

THE EFFECT OF TARIFFS ON LOCAL AND INTERNATIONAL ENERGY TRADE

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This article discusses the ongoing trade war initiated by the United States and its impacts on Canada's energy sector. Canada's retaliatory trade measures have escalated tensions, thus prompting additional tariffs and ultimately jeopardizing cross-border economic efficiency. There have been varying responses across Canadian provinces to the trade war, with energy producing provinces emphasizing the need for trade diversification. This article argues that if Canada reduced regulatory obstacles provincially, it could increase Canada's resilience against external trade disruptions. Further, the impact of the current trade war has influenced geopolitical stability, thus industry leaders must enhance energy security in the long-term to mitigate risk to the industry.

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INTRODUCTION

The first quarter of 2025 has seen extraordinary changes to Canada's international trade relationship with the United States. As particularized below, on 1 February 2025, US President Donald Trump began an international trade war, imposing substantial tariffs by executive fiat on goods entering the US from Canada and Mexico.

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The US trade war with Canada and Mexico took effect on 4 March 2025, as did Canada's retaliatory tariffs. On 6 March 2025, the US suspended tariffs on Canadian goods entering the US that comply with the free trade Agreement between the US, the United Mexican States, and Canada, which has been effective since 1 July 2020.¹

In effect, the 6 March 2025 US suspension exempted from tariffs approximately 38 percent of Canadian products imported into the US. That exemption is ongoing.

President Trump referred to 2 April 2025 as "Liberation Day," on which he imposed a minimum 10 percent tariff, effective 5 April 2025, on all US imports, with some exceptions, and imposed tariffs ranging from 11 percent to 50 percent on products imported from 57 nations, including Canada. The US also imposed tariffs on all steel, aluminum, and automotive imports imported in the US, including from Canada.

The US trade war with Canada and 56 other nations is ongoing and shows little sign of abating. On 4 April 2025, the US government announced that it intended to increase countervailing and anti-dumping duties on Canadian lumber products from 14.4 percent to 34.45 percent.² Some commenters observed that the US may negotiate suspending certain tariffs on 7 April 2025, but that did not occur. To the contrary, on 7 April 2025, President Trump threatened to impose an additional 50 percent tariff on Chinese products if China failed to suspend its retaliatory tariffs on US products by 8 April.

This article considers the purpose and effects of the US trade war with Canada, its consequential impacts on Canada's energy sector, and measures that might be taken to mitigate economic loss to Canada's international trade.

US tariffs on Canadian energy products directly increase the cost of exporting them to the US, the dominant export market being Canadian oil and gas. US tariffs raise the price of Canadian energy products for US buyers. Because US tariffs on Canadian products directly increase cost to US consumers and refiners, they may seek alternative sources, decreasing US demand for Canadian energy. As a result, Canadian producers may decrease the price of products they sell to US buyers to offset the tariff costs. This may render Canadian producers less competitive in the US market, and such market forces may require Canadian producers to access alternative markets outside the US or reduce extractive activities in Canada.

¹ *Canada-United States-Mexico Agreement* as amended by *Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 No 6 [CUSMA] In Canada, the USMCA is also styled the *Canada-United States-Mexico Agreement (CUSMA)* in English and *L'Accord Canada-États-Unis-Mexique (ACEUM)* in French. CUSMA applies to the territory comprising Canada, Mexico, and the United States as specified in Ch. 1, Art. 1.5 and the Country-specific definitions of their territory in section C of Ch. 1 (*ibid*).

² Mathieu Dion & Thomas Seal, "US Hits Canada Lumber with 34% Duties Even Before Trump Tariffs", *Bloomberg Law News* (7 April 2025).

Any reduced Canadian energy production would likely lead to domestic job loss, reduce royalties payable to governments, and erode Canada's gross domestic product (GDP³).⁴

Further, the US is the world's largest oil producer but remains heavily reliant on Canadian energy, importing more than six million barrels of Canadian crude oil per day as of January 2025 to meet US energy and petrochemical manufacturing sector needs.⁵ US tariffs on Canadian energy products may disrupt the integrated energy supply chains between Canada and the US, which some perceive as a threat to US energy security. Nearly 70 percent of oil imported in the US comes from Canada by sea and by land via more than 450,000 kilometers of oil and gas pipelines between the two countries. As the Canadian Energy Centre reports, citing the American Petroleum Institute, tariffs on Canadian "crude oil, natural gas, refined products, or critical input materials that cannot be sourced" in the US would render consumers less able to access the energy products they need at affordable purchase prices, which are often discounted relative to comparative global commodity trade.⁶

A clear understanding of the effects of tariffs on Canadian energy products warrants a few words on the meanings of energy and tariffs.

Canada's energy products include crude oil, natural gas, refined petroleum products, coal, and a growing array of renewable energy sources like hydroelectricity, wind, solar, critical minerals, and biomass.⁷

The American tax policy nonprofit, the Tax Foundation, explains trade tariffs as "taxes imposed by one country on goods imported from another country. Tariffs are trade barriers that raise prices, reduce available quantities of goods and services for US businesses and consumers, and create an economic burden on foreign exporters."⁸ Regulatory tariffs are schedules of tolls, conditions, classifications, practices or rules, and regulations applicable to the provision of a service⁹ or the import of goods¹⁰ by a regulated company or person.

In this article we consider both trade tariffs and regulatory tariffs.

³ GDP measures the total output created through the production of goods and services in a country during a certain period. It also measures the income earned from that production. See Statistics Canada, "Gross Domestic Product (GDP) Per Capita" (26 May 2025), online: [perma.cc/8TVB-49WP].

⁴ Doane Grant Thornton, "Impact of Tariffs on Canadian Businesses" (17 July 2025), online: [perma.cc/W5H9-FS86].

⁵ Hannah Ritchie, "The United States is the World's Largest Oil Producer" (20 November 2024), online: [perma.cc/ZXR7-36GL], citing Energy Institute, "Statistical Review of World Energy" (2024), online (pdf): [perma.cc/H3DF-M85Y].

⁶ Deborah Jaremko, "Why US Tariffs on Canadian Energy Would Cause Damage on Both Sides of the Border", *Canadian Energy Centre* (14 January 2025), online: [perma.cc/BU9C-C4L3].

⁷ National Energy Board, *2018–19 Annual Report to Parliament*, Catalogue No NE1E-PDF (Ottawa: NEB, 2019) at 6–9 online (pdf): [perma.cc/CX8X-LXHN].

⁸ Tax Foundation, "Tariff", online: [perma.cc/SE4A-KZBH].

⁹ See e.g. *Canadian Energy Regulator Act*, SC 2019, c 28, ss 10, 225 [*CER Act*].

¹⁰ See e.g. European Commission, "Carbon Border Adjustment Mechanism", online: [perma.cc/E8TZ-QGKM].

I. INTERNATIONAL TARIFFS

The rules-based international trading order is a cornerstone of global economic stability.¹¹ This international trading order traces its origins to the aftermath of World War II.¹² The *General Agreement on Tariffs and Trade* (*GATT*), first drafted in 1947, became the foundation of multilateral trade rules, and focused on reducing tariffs through successive negotiation rounds that bolstered global commerce during the post-war boom.¹³

At its core, the *GATT* was built on principles aimed at fostering fairness, predictability, and co-operation in international trade. Central to this framework was the concept of non-discrimination, embodied in the Most-Favored-Nation (MFN) principle, which mandated that any trade advantage granted to one member country must be extended immediately and unconditionally to all other member countries for like products.¹⁴ The *GATT* required member states (or “contracting parties”) to afford adequate opportunity for consultation regarding any representations with respect to any matter affecting the operation of the *GATT*,¹⁵ thereby reducing the occurrence of unilateral action that would destabilize the international trade order.

From the 1960s through to the 1980s, the rules-based system expanded to address emerging challenges following the accession of many new contracting countries;¹⁶ the imposition of non-tariff measures and other unfair trade practices such as dumping;¹⁷ and concerns regarding the efficacy of the *GATT* dispute resolution mechanism.¹⁸ The most transformative shift came out of the eighth round of negotiations in Punta del Este (the Uruguay negotiation round) which established the World Trade Organization (WTO) in 1995.¹⁹ The advent of the WTO also led to the introduction of a more robust, binding dispute

¹¹ Abdur Chowdhury et al, “The Role of Multilateralism of the WTO in International Trade Stability” (2021) 20:5 *World Trade Rev* 668; Sèna Kimm Gnanon, “Effect of the Duration of Membership in the GATT/WTO on Economic Growth Volatility” (2023) 65 *Structural Change & Econ Dynamics* 448.

¹² Cathleen D Cimino-Isaacs & Rachel F Fefer, *World Trade Organization: Overview and Future Direction*, R45417 (Washington, DC: Congressional Research Service, 2021) at 2; Douglas A Irwin, “The GATT in Historical Perspective” (1995) 85:2 *Am Econ Rev* 323; World Trade Organization, *World Trade Report 2007: Six Decades of Multilateral Trade Cooperation: What Have We Learnt?* (Geneva: WTO Publications, 2007) at 179–80 [*WTO Report 2007*].

¹³ Cimino-Isaacs & Fefer, *supra* note 12 at 3–4.

¹⁴ *Ibid*; *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187, art I [*GATT 1947*].

¹⁵ *Ibid*, art XXII.

¹⁶ Initially dominated by industrialized nations, the *GATT*’s membership grew from 23 founding signatories — including, Canada, the US, France, and England — to nearly 150 by the 2000s, including many developing nations: see *WTO Report 2007*, *supra* note 12 at 289.

¹⁷ *WTO Report 2007*, *supra* note 12 at 179, 184–88. “Dumping” is where the “products of one country are introduced into the commerce of another country at less than the normal value of the products,” which the *GATT* specifies “is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry” (*GATT 1947*, *supra* note 14, art VI(1)). Contracting members are permitted to levy an “anti-dumping duty not greater in amount than the margin of dumping in respect of such product” (*ibid*, art VI(2)).

¹⁸ *WTO Report 2007*, *supra* note 12 at 261–66.

¹⁹ *Ibid* at 190–92; Cimino-Isaacs & Fefer, *supra* note 12 at 5. The WTO’s authority stems from the Marrakesh Agreement Establishing the World Trade Organization, signed in April 1994, and its annexes, which include the updated *General Agreement on Tariffs and Trade* and other agreements covering trade in goods, services, and intellectual property: World Trade Organization, “WTO In Brief”, online: [perma.cc/NY7U-ND9C].

resolution mechanism.²⁰ The late twentieth and early twenty-first centuries saw globalization surge, marked by China's 2001 WTO accession, which integrated the world's largest emerging economy into the system.²¹

Support for globalization waned in the 2010s, when populist backlash against globalization fueled interest in trade protectionism, as illustrated by President Trump's support for tariffs, and the "America First" economic platform as part of his "Make America Great Again" campaign.²² The rules-based international trade order has been further strained by obstructionist views by some contracting parties. For example, the orderly resolution of disputes by the WTO and the system of international trade which it oversees has been impaired by the fact that the WTO's Appellate Body, critical for resolving disputes, has been unable to sit for lack of judges as the US has blocked appointments to the body since 2016.²³

Today, the rules-based order for international trade and long-standing trends toward international free trade is in flux, most recently due to unilateral tariff actions by the US (but also others, including the imposition of reciprocal countervailing tariffs imposed outside of the mechanisms established by the WTO as discussed below).

