accomplished, it would really be unfortunate if this was all brought to nought."[429]

In *Pelland*, the Court was tasked with determining whether a federal-provincial agreement with respect to the production and marketing of chicken was constitutional. Pursuant to the agreement, a federal body delegated its authority to regulate the interprovincial and international marketing of chicken to a provincial body. Therefore, the provincial body could allocate a single quota to the chicken producers in that province, regardless of whether their intention was to market the product within the province, beyond its borders, or both. In affirming the constitutionality of this federal-provincial marketing scheme, the Court simply noted that the agreement "both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility"[430] and found "no principled basis for disentangling what has proven to be a successful federal-provincial

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2003 SCC 3 ("given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts" at para 34).

[427] Gaudreault-DesBiens & Poirier, *supra* note 19 at 402.

[428] *British Columbia (Milk Board) v Grisnich*, [1995] 2 SCR 895 at paras 9, 30.

[429] [1978] 2 SCR 1198 at 1296.

[430] *Pelland*, *supra* note 420 at para 15.

merger."[431] The Court did so despite the scheme relying on an intergovernmental agreement that had not been sufficiently incorporated into federal or provincial legislation, thereby making its effects non-binding on third parties.[432] Professor Poirier remarked that "[c]et accroc au droit positif 'classique' n'est même pas relevé par la Cour suprême."[433]

In *NIL/TU,O*, the Supreme Court further demonstrated its deference to intergovernmental collaboration by upholding the constitutionality of a tripartite delegation agreement involving the province of British Columbia, the federal government, and an agency representing seven First Nations.[434] At issue was whether the labour relations of the agency, established to provide child welfare services for Aboriginal children and families in British Columbia, fell under provincial jurisdiction over labor relations or federal authority over "Indians." In the end, the Supreme Court affirmed provincial jurisdiction. In so doing, it used cooperative federalism "as a prism through which the impugned regime was seen in the best possible light."[435] Justice Abella, writing for the majority, eloquently stated that "[t]oday's constitutional landscape is painted with the brush of co-operative federalism" and that the agency's "operational features are painted with the same co-operative brush."[436] She endorsed the "sophisticated and collaborative effort" by the three parties in creating the agency to "respond to the particular needs of the Collective First Nations' children

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[431] *Ibid* at para 38.
[432] See Gaudreault-DesBiens & Poirier, *supra* note 19 at 403. See also *Boucher v Stelco Inc*, 2005 SCC 64. However, in *UL Canada Inc. v Quebec (AG)*, 2005 SCC 10, aff'g [2003] RJQ 2729 (QCCA) [*Unilever*], the Supreme Court and the Quebec Court of Appeal both held that several intergovernmental agreements could not be invoked to invalidate an earlier provincial regulation (see Gaudreault-DesBiens & Poirier, *supra* note 19, n 54). According to Professor Poirier, in *Unilever*, "la Cour suprême semble indiquer que la déférence judiciaire accordée aux normes négociées dans *Pelland* et *Stelco* ne se justifie pas lorsque les parties gouvernementales elles-mêmes se retranchent derrière le droit positif, classique, indéniablement unilatéral" (Poirier, "Armes à feu", *supra* note 19 at 78). For a discussion on these conflicting cases and an examination of the legal status of intergovernmental agreements in Canada more generally, see Johanne Poirier, "Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales" (2009) RQ Dr Constl 1.
[433] Poirier, "Armes à feu", *supra* note 19 at 76.
[434] *NIL/TU,O*, *supra* note 421 at para 24.
[435] Gaudreault-DesBiens & Poirier, *supra* note 19 at 403.
[436] *NIL/TU,O*, *supra* note 421 at paras 42—43.

and families" and described it as "an example of flexible and co-operative federalism at work and at its best."[437]

It is important to note however that despite the aspiration to encourage and safeguard intergovernmental collaborative arrangements, perhaps at times even to the extent of exhibiting "willful blindness" to the breach of the traditional rules of administrative law formulated in a dualist context,[438] the Supreme Court has asserted that cooperative federalism can "neither override nor modify the division of powers itself."[439] Thus, "[i]t cannot be seen as imposing limits on the valid exercise of legislative authority"[440] nor "can it support a finding that an otherwise unconstitutional law is valid."[441] In the *2011 Securities Reference*, the Court wrote that "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."[442] In that case, the Supreme Court declared that the primary provisions of the proposed federal legislation, which aimed to establish a comprehensive national regime for securities regulation, were beyond the scope of Parliament's general trade and commerce power. The Supreme Court held that the federal statute significantly encroached upon provincial authority over property and civil rights as it in essence constituted "a wholesale takeover of the regulation of the securities industry."[443] However, the Supreme Court highlighted that "[i]t is open to the federal government and the provinces to exercise their respective powers over securities harmoniously, in the spirit of

[437] *Ibid* at paras 43—44.
[438] Gaudreault-DesBiens & Poirier, *supra* note 19 at 400. See also Poirier, "Armes à feu", *supra* note 19 at 75.
[439] *Rogers*, *supra* note 222 at para 39. See also *2018 Securities Reference*, *supra* note 408 at para 18; *2011 Securities Reference*, *supra* note 408 at para 61.
[440] *Rogers*, *supra* note 222 at para 39, referring to *Long-Gun Registry Decision*, *supra* note 403 at paras 17—19. See also *2018 Securities Reference*, *supra* note 408 at para 18.
[441] *Rogers*, *supra* note 222 at para 39.
[442] *2011 Securities Reference*, *supra* note 408 at para 62.
[443] *Ibid* at para 128.

cooperative federalism."[444] To that effect, the Court invited the parties to cooperate[445] and emphasized that "each can work in collaboration with the other to carry out its responsibilities."[446]

Following this decision, the federal government and several other provinces took up the Court's invitation to collaborate and they established "a unified and cooperative system for the regulation of capital markets in Canada."[447] The cooperative regulatory system included a model provincial and territorial statute,[448] a federal statute[449] as well as a national securities regulator (the "Capital Markets Regulatory Authority") responsible for administering the regime by implementing both the federal and provincial statutes and by adopting regulations.[450] The national securities regulator and its board of directors were subject to the oversight of a Council of Ministers, composed of the federal Minister of Finance and the ministers "responsible for capital markets regulation" of the participating provinces and territories.[451] The *Memorandum of Agreement Regarding the Cooperative Markets Regulatory System* served as the connecting framework for the various elements of this complex normative scheme.[452] The scheme's

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[444] *Ibid* at para 9.
[445] *Ibid* at paras 130—34.
[446] *Ibid* at para 131.
[447] *2018 Securities Reference*, *supra* note 408 at para 22.
[448] *Capital Markets Act: A Revised Consultation Draft*, August 2015, online (pdf): *Cooperative Capital Markets Regulatory System* <http://ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf> [Model Provincial Act].
[449] *Capital Markets Stability Act —Draft for Consultation*, January 2016, online (pdf): *Cooperative Capital Markets Regulatory System* <http://ccmr-ocrmc.ca/wp-content/uploads/cmsa-consultation-draft-revised-en.pdf>.
[450] *2018 Securities Reference*, *supra* note 408 at paras 2, 21. The Capital Markets Authority Implementation Organization (CMAIO) was incorporated in July 2015, but subsequently dissolved in January 2022, see Cooperative Capital Markets Regulatory System, "About" (last visited 13 December 2023), online: <http://ccmr-ocrmc.ca/about/>.
[451] *2018 Securities Reference*, *supra* note 408 at paras 2, 21.
[452] *Memorandum of Agreement Regarding the Cooperative Capital Market Regulatory System*, signed between July 20 and August 4, 2016, online (pdf): *Cooperative Capital Markets Regulatory System* <http://ccmr-ocrmc.ca/wp-content/uploads/moa-23092016-en.pdf> [Memorandum]. See Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 102. The cooperation normative network is quite complex – while the Supreme Court initially listed only four components in its description of the system (*2018 Securities Reference*, *supra* note 408 at para 21), Professor Poirier identified ten such components (Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 101ff). A comprehensive study of the various elements in this cooperation scheme is beyond the scope of this thesis.

constitutionality was once again challenged, with Quebec referring two questions to its Court of Appeal.[453]

Most relevant for the purposes of this thesis is the majority of the Quebec Court of Appeal's finding that a significant portion of the cooperative scheme was unconstitutional as it impermissibly fettered provincial parliamentary sovereignty.[454] In particular, the majority took issue with the requirement that any amendments to the Model Provincial Act be subject to the approval of the Council of Ministers in accordance with the voting mechanism set out in section 5.5. of the Memorandum.[455] A unanimous Supreme Court, by contrast, considered there to be no constitutional barriers to the cooperative scheme.

Considering the pivotal role that parliamentary sovereignty plays in the evaluation of the cooperative scheme's constitutionality, a brief overview of the principle's key elements is in order. Parliamentary sovereignty, rooted in the Westminster model, is a fundamental principle acknowledging the unrestricted power of the legislature to enact, amend, and abrogate laws as it deems appropriate.[456] Professor A.V. Dicey, writing in the late nineteenth century, explained that parliamentary sovereignty means that the legislative assembly has "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[457] Although the principle of parliamentary sovereignty was introduced in Canadian law by virtue of the preamble of the

[453] *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2017 QCCA 756 at paras 1, 4. This thesis will focus solely on examining the first question.
[454] *Ibid* at paras 55, 57—81.
[455] *Ibid* at paras 61—62. Pursuant to paragraph 4.2(c) of the Memorandum, the Council of Ministers will be responsible for "proposing amendments to the Cooperative System Legislation." Section 5.5 of the Memorandum provides that "[a] proposal to amend the Capital Markets Act must be approved by: (a) at least 50 per cent of all members of the Council of Ministers; and (b) the members of the Council of Ministers from each Major Capital Markets Jurisdiction."
[456] *2018 Securities Reference*, *supra* note 408 at para 54.
[457] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 40. See Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 85.

Constitution Act, 1867,[458] the fundamental Diceyan rule that grants Parliament the authority "to make or unmake any law whatever" had to be modulated in its application to Canada.[459] Consequently, the principle is subject to the division of powers in the *Constitution Act, 1867* as well as the exigencies of the Charter.[460] Nonetheless, the fundamental tenet of the principle endures, namely that legislative assemblies cannot abdicate their sovereignty.[461] From this flows two rules which are of particular relevance to the following discussion: (1) the executive branch cannot bind the legislature; (2) the legislative assembly cannot relinquish its core legislative functions to an external entity.[462]

In the *2018 Securities Reference*, the Supreme Court considered the claim that the Council of Ministers' participation in amending the Model Provincial Act contradicts the principle of parliamentary sovereignty to be based on two flawed assumptions: "first, that the Memorandum *purports* to bind the legislatures of the participating provinces and second, that it is *actually capable* of doing so."[463]

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[458] The preamble of the *Constitution Act, 1867* bestowed upon Canada "a Constitution similar in Principle to that of the United Kingdom."
[459] See *2018 Securities Reference*, *supra* note 408 at para 56; Monahan, Shaw & Ryan, *supra* note 457 at 85.
[460] See Halsbury's Laws of Canada (online), *Constitutional Law (Division of Powers)*, "Constitutional Conventions and the Unwritten Principles of the Constitution: Unwritten Principles of the Constitution: Specific Unwritten Principles: The Principle of Parliamentary Sovereignty" (II.3(2)(a)) at HCL-29 "Parliamentary Sovereignty" (2023 Reissue). See also *2018 Securities Reference*, *supra* note 408 ("legislatures in Canada are constrained only by the Constitution — and are otherwise free to enact laws that they consider desirable and politically appropriate" at para 71); *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew*] ("[p]arliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority" at para 36). Professor Poirier noted that parliamentary sovereignty in Canada is also subject to section 35 of the *Constitution Act, 1867* and "possibly one or more unwritten principles of the Constitution" (Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 95; see also John Lovell, "Parliamentary Sovereignty in Canada" in Oliver, Macklem & Des Rosiers, *supra* note 19; Monahan, Shaw & Ryan, *supra* note 457).
[461] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 96.
[462] *Ibid* at 97—98. See *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at 564 [*CAP Reference*] and *2018 Securities Reference*, *supra* note 408 at para 60, which both cite *West Lakes Limited v The State of South Australia* (1980), 25 SASR 389 at 397—98 (SASC). See also *Friends of the Canadian Wheat Board v Canada (AG)*, 2012 FCA 183 at para 86.
[463] *2018 Securities Reference*, *supra* note 408 at para 48 [emphasis in original].

