Q&A with Professor Emmett Macfarlane: The Alberta Sovereignty within a United Canada Act

In this Q&A, CCS summer student Stephen Raitz talks to Professor Emmett Macfarlane (University of Waterloo, Department of Political Science) about the constitutional implications and potential future of the recently passed *Alberta Sovereignty within a United Canada Act*. Professor Macfarlane argues that the Sovereignty Act is not only unconstitutional, but *anti-constitutional*, too.

Q: Starting with the basics: what does the *Sovereignty Act* purport to do?

A: The *Sovereignty Act* purports to allow Alberta's legislative assembly to determine whether a federal law violates the constitution and, read plainly, it purports to permit the provincial cabinet to direct "provincial entities" — defined to include provincial agencies, municipalities, universities, and even police forces — to ignore or potentially even violate federal law. The *Act* was explicitly framed by Premier Danielle Smith as giving Alberta the same type of power that Quebec enjoys (although it is worth noting that Quebec has never tried to enact a law like it and does not enjoy such power).

Q: Are there any other examples — in Canada or elsewhere — where a provincial or state government has attempted to pass a piece of legislation like the *Sovereignty Act*? For example, are there similarities between the *Sovereignty Act* and the recently passed *Saskatchewan First Act*? And if there are, why are we seeing these types of initiatives right now?

A: I'm not aware of a constituent unit in another federal country that has enacted a legislative framework quite like the *Sovereignty Act*. One of the reasons the *Sovereignty Act* is so controversial is that it basically usurps the traditional role of the judiciary to determine

the constitutionality or validity of legislation passed by another order of government. Even the *Saskatchewan First Act*, which purports to assert jurisdiction and contains its own controversial provisions — including provisions asserting unilateral amendments of the *Constitution Act, 1867* and the *Saskatchewan Act, 1905* (these are plainly unconstitutional: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4156421) and establishing "economic impact assessments" of federal legislation — is not quite so broad in its framing as Alberta's *Sovereignty Act*.

I believe there are multiple factors that explain why legislation like this was enacted now, and they interact in complex ways. These factors include: right-wing populist appeal and the ideology of Alberta's current government; a somewhat subtle but important shift in tactics with respect to intergovernmental relations (for example, many of Smith's other initiatives and plans with respect to federal and provincial policy, such as floating a provincial police force and a provincial pension plan, are modelled quite explicitly on Quebec nationalism); and a reaction to federal assertiveness in environmental regulation, particularly around carbon pricing, environmental impact assessments, and pipelines. What it is not is particularly coherent or principled concerning federalism or the division of powers.

Q: Despite all the press it has received, the Alberta government has not used the *Sovereignty Act* yet. How likely is it that the *Act* will ever be used? And are there particular federal laws that could be targeted by the current AB government, or is the *Act* more a matter of political posturing?

A: There is certainly an element of political posturing driving the legislation. It is worth noting that, strictly speaking, the *Sovereignty Act* is simply unnecessary for the Alberta legislature to pass future laws relating to its own jurisdiction. If Alberta wanted to enact a *legislative* response to federal initiatives, it could always do so — the question would simply be whether such legislation was constitutional within whatever context it emerged. The *Sovereignty Act* is thus in many ways symbolic, although how and when the government might issue orders to "provincial entities" respecting federal initiatives, and what the nature of such orders might be, seems to be the primary issue. It is therefore difficult to predict when and how the *Sovereignty Act* might be employed, but that will ultimately come down to the government's political calculus, not the law, because one order of government cannot "declare" a law of another order of government unconstitutional in any meaningful sense.

Q: How might a legal challenge to the *Act* materialize? And if it

did, what specific constitutional rules or principles might be at play?

A: We've seen a number of arguments respecting the *Sovereignty Act*'s legal constitutionality. As I've noted, the *Act* effectively presumes that the legislature can usurp the role of courts with respect to determining the constitutionality of another order of government's law. Martin Olsynski and Nigel Bankes have written that, arguably, there is simply no legislative authority for the *Act*, and that its very pith and substance is to create an unconstitutional framework for passing judgment on federal initiatives (see here: https://ablawg.ca/2022/12/06/running-afoul-the-separation-division-and-delegation-of-powers-the-alberta-sovereignty-within-a-united-canada-act/). They argue that the *Act* may thus violate section 96 of the *Constitution Act, 1867* by impairing the independence and impartiality of the courts.

I've written that the very purpose of the *Act* might be regarded as unconstitutional because it seeks to target and even obstruct the operation of federal law. It is important to note, though, that there is no specific provision of the *Act* that constitutes a direct intrusion on federal jurisdiction. In this regard, it is not clear what the courts would say about this "purposive" critique in a legal sense.

Rather than constituting an infringement on a specific head of federal power, the *Act* stands as an attack on the very foundation of the division of powers. A "structural" view of the Constitution would therefore conclude that the *Sovereignty Act* stands on a very weak legal foundation. Similarly, the *Act* plainly flies in the face of the unwritten principles of federalism and the rule of law, and while the Supreme Court's decision in *City of Toronto v Ontario* makes it clear that a law cannot be invalidated on the basis of unwritten constitutional principles alone, the *Sovereignty Act* may still be unconstitutional in the broader sense of the spirit of the Constitution, even if not in the legal sense.

Q: Some defenders of the *Act*'s constitutionality have referred to previous examples of provinces choosing to not enforce federal legislation, including Quebec's decision to stop enforcing the criminal law on abortion in the 1970s. Is this a fair argument? If not, what distinctions would you draw between what the *Sovereignty Act* does and those other instances of provincial non-enforcement?

A: I don't think the comparison is particularly effective. There is a valid scholarly debate about whether provinces can refuse to enforce federal law, but I don't think most

reasonable observers would say, for example, that a province could validly stop enforcing all criminal law. The Supreme Court has spent far too much energy promoting a collaborative and working federalism for that to be permissible. And that's the fundamental problem: the terms of the *Sovereignty Act* don't contemplate a workable federation or division of powers. It is gateway legislation that, if read plainly, opens the door to the provincial government deciding to obstruct federal law whenever it wishes or it gets a stamp of approval from the legislature that it controls. By contrast, Quebec's decision in the 1970s took place in a very circumscribed and specific context. Quebec had attempted repeatedly to prosecute Dr Henry Morgentaler for breaching anti-abortion laws, and its decision to stop enforcing them came only after he was acquitted in multiple jury trials.

It is true that there would be nothing stopping the federal government from stepping in to enforce its own laws. But the *Sovereignty Act* doesn't just contemplate non-enforcement, it seems to pave the way for active non-compliance or even violation of federal law. Section 2(b) of the *Act* explicitly carves out a loophole for "provincial entities" to do so. In this sense the law is not so much unconstitutional as it is *anti-constitutional*.