A. UNITED STATES OF AMERICA

The US and Canada have one of the largest bilateral trade relationships in the world.²⁴

A Congressional Research Service (CRS) study showed that "Canada was the third-largest source of U.S. goods imports in 2024," exporting USD\$413 billion worth of goods to the US, and "the top destination for U.S. goods exports," importing USD\$349 billion worth of goods.²⁵ The CRS also noted, citing Statistics Canada data, that Canada "exported 76% of its goods to, and imported half of its goods from, the United States."²⁶ Canada is the largest supplier of US energy imports (including crude oil, natural gas, and electricity),²⁷ and, as the

²⁰ *WTO Report 2007*, *supra* note 12 at 193.

²¹ *Ibid* at 243–44, 253–56.

²² Robert J Barro, "Trump's Mercantilist Mess", *Project Syndicate* (5 September 2019), online: [perma.cc/RDQ4-57D3]; see also Kent Jones, *Populism and Trade: The Challenge to the Global Trading System* (New York: Oxford University Press, 2021); Sean D Ehrlich & Christopher Gahagan, "The Multisided Threat to Free Trade: Protectionism and Fair Trade During Increasing Populism" (2023) 11:1 *Politics and Governance* 223; Steve McCorriston & Ian M Sheldon, "Economic Nationalism: US Trade Policy vs. Brexit" (2020) 14:1 *Ohio St Bus LJ* 64; Robert G Finbow, "Populist Backlash and Trade Agreements in North America: The Prospects for Progressive Trade" (2023) 11:1 *Politics & Governance* 237.

²³ Cimino-Isaacs & Fefer, *supra* note 12 at 46, 51–56.

²⁴ International Trade Administration, "Market Overview" (3 November 2023), online: [perma.cc/HG7U-FCDR].

²⁵ Kyla H Kitamura, *US-Canada Trade Relations*, IF12595 (Washington, DC: Congressional Research Service, 2025) at 1.

²⁶ *Ibid*; see Statistics Canada, "Canadian International Merchandise Trade, December 2024" (2 February 2025), online: [perma.cc/3SD9-B4GY].

²⁷ Natalie Kempkey & ShaMyra Sylvester, "Canada Is the Largest Source of U.S. Energy Imports", *US Energy Information Administration* (5 June 2020), online: [perma.cc/K3XP-C4J2]; US Energy Information Administration, "Country Analysis Brief: Canada" (30 May 2024), online: [perma.cc/W6H7-YFGP].

CRS noted: “Canada’s share of U.S. crude oil imports by quantity increased from 38% (1.02 billion barrels) in 2014 to 63% (1.48 billion barrels) in 2024.”²⁸

Unless the US intends to embrace renewable energy with a hereto unseen fervour, the US will continue to import energy products. Alberta’s proven reserves of natural gas and oil far exceeds the remaining reserves found in the oil fields of the US. A new study shows Alberta’s proven natural gas reserves are over 130 trillion cubic feet, compared to proven Texan reserves of 170 trillion cubic feet; and Alberta’s oil reserves of 167 billion barrels far exceeds proven Texan oil reserves of 20 billion barrels.²⁹ Alberta will be able (and despite claims to the contrary,³⁰ will be needed) to continue to supply significant energy products to the US for the foreseeable future.³¹ In 2023, for example, the US consumed 32.5 trillion cubic feet of natural gas³² and 7.39 billion barrels of petroleum.³³

US-Canada trade has in recent history been governed by the 1989 *US-Canada Free Trade Agreement*; then by the 1994 *North American Free Trade Agreement (NAFTA)*; and presently by the 2020 *Canada-United States-Mexico Agreement (CUSMA)*.³⁴

On 1 February 2025, US President Donald Trump issued Executive Order 14193, “Imposing Duties to Address the Flow of Illicit Drugs Across our Northern Border.” This order sought to impose various trade tariffs on Canada, including an additional 10 percent ad valorem rate of duty applicable to Canadian energy or energy resources; and, otherwise, an additional 25 percent ad valorem rate of duty applicable to “all articles that are products of Canada.”³⁵ President Trump declared: (1) that Canada’s failure to act constitutes an “unusual and extraordinary threat ... to the national security and foreign policy of the US”; and (2) a national emergency under America’s *National Emergencies Act*³⁶ and the *International Emergency Economic Powers Act*.³⁷

“Energy” and “energy resources” as referenced in the 1 February 2025 order were given the same definition as used in President Trump’s 20 January 2025 Executive Order 14156, “Declaring a National Energy Emergency.”³⁸ In that order, “energy” and “energy resources”

²⁸ Kitamura, *supra* note 25; Matias Arnal “Canada’s Crude Oil has an Increasingly Significant Role in US Refineries” (1 August 2024), online: [perma.cc/F346-59WU].

²⁹ Government of Alberta, Government News, “New Gas Reserves Take Canada into Global Top 10” (12 March 2025), online: [perma.cc/SWX2-BG5A].

³⁰ At his address to the World Economic Forum on 23 January 2025, President Trump stated: “We don’t need [Canada’s] oil and gas. We have more than anybody”: Wallis Snowdon & Janet French, “Trump Says US Doesn’t Need Canada’s Oil, Gas, Vehicles or Lumber”, *CBC News* (23 January 2025), online: [perma.cc/2XMG-2EAZ].

³¹ Deborah Jaremko, “Explained: Why Canadian Oil Is So Important to the United States”, *Canadian Energy Centre* (30 January 2025), online: [perma.cc/58Z4-HHLB].

³² US Energy Information Administration, “How Much Natural Gas is Consumed in the United States?” (29 April 2024), online: [perma.cc/W29T-7ZWZ].

³³ US Energy Information Administration, “How Much Oil is Consumed in the United States?” (9 October 2024), online: [perma.cc/9R28-DGSR].

³⁴ Emiliano Introcaso, “NAFTA to CUSMA: What You Need to Know About Canada-US Free Trade Agreements” (26 February 2025), online: [perma.cc/6B2B-GF7N].

³⁵ US, Donald J Trump, Executive Order No 14193, *Imposing Duties to Address the Flow of Illicit Drugs Across Our National Border*, 90 FR 9113 (2025).

³⁶ *National Emergencies Act*, USC tit 50 §§ 1601–1651 (2025) [NEA].

³⁷ *International Emergency Economic Powers Act*, USC tit 50 §§ 1701–1710 (2025) [IEEPA].

³⁸ US, Donald J Trump, Executive Order No 14156, *Declaring a National Energy Emergency*, 90 FR 8433 (2025).

were defined to mean “crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals, as defined by 30 U.S.C. 1606 (a)(3).”³⁹ Notably, “energy” and “energy resources” therefore does not capture electricity sales, which were subject to the 25 percent tariff accordingly.

Also on 1 February 2025, the Canadian government announced that it would respond to President Trump’s tariffs with its own 25 percent tariffs on CAD\$155 billion worth of goods imported from the US, pursuant to sections 53(2) and 79(a) of the *Customs Tariff*.⁴⁰

On 3 February 2025, President Trump issued Executive Order 14197, “Progress on the Situation at our Northern Border.”⁴¹ This executive order paused the rates of duty mandated by the 1 February 2025 Executive Order from being implemented until 4 March 2025.⁴² The Canadian government responded on 3 February 2025 with an Order in Council repealing the US Surtax Order.⁴³

On 4 March 2025, President Trump’s trade tariffs were imposed. Ontario retaliated on 10 March with a 25 percent surcharge on electricity exports to the US,⁴⁴ prompting President Trump to threaten doubling tariffs on Canadian steel and aluminum. The surcharge was suspended the next day.⁴⁵ On 12 March, the US imposed 25 percent tariffs on global steel and aluminum imports, removing Canada’s exemption.⁴⁶ Canada responded on 13 March with reciprocal tariffs on CAD\$29.8 billion worth of US goods.⁴⁷

Later in March 2025, President Trump announced a temporary exemption from tariffs on Canadian and Mexican automobile imports under *CUSMA*, later formalized through

³⁹ *Ibid*, s 8(a).

⁴⁰ Department of Finance Canada, News Release, “Canada Announces \$155B Tariff Package in Response to Unjustified U.S. Tariffs” (1 February 2025), online: [perma.cc/7X9C-8F25]; *Customs Tariff*, SC 1997, c 36. The *Customs Tariff* is an act of Parliament intended “to give effect to the International Convention on the Harmonized Commodity Description and Coding System, to provide relief against the imposition of certain duties of customs or other charges, to provide for other related matters and to amend or repeal certain Acts in consequence thereof” (*ibid*).

⁴¹ US, Donald J Trump, Executive Order No 14197, *Progress on the Situation at Our Northern Border*, 90 FR 9183 (2025).

⁴² *Ibid*, s 3.

⁴³ Government of Canada, Order in Council, PC No 2025-0073 (3 February 2025), online: [perma.cc/G594-DV4Q]; Government of Canada, Customs Notice, “Customs Notice 25-04: Repeal of the United States Surtax Order (2025)” (3 February 2025), online: [perma.cc/95A2-WPJC].

⁴⁴ Government of Ontario Office of the Premier, News Release, “Ontario Applies 25 Per Cent Surcharge on Electricity Exports to United States” (10 March 2025), online: [perma.cc/TE3G-FRAW].

⁴⁵ Allison Jones & Liam Casey, “Ford Says Energy Surcharge Remains on Table but He Won’t ‘Antagonize’ U.S. in Talks”, *CBC News* (18 Mar 2025), online: [perma.cc/2KSW-D4ZB].

⁴⁶ US, Executive Office of the President, Proclamation No 10895, *Adjusting Imports of Aluminum into the United States*, 90 FR 9807 (2025); US, Executive Office of the President, Proclamation No 10896, *Adjusting Imports of Steel into the United States*, 90 Fed Reg 9817 (2025). These tariffs significantly expanded steel and aluminum tariffs which President Trump imposed during his first term in 2018 (pursuant to s 232 of the *Trade Expansion Act of 1962* (19 USC ch 7 [Trade Expansion Act])), and removed exemptions that had been granted to Canada in addition to other countries: see US, The White House, *Fact Sheet: President Donald J Trump Restores Section 232 Tariffs* (Washington, DC: The White House, 2025), online: [perma.cc/DB6A-SD3M].

⁴⁷ Department of Finance Canada, News Release, “List of Products from the United States Subject to 25 Per Cent Tariffs Effective March 13, 2025” (13 March 2025), online: [perma.cc/ZSN9-ECAD].