On the one hand, the Court highlighted that the Council of Ministers' role is limited to *proposing* amendments to the Model Provincial Act. Therefore, the Memorandum does not in any way mandate the Council of Ministers' involvement in the province's formal legislative processes.[464] In fact, it does not "imply that the legislatures of the participating provinces are *required* to implement the amendments made to the Model Provincial Act that have been approved by the Council of Ministers, or that they are *precluded* from making any other amendments to their securities laws."[465] As a result, the Court concludes that the cooperative system does not purport to fetter provincial law-making authority.[466]

On the other hand, the Court pointed out that any attempt by the Memorandum to restrict the provincial legislatures' power to enact, amend and repeal their securities legislation would prove ineffective in light of the principle of parliamentary sovereignty.[467] As we have seen, this foundational principle ensures legislative supremacy, preventing interference with the legislature's law-making function by the executive or judiciary. As a result, "[a]n executive agreement that purports to bind the parties' respective legislatures cannot… have any such effect."[468] In other words, parliamentary sovereignty does not render executive agreements inherently unconstitutional, but rather renders them ineffective in altering legislative powers.[469]

The Supreme Court recognized that, in reality, the provinces involved would "likely find it necessary" to implement any amendments to the Model Provincial Act sanctioned by the Council of Ministers.[470] Moreover, the Court acknowledged the impracticality of these provinces

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[464] *Ibid* at para 50.
[465] *Ibid* [emphasis in original]. The Court also observed that the omission of sections 4.2 and 5.5 of the Memorandum from the Model Provincial Act further reinforces the argument that "the Council of Ministers has no formal role to play in the legislative process" (*ibid* at para 51).
[466] *Ibid* at para 52.
[467] *Ibid* at paras 53, 61.
[468] *Ibid* at para 53.
[469] *Ibid* at paras 62, 67.
[470] *Ibid* at para 68.

disengaging from the cooperative scheme at a later stage.[471] However, the Court deemed these political effects to be irrelevant, emphasizing that the formal powers of provincial legislatures remained unrestricted despite the practical constraints imposed by the cooperative system.[472]

Thus, the *2018 Securities Reference* is "a significant addition to a rather consistent jurisprudential trend that lifts constitutional impediments to complex intergovernmental schemes, at least when governments *want* to cooperate."[473] Professor Poirier suggested that in this scenario, the Court used parliamentary sovereignty as a "shield" to protect the cooperative scheme.[474] However, in the following section, I will examine instances where governments *no longer want* to cooperate. In those cases, the Supreme Court employed parliamentary sovereignty as a "sword" which any federal partner can use to unilaterally withdraw from collaborative arrangements, underscoring the dualist nature of Canadian federalism.[475]

3.2.2 The Supreme Court's Refusal to Sanction Non-Cooperation

In the 1990 *CAP Reference*, the Supreme Court presented a "maximalist conception" of parliamentary sovereignty.[476] In so doing, the Court asserted that the freedom of government entities to legislate cannot be constrained by the doctrine of legitimate expectations.[477] Accordingly, it would not impose further procedural requirements to consult federal partners adversely affected by the legislation.[478]

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[471] *Ibid* at para 70.
[472] *Ibid* at paras 69—70. In contrast, the Quebec Court of Appeal considered that the scheme's practical consequences, arising from the fact that the executive branch has *de facto* control over the legislature, meant that the parliamentary sovereignty of the participating provinces' legislatures would in fact be unduly restrained (*Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, *supra* note 453 at paras 69—70).
[473] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 95 [emphasis in original].
[474] *Ibid* at 117. Professor Poirier highlighted that "[t]he Court relied on its 'maximalist' conception of parliamentary sovereignty to salvage part of a cooperative arrangement that — paradoxically — seemed to fetter the sovereignty of participating provinces" (*ibid* at 119).
[475] *Ibid* at 86, 100.
[476] *Ibid* at 98.
[477] *CAP Reference*, *supra* note 462 at 557ff.
[478] *Ibid* at 559. The Court asserted that the doctrine of legitimate expectations could not constrain the executive in the introduction of legislation. Professor Poirier has argued that, *a contrario*, the doctrine might not apply to the executive

Of particular relevance for our discussion, the Court rejected Manitoba's argument that a unilateral legislative withdrawal from a cooperative agreement, wherein a province had acquired vested rights to financial contributions, would either be beyond the legislative authority of Parliament or, if within that authority, unconstitutional by virtue of the "overriding principle of federalism."[479] Justice Sopinka, writing for the Court, relied on the principle of parliamentary sovereignty to opine that "[i]f a statute is neither *ultra vires* nor contrary to the [Charter], the courts have no jurisdiction to supervise the exercise of legislative power."[480]

Professor Poirier remarked that this is "strong dualism"[481] and reflects the Supreme Court's "staunch refusal" to reassess the relationship between the principles of parliamentary sovereignty and federalism.[482] She and Professor Gaudreault-DesBiens proposed that the Court, without contesting Parliament's legislative authority over financial aid to provinces, might have set forth additional conditions to prevent what can be considered analogous to an "abuse of right" or "unconstitutional use of constitutional competence."[483] They suggested that in the *CAP Reference*, this could have been done "by forcing the government in question to reconsider the timeline for the implementation of its new policy so as to reduce to a reasonable extent the significant negative externalities caused by the policy change."[484]

However, approximately 25 years later, the Supreme Court largely reaffirmed the stance it had adopted in the *CAP Reference*.[485] In 2012, Parliament passed the *Ending the Long-gun*

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when it is not involved in the legislative process (Poirier, "Armes à feu", *supra* note 19 at 92—94; Gaudreault-DesBiens & Poirier, *supra* note 19, n 84).

[479] *CAP Reference*, *supra* note 462 at 565. See also W J Newman, *supra* note 403 at 74.

[480] *CAP Reference*, *supra* note 462 at 565.

[481] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 98.

[482] Gaudreault-DesBiens & Poirier, *supra* note 19 at 409.

[483] *Ibid*. See also Poirier, "Armes à feu", *supra* note 19 at 88.

[484] Gaudreault-DesBiens & Poirier, *supra* note 19 at 409. See also Gaudreault-DesBiens, "Cooperative Federalism" *supra* note 20 at 13.

[485] *Long-Gun Registry Decision*, *supra* note 403. See Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 99.

Registry Act,[486] eliminating the registration mandate for long guns and decriminalizing unregistered long gun possession. In the *Long-Gun Registry Decision*, Quebec contested the constitutionality of section 29 of the *ELRA* which mandated the destruction of the long-gun registry's data and sought an order requiring the federal government to hand the data over to it.[487] Quebec, seeking to create its own long-gun registry, had asked the federal government for the province-related data contained in the existing registry. However, the federal government had refused to provide the data, even though Quebec had access to it during the operation of the long-gun registry.[488] Quebec argued that the principle of cooperative federalism prohibited the federal government from taking actions that could impede cooperation between the two orders of government in areas of concurrent jurisdiction.[489]

In the Quebec Superior Court, Blanchard J. considered that the establishment and functioning of the long-gun registry arose from the collaboration of federal, provincial, and municipal authorities, culminating in a partnership between these orders of government. He held that the pith and substance of section 29 of the *ELRA* was to prevent Quebec from utilizing the partnership's data, thereby impeding the province's uncontested legislative authority to establish its own long-gun registry. Therefore, he determined that section 29 of the *ELRA* contravened the principle of cooperative federalism and exceeded Parliament's legislative authority in relation to criminal law.[490] However, Blanchard J.'s decision was overturned on appeal. The Court of Appeal determined that since Parliament had the authority to establish the long-gun registry in the first place, it also had the power to dismantle the registry and destroy data contained therein.

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[486] SC 2012, c 6 [*ELRA*].
[487] *Long-Gun Registry Decision*, *supra* note 403 at para 2.
[488] *Ibid*. See also Ian Peach, "The Supreme Court of Canada Long-Gun Registry Decision: The Constitutional Question behind an Intergovernmental Relations Failure" (2015) 24:1 Const Forum Const 1 at 1.
[489] *Long-Gun Registry Decision*, *supra* note 403 at para 15.
[490] See *Québec (PG) c Canada (PG)*, 2012 QCCS 4202 at paras 4, 192 [*Long-Gun Registry Decision (QCCS)*]; *Long-Gun Registry Decision*, *supra* note 403 at para 9; Peach, *supra* note 488 at 1.

Additionally, the Court held that the principle of cooperative federalism cannot be used to modify the division of powers.[491]

In a close 5-4 decision, the Supreme Court determined that legislation repealing a legislative scheme previously enacted under the federal government's jurisdiction over criminal law, including provisions regarding the fate of data collected under the repealed scheme, represents a valid exercise of the federal government's criminal law power.[492] In upholding the constitutionality of section 29 of the *ELRA*, Cromwell and Karakatsanis JJ., writing for the majority, considered that the principle of cooperative federalism "cannot be seen as imposing limits on the otherwise valid exercise of legislative competence."[493] They went on to conclude that cooperative federalism cannot "limit the scope of legislative authority or… impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action."[494] Furthermore, they asserted that this held true irrespective of the purpose for which a legislature adopts a legislative measure, even if the purpose is to specifically hinder cooperation. Therefore, since long-gun registration fell under Parliament's jurisdiction over criminal law, it did not matter that the "federal government's ultimate goal may well have been to prevent Quebec from creating its own long-gun registry."[495]

The majority, however, acknowledged that their conclusion might have differed if the long-gun registry had been a "truly interlocking federal-provincial legislative framework."[496]

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[491] See *Canada (PG) c Québec (PG)*, 2013 QCCA 1138 at paras 37, 45, 49, 52-54; *Long-Gun Registry Decision*, *supra* note 403 at para 13; Peach, *supra* note 488 at 1—2.
[492] *Long-Gun Registry Decision*, *supra* note 403 at paras 33, 37, 41, 43; Peach, *supra* note 488 at 2.
[493] *Long-Gun Registry Decision*, *supra* note 403 at para 19.
[494] *Ibid* at para 20.
[495] *Ibid* at para 38. See Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 99.
[496] *Long-Gun Registry Decision*, *supra* note 403 at para 4. See also Glover, *supra* note 403 at 49. The majority ruled that even if the long-gun registry arose from a collaborative effort, it was exclusively established by federal law. According to the majority, Quebec had no involvement with the registration data; its role in the registry was confined to managing the licensing data within the licensing registry. Additionally, the provincially-designated Chief Firearms Officer was not functioning in her capacity as a provincial official when managing the licensing registry, but rather as

Conversely, the dissenting judges – including all three judges from Quebec – were of the view that the federal and provincial governments had formed a genuine partnership with respect to firearms regulation.[497] Justices LeBel, Wagner, and Gascon, writing for the dissent, contended that this partnership upheld the spirit of cooperative federalism by allowing federal and provincial governments to collaborate to fulfill both federal (criminal law) and provincial (public safety and justice administration) objectives.[498] In their view, courts should support intergovernmental co-operation by protecting joint schemes both when they are created and when they are terminated.[499] They highlighted that "[i]t would hardly make sense to encourage co-operation and find that schemes established in the context of a partnership are valid while at the same time refusing to take this particular context into account when those schemes are terminated."[500]

As a result, LeBel, Wagner, and Gascon JJ. outlined the following considerations that must be taken into account when determining whether legislation that unilaterally dismantles an intergovernmental cooperative scheme aligns with the principle of cooperative federalism:

> Parliament or a provincial legislature cannot adopt legislation to terminate such a partnership without taking into account the reasonably foreseeable consequences of the decision to do so for the other partner. The courts must, in considering whether legislation or a statutory provision having as its purpose to dismantle the partnership is constitutional, be aware of the impact of that legislation or provision on the other partner's exercise of its powers, especially when the partner that terminates the relationship is intentionally bringing about that impact.[501]

The dissenting judges ultimately concluded that the pith and substance of the impugned provision was to prevent the use of long-gun registration data for provincial purposes, thereby

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an "agent" of the federal government (*Long-Gun Registry Decision*, *supra* note 403 at paras 4, 26; Poirier, "Taking Aim", *supra* note 19; Poirier, "Armes à feu", *supra* note 19 at 106ff).

[497] *Long-Gun Registry Decision*, *supra* note 403 at paras 115—35.

[498] *Ibid* at para 149.

[499] *Ibid* at para 152.

[500] *Ibid*.