Executive Order 14231.⁴⁸ This order exempted *CUSMA*-compliant goods from tariffs while maintaining or adjusting tariffs on non-compliant goods, including a reduced 10 percent tariff on potash.⁴⁹

As of 19 March 2025, the US has imposed:

- 10 percent tariffs on the following Canadian energy products: liquefied natural gas (Harmonized System code (HS) 2711.11), coal (HS 2701.11 and 2701.12), and processed uranium (HS 2844.20);
- 25 percent tariffs (since revised to 35 percent), on the following Canadian energy products: uranium ore and concentrates (HS 2612.10), bitumen (HS 2714.90), and electricity (HS 2716.00);
- A 10 percent plus 5.25 cents/barrel (bbl) tariff for Canadian crude oil, diesel, and fuel testing under 25 degrees API (HS 2709.00.10.00 and 2710.19.06);
- A 10 percent plus 10.5 cents/bbl tariff for crude oil and diesel and fuel testing 25 degrees API or more (HS 2709.00.20 and 2710.19.11); and
- A 10 percent plus 52.5 cents/bbl tariff for gasoline (HS 2710.12) and most kerosene product codes (HS 2710.19.16 to HS 2710.19.25).⁵⁰

On 26 March 2025, President Trump imposed a 25 percent tariff on imports of automobiles and certain automobile parts (from all countries).⁵¹ Prime Minister Mark Carney indicated in early April that Canada would be imposing a reciprocal 25 percent counter-tariff on American car imports that do not comply with *CUSMA*.⁵²

On 2 April 2025, President Trump also presented and signed Executive Order 14257, “Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits.”⁵³

President Trump has made further significant changes with respect to the announced tariffs since, including by: (1) on 8 April 2025, significantly increasing the base US tariff

⁴⁸ US, Donald J Trump, Executive Order No 14231, *Amendment to Duties to Address the Flow of Illicit Drugs Across Our Northern Border*, 90 FR 11785 (2025).

⁴⁹ *Ibid*, s 2(b).

⁵⁰ Tariff rates obtained from Government of Canada, “Canada Tariff Finder” (accessed 19 March 2025), online: [perma.cc/Q3U9-P2ZB].

⁵¹ US, Executive Office of the President, Proclamation No 10908, *Adjusting Imports of Automobiles and Automobile Parts into the United States*, 90 FR 14705 (2025).

⁵² Prime Minister of Canada, News Release, “Canada Announces New Countermeasures in Response to Tariffs from the United States of America” (3 April 2025), online: [perma.cc/M2ER-L6C3].

⁵³ US, Donald J Trump, Executive Order No 14257, *Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits*, 90 FR 15041 (2025). These tariffs were likewise issued pursuant to the *IEEPA* regarding a new emergency President Trump declared under the *NEA*, that the United States’ “large and persistent annual U.S. goods trade deficits, constitute an unusual and extraordinary threat to the national security and economy of the United States” (*ibid*).

applicable to China from 34 percent to 84 percent;⁵⁴ (2) on 9 April 2025, suspending for 90 days the specific “reciprocal” tariffs from 2 April 2025 above a baseline 10 percent on all countries other than China and further increasing the base US tariff applicable to China from 84 percent to 125 percent;⁵⁵ and (3) on 29 April 2025, suspending the previously imposed US tariffs on China, temporarily replacing the 125 percent tariff rate with a tariff rate of 34 percent instead.⁵⁶

These subsequent significant announcements did not affect the previously announced tariff rates applicable to Canada. President Trump did, however, issue on 29 April 2025: (1) a proclamation that automobiles which undergo final assembly in the US would be eligible for a credit to offset the previously announced tariff on imported foreign-made automobile parts, partially blunting the impact of the other tariffs applicable to Canadian made-automobile parts;⁵⁷ and (2) an executive order to clarify that certain tariffs (including the tariffs applicable to automobile and auto parts, the northern border fentanyl and immigration “emergencies,” and steel and aluminum) generally do not “stack,” with the highest applicable duty applying instead of cumulative duties.⁵⁸

1. LEGAL BASIS FOR AMERICAN EXECUTIVE ORDERS

The US Constitution empowers Congress, not the Executive, to “lay and collect duties” and to “regulate commerce”.⁵⁹

The additional tariffs which President Trump has mandated (with respect to Canadian products and otherwise, except for the new tariffs on vehicles, aluminum and steel) rely on the *IEEPA* for legal authority. The *IEEPA* is legislation from 1977 which empowers the President of the United States to take certain steps to “deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”⁶⁰

Under the *IEEPA* the President of the United States is authorised to take executive action in response to a declared “national emergency.”⁶¹ The *IEEPA* empowers the President to “regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or

⁵⁴ US, Donald J Trump, Executive Order No 14259, *Amendment to Reciprocal Tariffs and Updated Duties as Applied to Low-Value Imports from the People’s Republic of China*, 90 FR 15509 (2025), s 2.

⁵⁵ US, Donald J Trump, Executive Order No 14266, *Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment*, 90 FR 15625 (2025), s 3(b).

⁵⁶ US, Donald J Trump, Executive Order No 14298, *Modifying Reciprocal Tariff Rates to Reflect Discussions with the People’s Republic of China*, 90 FR 21831 (2025), s 3(c)–(d).

⁵⁷ US, Executive Office of the President, Proclamation No 10925, *Amendments to Adjusting Imports of Automobiles and Automobile Parts into the United States*, 90 FR 18899 (2025).

⁵⁸ US, Donald J Trump, Executive Order No 14289, *Addressing Certain Tariffs on Imported Articles*, 90 FR 18907 (2025), s 1.

⁵⁹ US Const art I, § 8, cls 1, 3.

⁶⁰ *IEEPA*, *supra* note 37, § 1701(a).

⁶¹ *Ibid*, § 1701(b).

dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.”⁶²

The *IEEPA* has never previously been used to impose tariffs.⁶³ While past US presidents have imposed tariffs in response to identified national security threats, they have done so pursuant to section 232 of the *Trade Expansion Act* of 1962.⁶⁴ The *Trade Expansion Act* differs from the *IEEPA* in part because it: (1) requires (prior to the imposition of tariffs) an investigation and report that has to be issued within 270 days; and (2) focuses on imports that “threaten to impair” US national security.⁶⁵

Opinion is divided on the extent to which a president has the authority to impose such tariffs under the *IEEPA* as part of their power to “regulate” a variety of international economic transactions and imports. Legal scholars in the US have noted that there are several arguments that could be made to support the claim that President Trump does *not* have the power under the *IEEPA* to impose these tariffs.⁶⁶

There is some judicial guidance regarding the scope of presidential powers, namely the US Court of Customs and Patent Appeals judgment in the matter of *United States v. Yoshida International, Inc.*⁶⁷ *Yoshida* considered the 1971 tariffs that former President Nixon imposed pursuant to a similar emergency powers provision under the *Trading with the Enemy Act (TWEA)* of 1917 (upon which the *IEEPA* was based)⁶⁸ to briefly impose a 10 percent tariff on all imports into the US in response to an identified monetary crisis. Specifically, the emergency the President identified was that the US was suffering from an exceptionally severe and worsening balance of payments deficit, which was attributed in part to foreign exchange rates being controlled by the US’ major trading partners “in such a way as to overvalue the US dollar.”⁶⁹

The import surcharge was challenged by several importers who alleged that Nixon lacked the authority to impose the tariff. The US Court of Customs and Patent Appeals in *Yoshida*

⁶² *Ibid.*, § 1702(a)(1)(b).

⁶³ Christopher A Casey, *The International Emergency Economic Powers Act (IEEPA), the National Emergencies Act (NEA), and Tariffs: Historical Background and Key Issues*, IN11129 (Washington, DC: Congressional Research Service, 2025) at 1. The *IEEPA* has been used to impose sanctions in response to various identified threats, against, for example, Venezuela’s state-owned oil company, Iran, foreign based hackers, and terrorist organizations. As of 15 January 2025, 69 national emergencies invoking the *IEEPA* had ever been declared, 39 of which were still in effect. The first state of emergency declared in relation to the *IEEPA*, from 1979 in response to the Iran hostage crisis is still in effect: see Christopher A Casey & Jennifer K Elsea, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, R45618 (Washington, DC: Congressional Research Service, 2024).

⁶⁴ Rachel F Fefer, *Section 232 of the Trade Expansion Act of 1962*, IF10667 (Washington, DC: Congressional Research Service, 2022). In his first term, President Trump initiated eight section 232 investigations, two of which resulted in President Trump imposing tariffs, for steel and aluminum: US Department of Commerce, *The Effect of Imports of Steel on the National Security* (11 January 2018); US Department of Commerce, *The Effect of Imports of Aluminum on the National Security* (17 January 2018)).

⁶⁵ *Trade Expansion Act*, *supra* note 46, § 1862(b).

⁶⁶ See e.g. Peter E Harrell, “The Case Against IEEPA Tariffs” (31 January 2025), online: [perma.cc/PWM6-JWJ8]; Addar Levi, “IEEPA Tariffs’ Many Legal Challenges” (18 February 2025), online: [perma.cc/NX5Q-VE8G].

⁶⁷ 526 F (2d) 560 (CCPA 1975) [*Yoshida*].

⁶⁸ Casey & Elsea, *supra* note 63 at 2–6.

⁶⁹ *Yoshida*, *supra* note 67 at 567.

held that it was “incontestable that [the *TWEA*] does in fact delegate to the President, for use during war or during national emergency only, the power to ‘regulate importation.’”⁷⁰ and upheld the President’s action, in part because “the President’s action in imposing the surcharge bore an eminently reasonable relationship to the emergency confronted”⁷¹ and was “a reasonable response to the particular national emergency declared therein.”⁷² In this regard, the Court in *Yoshida* found that delegated emergency powers must be exercised in a reasonable manner in relation to the power delegated and the emergency giving rise to the action: “[t]he nature of the power determines what may be done and the nature of the emergency restricts the how of its doing, i.e., the means of execution.”⁷³

It remains to be seen whether the tariffs imposed on Canadian products by President Trump will be considered valid and lawful as an exercise of the delegated emergency power. While the *IEEPA* does provide Congress with the authority to terminate an emergency by passing a joint resolution to that effect, Congress has never exercised this authority to date.⁷⁴

As of 15 May 2025, at least seven lawsuits have been filed in the US targeting the validity of President Trump’s tariffs.⁷⁵ For instance, on 16 April 2025, the State of California filed a lawsuit challenging the tariffs;⁷⁶ on 23 April 2025, 12 other states followed suit.⁷⁷ The first of these cases to go to a hearing seeking injunctive relief against the tariffs — *V.O.S. Selections Inc. v. Trump*,⁷⁸ initiated by several small businesses — was heard by the US Court of International Trade on 13 May 2025. Arguments at that hearing (and the pleadings filed in that and the other claims) focused on the significance of *Yoshida* as a precedent and the other issues which we have identified above.⁷⁹

2. US TARIFFS ARE INCONSISTENT WITH OTHER LEGAL OBLIGATIONS

The question arises whether the extensive tariffs from the US are consistent with: (1) the US’ obligations under WTO and *CUSMA*; and (2) what relief is available for aggrieved parties. This article does not opine on that complicated ultimate issue, but seeks to provide the reader with relevant context regarding the applicable framework and regime for each.

⁷⁰ *Ibid* at 573.

⁷¹ *Ibid* at 580.

⁷² *Ibid* at 584.

⁷³ *Ibid* at 578 [emphasis omitted].

⁷⁴ Casey & Elsea, *supra* note 63 at 54.

⁷⁵ Paul Wiseman & Lindsay Whitehurst, “Trump Trade War Faces Legal Challenge as Businesses, States Argue His Tariffs Exceeded His Power”, *The Globe and Mail* (13 May 2025), online [perma.cc/Q6T3-4XJE].

⁷⁶ Government of California, “Governor Newsom Files Lawsuit to End President Trump’s Tariffs” (16 April 2025), online: [perma.cc/WZ54-89XP].

⁷⁷ The New York Times, “Read the Lawsuit From 12 States Over Trump Tariffs” (24 April 2025), online: [perma.cc/Y75Y-HUS2].

⁷⁸ No 20-00066 (Ct Int’l Trade 2025).