[501] *Ibid* at para 153.

encroaching on the provinces' jurisdiction over property and civil rights.[502] Consequently, they held that section 29 of the *ELRA* was unconstitutional as it did not fall within the federal criminal law power and was not saved under the ancillary powers doctrine.[503]

The *Long-Gun Registry Decision* served as a genuine test for the principle of cooperative federalism. The Supreme Court had the opportunity to strengthen it by elevating it to a substantive normative principle with concrete legal effects.[504] However, the majority of the Supreme Court implicitly refused to imbue cooperative federalism with normative force.[505] In other words, "[t]he normative force of 'cooperative federalism', understood as a shield against third party challenges, vanishes when opposition occurs between the orders of government themselves."[506]

Thus, in both the *CAP Reference* and the *Long-Gun Registry Decision*, the Supreme Court affirmed the full autonomy of each order of government to unilaterally disengage from a cooperative scheme it no longer wishes to be a part of, irrespective of any adverse effects on the other federal partner. The consequences of uncooperative behaviour were deemed to be political in nature and accordingly beyond the purview of the courts.[507] This stance appears somewhat contradictory, considering the Court's efforts, as discussed earlier, to actively promote intergovernmental cooperation and to afford it considerable judicial deference in the face of third party challenges. Once federal and provincial authorities opt to collaborate on a joint venture, there are mutual interests in overseeing its management, including its eventual dismantling.[508] As Professor Paul Daly aptly noted, allowing one federal partner to unilaterally terminate a collaborative arrangement results in an irrational situation where all partners must assume bad

[502] *Ibid* at para 176.
[503] *Ibid* at para 190.
[504] Gaudreault-DesBiens & Poirier, *supra* note 19 at 410.
[505] *Ibid* at 411.
[506] *Ibid*.
[507] Poirier, "Dualist Federalism to the Rescue", *supra* note 19 at 117.
[508] Glover, *supra* note 403 at 63.

faith from others to protect themselves, which contradicts the principle of cooperative federalism.[509] Similarly, Professor Poirier argued that the dissent offers a deeper meaning of cooperative federalism, and one which is more consistent with previous rulings on joint schemes:[510]

> Having promoted concerted action between orders, and having lowered the "picket fences" which defined the original Canadian federal system, they recognise that the judicial branch cannot logically slide back to a traditional dualist conception of federalism.[511]

Therefore, the dissenting opinion in the *Long-Gun Registry Decision* – that the protection of collaborative schemes should also extend to their termination – would help address what Professor Gaudreault-DesBiens identified as the main issue with cooperative federalism: its "a-normative nature."[512] However, as chapter 4 will further explain, a more thorough solution would involve recognizing a principle of federal loyalty in Canadian constitutional law.

[509] Daly, "Abolition du registre", *supra* note 21 at 41.
[510] Glover, *supra* note 403 at 63.
[511] Poirier, "Taking Aim", *supra* note 19. See also Poirier, "Armes à feu", *supra* note 19.
[512] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 14.

CHAPTER 4 – Federal Loyalty: A Potential Normative Foundation for Cooperative Federalism

This chapter explores how the principle of federal loyalty could serve as a normative basis for cooperative federalism, providing it with substantive force.[513] Specifically, federal loyalty could provide a basis for a new understanding of the exercise of constitutional powers, requiring federal partners to take each other's interests into account alongside their own. This would create an obligation to consult and cooperate with one another, particularly in processes such as interprovincial pipeline approvals, which, as discussed in chapters 1 and 2, require extensive collaboration among Canada's federal partners.

This chapter begins by defining federal loyalty and examining its development in Germany, Belgium, and South Africa. It then analyzes its presence in the Canadian context and explores its potential as a sub-principle of federalism, concluding with a discussion of how federal loyalty could be applied to the TMX Project case study.

4.1 Definition of Federal Loyalty

The principle of federal loyalty, also referred to as "comity," "fidelity," "mutual consideration," "Bundestreue," "loyauté fédérale," "leale collaborazione," and "solidarity,"[514] can be defined in multiple ways.[515] According to Professor Anna Gamper, its foundational premise is that "the federation and the constituent states... are mutually bound to consider each other's interests and to act loyally vis-à-vis each other."[516] Regardless of the diverse expressions of such

[513] *Ibid*.
[514] The terms "federal loyalty" and "federal solidarity" are used interchangeably by some authors (Michael Da Silva, "Federal Loyalty and the 'Nature' of Federalism" (2019) 24:2 Rev Const Stud 207, nn 4, 83; Hugo Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 Const Forum Const 20 at 31). However, Erika Arban maintains that while federal solidarity is implicit in federal loyalty, the two concepts remain distinct (Erika Arban, "Exploring the Principle of (Federal Solidarity)" (2017) 22:2 Rev Const Stud 241; see also Da Silva, *supra* note 514 at 230).
[515] Da Silva, *supra* note 514 at 209, 221.
[516] Anna Gamper, "On Loyalty and the (Federal) Constitution" (2010) 4:2 Vienna Online J on Int'l Const L 157 at 160 (HeinOnline).

consideration in various legal systems,[517] I will adopt Jan Raeimon Nato's overarching definition, stating that federal loyalty is "any duty incumbent upon an order of government to have a minimum level of consideration for their federal partners in the otherwise legitimate exercise of their powers."[518]

The principle of federal loyalty is present in the legal frameworks of numerous federations, though its scope and strength can vary.[519] For example, it is explicitly entrenched in the constitutions of the Belgian,[520] Swiss,[521] and South African federations.[522] In Austria, the Constitutional Court recognized the "principle of mutual consideration" even though it is not formally enshrined in the Constitution.[523] Several quasi-federal states, including Italy and Spain, also refer to doctrines akin to federal loyalty in their constitutions.[524] However, federal loyalty has its deepest historical roots in Germany, where it first emerged.[525] Therefore, this thesis primarily focuses on the evolution of federal loyalty in Germany, while integrating relevant insights from Belgium and South Africa to inform the Canadian context.

4.1.1 Germany: The Origin of Federal Loyalty (*Bundestreue*)

In Germany, the doctrine of *Bundestreue*, signifying fidelity, loyalty or faithfulness (*Treue*) to the federal compact (the *Bund*), emerged in the nineteenth century with the Reich Constitution

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[517] Nato, *supra* note 424 at para 18.
[518] *Ibid*.
[519] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 2.
[520] Art 143(1), GGW. The English version of the *1993 Belgian Constitution* is available at the following website: <https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf>.
[521] Art 44 Satz 1, 2 & 3 BV. The English version of the *Federal Constitution of the Swiss Confederation* is available at the following website: <https://www.fedlex.admin.ch/eli/cc/1999/404/en>.
[522] *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 41. The English version of the *Constitution of the Republic of South Africa, 1996*, is available at the following website: <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-04-feb-1997>. See also Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 2.
[523] Gamper, *supra* note 516 at 160; Arban, *supra* note 514 at 251; Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 2.
[524] Arban, *supra* note 514 at 251—52; Gamper, *supra* note 516 at 161.
[525] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 2. Professor Gaudreault-DesBiens' examination of German constitutional law is based on his work in Gaudreault-DesBiens, "Ethos", *supra* note 21 at 63—77.

of 1871.[526] However, for many decades, this principle, initially considered purely political, remained confined to the "realm of rhetoric."[527] It was only after the enactment of the German Basic Law of 1949 and subsequent judicial recognition that the principle of *Bundestreue* developed into a full-fledged legal principle.[528]

The principle of *Bundestreue* was initially articulated by the Federal Constitutional Court in a 1952 ruling concerning post-World War II housing funding.[529] In the *Housing Funding Case*, Bavaria sought an injunction to stop the federal distribution of funds to *Länder*, arguing that the distribution could only occur "in agreement with the *Länder*" pursuant to section 14 of the *First Housing Act*. Specifically, Bavaria asserted its entitlement to a specific share of the funds based on a prior agreement.[530] After deciding that the agreement was non-binding, the Federal Constitutional court explicitly invoked the *Bundestreue* principle for the first time, stating that "all parties to the constitutional 'union' are bound to cooperate according to the nature of this union and to contribute to its consolidation and to the preservation of its interests and well-known interests of its members."[531] Professor Gaudreault-DesBiens highlighted that, employing language evocative of the Canadian Supreme Court in the *Quebec Secession Reference*,[532] the Court asserted "that the *Länder* in their common relationships and the federal government in its relations with the *Länder* are bound by a constitutional obligation to negotiate in good faith and to reach mutual

[526] Arban, *supra* note 514 at 247.
[527] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 3.
[528] Arban, *supra* note 514 at 247—48; Bertus De Villiers, "Comparative Studies of Federalism: Opportunities and Limitations as Applied to the Protection of Cultural Groups" [2004]:2 J S Afr L 209 at 215 n 24 (HeinOnline). Though not explicitly set out in the Basic Law of 1949, *Bundestreue* has been recognized by the Federal Constitutional Court as intrinsic to Germany's federal nature (Arban, *supra* note 514 at 248; Donald P Kommers & Russel A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 3rd ed (Durham: Duke University Press, 2012) at 90 (HeinOnline)).
[529] 1 BVerfGE 299 (1952) [*Housing Funding Case*].
[530] See Nato, *supra* note 424 at paras 22—24; Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 3.
[531] *Housing Funding Case*, *supra* note 529 at 315, translated in Donald R Reich, "Court, Comity, and Federalism in West Germany" (1963) 7:3 Midwest J Political Science 197 at 209.
[532] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Quebec Secession Reference*].

understanding."[533] This meant that, firstly, the federal government's proposal must be suitable given the circumstances and, secondly, a *Land* may not withhold its agreement without reasonable justification.[534]

In two later cases,[535] the Court determined that when the *Länder* make administrative decisions regarding the compensation of their own civil-service employees, the principle of federal loyalty obligates them to contemplate "the possibility of untoward effects on civil servants in another *Land* or in the federal system as a whole."[536] Correspondingly, Professor Gaudreault-DesBiens advanced that the principle of *Bundestreue* could prevent these "untoward effects" through the imposition of both negative and positive duties.[537]

First, federal loyalty imposes a "negative duty of self-restraint" on both orders of government if their exercise of an otherwise lawful power is held to be "unreasonable, susceptible to paralyzing institutional mechanisms, or constitutive of disproportionately negative externalities for others."[538] Second, a "positive duty to act" is mandated in certain cases. For example, in the *Atomic Weapons Referenda II Case*,[539] the Federal Constitutional Court determined that Hesse's failure to prohibit local referenda, aimed at undermining the federation's intended procurement of nuclear weapons, violated the principle of federal loyalty.[540] In that case, the failure of the *Land* government was not in its political opposition to federal government policies, but rather in its

[533] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 4, citing Reich, *supra* note 531 at 209.
[534] Nato, *supra* note 424 at para 28. In the circumstances of the case, the Court determined that Bavaria's rejection of the funding proposal was warranted, given that the federal government had allocated the funds based on questionable grounds (*ibid* at para 29; Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 4).
[535] *Christmas Bonus Case*, 3 BVerfGE 52 (1953); *North Rhine-Westphalia Salaries Case*, 4 BverfGE 115 (1954).
[536] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 4, citing Reich, *supra* note 531 at 210.
[537] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 4.
[538] *Ibid* at 5. In the *Concordat Case*, 6 BVerfGE 309 (1957), the Federal Constitutional Court determined that a *Land*'s unreasonable refusal to implement international obligations contracted by the federal government in areas of exclusive *Land* jurisdiction could be considered a violation of the principle of federal loyalty.
[539] 8 BVerfGE 122 (1958).
[540] Kommers & Miller, *supra* note 528 at 94.

omission to remedy the unconstitutional actions of its municipal government.[541] Moreover, Professor Gaudreault-Desbiens emphasized that federal loyalty also includes a "duty to act fairly," preventing the federal government from using a "divide and conquer" strategy against dissenting *Länder* and from presenting federal partners with a *fait accompli*.[542]

Hence, the concept of federal loyalty, as articulated in the German context, involves the establishment of a form of partnership among the different orders of government in a federation. This necessitates that each order of government contemplates the interests of others when acting within their respective jurisdictions.[543] From this implicit partnership flow many aspirations for "federally friendly behaviour" ("*bundesfreundlichem Verhalten*")[544] including that:

> governments in all spheres must promote national unity, respect one another's status and powers, refrain from encroaching on one another's integrity and from assuming powers not conferred on them in the constitution, and co-operate in mutual trust and good faith. They must support and consult one another, co-ordinate their actions and in case of conflict exhaust all remedies before turning to the courts.[545]

The German case study is intriguing for Canada as it offers a meaningful example of how the judiciary can give substance to the federal loyalty principle, offering insights gained through a lengthy balancing process undertaken by the German courts.[546] Furthermore, it is important to observe that in other federations acknowledging federal loyalty, its meaning and extent correspond with the general concepts explored in the above analysis of German law.[547]

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[541] Reich, *supra* note 531 at 213.
[542] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 5—6, referring to *First Broadcasting Case,* 12 BVerfGE 205 (1961). See also Nato, *supra* note 424 at para 34; Walter van Gerven, "Federalism In the US and Europe" (2007) 1:1 Vienna Online J on Int'l Const L 3 at 26 (HeinOnline).
[543] Dirk Brand, "The South African Constitution - Three Crucial Issues for Future Development" (1998) 9:2 Stellenbosch L Rev 182 at 186 (HeinOnline). See also Arban, *supra* note 514 at 249.
[544] *Housing Funding Case*, *supra* note 529 at para 60, translated in Nato, *supra* note 424 at para 28.
[545] Uwe Leonardy & Dirk Brand, "The Defect of the Constitution: Concurrent Powers Are Not Co-operative or Competitive Powers" [2010]:4 J S Afr L 657 at 661 (HeinOnline). See also Arban, *supra* note 514 at 248.
[546] Nato, *supra* note 424 at paras 19—20.
[547] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 6. Professor Gaudreault-DesBiens remarked that federal loyalty is often conceived "partly as a rule of interpretation but mostly as an independent unwritten

4.1.2 Belgium: Combining Dualism and Federal Loyalty

Belgium serves as another interesting case study, as it is the only state that has combined dualism and federal loyalty.[548] Belgium's incorporation of federal loyalty into its legal framework provides valuable insights for considering the recognition of federal loyalty in the Canadian context. As explained by Nato, Belgium has a dualist federation akin to Canada's and it has faced challenges in implementing federal loyalty.[549]

After extensive debate, the principle of federal loyalty was formally enshrined in the Belgian Constitution in 1993.[550] Article 143(1) provides that "[i]n the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for *federal loyalty*, in order to prevent conflicts of interest."[551] The principle federal loyalty was situated "au niveau *des relations politiques*,"[552] with the Arbitration Court (renamed the "Constitutional Court" in 2007) excluded from adjudicating conflicts of interests between federal partners.[553]

However, Nato explained that despite the legislator's intent to exclude the principle of federal loyalty from the ambit of judicial intervention, the Constitutional Court suspended and

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principle" (*ibid*, citing Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart Publishing, 2011) at 57).

[548] Da Silva, *supra* note 514, n 78; Francesco Palermo and Karl Kössler, *Comparative Federalism : Constitutional Arrangements and Case Law*, Hart Studies in Comparative Public Law, vol 19 (Oxford: Hart Publishing, 2017) at 249.

[549] Nato, *supra* note 424 at para 44.

[550] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 6. The 1993 Constitution also formally established Belgium as a federal state.

[551] *Supra* note 520 [emphasis added]. Reactions to the provision varied, with certain scholars criticizing its impracticality and ambiguity, while others recognized its potential psychological value (Nato, *supra* note 424 at para 46; Jean-Claude Scholsem, "De la *Bundestreue* à la loyauté fédérale: Fidelité ou inconstance?" in Joe Verhoeven, ed, *La Loyauté: mélanges offerts à Étienne Cerexhe* (Brussels: Larcier, 1997) 335 at 342—43; Marc Uyttendaele, *Précis de droit constitutionnel belge : regards sur un système institutionnel paradoxal*, 3rd ed (Brussels: Bruylant, 2005) at para 882).

[552] Francis Delpérée, *Le droit constitutionnel de la Belgique* (Brussels: Bruylant, 2000) at para 761 [emphasis in original]. See also Scholsem, *supra* note 551 at 340.

[553] Nato, *supra* note 424 at para 46. Rather, Nato explains that "Belgian law foresaw a web of committees of concertation and negotiation procedures to facilitate the political process envisaged under Article 143" (*ibid*; see also Uyttendaele, *supra* note 551 at para 878).

later annulled a legal norm solely on the basis of article 143 by 2010.[554] Anne-Catherine Rasson contended that this occurred through the amalgamation of pre-existing fundamental principles in Belgian law, such as the principles of "vivre ensemble," proportionality, reasonability, and teleological interpretation, with the Constitution's newly-recognized political concept of federal loyalty.[555] Shortly after, in 2012, the *Sixième Réforme de l'État* formally amended Belgian law to make federal loyalty subject to the control of the Constitutional Court, acknowledging "le besoin de coordination entre l'Etat fédéral et les entités fédérées."[556]

It is noteworthy that in both Germany and Belgium, the emergence of the federal loyalty principle might have been influenced by the infusion of their private law concept of good faith into their constitutional law.[557] In Canada, although the concept of good faith is recognized in the civil law of Quebec,[558] Anglo-Canadian common law has traditionally been reluctant to accept the existence of a general good faith doctrine governing parties in the performance of contracts.[559] However, in a landmark 2014 decision in *Bhasin v Hryniew*, the Supreme Court of Canada unanimously dispelled the conventional skepticism toward good faith in contract law, affirming that "good faith contractual performance is a general organizing principle of the common law of contract."[560] Although the full implications of this ruling remain to be seen, it does indicate a

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[554] C. Const., 29 July 2010, n° 95/2010 (suspension order) and C. Const., 28 October 2010, n° 124/2010 (annulment order). See Nato, *supra* note 424 at para 47; Anne-Catherine Rasson, "Le principe du « vivre ensemble » belge : une épopée constitutionnelle" [2012]:1 Chroniques Dr Public 25 at paras 1, 88ff; Yves Lejeune, *Droit constitutionnel belge : fondements et institutions*, 3e ed (Bruxelles : Éditions Larcier, 2017) at para 355-2.

[555] See Nato, *supra* note 424 at para 47; Rasson, *supra* note 554 at paras 69—71, 119ff, 124ff. See also Lejeune, *supra* note 554 at para 355-1; Scholsem, *supra* note 551 at 340, 343.

[556] Belgium, *Un État fédéral plus efficace et des entités plus autonomes : Accord institutionnel pour la sixième réforme de l'État*, 11 October 2011 at para 7.1, online (pdf): <https://www.dekamer.be/kvvcr/pdf_sections/home/FRtexte%20dirrupo.pdf>. See also Nato, *supra* note 424 at para 48; Rasson, *supra* note 554 at para 1.

[557] Nato, *supra* note 424 at paras 40, 51.

[558] Arts 6, 7 and 1375 CCQ. See also *Bank of Montreal v Bail Ltée*, [1992] 2 SCR 554; *Houle v Canadian National Bank*, [1990] 3 SCR 122; *National Bank of Canada v Soucisse*, [1981] 2 SCR 339.

[559] *Bhasin v Hrynew*, 2014 SCC 71 at para 32.

[560] *Ibid* at para 33. The Court also stated that the general organizing principle of good faith establishes a novel common law duty "to act honestly in the performance of contractual obligations" (*ibid*). See generally Shannon O'Byrne &

growing awareness for the need to establish rules for the conduct of parties engaging in consensual interactions.[561] This development may lay the foundation for the easier recognition of a duty of federal loyalty in Canadian constitutional law.

4.1.3 South Africa: Process-Based Loyalty Duties

Finally, South Africa's Constitution,[562] which possibly encapsulates the most extensive codification of the fundamental precepts of federal loyalty,[563] can serve as an inspiration to Canada to ease the tension between dualism and cooperative federalism explored in the previous chapter. Section 41(1) of the South African Constitution unmistakably draws from *Bundestreue*[564] and outlines the "principles of cooperative government and intergovernmental relations," which encompass reciprocal duties of cooperation, coordination, information-sharing, and consultation. In addition, all spheres of government and all organs of state must "avoi[d] legal proceedings against one another."[565] Furthermore, section 41(3) requires that in the event of intergovernmental conflict, the federal partners are required to exert "every reasonable effort" to settle the dispute through intergovernmental mechanisms[566] and must explore all alternative remedies before resorting to court intervention. Should the court find that the involved parties have not made

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Ronnie Cohen, "The Contractual Principle of Good Faith and the Duty of Honesty in Bhasin v. Hrynew" (2015) 53:1 Alta L Rev 1 (QL); Angela Swan, Jakub Adamski & Annie Y Na, *Canadian Contract Law*, 4th ed (Toronto: LexisNexis, 2018) at §8.319; Manasvin Goswami, "Coherence and Consistency in a System of Good Faith: Assessing and Explaining the Impact of Bhasin v. Hrynew on Canadian Contract Law" (2017) 77 SCLR (2d) 309 (QL); Neil Finkelstein et al, "Honour Among Businesspeople: The Duty of Good Faith and Contracts in the Energy Sector" (2015) 53:2 Alta L Rev 349 (QL).

[561] In Jacob Young's words: "Bhasin shifts the theoretical foundation by rejecting the classical conception of contractual relations being motivated by purely self-interested actors. The decision instead favours an understanding of contracts as cooperative and mutually beneficial undertakings" (Jacob Young, "Justice Beneath the Palms: Bhasin v. Hrynew and the Role of Good Faith in Canadian Contract Law" (2016) 79 Sask L Rev 79 at para 3 (QL)).

[562] *Constitution of the Republic of South Africa, 1996*, *supra* note 522.

[563] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 8; De Villiers, *supra* note 528 at 215—16.

[564] Arban, *supra* note 514 at 250.

[565] *Constitution of the Republic of South Africa, 1996*, *supra* note 522, s 41(1)(h)(vi).

[566] These mechanisms are outlined in several sector-specific laws, such as the *Division of Revenue Act, 2023* (S Afr), No 05 of 2023, s 31 (S Afr), and are comprehensively governed by Chapter 4 of the *Intergovernmental Relations Framework Act, 2005* (S Afr), No 13 of 2005 (S Afr) [*IRFA*], which applies as the standard in all other instances (Palermo & Kössler, *supra* note 548 at 252).

exhaustive efforts to resolve their dispute, it retains the authority to refer the matter back to the parties.[567]

As explained by Professor Poirier, the South African Constitution could provide a "solution mitoyenne" between on the one hand, protecting each federal partner's parliamentary sovereignty and, on the other hand, encouraging cooperative federalism.[568] She further elaborated that by empowering the judiciary to oversee compliance with the principles of cooperative government but by emphasizing non-judicial resolutions, the South African Constitution allows judges to avoid delving into the "substance" of intergovernmental relations. Instead, judges can focus on ensuring that federal entities act in good faith when exercising their competences and interacting with other entities. Thus, the principle of federal loyalty elaborated in that context is primarily of a procedural nature.[569]

Accordingly, in *Premier Western Cape v The President of the Republic of South Africa and Another*, the Constitutional Court found that opposition rooted in policy preferences by provinces to an otherwise legitimate federal law is not enough to invoke the principles of cooperative federalism, particularly when the federal government had engaged in consultations with the provinces and provided them with opportunities to express their views before enacting the law.[570]

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[567] *Constitution of the Republic of South Africa, 1996*, *supra* note 522, s 41(4). See also Stu Woolman & Theunis Roux, "Co-operative Government & Intergovernmental Relations" in Stuart Woolman & Michael Bishop, eds, *Constitutional Law of South Africa*, 2nd ed, vol 1 (Cape Town: Juta & Company, 2014) 14-1 at 14-19 to 14-20.
[568] Poirier, "Armes à feu", *supra* note 19 at 90.
[569] *Ibid*.
[570] [1999] ZACC 2, 1999 (3) SA 657, 1999 (4) B Const LR 383 at paras 49—62, 90 (CC). In that case, the Court held that the purpose of paragraph 41(1)(g) was "to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively" (*ibid* at para 58). However, the Court highlighted that the provision did not mean that provinces have "the right to veto national legislation with which they disagree, or to prevent the national sphere of government from exercising its powers in a manner to which they object" (*ibid* at para 59). For another case in which the Court held that the cooperative governance obligations outlined in the South African Constitution were not violated, see *Minister of Police and Others v Premier of the Western Cape and Others*, [2013] ZACC 33, 2013 (12) B Const LR 1365, 2014 (1) SA 1 at paras 58—64 (CC). See also Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 8; M Z Makoti & O K Odeku, "Co-operative Governance in South Africa" (2021) 12:2 Afr J Pub Aff 43.

Yet, in a later case, the Constitutional Court held that a province's enactment of legislation in an area of overlapping jurisdiction without informing or consulting the federal Parliament, while the latter was engaged in a consultative process to assess the viability of a national scheme, contradicted the principles of cooperative government.[571] Moreover, the Court underscored that the constitutional obligation of federal partners to avoid litigation extends beyond attempts to settle existing court cases. Instead, it demands a profound re-evaluation of the position of each party involved.[572]

This understanding of federal loyalty as a procedural obligation, requiring that federal partners consider each other's interests in exercising their competences, aligns with the Supreme Court of Canada's increasing focus on process in shaping constitutional rights and freedoms. Professor Colleen Sheppard noted that constitutional rights and freedoms in Canada are increasingly being framed by the judiciary in terms of "the processes and practices they require rather than in terms of specific constitutionally-mandated substantive outcomes."[573] She explained that process-based constitutionalism is advantageous, empowering marginalized individuals to participate in decision-making processes. It also obviates the need for courts to interpret the substantive content of rights in contexts that involve considering and balancing complex social and political factors – a task for which the judiciary may be institutionally ill-suited.[574] Nonetheless, while there is potential for greater inclusivity, Professor Sheppard warned that shifting the focus from substantive rights to procedural ones might offer less protection to

[571] *National Gambling Board v Premier of KwaZulu-Natal and Others*, [2001] ZACC 8, 2002 (2) B Const LR 156, 2002 (2) SA 715 at para 34 (CC). See also Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 8.
[572] *National Gambling Board v Premier of KwaZulu-Natal and Others*, *supra* note 571 at para 36.
[573] Colleen Sheppard, "Inclusion, Voice, and Process-Based Constitutionalism" (2013) 50:3 Osgoode Hall LJ 547 at 548.
[574] *Ibid* at 549, 554, 573.

historically marginalized individuals. Persistent historical inequalities among the parties involved could endure, resulting in the ongoing denial of substantive rights or inequitable outcomes.[575]

However, as Professor Poirier highlighted, these potential risks of recognizing procedural rights would not materialize in the context of acknowledging a duty of federal loyalty for Canada's federal partners. Such recognition would not replace existing substantive rights but would instead introduce new behavioral standards in intergovernmental relations that have previously evaded judicial review.[576] Indeed, manifestations of this shift toward process-based constitutionalism are evident in various areas of Canadian constitutional law, suggesting a potential foundation for acknowledging a federal loyalty principle. This will be explored in more detail in the following section.