⁷⁹ Ankush Khardori, “‘An Enormous Usurpation’: Inside the Case Against Trump’s Tariffs”, *Politico* (21 April 2025), online: [perma.cc/27TT-DTUP]; Alison Durkee, “Key Trump Tariff Hearing: Court Weighs Potential Block — But Doesn’t Hint How It Will Rule”, *Forbes* (13 May 2025), online: [perma.cc/B3SJ-9S9E]; Ian Millhiser, “The First Federal Court Hearing on Trump’s Tariffs Did Not Go So Well for Trump”, *Fox* (13 May 2025), online: [perma.cc/3S5P-5ZBJ].

a. WTO

The American tariffs may breach the US' obligations as a member nation to the WTO. The WTO's MFN principle generally prohibits countries from discriminating against particular trading partners. The tariffs the US has imposed also exceed the upper limit rates which the US had committed to stay below as part of its WTO membership.⁸⁰ Canada's delegation has already initiated the necessary preliminary consultation process with the US before the WTO's Dispute Settlement Body with such complaints.⁸¹

The US' obligations within the WTO, however, are subject to carveouts and exceptions. Specifically, Article XXI of the WTO terms provide that "[n]othing in this Agreement shall be construed ... (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations."⁸² The US predictably relied on this exception on 14 March 2025, when it filed correspondence responding to Canada's request for consultation, stating as follows:

Canada's request concerns certain actions of the United States ... relating to issues of national security. Issues of national security are political matters not susceptible to review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those measures that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994.⁸³

The US previously relied on Article XXI in defence of the tariffs President Trump imposed on steel (25 percent) and aluminum (10 percent) in his first term.⁸⁴ The US subsequently agreed to lift these tariffs as against Canada (and Mexico) as part of negotiations to ratify the *CUSMA*, and to resolve Canada's retaliatory tariffs and pending WTO proceedings.⁸⁵ The tariffs remained in place with respect to other countries, however, and the WTO proceedings brought by Norway, China, Switzerland, and Turkey proceeded.⁸⁶ The US responded to these proceedings by relying on Article XXI and arguing (as they purport to now) that the US' determination of its national security needs was "self-judging" and not susceptible to review by a WTO dispute settlement panel.

⁸⁰ World Trade Organization, "Tariff Profiles: United States", online (pdf): [perma.cc/KYE5-ECPL].

⁸¹ See e.g. official correspondence dated 4 March 2025, regarding President Trump's initial February 2025 executive orders: WTO, *United States — Additional Import Duties on Goods from Canada: Request for Consultations by Canada*, WTO Doc G/L/1562 (2025), online [perma.cc/MZA9-5U4T].

⁸² World Trade Organization, "Analytical Index of the GATT — Article XXI: Security Exceptions", online (pdf): [perma.cc/GQ7N-NKTH].

⁸³ WTO, *United States — Additional Import Duties on Goods from Canada: Communication from the United States*, WTO Doc WT/DS634/2 (18 March 2025), online: [perma.cc/449G-QBDK].

⁸⁴ See e.g. United States, "First Written Submission" (12 June 2019) at paras 42–55, online: [perma.cc/J9P9-EHJB].

⁸⁵ United States & Canada, Joint Statement (2019), online: [perma.cc/VW4R-KZ6K]; Finance Canada, News Release, *Canada Eliminates Countermeasures as the United States Lifts Tariffs on Canadian Steel and Aluminum* (20 May 2019), online: [perma.cc/YJ2P-MQNC].

⁸⁶ WTO, News Release, "WTO Circulates Dispute Panel Reports Regarding US Measures on Steel and Aluminium Products" (9 December 2022), online: [perma.cc/A5SD-F2ML].

On 9 December 2022, the WTO issued its decisions in all four proceedings.⁸⁷ These were considered landmark rulings specifically because they purported to settle the issue of whether the assertion of the national security exception was “nonjusticiable” or “self-judging”.⁸⁸ The WTO dispute resolution panel confirmed that the exception was not, and that it was incumbent upon the panel to address the invocation of Article XXI(b) “in accordance with the terms of the provision itself and within an objective assessment of the relevant measures and claims.”⁸⁹ The panel held that the “‘emergency in international relations’ under Article XXI(b)(iii) refers to situations of a certain gravity or severity and international tensions that are of a critical or serious nature in terms of their impact on the conduct of international relations,”⁹⁰ and found that the measures at issue did not qualify as such.⁹¹

The US government’s response to the decisions was defiant. The Biden administration stated that it rejected the panel’s conclusions, that it did not intend to remove the tariffs, and that the decision “only reinforce[d] the need to fundamentally reform the WTO dispute settlement system.”⁹²

In January of 2023, the US appealed the panel’s decision.⁹³ Those appeals have stalled, however, because the WTO’s Appellate Body has lacked the judges needed for quorum since 2019, after the first Trump administration began blocking the appointment of new judges in 2016 — a practice and policy which the Biden administration continued. While panels can continue to hear cases, decisions which are appealed remain formally unresolved such that the decisions cannot be adopted or finalized, and retaliation cannot be authorized.⁹⁴

⁸⁷ WTO, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS564/R (9 December 2022), online: [perma.cc/6EN9-8ZKE]; WTO, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS556/R (9 December 2022), online: [perma.cc/RFN3-E9L7] [WT/DS556/R]; WTO, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS552/R (9 December 2022), online: [perma.cc/2HPH-RNXG]; WTO, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS544/R (9 December 2022), online: [perma.cc/5ANC-SMMM].

⁸⁸ Klint W Alexander, “The 2022 US Steel/Aluminum Tariff Ruling: A Legal Reckoning for the United States and the WTO Over the National Security Exception in International Law” (2023) 72:4 Am UL Rev 1137 at 1170.

⁸⁹ WT/DS556/R, *supra* note 87 at 7.143.

⁹⁰ *Ibid* at 7.165.

⁹¹ *Ibid* at 7.159–66.

⁹² Office of the United States Trade Representative, Press Release, “Statement from USTR Spokesperson Adam Hodge” (9 December 2022), online: [perma.cc/T95B-W5YB].

⁹³ WTO, *United States – Certain Measures on Steel and Aluminum Products – Notification of an Appeal by the United States Under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, WTO Doc WT/DS544/14 (30 January 2023), online: [perma.cc/QE7N-V8XH].

⁹⁴ Brandon J Murrill, *The WTO’s Appellate Body Loses Its Quorum: Is This the Beginning of the End for the “Rules-Based Trading System”?*, LSB10385 (Washington, DC: Congressional Research Service, 2019).

b. *CUSMA*

CUSMA was signed by the US, Canada, and Mexico in 2018 as a free trade agreement to replace its predecessor *NAFTA*.⁹⁵ Two key differences between *NAFTA* and *CUSMA* are as follows: (1) “*CUSMA* does not include ... [an] ‘energy proportionality clause.’ ... [E]limination of the proportionality clause in *CUSMA* reaffirms Canada’s sovereignty over its energy resources”;⁹⁶ and (2) Canada can now reduce or halt energy exports to the US without violating the agreement, provided such measures are applied uniformly (for example, not targeting the US specifically).⁹⁷

Canada is not a party to *CUSMA*’s chapter on investor state dispute settlement. This means that, unlike under *NAFTA*, investor state dispute settlement claims cannot be asserted by Canadian investors (or against Canada) under *CUSMA*.⁹⁸

Under Chapter 31 of *CUSMA*, Canada has the right to pursue state-to-state dispute settlement.⁹⁹ The mechanism specified by this provision in many ways reflects the WTO’s, in that dispute resolution begins first with formal bilateral consultations prior to escalation for a dispute to be adjudicated before an independent arbitration panel.¹⁰⁰ If a panel decides that certain tariffs violate *CUSMA*, then the parties must seek to resolve the dispute within 45 days of the decision (for example, by the offending party amending the *CUSMA*-inconsistent law or providing compensation), failing which the complaining party may suspend equivalent benefits to the responding party.¹⁰¹

In this case, the US would almost certainly claim again that the tariffs were imposed as a matter of national security. Article 32.2 of *CUSMA* has a provision which largely mirrors the WTO’s “security/emergency” provision, stating in relevant part as follows: “[n]othing in this Agreement shall be construed to ... preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”¹⁰²

3. ECONOMIC CONSIDERATIONS

It is generally true that US refineries (especially refineries in the Midwest and Gulf Coast, or “Petroleum Administration for Defence Districts” 2 and 3), are highly dependent on Canadian crude oil for inputs.¹⁰³ These American refineries are uniquely configured to

⁹⁵ Government of Canada, “Canada–United States–Mexico Agreement (CUSMA): Summary of Outcomes” (28 January 2020), online: [perma.cc/FHH8-UDDL].

⁹⁶ Government of Canada, “Canada–United States–Mexico Agreement (CUSMA): Energy Provisions Summary” (11 July 2019), online: [perma.cc/68CL-6R97].

⁹⁷ *Ibid.*

⁹⁸ DLA Piper, “USMCA Investor-State Dispute Settlement Provisions: Key Differences for Mexico” (30 September 2017), online: [perma.cc/M9CQ-XLH2].

⁹⁹ Government of Canada, “Canada–United States–Mexico Agreement (CUSMA): CUSMA Dispute Settlement” (9 May 2023), online: [perma.cc/GQX8-ZGX9].

¹⁰⁰ *CUSMA*, *supra* note 1 at ch 31.

¹⁰¹ Nina M Hart, *Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism*, IF11399 (Washington, DC: Congressional Research Service, 3 January 2020). *CUSMA*, *supra* note 1 at ch 32.2(1).

¹⁰³ Kitamura, *supra* note 24; US Energy Information Administration, “Canada’s Crude Oil has an Increasingly Significant Role in US Refineries” (1 August 2024), online: [perma.cc/F346-59WU].

process Canadian crude, which as a feedstock is much heavier than (and not easily substituted for) the lighter crudes which are produced from the US shale patch.¹⁰⁴ If these refineries were forced to pivot away from buying Canadian crude oil, the refineries could, theoretically, turn to Venezuelan heavy crude without retooling; that does not appear to be a feasible option, though, because the US has separate longstanding concerns about Venezuela as a trading partner.¹⁰⁵ Indeed, on 27 February 2025, President Trump signed an executive order “Continuation of the National Emergency with Respect to Venezuela,” continuing for one year a previous declaration of emergency with respect to “the situation in Venezuela”;¹⁰⁶ then, on 24 March 2025, President Trump signed a further executive order which stated (pursuant to the *IEEPA*) that “[o]n or after April 2, 2025, a tariff of 25 percent may be imposed on all goods imported into the United States from any country that imports Venezuelan oil, whether directly from Venezuela or indirectly through third parties.”¹⁰⁷

B. EUROPEAN UNION

In the face of the US’ recent aggression and substantial tariffs, Canadians have increasingly looked towards strengthening Canada’s close ties with its European allies. In February 2025, one poll of Canadians even indicated that 44 percent of Canadians were in favour of Canada joining the EU.¹⁰⁸

The EU “is dependent on imports for 70% of its hard coal consumption, 97% of its oil consumption and 90% of its fossil gas consumption”¹⁰⁹ and is one of the world’s largest importers of fossil energy.¹¹⁰ Canada and the European Union have a significant trade relationship governed primarily by the *Comprehensive Economic and Trade Agreement*

¹⁰⁴ Institute for Energy Research, “US Refineries and Canadian Crude Oil” (28 January 2025), online: [perma.cc/VXN9-YAED]; Alex Kimani, “Why US Refiners Won’t Ditch Canadian Crude”, *Oil Price* (3 February 2025), online: [perma.cc/3UK5-MFF9]; Meghan Potkins “‘We Only Have One Card to Play’: Calling Trump’s Bluff on Canadian Oil”, *Financial Post* (24 January 2025), online: [perma.cc/GTT4-UEG8].