4.2 The Implicit Presence of Federal Loyalty Features in Canadian Constitutional Law

4.2.1 The Unwritten Constitutional Principle of Federalism

While the Supreme Court has recently reminded us that unwritten constitutional principles cannot be used to independently invalidate legislation,[577] they can be used to inform decision-making in one of two ways. First, they can be used to interpret constitutional provisions.[578] Second, these principles "can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent."[579]

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[575] *Ibid* at 573—74.
[576] Poirier, "Armes à feu", *supra* note 19 at 91.
[577] *Toronto (City) v Ontario (AG)*, 2021 SCC 34 at paras 57, 63, 84 [*City of Toronto*]. Justice Abella, writing for the dissent, strongly disagreed with this assertion, contending that unwritten constitutional principles can indeed be employed to invalidate legislation (*ibid* at paras 170, 185).
[578] *Ibid* at para 55.
[579] *Ibid* at para 56.

In *City of Toronto*, the Court affirmed that "while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis."[580] Hence, although the Constitution remains silent on the exercise of federal and provincial powers, federal loyalty can serve as a mechanism to guide this exercise, emerging from the unwritten constitutional principle of federalism. Such a principle of federal loyalty could give rise to a structural doctrine of good faith, conceivably encompassing obligations to consult and cooperate with other orders of government when exercising valid constitutional powers that could adversely affect them. A parallel can be drawn with the doctrine of full faith and credit, also seen as inherent to Canadian federalism.[581] This doctrine arguably encompasses some elements of federal loyalty as it requires provinces to respect differences between their legal systems and those of other provinces.[582] Moreover, as illustrated in chapter 2, other doctrines, such as federal paramountcy and interjurisdictional immunity, have been developed judicially to regulate the exercise of federal and provincial powers. Therefore, federal loyalty could offer another avenue to address how constitutional powers are to be exercised, providing a normative basis for the Supreme Court's recent endorsement of a cooperative vision of federalism.

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[580] *Ibid* at para 50. In that case, the Court was tasked with deciding whether provincial legislation implementing a reduced ward structure for the City of Toronto during an election campaign violated the unwritten constitutional principle of democracy. In upholding the legislation, the Court found that there was "no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections" (*ibid* at para 82).

[581] *Hunt v T&N plc*, [1993] 4 SCR 289 at 324 [*Hunt*]; *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1100.

[582] See Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 9; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 59. See also Cyr, *supra* note 514 at 32—33. Professor Gaudreault-DesBiens affirmed that this obligation to respect differences between legal systems "can be construed as imposing upon provinces' occasional obligations to cooperate, be it by refraining from interfering into another province's affairs ('passive cooperation'), or by recognizing rulings emanating from another province ('active cooperation')" (Jean-François Gaudreault-DesBiens, "The 'Principle of Federalism' and the Legacy of the Patriation and Quebec Veto References" (2011) 54 SCLR (2d) 77 at para 44 (QL) [Gaudreault-DesBiens, "Principle of Federalism"]). However, he did express skepticism about whether such a duty to cooperate can be broadened and mandated for Canada's federal partners in other situations (*ibid* at para 45).

We have seen in chapter 3 that the Supreme Court of Canada refused to limit parliamentary sovereignty, or to impose any sort of constraint on the unilateral action of a government acting within its competencies. Nonetheless, within the Supreme Court's jurisprudence, there are indications suggesting the presence of loyalty-like duties stemming from the unwritten constitutional principle of federalism, particularly in instances where the Court endeavors to preserve the stability and internal balance of the federal union.[583]

The Supreme Court's advisory opinion in the 1981 *Patriation Reference* sparked renewed interest in the normative implications of federalism.[584] The Court found that while the federal government's attempt to unilaterally patriate the Constitution from the United Kingdom was legally valid, it contravened a constitutional convention necessitating a "substantial degree of provincial consent."[585] This convention was grounded in the federal principle, which disallowed unilateral modifications of provincial legislative powers by federal authorities.[586]

However, as highlighted by Professor Gaudreault-DesBiens, the *Patriation Reference* preceded the resurgence of unwritten constitutional principles in the late 1990s. According to him, these principles offer a "much stronger normative foundation" for decisions aiming to uphold federalism's core values, despite their varying enforceability.[587] He suggested that had the majority opinion been informed by constitutional principles rather than conventions, such an opinion could have easily relied on federal loyalty, assuming that it is inherent to federalism, to challenge unilateral actions jeopardizing the federal nature of the Canadian Constitution.[588]

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[583] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 12—14.
[584] *Reference Re Resolution to amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*]. See *ibid* at 10.
[585] *Patriation Reference*, *supra* note 584 at 904—05.
[586] *Ibid* at 905.
[587] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 11.
[588] *Ibid*.

One seminal case that brought these unwritten constitutional principles to the forefront of Canadian constitutional law was the 1998 *Quebec Secession Reference*.[589] The Court identified four foundational constitutional principles that underpin the Constitution's structure and as such constitute "its lifeblood":[590] federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[591] In the absence of an express provision dealing with secession in the *Constitution Act, 1867*, the Court drew on these underlying principles to navigate the complex issue of whether and how a province can unilaterally secede from Canada.[592] It ruled that if a clear majority of Quebec residents voted clearly in favour of secession, all parties to Confederation would be obligated to engage in negotiations with Quebec concerning its potential separation from Canada.[593] Professor Sheppard noted that although the Court restrained its supervisory authority over the political dimensions of the duty to negotiate,[594] its rationale exemplifies the judiciary's shift towards a process-oriented approach in resolving intricate constitutional matters.[595]

Others have gone further and have viewed the *Quebec Secession Reference* as recognizing ideas akin to federal loyalty, albeit implicitly. In his discussion of the *Quebec Secession Reference*, Mathieu Roy wrote that "[t]he parallels with federal loyalty are obvious. One could thus argue that federal loyalty, being a pillar of the overarching principle of federalism, is already present in all but name in the Canadian constitutional order."[596] Similarly, Professor Gamper asserted that the Supreme Court acknowledged the relationship between

[589] *Supra* note 532.
[590] *Ibid* at para 51.
[591] *Ibid* at para 32.
[592] *Ibid* at para 88.
[593] *Ibid* at paras 88, 150.
[594] *Ibid* at paras 100—03, 153.
[595] Sheppard, *supra* note 573 at 554.
[596] Mathieu Roy, *Treaty-Making Powers of Canadian Provinces: Revisiting the 1960s Debate in Light of Subsidiarity and Federal Loyalty* (Toronto: LLM Thesis, Faculty of Law, Toronto, 2005) at 59.

secession and federal loyalty, despite not explicitly affirming federal unity as an "untouchable" constitutional principle.[597]

Nato took a firmer stance, suggesting that the obligation to negotiate outlined by the Supreme Court in the *Quebec Secession Reference* effectively instituted federal loyalty within Canadian constitutional law.[598] However, Nato subsequently moderated his assertion, noting that while the advancement of federal loyalty as a constitutional principle is unlikely in the immediate future due to the Supreme Court's recent reaffirmation of parliamentary sovereignty,[599] there is potential for acknowledging federal loyalty as a constitutional convention.[600]

For his part, Professor Gaudreault-DesBiens also agreed that the *Quebec Secession Reference* implicitly acknowledged the presence of loyalty principles in Canadian constitutional law.[601] This led him to ask the following question:

> if federal actors negotiating the secession of one of them from the federation are under a constitutional duty to negotiate in good faith the terms of that secession — even if it is a procedural obligation of means and not of results, is it not arguable that federal actors dealing with each other in the "ordinary life" of the federation are under a similar duty to act in good faith and to take into consideration the rights and interests of each other?[602]

I contend that the answer to that question is a resounding "yes". Traces of federal loyalty have begun to weave themselves into Canadian constitutional law. First, as illustrated in the previous chapter, the Supreme Court has strongly endorsed the principle of cooperative federalism. However, thus far, the Court has refrained from imbuing cooperative federalism with any

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[597] Gamper, *supra* note 516 at 163.
[598] Nato, *supra* note 424 at paras 53, 55.
[599] *Ibid* at paras 58—59, referring to *Mikisew*, *supra* note 460; *2018 Securities Reference*, *supra* note 408.
[600] Nato, *supra* note 424 at paras 60—62.
[601] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 9; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 59. See also Cyr, *supra* note 514 at 32.
[602] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 10. This seems to contradict an assertion he made in an earlier article, where he suggested that the likelihood of the duty to negotiate, as outlined in the *Quebec Secession Reference*, extending beyond its unique circumstances "appears limited" (Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 45; see also Gaudreault-DesBiens, "Ethos", *supra* note 21 at 60).

normative force. Consequently, although Canada's federal partners are urged to cooperate, there are no consequences for non-cooperation, rendering cooperative federalism a relatively weak principle. I suggest that federal loyalty can bolster it with the normative strength it currently lacks by setting forth the "rules of engagement" for addressing conflict that inevitably arises from cooperation among the federal partners.[603] Second, through its revival of unwritten constitutional principles, the Court has been concerned with maintaining the stability of the federal union and consequently has a deep suspicion of unilateral actions that affect the federal balance.[604] While negative instances of this were seen in the *CAP Reference* and *Long-Gun Registry Decision*, there are other cases where the Court has shown itself to be more mindful of the disruption to the federal union's stability caused by certain unfettered unilateral actions.

4.2.1.1 Stability: Constraining the Exercise of Unilateral Powers

For instance, in *Ontario Hydro*,[605] at issue was the scope of Parliament's power to declare works for the general advantage of Canada. Specifically, the Court had to determine if federal labour relations laws applied to employees working at provincial nuclear electrical generating stations, which fell within the scope of the federal declaratory power. While federal jurisdiction over labour relations in these stations was upheld, Iacobucci J., writing for himself and two other judges (with concurrence on this point from Lamer C.J.) opined that the declaratory power had to be circumscribed to uphold the federal principle.[606] He maintained that both the declaratory power and the federal government's power under the "Peace, Order and Good Government" ("**POGG**")

[603] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 14, citing Robert A Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009) at 91.
[604] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 11—13; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 60—62.
[605] *Supra* note 191.
[606] See Cyr, *supra* note 514 at 25.

clause were governed by "same balancing principles of federalism."[607] Consequently, he concluded that "Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved."[608]

Thus, in *Ontario Hydro*, the majority seemed willing to accord meaning to "a principle of political morality" that would constrain the exercise of an otherwise uncontested unilateral and discretionary constitutional power.[609] This reflects the judicial treatment received by the principle of federal loyalty in other federations, as discussed in the preceding section.[610] This utilization of the principle of federalism as a normative benchmark, aimed at curbing political unilateralism[611] and promoting stability and predictability, is intended to "discourage abrupt and unexpected shifts in the relationships between the governments of the federation."[612] Such an approach has been observed more recently in cases such as the *Senate Reform Reference*[613] and the *Supreme Court Act Reference*.[614]

In the *Senate Reform Reference*, the Supreme Court adopted a narrow interpretation of Parliament's unilateral power for Senate reform under section 44 of the *Constitution Act, 1982*. This stance stemmed from the Court's acknowledgment of the equality between Parliament and