¹⁰⁵ Evan Dyer, “Cutting Off Oil is Canada’s Nuclear Option. What Would it Mean if it Happens?”, *CBC News* (19 January 2025), online: [perma.cc/LMJ7-7LLN]; Deborah Jaremko, “A Matter of Fact: Canada, Not Venezuela, Is the Solution for US Energy Security” (7 March 2022), online: [perma.cc/V859-MMM3].

¹⁰⁶ In referring to the “Venezuela Situation”, the order refers to “the Government of Venezuela’s erosion of human rights guarantees, persecution of political opponents, curtailment of press freedoms, use of violence and human rights violations and abuses in response to antigovernment protests, and arbitrary arrest and detention of antigovernment protesters, as well as the exacerbating presence of significant government corruption.”: US, Executive Office of the President, Presidential Document No 2025-03463, *Continuation of the National Emergency with Respect to Venezuela*, 90 FR 11011 (2025). The original emergency declaration was made by President Obama on 8 March 2015: US, Donald J Trump, Executive Order No 13692, *Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela*, 80 FR 12747 (2025).

¹⁰⁷ US, Donald J Trump, Executive Order No 14245, *Imposing Tariffs on Countries Importing Venezuelan Oil*, 90 FR 13829 (2025), s 2(a).

¹⁰⁸ Sandro Ayrlé & David Coletto, “What Canadians Think About Canada Joining the European Union” (10 March 2025), online: [perma.cc/9VCC-YLBC].

¹⁰⁹ EU, *Regulation (EU) 2024/1787 of the European Parliament and of the Council of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation (EU) 2019/942*, [2024] OJ L 61/1, s 63 [EU Methane Regulation].

¹¹⁰ *Ibid*, s 5.

(*CETA*), which has been provisionally in force since September 2017.¹¹¹ Under *CETA*, no trade tariffs are applicable to Canadian energy products which it exports, including crude oil, liquefied natural gas, coal, uranium ore and concentrates and processed uranium, bitumen and refined petroleum products (for example, gasoline and diesel and fuel oil).¹¹²

The EU's *Methane Regulation* establishes a legal framework for the measurement, reporting, and verification of methane emissions from imported oil, gas, and coal.¹¹³ From 1 January 2027, importers must comply with the requirements of the *Methane Regulation*, failing which the *Methane Regulation* imposes penalties which may have significant financial and geopolitical effects.¹¹⁴ Given that compliance with the *Methane Regulation* may be shown through regulatory equivalence, Canada may have a competitive advantage over other exporters with less stringent measurement, reporting, and verification requirements.

In addition to the *Methane Regulation*, the EU introduced the Carbon Border Adjustment Mechanism (CBAM).¹¹⁵ CBAM provides for carbon pricing on the production of carbon intensive goods that are entering the EU. CBAM has been transitionally applicable since 1 October 2023 and will be in full force in 2026. CBAM is initially applicable to goods with carbon intensive production and at most risk of carbon leakage¹¹⁶ such as cement, iron and steel, aluminium, fertilisers, electricity, and hydrogen. On 26 February 2025, the EU proposed to simplify CBAM by introducing a *de minimis* threshold exemption that would “allow [the EU] to keep around 99% of emissions still in the CBAM scope, while exempting around 90% of the importers.”¹¹⁷ While CBAM does not directly affect Canadian energy products yet, should industries such as hydrogen production grow to the point where export becomes viable, CBAM may be a barrier to market entry.

C. UNITED KINGDOM

After Brexit, the UK ceased to be part of *CETA*. To avoid trade disruption, Canada and the UK signed a *Transitional Trade Continuity Agreement (TCA)* in December 2020.¹¹⁸ Under

¹¹¹ *CETA* was primarily implemented as a matter of domestic law in Canada pursuant to the *Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act*, SC 2017, c 6.

¹¹² Tariff rates obtained from Government of Canada, Canada Tariff Finder, online: [perma.cc/Q3U9-P2ZB].

¹¹³ EU *Methane Regulation*, *supra* note 109.

¹¹⁴ Valerio Giovannini & Thomas Delille, “EU Methane Regulation – What Importers and Exporters Need to Know” (16 October 2024), online (blog): [perma.cc/DR4K-RDQA].

¹¹⁵ European Commission, “Carbon Border Adjustment Mechanism”, online: [perma.cc/QT5X-VT8S].

¹¹⁶ As explained in Canadian Association of Petroleum Producers, explain: “Carbon leakage is a shift of greenhouse gas emissions from one part of the globe to another, so from one country to another. This occurs when companies choose to move oil and natural gas production to a region with lower costs, but often fewer or no environmental regulations. As a result, there is no reduction in net global greenhouse gas emissions.”; Canadian Association of Petroleum Producers, “Carbon Leakage”, online: [perma.cc/X9J9-6932].

¹¹⁷ CBAM, “Towards the Definitive Phase”, online: [perma.cc/UF9V-SKFN].

¹¹⁸ *Canada–United Kingdom Trade Continuity Agreement*, 9 December 2020, Can TS 2021 No 2, art 2 [*Canada–UK TCA*]; Global Affairs Canada, *Brexit: Information for Canadian Companies* (accessed 4 April 2025), online: [perma.cc/T6J7-EMYC]. The *TCA* was primarily implemented as a matter of domestic law in Canada pursuant to the *Canada–United Kingdom Trade Continuity Agreement Implementation Act*, SC 2021, c 1.

the *TCA*, which came into force on 1 April 2021, the same Canadian energy products that enjoyed 0 percent tariffs under *CETA* remain tariff-free.¹¹⁹

The *TCA* does not have a fixed expiration date,¹²⁰ but contemplates Canada and the UK negotiating towards and concluding a “new Canada-United Kingdom free trade agreement.”¹²¹ Formal negotiations between Canada and the UK for a permanent free trade agreement began in March of 2022, but have stalled since January of 2024.¹²²

As Julia Derrick and Justyna Bremen report, “[t]he UK has been a net importer of gas since 2004” and has the second-largest liquefied natural gas (LNG) regasification infrastructure in Europe.¹²³ In 2024, the US supplied 11 percent of the UK’s natural gas. While the UK’s demand for gas is decreasing, it’s domestic production is unlikely to supply its demand in the near future.¹²⁴

The UK will introduce a CBAM of its own on 1 January 2027. Industrial goods imported to the UK from the aluminium, cement, fertiliser, hydrogen and iron and steel sectors will be impacted.¹²⁵ Derrick and Bremen, however, explain that “[t]here are no special regulatory requirements that apply to the cross-border imports or exports of oil or oil products.”¹²⁶

D. CHINA

China is Canada’s second largest trading partner after the US.¹²⁷ Unlike many of Canada’s other trading partners, Canada does not have a free trade agreement with China. China is, however, a fellow member of the WTO, and therefore Canada and China have obligations to ascribe to their bound tariff rates and MFN tariffs.

While China has recently imposed additional tariffs against certain Canadian products as retaliation for Canada’s tariffs against Chinese electric vehicles, none of the products implicated are Canadian energy products.¹²⁸ Chinese trade tariffs on Canadian energy products are currently as follows:

¹¹⁹ Tariff rates obtained from Government of Canada, Canada Tariff Finder (accessed 19 March 2025), online: [perma.cc/Q3U9-P2ZB].

¹²⁰ *Canada–UK TCA*, *supra* note 118, art V.

¹²¹ *Ibid*, art IV.

¹²² Janyce McGregor & John Paul Tasker, “UK Walks Away from Trade Talks with Canada”, *CBC News* (25 January 2024), online: [perma.cc/DSS6-3VFS].

¹²³ Julia Derrick & Justyna Bremen, “Oil & Gas Laws and Regulations United Kingdom 2025” (21 February 2025), online: [perma.cc/WR8M-6DWD].

¹²⁴ Josh Jackman, “Where Does the UK Get its Gas From?” (30 April 2025), online: [perma.cc/2U4R-PM9P].

¹²⁵ HM Revenue & Customs, “Draft Legislation: Carbon Border Adjustment Mechanism” (24 April 2025) at 2, online: [perma.cc/SSD4-5WTT].

¹²⁶ Derrick & Bremen, *supra* note 123.

¹²⁷ Global Affairs Canada, *The Canada-China Global Commerce Picture and Supply Chain Link*, by Colin Scarffe (September 2020), online (pdf): [perma.cc/69W9-TVND].

¹²⁸ China recently imposed tariffs against Canada of 100 percent on Canadian canola oil, canola meal, and peas, as well as 25 percent tariffs on certain pork, fish, and seafood products: Agriculture and Agri-Food Canada, News Release, “Government of Canada Announces Support for Agricultural Sector Following the Imposition of Tariffs by China” (22 March 2025), online: [perma.cc/AN8W-W57E].

- 0 percent on liquefied natural gas, uranium ore and concentrates, and crude oil;
- 3 to 4.5 percent on coal and bitumen;
- 5 percent tariff on processed uranium; and
- 5 to 6.5 percent tariff for diesel and other petroleum fuels.¹²⁹

China has seen a large uptake in new energy vehicles (NEVs),¹³⁰ and is likely to see a continued increase as “Beijing will double the ultra-long-term special treasury bonds (those with terms greater than 10 years) issued to support consumer goods trade-in programs, from 150 billion yuan in 2024 to 300 billion yuan ([USD]\$41.3 billion) in 2025.”¹³¹ This uptake in NEVs has decreased China’s demand for gasoline. This has resulted in refineries shifting production to high-end chemicals, such as those used in solar panels and lithium-ion batteries.¹³² The effect of this policy approach is reflected in the decrease in imports of crude oil in 2024, down to 11.1 million barrels per day in 2024 compared to 11.3 million barrels per day in 2023.¹³³ China did however increase its imports from Canada, while reducing its imports from the US in the same period.¹³⁴

Increased consumption tax is expected to further drive down demand for crude oil, as refiners will only be able to offset consumption taxes levied equivalent to the actual yield of taxable products, and will have to bear the remaining tax burden. This will increase the tax burden per barrel by at least 400–500 Chinese yuan per metric ton (mt) — or USD\$54.59–\$68.24/mt.¹³⁵ While environmental regulatory tariffs in the strict sense are not expected to play a big role in access to the Chinese markets, other regulatory tariffs may depress demand.

II. INTERPROVINCIAL TRADE BARRIERS

Increased interprovincial trade has been proposed as part of Canada’s response to trade and tariff uncertainty. Trade barriers have however come to dominate any discussion regarding Canada trading internally. It is therefore unsurprising that provincial responses and plans to counter trade tariff provisions mention breaking down trade barriers.¹³⁶ Reports of

¹²⁹ Tariff rates obtained from World Bank: World Integrated Trade Solution, “China Tariffs on Canada”, online: [perma.cc/4ZR5-Q5WF].

¹³⁰ A new energy vehicle is a category of vehicle that includes battery-electric vehicles, plug-in hybrids, and fuel-cell electric vehicles: Xu Wang et al, “Impact of Battery Electric Vehicles on Ventilation Design for Road Tunnels: A Review” (2023) 134 *Tunnelling & Underground Space Technology* 105013.