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[607] *Ontario Hydro*, *supra* note 191 at 423. Chief Justice Lamer wrote that the two powers were "similarly subject to balancing federal principles" (*ibid* at 340).
[608] *Ibid* at 404, and cited with approval by Lamer C.J. at 340.
[609] Gaudreault-DesBiens, "Ethos", *supra* note 21 at 62; Gaudreault-DesBiens & Poirier, *supra* note 19 at 408. Professors Gaudreault-DesBiens and Poirier noted however that "the actual influence of *Ontario Hydro* has been rather limited with regard to the judicial review of the manner in which the uncontested holder of a constitutional competence may or may not exercise it" (Gaudreault-DesBiens & Poirier, *supra* note 19 at 408—09).
[610] See Gaudreault-DesBiens, "Ethos", *supra* note 21 at 62; Gaudreault-DesBiens & Poirier, *supra* note 19 at 408.
[611] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 11.
[612] *Ibid* at 12. See also Gaudreault-DesBiens, "Ethos", *supra* note 21 at 62. This represents the interpretation of federal loyalty within German constitutional jurisprudence (see section 4.1.1, *above*; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 69).
[613] *Reference re Senate Reform*, 2014 SCC 32 [*Senate Reform Reference*].
[614] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*]. See Harding & Snow, *supra* note 418 at 122.

the provinces in the Canadian constitutional framework and the understanding that "[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution."[615] This aligns with the Supreme Court's assertion in the *Supreme Court Act Reference* regarding Parliament's unilateral authority to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada" pursuant to section 101 of the *Constitution Act, 1867*. Recognizing the Supreme Court's emergence as an "essential institution engaging both federal and provincial interests"[616] within Canada's constitutional architecture, the Court affirmed that "[t]he unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*."[617]

Professor Kate Glover asserted that in both the *Senate Reform Reference* and the *Supreme Court Act Reference*, the Supreme Court employed cooperative federalism as a lens through which it interpreted unilateral amending powers narrowly and amending provisions requiring multilateral consensus broadly.[618] She used this to support her claim that the amending procedures set out in Part V of the *Constitution Act, 1982* are "an expression of cooperative federalism" and that "cooperative federalism is embedded in the structure of the Constitution."[619] Professor Glover suggested that this structural understanding of federalism could lead to the acknowledgment of loyalty-like obligations when different orders of government work together and establish intergovernmental legislative partnerships.[620]

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[615] *Reference re Senate Reform*, *supra* note 613 at para 48.
[616] *Supreme Court Act Reference*, *supra* note 614 at para 87.
[617] *Ibid* at para 101. See also Cyr, *supra* note 514 at 25.
[618] Glover, *supra* note 403 at 55—59.
[619] *Ibid* at 45, 53, 59—60.
[620] *Ibid* at 46, 63.

4.2.1.2 Balance and Subsidiarity

In addition to its concerns for stability, the Supreme Court has placed considerable emphasis on maintaining a balanced federal structure.[621] For instance, in *Canadian Western Bank*, the Court stated that "[t]he constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power."[622] In the *2011 Securities Reference*, the Court stressed that federal and provincial powers must not be exercised in ways that undermine one another.[623] Rather, the Court asserted that "federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres."[624] This desire to prevent disruption of the federal balance is reflected in the Supreme Court's interpretation of the extent of federal jurisdiction under the national concern branch of the POGG power and the general regulation of trade branch of the "trade and commerce" power. Both tests seek to ensure that federal powers are construed in a manner that does not unduly encroach on provincial jurisdiction.[625] For example, most recently in the *GHG Reference*, the Supreme Court reiterated that to establish federal jurisdiction under the national concern branch of the POGG power, the

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[621] Peach, *supra* note 488 at 4—5; Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 13; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 77.
[622] *Supra* note 214 at para 24. The Court stated that the constitutional doctrines are based on the "guiding principles" of the Constitution (*ibid*).
[623] *Supra* note 408 at para 7.
[624] *Ibid*. See also *ibid* at para 61; *Assisted Human Reproduction Act Reference*, *supra* note 407 at paras 193, 246.
[625] Both tests hinge on the court's assessment of whether the provinces, acting individually or collectively, possess the constitutional capacity to address the policy issue without federal intervention (*GHG Reference*, *supra* note 158 at paras 146, 152, 157). See Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 48; Jeremy Webber, "Frustrations of Federalism, Frustrations of Democracy: Trudeau, Transformative Change and the Canadian Constitutional Order" (2020) 99 SCLR (2d) 101 at para 53 (QL); Johanne Poirier & Colleen Sheppard, "Rights and Federalism: Rethinking the Connections" (2022) 26:2 Rev Const Stud 249 at 268 (HeinOnline); Centre for Constitutional Studies, "Subsidiarity" (4 July 2019), online: <https://www.constitutionalstudies.ca/2019/07/subsidiarity/>.

proposed matter must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[626]

Tied into this concept of equilibrium between federal and provincial powers, and informing both the aforementioned POGG and "trade and commerce" tests, is the principle of subsidiary.[627] In Canadian law, subsidiarity is a jurisdictional principle that promotes decision-making at the level of government nearest to the individuals affected, whenever possible.[628] Professor Dwight Newman asserted that it has come to be acknowledged as a "key structural principle" within Canadian constitutional law.[629]

Justice L'Heureux-Dubé explicitly referenced subsidiarity in *Spraytech*, stating that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity."[630] In *Canadian Western Bank*, Binnie and LeBel JJ. cited the "asymmetrical effect" of the interjurisdictional immunity doctrine, applied primarily to safeguard federal powers, as potentially conflicting with the principles of subsidiarity.[631] In *Lacombe*, Deschamps J., in her dissent, criticized the majority for overlooking the principles of cooperative federalism and subsidiarity.[632] She highlighted that subsidiarity is a vital aspect of

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[626] *Supra* note 158 at para 160, citing *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 432.
[627] Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 50; Cyr, *supra* note 514 at 28; Poirier & Sheppard, *supra* note 625 at 268; Centre for Constitutional Studies, *supra* note 625; Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 197 (HeinOnline) [D Newman, "Federalism, Subsidiarity, and Carbon Taxes"]; Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR (2d) 601 at 608; Jean-François Gaudreault-DesBiens & Noura Karazivan, "Dissipating Normative Fog: Revisiting the POGG's National Concern Test" (2021) 55 RJTUM 103. *Contra* Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2003) 28 Queen's LJ 411 at para 25 (QL).
[628] Carrière, *supra* note 412 at para 4; Peter W. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 NJCL 341 at 341.
[629] D Newman, "Federalism, Subsidiarity, and Carbon Taxes", *supra* note 627 at 193. See also *Assisted Human Reproduction Act Reference*, *supra* note 407 at para 183.
[630] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.
[631] *Supra* note 214 at para 45. See also Cyr, *supra* note 514 at 28.
[632] *Supra* note 320 at paras 184—85. See also Harding & Snow, *supra* note 418 at 117.

Canadian federalism and of modern federalism worldwide.[633] She proceeded to argue for a narrow interpretation of the federal paramountcy rule, asserting that "[t]he unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity favour a strict definition of the concept of conflict."[634] Professors Mark S. Harding and Dave Snow noted that the acknowledgment of cooperative federalism and subsidiarity as "underlying principles" of federalism indicated a significant increase in their importance among certain Supreme Court justices.[635]

Professor Gaudreault-DesBiens has urged the Court to establish consistent parameters, which he calls sub-principles, to guide decision-making in cases where formal constitutional provisions offer limited direction on resolving federalism-related issues.[636] He cited subsidiarity as an example of such a sub-principle.[637] Although acknowledging potential disagreement on the application of sub-principles, as seen with the diverging opinions on the impact of subsidiarity in the *Assisted Human Reproduction Act Reference*,[638] he stressed the importance of consensus on their foundational aspects to better understand the normative implications of federalism.[639]

4.2.2 Federal Loyalty as a Sub-Principle of Federalism

I propose that if subsidiarity can be seen as evolving into a "clearer constitutional principle,"[640] it establishes a precedent for incorporating federal loyalty into Canadian

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[633] *Lacombe*, *supra* note 320 at para 109.
[634] *Ibid* at para 119.
[635] Harding & Snow, *supra* note 418 at 117. See also Brouillet, *supra* note 627 at 627.
[636] Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 66. For an exploration of the significance of implicit principles in Canadian constitutional law, see Jean-François Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy and Identity" (1999) 23:4 Vt L Rev 793 (HeinOnline); Jean-François Gaudreault-DesBiens, "Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the *Quebec Secession Reference*", in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 178.
[637] Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 66.
[638] *Supra* note 407.
[639] Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at paras 66—68.
[640] Brouillet, *supra* note 627 at 625, see also 628.

constitutional law.[641] Similar to how a principle delineating jurisdictional boundaries can be considered a "procedural sub-principle" of federalism,[642] despite not being explicitly outlined in the formal constitutional framework of the federation,[643] the same recognition should extend to a loyalty principle regulating the exercise of those powers. Professor Gaudreault-DesBiens elaborated on the role of such sub-principles within a federation as follows:

> Such sub-principles could provide, in the daily life of a federation, a deontic interval within which constitutional powers can, or should, be exercised. These sub-principles, which may have substantial and procedural dimensions, can be derived from the fundamental structural characteristics common to all federations, and adapted to the particular institutional features of the Canadian federation and to its political tradition. ... As well, these sub-principles refer us back to a federation's initial goals; those responsible for individuating them assume an obligation to act in a manner that can reasonably be characterized as fostering those goals, or, to put it negatively, as not unduly undermining the said goals.[644]

Recall our discussion in chapter 3 concerning the Supreme Court's strong endorsement of cooperative federalism. It identified fostering cooperation among governments and legislatures as one of the fundamental objectives of federalism. Since the Court views intergovernmental cooperation as desirable for our federation, acknowledging a sub-principle of federal loyalty would contribute to achieving that objective. Consequently, federal loyalty could help bridge what Professor Gaudreault-DesBiens calls the "missing juridical link" in Canadian federalism between jurisdictional autonomy and intergovernmental cooperation.[645] Some scholars reinforce this claim

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[641] *Contra* Da Silva, *supra* note 514 at 229.

[642] See Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 66. It is important to highlight that not all members of the Court adopted this view of subsidiarity in the *Assisted Human Reproduction Act Reference*. In that case, McLachlin C.J., writing for herself and three other justices, advocated for a narrow interpretation of subsidiarity, viewing it as relevant solely in areas of concurrent jurisdiction and relating only to the complementary relationship between federal and provincial legislation (Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 55). Under that understanding, "[t]he principle does not attribute competence, but governs its *exercise*" (Brouillet, *supra* note 627 at 630 [emphasis in original]).

[643] Brouillet, *supra* note 627 at 603. Professor Eugénie Brouillet suggested that it is not implausible for the Supreme Court to potentially lean towards constitutionalizing the principle of subsidiarity (*ibid* at 628).

[644] Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 66.

[645] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 2. As Professor Gaudreault-Desbiens eloquently expressed: "If formal constitutional provisions constitute the grammar of federalism in a particular federation, these

by contending "that autonomy, subsidiarity, and/or democracy support cooperative federalism and could combine with federal loyalty to form an underlying normative justification for cooperative understandings of federalism."[646]

Others go further, asserting that federal loyalty is inherently embedded within the concept of federalism itself,[647] although such a view is contentious.[648] For example, Professor Gaudreault-DesBiens asserted that the federal loyalty principle "is *inherent* to any federal regime, even when the word loyalty does not formally appear in the law of a given federation."[649] Meanwhile, Professor Gamper contended that arguments supporting federal loyalty as an unwritten principle of federalism mirror those in favour of constitutional loyalty. She asserted that constitutions, even if they do not explicitly mention constitutional loyalty, inherently demand it to maintain consistency and coherence between all the sources of law.[650] In the same vein, she suggested that the vertical separation of powers inherently implies a duty of federal loyalty to prevent abuses of power between orders of government. As Professor Gamper highlighted, "the allocation of powers cannot only be violated by the usurpation of the other tier's power, but also by excessive use of

sub-principles form its syntax, and may bridge the gaps between text, subtext and context, as well as that between law and politics" (Gaudreault-DesBiens, "Principle of Federalism", *supra* note 582 at para 66).

[646] Da Silva, *supra* note 514 at 215.

[647] See Gaudreault-DesBiens, "Ethos", *supra* note 21 at 53; Gamper, *supra* note 516 at 168—70; Cyr, *supra* note 514 at 31; Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 3, 9.

[648] Michael Da Silva strongly opposed the notion that federal loyalty is inherent to the concept of federalism, arguing instead that each state should determine whether to adopt federal loyalty through standard amendment processes (Da Silva, *supra* note 514).

[649] Gaudreault-DesBiens, "Ethos", *supra* note 21 at 53 [emphasis in original]. Professor Gaudreault-DesBiens acknowledged that the notion of core ideas inherent to federalism is debated, especially among scholars adopting functionalist interpretations of federalism (Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20, n 12). However, he observed that there is no sign of a functionalist shift in the Supreme Court's recent jurisprudence (Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 12; *contra* Leclair, *supra* note 627).

[650] Gamper, *supra* note 516 at 168—69. Professor Gamper defined constitutional loyalty as the principle "that all subjects governed by the law, including state authorities, are bound to observe what the constitution stipulates" (*ibid* at 160).

one's own power."[651] In such cases, she argued, a constitutional challenge would require linking a division of powers argument to the principle of federal loyalty.[652]

Therefore, although the Supreme Court has not explicitly recognized the principle of federal loyalty as a central element of federalism, its influence is evident in various constitutional rules derived from the Court's federalism jurisprudence.[653]

4.3 The Explicit Recognition of Federal Loyalty in the Canadian Context

The previous section highlighted several features of federal loyalty that are recognized, albeit implicitly, in Canadian constitutional law. However, the explicit recognition of federal loyalty in Canadian law would raise numerous questions. Professor Poirier highlighted the following issues that would need to be considered: "Should courts police how federal partners interact with each other? If so, how should this be done? Should courts only impose procedural rules, such as consultation, or should they review the outcome of a policy taken without due regard for the federal spirit?"[654] While not providing exhaustive answers to all of these questions, this section outlines the potential characteristics of a federal loyalty duty in Canada.

Drawing from the German, Belgian, and South African case studies explored earlier, I propose that any acknowledged federal loyalty duty in Canada would consist of two main facets: (1) a "negative duty" to refrain from using a legitimate constitutional power to interfere with or harm another order of government, and (2) a "positive duty" to consult and cooperate in good faith with another order of government when pursuing an otherwise lawful action that could produce adverse effects for that order of government.[655] These two facets reflect the gap-filling role of

[651] *Ibid* at 169.
[652] *Ibid*.
[653] Cyr, *supra* note 514 at 31.
[654] Johanne Poirier, "Intergovernmental relations: the lifeblood of federalism" in John Kincaid & J. Westley Leckrone, *Teaching Federalism: Multidimensional Approaches* (Cheltenham: Edward Elgar, 2023) 79 at 85.
[655] See Daly, "Abolition du registre", *supra* note 21 at 46; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 77—78.

unwritten constitutional principles identified by the Supreme Court in *City of Toronto*, as the Constitution does not specify how different orders of government should interact or consider each other's interests while exercising their respective competences. Of course, these two dimensions of the federal loyalty principle are not mutually exclusive and often intersect in policy contexts. For example, I contend that both aspects were breached in the *Long-Gun Registry Decision*.[656]

First, the federal government violated the "negative duty" facet of the federal loyalty principle. Asserting that the federal government breached this aspect of the federal loyalty principle goes beyond what the dissent in the *Long-Gun Registry Decision* was prepared to hold.[657] Instead, the dissent opted for a more restrained position.[658] While the principle of cooperative federalism informed its division of powers analysis, the dissent refrained from striking down the impugned provision as contravening cooperative federalism. Rather, the principle of cooperative federalism prompted the dissent to conclude that the impugned provision did not constitute a valid exercise of the federal criminal law power but instead fell under the province's jurisdiction over property and civil rights.[659] However, I believe that it is more accurate to state that section 29 constitutes *a priori* a lawful exercise of Parliament's criminal law power,[660] yet the principle of federal loyalty restricts Parliament's exercise of this power. It prohibits Parliament from disposing

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[656] Professors Paul Daly and Hugo Cyr similarly argued that the legislation in question would violate a principle of federal loyalty (Daly, "Abolition du registre", *supra* note 21 at 46; Cyr, *supra* note 514 at 33—34). In contrast, Professor Gaudreault-DesBiens expressed doubts about whether the legislation would necessarily breach such a principle (Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 15). Ian Peach raised the issue but did not offer a conclusive opinion on the matter (Peach, *supra* note 488 at 5).

[657] Glover, *supra* note 403 at p 64.

[658] Paul Daly, "Cooperative Federalism Divides the Supreme Court of Canada: Quebec (Attorney General) v. Canada (Attorney General)" (30 March 2015), Intl J Const L Blog (I-Connect), online (blog): <https://www.iconnectblog.com/cooperative-federalism-divides-the-supreme-court-of-canada-quebec-attorney-general-v-canada-attorney-general/> [Daly, "Cooperative Federalism Divides"].

[659] *Long-Gun Registry Decision*, *supra* note 403 at para 176.

[660] While the first instance judge implicitly held that a principle of federal loyalty was violated (*Long-Gun Registry Decision (QCCS)*, *supra* note 490 at paras 4, 144, 150, 192; Poirier, "Armes à feu", *supra* note 19 at 113, 122, 128), he, like the dissenting judges of the Supreme Court, concluded that the pith and substance of section 29 of the *ELRA* was to prevent Quebec from using the federal long-gun registry's data, thus making it *ultra vires* Parliament's criminal law power (*Long-Gun Registry Decision (QCCS)*, *supra* note 490 at paras 116, 125, 134—42, 192).

of the data due to the significant negative externalities imposed on Quebec. Therefore, the law would not be invalid but would be deemed inapplicable to Quebec, akin to how legislation that contravenes the doctrine of full faith and credit, discussed earlier, is not invalid but rather considered inapplicable to the affected federal partners.[661] This would serve to mitigate any impact on parliamentary sovereignty.

In my view, basing the argument on federal loyalty would lend greater coherence to the Supreme Court's recent jurisprudence on cooperative federalism as it would better reflect the Court's promotion and defense of intergovernmental cooperation.[662] I concur with the majority that the doctrine of colourability was not engaged by section 29 of the *ELRA* because the federal government was not trying to "do indirectly what it cannot do directly."[663] The form and substance of the impugned provision were the same – the destruction of the long-gun registry's data.[664] Furthermore, although Quebec was precluded from using the federal long-gun registry's data, section 29 of the *ELRA* did not unlawfully restrict Quebec's authority to establish its own registry under its power over property and civil rights.[665] However, I contend that Parliament exhibited uncooperative federal behavior by using a legitimate constitutional power to interfere with and harm Quebec, thereby violating the "negative duty" dimension of the federal loyalty principle. In fact, it was only after Quebec announced its intention to create its own long-gun registry that section 29 was added to the *ELRA*.[666] Parliamentary debate excerpts quoted by Blanchard J.

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[661] See Cyr, *supra* note 514 at 33—34.
[662] In the same vein, Professor Poirier wrote: "Étant donné son endossement enthousiaste du « fédéralisme coopératif » depuis une bonne décennie, il eut été cohérent que le plus haut tribunal envisage de constitutionnaliser certains garde-fous, qui permettent de maintenir un équilibre dans les relations fortement entrecroisées que le fédéralisme coopératif favorise" (Poirier, "Armes à feu", *supra* note 19 at 90—91).
[663] Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada: 2023 Student Edition* (Toronto: Thomson Reuters, 2023) at 467.
[664] *Long-Gun Registry Decision*, *supra* note 403 at para 40.
[665] *Ibid* at paras 38—40. *Contra* Peach, *supra* note 488 at 3—4.
[666] *Long-Gun Registry Decision*, *supra* note 403 (Factum, Appellant at para 125 [FOA]); Daly, "Cooperative Federalism Divides", *supra* note 658; Poirier, "Armes à feu", *supra* note 19 at 104. None of the earlier bills included

confirm that this section was introduced with the explicit purpose of making it more challenging for Quebec to exercise its unquestioned authority to create such a registry.[667] The creation of a new long-gun registry without access to data from the federal registry would not only impose a significant financial burden on Quebec, but the registry's value and effectiveness would be greatly compromised, as the data on each firearm's chain of ownership since 1998 would be irretrievably lost.[668] As noted earlier, Professor Daly questioned the value of cooperative federalism if one federal partner could unilaterally withdraw from a cooperative scheme, as this would compel all partners to assume that others will act in bad faith to protect their own interests. In the case of the firearms registry, provinces would have had to maintain their own registries containing identical data to protect themselves, thereby defeating the purpose of collaborating with the federal government to increase efficiency and reduce the costs of long-gun data collection.[669] Thus, a principle of federal loyalty could serve as a valuable means to address non-cooperative actions by federal partners, such as when one government deliberately obstructs another from implementing policies it opposes. Although such behavior may not necessarily indicate a "colourable" attempt to encroach upon another order of government's jurisdiction, thereby affecting a statute's validity,

provisions for the destruction of the data (FOA, *supra* note 666 at para 125; *Long-Gun Registry Decision (QCCS)*, *supra* note 490 at para 141; Poirier, "Armes à feu", *supra* note 19 at 104). However, Canada argued that the destruction of the data was implicit in the previous bills (*Long-Gun Registry Decision*, *supra* note 403 (Factum, Respondent at para 95)).

[667] *Long-Gun Registry Decision (QCCS)*, *supra* note 490 at paras 136—39; *Long-Gun Registry Decision*, *supra* note 403 at paras 167—68; Daly, "Cooperative Federalism Divides", *supra* note 658. The dissenting judges of the Supreme Court agreed with Blanchard J.'s assertion that "the Court cannot ignore the fact that Parliament's avowed intention reveals a harmful intent with respect to all other provincial legislatures" (*Long-Gun Registry Decision (QCCS)*, *supra* note 490 at para 136). They further noted that "the intention to cause harm is all the more relevant in that it arises in a context in which Quebec and the federal government had agreed to act jointly, in the spirit of co-operative federalism" (*Long-Gun Registry Decision*, *supra* note 403 at para 189).

[668] *Long-Gun Registry Decision*, *supra* note 403 at para 181; FOA, *supra* note 666 at paras 60, 109—14.

[669] Daly, "Abolition du registre", *supra* note 21 at 41. In fact, Blanchard J. determined that "Quebec most likely participated in this partnership on the assumption that the federal government would not be able to unilaterally destroy its fruits" (*Long-Gun Registry Decision*, *supra* note 403 at para 128).

it contradicts the collaborative spirit of federalism advocated by the Supreme Court. As such, it should be subject to the novel form of inapplicability outlined in this discussion.

Second, I argue that the "positive duty" aspect of the federal loyalty principle was breached in the *Long-Gun Registry Decision*. The scope and intensity of a government's "positive duty" to consult and collaborate when its actions might adversely affect another order of government can differ. It could be a substantive principle, potentially acquiring the authority to invalidate legislation or governmental actions that violate it. Alternatively, it could be a procedural duty, similar to the one that exists in South Africa, which mandates that federal partners make "every reasonable effort" to resolve disputes through intergovernmental mechanisms before seeking court intervention.[670] Additionally, courts may require governments to return to negotiations if they determine that the parties have not made sufficient attempts to settle the conflict.[671] Given the potential conflict of a federal loyalty principle with constitutional doctrines such as dualism or parliamentary sovereignty,[672] envisioning it as a procedural requirement rather than imposing substantive outcomes would likely be more suitable in the Canadian context. In this way, courts can ensure that Canada's federal partners are acting in good faith and respecting each other's interests in the exercise of their powers, while avoiding involvement in actual substantive policy issues.[673]

A parallel can be drawn between this "positive duty" of federal loyalty and the duty to consult and accommodate stemming from the honour of the Crown, a cornerstone principle of Aboriginal law that underpins the relationship between the Crown and Aboriginal peoples.[674] This

[670] See section 4.1.3, *above*.
[671] *Ibid*.
[672] Da Silva, *supra* note 514 at 226—30.
[673] Poirier, "Armes à feu", *supra* note 19 at 90—92.
[674] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*]; *Mikisew*, *supra* note 460 at paras 20—21. See also Poirier, "Armes à feu", *supra* note 19 at 98—99; Daly, "Abolition du registre", *supra* note 21 at 46.

duty obliges "the Crown to consult (and if appropriate, accommodate) Aboriginal peoples before taking action that may adversely affect their asserted or established rights under s. 35 of the *Constitution Act, 1982*."[675] Although the extent of this obligation varies based on the strength of the claimed right and on the gravity of the adverse effect on this right,[676] in all instances, "the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances."[677] Thus, we can see that courts have not hesitated to assess whether the Crown has acted in good faith in the context of its dealings with Aboriginal peoples. Professor Johanne Poirier and Sajeda Hedaraly have even considered the possibility that Canadian law's complex division of powers concerning Indigenous peoples might impose a constitutional obligation on Canada's federal partners to cooperate on matters related to Indigenous interests.[678] Thus, I argue that the duty to consult and accommodate in the Indigenous context can inspire a more general, constitutionally recognised federal loyalty principle between the federal government and the provinces, as well as among the provinces themselves.[679]

I contend that enforcing such a "positive duty" of federal loyalty would have helped in the *Long-Gun Registry Decision*. A strong version of the duty, focusing on substance, would have