¹³¹ Erica Downs, “Oil and Gas Industry Takeaways from China’s ‘Two Sessions’” (26 March 2025), online (blog): [perma.cc/GQ9T-8Z56].

¹³² *Ibid.*

¹³³ US Energy Information Administration “China’s Crude Oil Imports Decreased from a Record as Refinery Activity Slowed” (11 February 2025), online: [perma.cc/V9WM-UJHY].

¹³⁴ *Ibid.*

¹³⁵ Daisy Xu & Oceana Zhou, “CHINA DATA: Feedstock Fuel Oil Imports to Fall Further in 2025 Amid Rising Tax Burden”, *S&P Global* (8 January 2025), online: [perma.cc/FN6V-FZNS].

¹³⁶ See e.g. Prime Minister of Canada, News Release, “First Minister’s Statement on Eliminating Internal Trade Barriers in Canada” (5 March 2025), online: [perma.cc/6XLQ-LF2V].

other responses have varied between Alberta's promise to keep dialogue open,¹³⁷ to Ontario's threat of terminating the export of electricity.¹³⁸

The rules-based international trade order is premised on continued engagement and diplomacy, and it would therefore not do to suggest that continued diplomacy is unlikely to succeed. However, provinces have quite correctly identified that steps should be taken to protect intraprovincial trade and commerce:

- Ontario has announced a 6-month tax deferral scheme, as well as the payment of certain rebates to businesses.¹³⁹
- British Columbia has implemented a series of countermeasures including ceasing trade in American liquor, directing that all BC government and Crown corporations will buy goods and services from Canada and other countries first, disallowing for CleanBC or BC Hydro rebates on Tesla electric vehicle charging products after 12 March 2025, and requiring low-carbon biofuels that are added to our gasoline and diesel be produced in Canada instead of the US.¹⁴⁰
- Saskatchewan is implementing changes in its procurement with the goal to prioritize Canadian suppliers and reducing or eliminating procurement from the US.¹⁴¹
- New Brunswick has unveiled a four pillar program which includes establishing support for New Brunswickers, providing relief for New Brunswick businesses, breaking down trade barriers, and promoting products and services made in New Brunswick.¹⁴²

Amidst these changes, questions arise as to whether interprovincial trade barriers should be struck down or significantly curtailed, and whether the federal government can achieve this outcome on its own, or can only do so with provincial law reform. The answers to these questions (especially with respect to energy) are revealed by examining the legislative division of powers between Parliament and the provincial legislatures enacted in sections 91 and 92 of the *Constitution Act, 1867*.¹⁴³

¹³⁷ Matthew Black, "Smith Hopeful, but Unsure, that Alberta Oil and Food Production Will Escape Wednesday's US Tariffs", *Edmonton Journal* (1 April 2025), online: [perma.cc/EE72-GF9C].

¹³⁸ Max Saltman, "Ontario Premier Threatens to 'Shut Off Electricity Completely' for US if Trade War Escalates", *CNN* (11 March 2025), online: [perma.cc/8X77-EYCK].

¹³⁹ BNN Bloomberg, "Finance Minister Breaks Down Ontario's Response to US Tariffs" (7 April 2025) online (channel): [perma.cc/VE43-86WQ].

¹⁴⁰ Government of British Columbia, "BC's Response to Unjustified US Tariffs" (18 September 2025), online: [perma.cc/PVE3-CSD6].

¹⁴¹ Saskatchewan's tariff response measures are no longer in force and have since been removed from its government website: see Alexander Quon & Laura Sciarpetti, "Sask Quietly Ends Its Response to U.S. tariffs; Opposition Calls Decision 'Tone Deaf'", *CBC News* (11 June 2025), online: [perma.cc/3TS6-JY8S].

¹⁴² Government of New Brunswick, "Understanding the Impact of the US Tariffs on New Brunswick", online: [perma.cc/Y5BU-NZML].

¹⁴³ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

Constitutional and practical constraints on federal power mean that, for the purposes of facilitating the interprovincial energy trade, the federal government would be better served by promoting an increase in east–west infrastructure across the country than by attempting to directly regulate energy markets on a national scale. Transmission lines and pipelines that cross provincial boundaries are more directly regulated at a federal level, whereas the internal energy markets managed by the provinces are squarely within provincial jurisdiction.

Businesses across the country technically have unrestricted access to markets in other provinces, but they are practically restrained by regulatory barriers. The history of trade and commerce jurisprudence in Canada reveals that the federal government is limited in its ability to enable interprovincial trade. Federal Parliament can enact legislation that primarily regulates transactions and business that are interprovincial in nature. It cannot use the trade and commerce power to reach into the provinces and dictate regulatory policy or direct the operation of intraprovincial business. Nevertheless, the federal government can, to some extent, act to harmonize marketing schemes, product standards, and other similar objectives for the purposes of facilitating interprovincial trade.

Regulatory trade barriers between the provinces (rather than direct tariffs) also pose an obstacle to interprovincial trade. The existing *Canadian Free Trade Agreement* provides a ready-made framework for the elimination of regulatory barriers.¹⁴⁴ As will be explored below, the prevailing trend in constitutional jurisprudence necessitates an approach to facilitating interprovincial energy trade that centres on cooperative federalism and negotiation between the provinces.

A. THE CONSTITUTIONAL STRUCTURE OF TRADE WITHIN CANADA

1. THE TRADE AND COMMERCE POWER

Section 91(2) of the *Constitution Act, 1867* grants exclusive jurisdiction over the “Regulation of Trade and Commerce” to the federal Parliament of Canada.¹⁴⁵ While its wording is fairly broad, the trade and commerce power has been significantly narrowed by the courts in the years since the *Constitution Act, 1867* was enacted. The federal trade and commerce power has been limited to two areas: (1) “interprovincial or international trade and commerce,” and (2) trade and commerce matters of a general application.¹⁴⁶ The “general” commerce branch underpins the federal government’s power over competition legislation and other such matters, and is outside the scope of this article. The following survey of constitutional law focuses on the first branch of the trade and commerce power.

There is no serious doubt as to whether the trade and commerce power grants Parliament the exclusive jurisdiction to regulate international trade with Canada.¹⁴⁷ As it stands today, the section 91(2) power grants Parliament exclusive jurisdiction over international and interprovincial trade, but only if the federal law pertains to commerce that is bound for extra-

¹⁴⁴ *Canadian Free Trade Agreement* (1 July 2017), online: [perma.cc/8KR8-2EVL] [CFTA].

¹⁴⁵ *Constitution Act, 1867*, *supra* note 143, s 91(2).

¹⁴⁶ Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (July 2025), § 20:1, online: WL Can Thomson Reuters Canada.

¹⁴⁷ See *Gold Seal Ltd v Alberta (Attorney-General)*, 1921 CanLII 25 (SCC); *Caloil Inc v Attorney General of Canada*, 1970 CanLII 194 (SCC) [Caliol].

provincial export. If the law does impact entirely intraprovincial activity, then that impact must be limited and incidental to a purpose aimed at trade between the provinces.

There is a long history of cases that consider the federal power of trade and commerce. As will be seen, none of these cases resulted in striking down a law that only purports to govern interprovincial trade, but the development of the case law shows how Parliament's ability to facilitate trade has remained constrained over the course of Canada's history.

In the matter of *Citizens' Insurance Co. v. Parsons*, the Judicial Committee of the Privy Counsel (JCPC) ruled that a provincial law requiring certain stipulations to be present in all insurance contracts in the province was valid under the provincial head of power over property and civil rights, which included the power to regulate contracts of a particular business or trade in a single province.¹⁴⁸ The federal trade and commerce power, on the other hand, was held to include "political arrangements in regard to trade requiring the sanction of [P]arliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion."¹⁴⁹

Since *Parsons*, it has been generally accepted that *intraprovincial* trade and commerce is a matter within provincial power under the "Property and Civil Rights in the Province" head of power.¹⁵⁰

During the years following the *Parsons* decision, the JCPC further curtailed the trade and commerce power. In 1922, Viscount Haldane held that section 91(2) "did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above [peace, order, and good government], be free to engage in the Provinces."¹⁵¹ This and other decisions¹⁵² struck down federal laws attempting to regulate general aspects of the economy that ignored provincial boundaries (such as combinations, prices, and labour) in favour of the provincial property and civil rights power.¹⁵³

The JCPC (and the Supreme Court of Canada) continued applying this view of the trade and commerce power through the first half of the twentieth century. In *The King v. Eastern Terminal Elevator Co.*,¹⁵⁴ the Supreme Court of Canada struck down a federal statute attempting to regulate grain trade through the licensing and regulation of grain elevators. The Supreme Court held that the licensing and regulation of local works like grain elevators made the entire scheme invalid.¹⁵⁵ In the *Natural Products Marketing Reference*,¹⁵⁶ the JCPC made a similar ruling, holding that "the establishment of marketing schemes for ... natural products

¹⁴⁸ *The Citizens Insurance Company of Canada v William Parsons* (1881), 7 App Cas 96 at 113 (PC) [*Parsons*].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Constitution Act, 1867*, *supra* note 143, s 92(13).

¹⁵¹ *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 AC 191 at 198 (JCPC).

¹⁵² See e.g. *Toronto Electric Commissioners v Snider*, 1925 CanLII 331 (JCPC).

¹⁵³ Hogg & Wright, *supra* note 146, § 20:2.

¹⁵⁴ 1925 CanLII 82 (SCC).

¹⁵⁵ Hogg & Wright, *supra* note 146, § 20:2.

¹⁵⁶ *AG BC v AG Can*, 1937 CanLII 364 (JCPC).

whose principal market was outside the province of production ... was invalid because it included within its purview some transactions that could be completed within the province.”¹⁵⁷

In its last decision on section 91(2), the *Margarine Reference*,¹⁵⁸ the JCPC “held that a federal prohibition of the manufacture, sale or possession of margarine ... was wholly invalid, because it [prohibited] not only interprovincial transactions but also transactions that could be completed within a province.”¹⁵⁹

Following the abolition of appeals to the JCPC, the Supreme Court of Canada broadened the application of the trade and commerce power. In *Re The Farm Products Marketing Act*¹⁶⁰ four judges (in three separate sets of reasons concerning the first reference question) sought to define transactions that might take place within a province and yet not be “intraprovincial,” indicating that federal power could extend to some transactions which were not wholly interprovincial.¹⁶¹ Following the *Farm Products Marketing Reference*, the Manitoba Court of Appeal was asked to decide whether a federal power could apply to an entirely local operation where wheat was produced and sold as feed to local farmers within the province in *R. v. Klassen*.¹⁶² The Court in *Klassen* held that the production quotas established under the *Canadian Wheat Board Act*,¹⁶³ which applied both to grain destined for sale outside of the province and to grain sold entirely within Manitoba, were valid. The quotas’ application to intraprovincial trade was found to be “incidental to the principal purpose of the Act, which was to regulate the interprovincial and export trade in grain.”¹⁶⁴ Despite *Klassen* being a clear departure from previous jurisprudence on whether federal laws would regulate wholly intraprovincial transactions, the Supreme Court of Canada refused leave to appeal the decision.¹⁶⁵

In *Caloil*,¹⁶⁶ the Supreme Court “unanimously upheld a federal prohibition on the transportation or sale of imported oil west of the Ottawa Valley,” despite the fact that this prohibition impacted transactions that would be completed within a province.¹⁶⁷ The Supreme Court upheld the act as “an incident in the administration of an extraprovincial marketing scheme”¹⁶⁸ and as “an integral part of the control of imports in the furtherance of an extraprovincial trade policy.”¹⁶⁹

Despite the expansion of the federal government’s power under section 91(2) in cases like *Klassen* and *Caloil*, the pendulum swung back towards provincial authority in *Dominion*

¹⁵⁷ Hogg & Wright, *supra* note 146, § 20:2.