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[675] *Mikisew*, *supra* note 460 at para 1.
[676] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 79; *Haida*, *supra* note 674 at paras 39ff.
[677] *Haida*, *supra* note 674 at para 41. See also Daly, "Abolition du registre", *supra* note 21 at 46. In the words of Karakatsanis J., the duty to consult "promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew*, *supra* note 460 at para 26).
[678] Johanne Poirier & Sajeda Hedaraly, "Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who *Can* and *Should* do What?" (2019) 24:2 Rev Const Stud 171 at 176, 204—05. They advocated for a constitutional obligation of cooperation among the members of Canada's federation, which together constitute the "Crown." They argued that "in the federal system, a divided Crown must act cooperatively if it is to act honourably" (*ibid* at 205).
[679] At the very least, this duty of federal loyalty would apply between their respective executive branches, considering that the duty to consult and accommodate applies only to executive action, not legislative action (*Mikisew*, *supra* note 460 at paras 32ff). However, it should be noted that, in practice, legislation affecting Aboriginal peoples generally involves some degree of consultation, even in the absence of a formal duty to consult (Johanne Poirier, *LAWG 517 - Cooperative Federalism, Intergovernmental Relations & Public Policy*, Course Notes (Faculty of Law, McGill University, Summer 2023).

mandated the federal government to transfer the long-gun registry data to Quebec[680] given its obligation to support Quebec in achieving its goal of creating its own registry under its jurisdiction over property and civil rights.[681] However, as noted by Professor Gaudreault-DesBiens, such a "*positive* constitutional duty imposed upon one level of government to assist the other level in the exercise of its jurisdictions would in all likelihood be situated rather highly on the intensity scale of the [federal loyalty] principle."[682] A weaker interpretation of the duty, focusing on procedure, would have required the federal government to negotiate with Quebec regarding the fate of the long-gun registry's data upon the registry's abolishment. In this way, "[i]t would not in and of itself dictate any particular outcome, but it would at least ensure that federalism-related considerations are taken seriously whenever they are relevant."[683] This approach was adopted by the dissent,[684] who, despite holding that section 29 of the *ELRA* was unconstitutional, concluded that Quebec had not proven its legal right to obtain the data.[685] The dissenting judges affirmed that although the federal government could not destroy the long-gun registry's data without first considering the effect of doing so on Quebec's competencies, given that the registry resulted from a federal-provincial partnership, "the other side of the coin is that Quebec cannot dictate to the federal government what it is 'entitled' to receive when their relationship comes to an end."[686] Thus, they stated that "the source of the appropriate remedy must lie in the political process rather than in the courts."[687]

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[680] The first instance judge effectively declared that Quebec was entitled to receive the long-gun registry data within 30 days (*Long-Gun Registry Decision (QCCS)*, *supra* note 490 at para 195).
[681] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 15.
[682] *Ibid* [emphasis in original].
[683] *Ibid* at 13.
[684] However, it is important to reiterate that the dissent did not base its conclusion on a breach of a federal loyalty principle (see 114, *above*).
[685] *Long-Gun Registry Decision*, *supra* note 403 at para 198.
[686] *Ibid* at para 200.
[687] *Ibid* at para 199.

Notably, the dissenting judges emphasized that "[i]t was up to the members of the partnership to set out the conditions that were to apply upon termination of their joint venture in their agreements."[688] This aligns with Professor Karazivan's argument that courts should not be the primary actors involved in making intergovernmental agreements more binding by restricting Parliament's legislative freedom or by imposing a duty of good faith or loyalty on governments.[689] Rather, she contended that cooperative federalism's weak normative force should first be remedied by the legislative and governmental actors involved.[690] According to her, it is the responsibility of these legislatures and governments to anticipate the end of collaboration by adopting dispute resolution mechanisms and enacting manner and form provisions.[691] However, she acknowledged that these approaches inherently involve "a certain dose of uncertainty."[692] For instance, parliaments are free to enact legislation that expressly negates provisions in intergovernmental agreements detailing the consequences of failed cooperation or non-compliance, despite the political costs.[693] Similarly, parliaments can repeal manner and form provisions in legislation implementing intergovernmental agreements that mandate consultation or impose stricter voting requirements before the agreements' terms can be modified.[694]

While it is desirable for legislatures and governments to proactively address the normative challenges arising from intergovernmental cooperation to minimize judicial intervention and avoid separation of powers issues,[695] this has often not been done. Therefore, a more fundamental principle governing interactions between parliaments and governments is necessary to enable

[688] *Ibid* at para 200.
[689] Karazivan, *supra* note 410 at 295.
[690] *Ibid*.
[691] *Ibid* at 320. See also *ibid* at 313ff, 315ff.
[692] *Ibid* at 321.
[693] *Ibid* at 315.
[694] *Ibid* at 319—20.
[695] *Ibid* at 312—13.

courts to adjudicate issues arising from this cooperation. We have observed that federal loyalty, encompassing both negative and positive obligations, could serve this role by enforcing behavioral duties between Canada's federal partners.[696]

[696] Gaudreault-DesBiens, "Cooperative Federalism", *supra* note 20 at 13.

CONCLUSION – Exploring the Role of Federal Loyalty in the TMX Project

This thesis provides a preliminary exploration of what recognizing a principle of federal loyalty could entail in the Canadian context. While acknowledging that such a principle might not have changed the outcome of the TMX Project saga, I contend that it would have at least set clearer rules for the federal government and the provinces to follow in their interactions, thereby fostering greater cooperation.

Of course, deciding if a federal loyalty principle was violated during the TMX Project will depend on the scope and strength the Supreme Court ultimately would give to the principle.[697] For instance, should federal loyalty be confined to intergovernmental cooperative schemes?[698] In the case of the TMX Project, although there was no official joint scheme, shared jurisdiction over environmental matters led to significant interaction at both the constitutional and regulatory levels. The lack of cooperation among the parties stemmed from this interaction. Another question is whether federal loyalty should apply exclusively to executive actors, legislative actors, or both within a federation. While the Supreme Court has rejected the idea of imposing a good faith obligation on legislatures, it has not entirely ruled out the possibility of imposing this obligation on the executive branch.[699] In the TMX Project, both legislative and executive bodies displayed uncooperative behavior. The *EMA Reference* and British Columbia's challenge to Alberta's Bill 12 involved legislative acts, while the trade war between the two provinces and overall lack of intergovernmental collaboration involved executive bodies. Regardless of the approach the

[697] *Ibid* at 15; Gaudreault-DesBiens, "Ethos", *supra* note 21 at 53.
[698] Professor Daly suggested that a federal loyalty duty would apply "aux organismes réglementaires créés coopérativement dans un domaine de double aspect" (Daly, "Abolition du registre", *supra* note 21 at 46). See also Glover, *supra* note 403 at 63; Poirier, "Armes à feu", *supra* note 19 at 100, 130. However, as Professor Kate Glover noted, the principle of cooperative federalism has been invoked even "in cases in which the legislative scheme under review has no coordinated or joint qualities" (Glover, *supra* note 403 at 51). If federal loyalty is to be seen as a normative basis for cooperative federalism, this could imply that it has a role beyond jointly established cooperative schemes.
[699] Poirier, "Armes à feu", *supra* note 19 at 92ff, 100—01.

Supreme Court ultimately adopts, I argue that introducing a federal loyalty principle would have helped mitigate intergovernmental conflict in the TMX Project, even if it did not eliminate it entirely.

For instance, British Columbia's challenge of Alberta's Bill 12 illustrated a situation where recognizing a principle of federal loyalty might have been beneficial. Although we do not have the court's opinion on the constitutionality of the legislation, as the challenge was dismissed for being premature, it can be argued that, regardless of its constitutionality, Bill 12 violated the principle of federal loyalty. Federal loyalty should not be used by one province to undermine the policies of another merely because of differing policy preferences. However, this case was unique, as an examination of the legislative debates leading to the Bill's passage suggests that one of its primary purposes was to intimidate and threaten the well-being of British Columbia.[700] The Bill allowed Alberta to restrict the export of natural gas, crude oil and refined fuels to British Columbia to "inflict economic pain"[701] upon it in retaliation for its opposition to the TMX Project.[702] I would argue that this clearly violates the first branch of federal loyalty described above—a "negative duty" to refrain from using legitimate constitutional power to interfere with or harm another order of government. Thus, the Supreme Court could rule that, even if it were a valid exercise of Alberta's concurrent jurisdiction over the interprovincial export of the primary production from

[700] *BC v Alberta (FC)*, *supra* note 14 at paras 121—28; *Alberta v BC (FCA)*, *supra* note 14 at para 165. However, as noted by the Federal Court of Appeal, "the legislative debates also suggest possible non-discriminatory motivations behind the [Bill] such as maximizing the return on Alberta's natural resources" (*Alberta v BC (FCA)*, *supra* note 14 at para 187; see also *BC v Alberta (FC)*, *supra* note 14 at paras 126, 129).

[701] Alberta, Legislative Assembly, *Alberta Hansard*, 9 April 2018 at 441, online: <https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_29/session_4/20180409_1330_01_han.pdf>, cited in *BC v Alberta (FC)*, *supra* note 14 at para 123.

[702] *Alberta v BC (FCA)*, *supra* note 14 at para 3.

its non-renewable natural resources,[703] it would be inapplicable to British Columbia due to its retaliatory nature and the significant negative externalities it would impose on British Columbia.[704]

As for the *EMA Reference*, it was likely necessary to clarify the impact of provincial environmental legislation on interprovincial pipelines. Reference cases can promote cooperation by clearly defining the boundaries of constitutional powers, thereby paving the way for additional intergovernmental negotiations.[705] However, according to Professor Kate Puddister, "[r]eference cases on their own have not secured cooperative outcomes nor have they enforced intergovernmental agreements when cooperation between governments falls apart."[706] She went on to write that "relying on the reference process can cause governments to harden in their positions and … using courts to address political disputes may do 'more harm than good by adding' salt to an open constitutional wound."[707] Thus, while some litigation is inevitable, it alone does not foster effective and sustained intergovernmental collaboration.[708] Instead, especially for complex policy areas such as the environmental regulation of pipelines, discussion and negotiation between Canada's federal partners facilitate flexible arrangements that meet the needs of all parties,[709] "rather than courtroom showdowns involving zero-sum, winner-takes-all competitions for jurisdiction."[710]

The failure of litigation alone to resolve the TMX Project dispute was evident in the ensuing escalation in tension between Alberta and British Columbia: the general heated rhetoric

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[703] *Constitution Act, 1867*, s 92A(2).
[704] For an analysis of the potential harm that Bill 12 could inflict on British Columbia, see *BC v Alberta (FC)*, *supra* note 14 at paras 133ff.
[705] Kate Puddister, "What We've Got Here Is Failure to Cooperate: Provincial Governments and the Canadian Reference Power" (2021) 51 RGD 91 at 126—27.
[706] *Ibid* at 126.
[707] *Ibid* at 109, citing John L Taylor, "Settlement of Disputes Between Federal and States Concerning Offshore Petroleum Resources: Accommodation or Adjudication" (1970) 11:2 Harvard Int LJ 358 at 392.
[708] Puddister, *supra* note 705 at 127.
[709] Saad & Hoste, *supra* note 175 at 7.
[710] Wright, *supra* note 417 at para 53.

between the provinces; Alberta Premier Notley's threat to "turn off the taps" with Bill 12;[711] Premier Notley's withdrawal from the federal climate plan after the Federal Court of Appeal overturned the federal government's initial approval of the TMX Project;[712] Alberta's growing sense of western alienation in response to perceived attacks on its oil and gas sector;[713] Alberta's constitutional challenges to the federal carbon pricing plan and the *Impact Assessment Act*;[714] and Alberta and Saskatchewan's sovereignty acts.[715]

These issues might have been mitigated if a principle of federal loyalty had been established, strengthening the normative foundation of cooperative federalism and equipping the Supreme Court with a constitutional mechanism to encourage cooperative behavior and address uncooperative actions between the federation's partners. Such a principle could have potentially prevented earlier harmful actions, such as the trade war between British Columbia and Alberta. It might also have compelled the governments to engage in consultation and negotiation governed by clearer behavioural rules, rather than allow tensions to escalate to a point where meaningful cooperation and dialogue became illusory. As Professor Thomas O. Hueglin aptly noted, in a federation where federal and provincial governments pursue divergent and often competing political objectives, "[g]ood behaviour … requires reliable and binding procedural rules and institutionalized mechanisms securing or at least facilitating intergovernmental cooperation."[716] These features are largely missing in the current Canadian federal system, but considering what a principle of federal loyalty could mean within the Canadian context may be a crucial first step in addressing this deficiency. As it stands, in Professor Karazivan's words, "if you respect the

[711] See 19, *above*.
[712] See 21, *above*.
[713] See section 1.2, *above*.
[714] See 23—24, *above*.
[715] See 26—27, *above*.
[716] Hueglin, *supra* note 107 at 320.

division of powers, you do not need to be nice."[717] However, with a principle of federal loyalty, Canada's federal partners might at least need to be polite.

[717] Noura Karazivan, "Cooperative Federalism in Canada and Quebec's Changing Attitudes" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 136 at 163.

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