¹⁵⁸ *Reference Re Validity of Section 5(a) of The Dairy Industry Act, Canadian Federation of Agriculture v Attorney General of Quebec*, 1950 CanLII 342 (JCPC).

¹⁵⁹ Hogg & Wright, *supra* note 146, § 20:2.

¹⁶⁰ 1957 CanLII 1 at 204, 209, 231 (SCC) [*Farm Products Marketing Reference*].

¹⁶¹ See the discussion of the *Farm Products Marketing Reference* (*ibid*) in the decision *Carnation Company Limited v Quebec Agricultural Marketing Board*, 1968 CanLII 82 at 245–46 (SCC).

¹⁶² 1959 CanLII 438 (MBCA) [*Klassen*].

¹⁶³ RSC 1952, c 44, ss 16, 42.

¹⁶⁴ Hogg & Wright, *supra* note 146, § 20:3.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Supra* note 147.

¹⁶⁷ Hogg & Wright, *supra* note 146, § 20:3.

¹⁶⁸ *Caloil*, *supra* note 147 at 544.

¹⁶⁹ *Ibid* at 551.

Stores Ltd. v. The Queen,¹⁷⁰ where the Supreme Court of Canada struck down part of the *Canada Agricultural Products Standard Act*.¹⁷¹ The *Act* established grade names for various agricultural products and imposed their use for products moving in interprovincial or international trade. The impugned part of the *Act* did not require the use of the grade names if used in local trade, but did require that the federal standards be complied with if the names were used. Peter Hogg and Wade Wright argue that this case was wrongly decided, as surely “a modest intrusion into local trade” like the protection of the value of grade names under the federal statute bore a rational, functional connection with the regulation of interprovincial and international trade.¹⁷²

In the same year as *Dominion Stores*, the Supreme Court also held that federal rules on the compositional standards for beer under the *Food and Drugs Act*¹⁷³ could not be upheld under the trade and commerce power because the standards were imposed without regard to the product’s movements across provincial boundaries.¹⁷⁴ The Supreme Court also reaffirmed the rule that the trade and commerce power does not authorize the regulation of individual industries.¹⁷⁵

While the federal government now seems to have the power to regulate interprovincial trade in a way that incidentally impacts intraprovincial activity, the extent of that power remains unclear. The constitutional validity of a trade statute or regulation will ultimately depend on whether, in pith and substance, it is aimed at the regulation of interprovincial trade or regulation for a common Canadian-wide market.¹⁷⁶ Justice Estey framed the issue as follows: “[I]f contractual rights within the province are the object of the proposed regulation, the province has the authority. On the other hand, if regulation of the flow in extraprovincial channels of trade is the object, then the federal statute will be valid. Between these spectrum ends, the shadings cannot be foretold in anything approaching a constitutional formula.”¹⁷⁷ As can be seen from the *Dominion Stores* decision, the interpretation of those “shadings” can result in the court striking down provisions that would appear to be necessary for the usefulness of an interprovincial trading scheme.

We can see a path, doctrinally, where Canada could enact legislation that enables trade interprovincially. Provinces can levy any taxes and such internally but cannot enact laws that fetter interprovincial trade. However, the dominant strain of constitutional jurisprudence on this first branch of the trade and commerce power has remained focused on co-operation where a province’s right to incidentally affect interprovincial trade overlaps with Parliament’s right to incidentally affect intraprovincial commerce.¹⁷⁸

¹⁷⁰ 1979 CanLII 57 (SCC) [*Dominion Stores*].

¹⁷¹ RSC 1970, c. A-8.

¹⁷² Hogg & Wright, *supra* note 146, § 20:3.

¹⁷³ RSC 1985, c F-27.

¹⁷⁴ *Labatt Breweries of Canada Ltd v Attorney General of Canada*, 1979 CanLII 190 at 939, 943 (SCC) [*Labatt Breweries*].

¹⁷⁵ *Ibid* at 941.

¹⁷⁶ *Saputo Inc v Canada (Attorney General)*, 2011 FCA 69 at para 58 [*Saputo*].

¹⁷⁷ *Labatt Breweries*, *supra* note 174 at 943.

¹⁷⁸ *Saputo*, *supra* note 176 at paras 55–56.

2. SECTION 121 AND INTERPROVINCIAL “TARIFFS”

Another provision in the *Constitution Act, 1867* that precludes the imposition of trade barriers by the provinces is section 121, which states: “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other provinces.”¹⁷⁹

This provision prohibits provinces from imposing explicit tariffs on the flow of trade into or out of their jurisdiction. However, common law jurisprudence has watered down the strict meaning of this section to allow for provinces to enact schemes that, in effect, function like a tariff.

In *R. v. Comeau*,¹⁸⁰ Mr. Comeau was charged under section 134(b) of New Brunswick’s *Liquor Control Act*¹⁸¹ for bringing a certain quantity of alcohol purchased in Quebec into New Brunswick. The *Act* prohibited the possession of quantities of alcohol over a certain threshold purchased outside of the province. Mr. Comeau was acquitted in the New Brunswick courts whereafter the Crown appealed to the Supreme Court of Canada.

The Supreme Court concluded that section 121 precludes customs duties (tariffs) and “tariff-like measures,” which would include measures that in essence and purpose burden the passage of goods across a provincial border.¹⁸² However, the Supreme Court also found that section 121 did not preclude measures directed at other goals that have incidental effects on the passage of goods across provincial borders or that “form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.”¹⁸³

In *Comeau*, the Supreme Court found that section 134(b) of the *Liquor Control Act* did in fact have the effect of restricting trade across a provincial border, but that its primary purpose was not to impede trade, but rather to restrict access to any non-New Brunswick Liquor Corporation liquor.¹⁸⁴ The effect that section 134(b) of the *Liquor Control Act* had on interprovincial trade was therefore found to be “incidental in light of the objective of the provincial scheme in general.”¹⁸⁵

Hogg and Wright note that *Comeau* leaves section 121 with little work to do, as any provincial statute aimed primarily at interprovincial trade would be invalid as an ultra vires encroachment on the federal trade and commerce power.¹⁸⁶

However, following *Comeau*, the Alberta Court of Appeal applied its principles to strike down a provincial law under section 121, not section 91(2), of the *Constitution Act, 1867*. In *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, the Alberta Court of

¹⁷⁹ *Constitution Act, 1867*, *supra* note 143, s 121.

¹⁸⁰ 2018 SCC 15 [*Comeau*].

¹⁸¹ RSNB 1973, c L-10.

¹⁸² *Comeau*, *supra* note 180 at para 53.

¹⁸³ *Ibid* at paras 53, 114.

¹⁸⁴ *Ibid* at para 122.

¹⁸⁵ *Ibid* at para 125.

¹⁸⁶ Hogg & Wright, *supra* note 146, § 20:3.

Appeal considered whether several provincial regulatory body mark-up schemes on liquor sales violated section 121.¹⁸⁷

Taking up the *Comeau* decision, the Alberta Court found that the Supreme Court established a two-part test to determine whether a law ran afoul of section 121. First is an “inquiry into the ‘essence’ of the law (or government action), ... [asking] whether the challenged measure distinguishes between goods in a manner related to a provincial boundary” (specifically looking at whether an additional cost or burden is imposed on goods from outside the province).¹⁸⁸ Second, a court looks at “whether the [law’s] primary purpose is to restrict trade” or “is similar to the traditional purposes of tariffs – collecting funds from goods passing the border, protecting local industry or harming another province.”¹⁸⁹ Such a purpose is a strong indicator that the primary purpose is to restrict trade.

The first provincial scheme, enacted in 2015, created a “price wedge” by imposing greater costs on the sale of craft beer imported from provinces outside of Alberta, British Columbia, and Saskatchewan than on the sale of craft beer produced in these provinces. The Ministerial briefing note for the 2015 mark-up explained that the purpose was “to obtain an additional \$85 million in revenue from liquor [m]ark-ups.”¹⁹⁰ The second scheme, enacted in 2016, applied a consistent mark-up to the sale of all craft beers Alberta, but it was implemented concurrent to a grant program that was enacted to ensure that certain Alberta craft brewers remained “in the same position economically as they were under the 2015 [m]ark-up scheme.”¹⁹¹

The Alberta Court of Appeal found that the purpose of both mark-ups was to promote and “protect local industry ... by imposing a tariff-like burden on extra-provincial producers,”¹⁹² and upheld the lower court’s decision to invalidate the impugned regulations pursuant to section 121.¹⁹³ It would therefore seem that section 121 still retains some usefulness, despite the fact that section 91(2) could potentially have been used to strike down the impugned Alberta regulatory schemes instead.

3. SECTION 92(10) – PROVINCIAL CONTROL OVER LOCAL WORKS AND UNDERTAKINGS AND THE EXCEPTIONS FOR INTERPROVINCIAL TRANSPORTATION AND COMMUNICATION

Section 92(10) of the *Constitution Act, 1867* exempts the regulation of certain activities from provincial jurisdiction because they have an interprovincial or international character. Through section 92(10), the infrastructure and transportation operations of cross-border energy trade come under federal jurisdiction. The degree to which such jurisdiction extends to works and undertakings within the provinces depends on a judicial balancing of the undertaking’s inter-connectedness with provincial works. Section 92(10) is therefore relevant

¹⁸⁷ 2019 ABCA 468.

¹⁸⁸ *Ibid* at para 82.

¹⁸⁹ *Ibid* at para 83.

¹⁹⁰ *Ibid* at para 103.

¹⁹¹ *Ibid* at para 108.

¹⁹² *Ibid* at para 105 [emphasis removed].

¹⁹³ *Ibid* at paras 110, 114.

to interprovincial trade because it exempts works and undertakings connecting a province to the outside world from provincial control under section 92(10)(a). Section 92(10)(c) also allows federal Parliament to declare certain works to be within federal jurisdiction using what has been dubbed the “declaratory power.”

Section 92(10) of the *Constitution Act, 1867* reads as follows:

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.¹⁹⁴

With respect to the transportation of energy products, infrastructure relating to the transportation of oil and gas via pipelines or electricity via transmission lines has been found to fall under federal jurisdiction pursuant to section 92(10)(a) if they are operated as part of an interprovincial (or international) undertaking.¹⁹⁵

According to Hogg and Wright, “[t]he essential scheme of s. 92(10) is to divide legislative authority over transportation and communication on a territorial basis.”¹⁹⁶ To that end, the delineation between intraprovincial and interprovincial undertakings is crucial to separating jurisdiction. The courts have done so by interpreting “connection” to something external to the province to mean “an operational connection, and not a merely physical one.”¹⁹⁷ A pipeline that is physically connected to an interprovincial pipeline network is not automatically under federal jurisdiction. An operation comes under federal jurisdiction if its own business operations extend beyond the provincial border or if the undertaking has a close operational relationship with an interprovincial undertaking.¹⁹⁸

¹⁹⁴ *Constitution Act, 1867*, *supra* note 143, s 92(10).

¹⁹⁵ For pipelines, see *Campbell-Bennett v Comstock Midwestern Ltd*, 1954 CanLII 216 (SCC); *Saskatchewan Power Corporation v TransCanada Pipelines Ltd*, 1978 CanLII 163 (SCC); *Reference re National Energy Board Act*, 1987 CanLII 5285 (FCA); *Reference re Constitution Act, 1867, s 92(10)(a)*, 1988 CanLII 4634 (ONCA); *Westcoast Energy Inc v Canada (National Energy Board)*, 1998 CanLII 813 (SCC) [*Westcoast Energy*]; *Reference Re Environmental Management Act (British Columbia)*, 2019 BCCA 181, *aff’d* 2020 SCC 1. For transmission lines, see *Fulton v Energy Resources Conservation Board*, 1981 CanLII 169 (SCC); *Summerside (Town) v Maritime Electric Co Ltd*, 1983 CanLII 2950 (PE SCTD).

¹⁹⁶ Hogg & Wright, *supra* note 146, § 22:1.

¹⁹⁷ *Ibid.*, § 22:4.

¹⁹⁸ *YMHA Jewish Community Centre of Winnipeg v Brown*, [1989] 1 SCR 1532 at 1552. See also *Canadian Pacific Railway Company v Attorney-General for British Columbia*, [1950] AC 122 at 142 (PC) [*Empress Hotel*].

The courts have consistently refused to divide jurisdiction between federal and provincial legislatures over a single undertaking.¹⁹⁹ For example, in *A.G. of Ontario v. Winner*,²⁰⁰ the JCPC denied New Brunswick the authority over bus line routes that ran entirely within the province because the undertaking as a whole also involved bus lines that ran outside the province. *Winner* continues to be followed, such that the classification of an undertaking is now determined at the hand of whether all of its services will be regulated federally or provincially.²⁰¹

To be classified as interprovincial (and therefore federally regulated) the interprovincial services provided by the undertaking must be a “continuous and regular” part of the undertaking’s operations. In *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279*,²⁰² the Ontario Court of Appeal held that labour relations on the municipal transit system in Ottawa, that ran some routes to Quebec, was an interprovincial service and under federal jurisdiction because the service was “continuous and regular.”²⁰³ This was despite the fact that less than one percent of the total distance travelled by the system’s vehicles and three percent of the system’s passengers were related to the Quebec service.²⁰⁴ This approach has also been applied to a number of trucking operations cases, where small amounts of a business’ operations outside of a province have resulted in the finding that the business falls under federal jurisdiction.²⁰⁵

However, a company may engage in more than one undertaking. In the *Empress Hotel* case the JCPC held that Canadian Pacific Rail’s hotel operations were separate from their rail undertakings, because the hotel carried on a general hotel business, whereas if the hotel had catered principally to railway travellers it would have been classified as part of the railway undertaking.²⁰⁶

This analysis is limited by the degree to which undertakings are operated in a common and single enterprise.²⁰⁷ In *Westcoast Energy* the Supreme Court of Canada found that gathering pipelines and processing plants all owned by Westcoast Energy were under federal jurisdiction, despite the fact that they were all wholly located in British Columbia.²⁰⁸ This was because the processed gas that this system produced was transported into an interprovincial pipeline that was also owned and operated by Westcoast Energy. The indicia of common ownership and common management are therefore relevant to how courts divide or agglomerate undertakings under section 92(10)(a).

¹⁹⁹ Hogg & Wright, *supra* note 146, § 22.5; see e.g. *Corporation of the City of Toronto v Bell Telephone Company of Canada*, [1905] AC 52.

²⁰⁰ 1954 CanLII 289 (JCPC) [*Winner*].

²⁰¹ Hogg & Wright, *supra* note 146, § 22.5.

²⁰² [1983] 4 DLR (4th) 452 (ONCA).

²⁰³ *Ibid* at 460, 465.

²⁰⁴ Hogg & Wright, *supra* note 146, § 22:6.

²⁰⁵ See *Re Tank Truck Transport Ltd*, 1988 CanLII 9290 (ONLA); *R Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd*, 1964 CanLII 162 (ONSC).

²⁰⁶ *Empress Hotel*, *supra* note 198 at 144.

²⁰⁷ Hogg & Wright, *supra* note 146, § 22:8.

²⁰⁸ *Ibid*; *Westcoast Energy*, *supra* note 195.

For true interprovincial projects, jurisdiction for broad topics like environmental concerns have been ruled to fall under federal jurisdiction.²⁰⁹ However, this does not mean that interprovincial undertakings are immune from provincial regulation. In *Coastal First Nations v. British Columbia (Environment)*,²¹⁰ the British Columbia Supreme Court, citing *Alberta (Attorney General) v. Moloney*,²¹¹ found that the British Columbia *Environmental Assessment Act* could apply to an interprovincial pipeline, as the act's conditions were not in conflict with the relevant federal environmental statutes, and the provincial statute was more restrictive than the federal one.²¹²

In *Reference re Environmental Management Act (British Columbia)*,²¹³ the British Columbia Court of Appeal reviewed the history of cases grappling with the distribution of powers with respect to environmental assessments.²¹⁴ Federal undertakings are not “‘enclaves’ immune from provincial environmental laws ... [and] both levels of government have jurisdiction over aspects of the environment.”²¹⁵ In *EMA (BC)*, the Court found that the sole effect of Part 2.1 of British Columbia's *Environmental Management Act* was “to set conditions for, and [potentially] prohibit, the possession and control of increased volumes of heavy oil in the [p]rovince.”²¹⁶ In part because heavy oil would only enter British Columbia via interprovincial pipeline or rail and would largely be destined for tidewater for export, the Court found the provisions to be an impermissible regulation of federal undertakings.²¹⁷ The Court found that Part 2.1 had the potential to affect (or halt) the entire operation of the Trans Mountain pipeline — it was legislation that in pith and substance related only to what made the pipeline “specifically of federal jurisdiction.”²¹⁸ The Court distinguished this instance from the decision in *Coastal First Nations*, as the *Environmental Assessment Act* was truly a law of general application and did not contain a prohibition.²¹⁹

The other relevant part of section 92(10) is the declaratory power. This power has been used at least 472 times, mostly with respect to local railways.²²⁰ The power is not limited to just works involved in transportation or communication.²²¹ The declaratory power cuts against the grain of federalism, as it allows Parliament to step in and override provincial jurisdiction when it so chooses. It has not been much used in recent times.²²²

4. SECTION 92A – ENERGY IN THE PROVINCES

Section 92A of the *Constitution Act, 1867* was added in 1982. This section concerns natural resources and energy specifically, and has granted the provinces control over the

²⁰⁹ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 65–66.

²¹⁰ 2016 BCSC 34 [*Coastal First Nations*].

²¹¹ 2015 SCC 51.

²¹² *Coastal First Nations*, *supra* note 210 at paras 67–76.

²¹³ 2019 BCCA 181 [*EMA (BC)*].

²¹⁴ *Ibid* at paras 62–91.

²¹⁵ *Ibid* at para 93 [emphasis removed].

²¹⁶ *Ibid* at para 94.

²¹⁷ *Ibid* at paras 94–96.

²¹⁸ *Ibid* at para 101.

²¹⁹ *Ibid* at para 96.

²²⁰ Hogg & Wright, *supra* note 146, § 22:10.

²²¹ *Jorgenson v Attorney General of Canada*, 1971 CanLII 136 (SCC); *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*].

²²² Hogg & Wright, *supra* note 146, § 22:10.

export of energy and resources from their territorial jurisdiction.²²³ However, the full extent of this power is largely unexplored, and there has been no challenge that has tested how far the provinces can go to control the flow of their natural resources or energy under section 92A.

According to Hogg and Wright, section 92A of the *Constitution Act, 1867* has likely done little to change the pre-1982 state of the constitutional order with respect to natural resources and the generation and production of electrical energy.²²⁴ With respect to section 92A(1), the provinces already had power over the exploration, development, conservation, and management of resources within their territory under section 92(13) (Property and Civil Rights) — or sections 92(10) (Local Works and Undertakings) or 92(16) (Matters of a merely local or private Nature). What section 92A did change (through subsection (2)) was the provinces' ability to regulate the export of non-renewable natural resources, forestry products, and electricity to other parts of Canada. Prior to the 1982 amendment that added the section, the provinces had been unable to make such regulations, as it was a matter regulated under the federal trade and commerce power. The provinces remain unable to regulate the export of electricity from Canada.²²⁵ The subsection also provides that such provincial laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

In *Ontario Hydro*, the Supreme Court of Canada concluded that the exclusive provincial legislative authority conferred in section 92A(1) over electrical generating facilities did not impinge on federal legislative authority under either the residuary peace, order, and good government power or under the declaratory power in section 92(10)(c).²²⁶ Thereafter, in *Westcoast Energy*, the Supreme Court concluded that what was true for the declaratory power must “apply with equal force to Parliament’s jurisdiction over interprovincial transportation undertakings under s. 92(10)(a).”²²⁷ This further confirmed that section 92A(1) was restricted to intraprovincial activities.

There is little guidance in case law on the implications of section 92A(2). In 2021 the Federal Court of Appeal noted that “no law has ever been challenged on the basis of [s. 92A(2)].”²²⁸ However, in the decision of the Court below,²²⁹ Justice Grammond made preliminary comments interpreting section 92A(2). Justice Grammond took the view that section 92A(2) should be read as a limited exception to the general proposition that a province could not legislate in relation to interprovincial commerce, and that “the proper analytical framework is to determine whether the ... provincial legislation is, in pith and substance,

²²³ *Constitution Act, 1867*, *supra* note 143, s 92A.

²²⁴ Hogg & Wright, *supra* note 146, § 30:30.

²²⁵ *Ibid*; Nigel Banks & Andrew Leach, “Preparing for a Mid-Life Crisis: Section 92A at 40” (2023) 60:4 *Alta L Rev* 853 at 872.

²²⁶ *Ontario Hydro*, *supra* note 221 at 356.

²²⁷ *Westcoast Energy*, *supra* note 195 at para 82; Banks & Leach, *supra* note 225 at 866.

²²⁸ *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 at para 166 [*Turn Off the Taps FCA*].

²²⁹ *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 [*Turn Off the Taps FC*].

related to interprovincial commerce and, if so, whether it is nevertheless valid because it complies with the conditions imposed by section 92(A)(2).”²³⁰

The *Turn Off the Taps* cases concerned a statute introduced in Alberta that allowed its Minister of Energy to require exporters of natural gas, crude oil, or refined fuel to obtain a license. Section 4 of the *Preserving Canada’s Economic Prosperity Act* allowed the Minister to set the terms of these export licenses, including restrictions on maximum quantities and methods of exportation.²³¹ Justice Grammond found that the *Act* allowed for discrimination between provinces located adjacent to Alberta, and held that Alberta had not “negated the serious issue raised by British Columbia that the [impugned] Act breache[d] section 92A(2) for authorizing discrimination” in energy exports.²³²

Justice Grammond’s comments were made in the context of an interlocutory application, and the Federal Court of Appeal overturned his decision on the basis that, without harms resulting from action taken under the *Act*, a judicial intervention was not yet appropriate.²³³

B. INTERPROVINCIAL TRADE BARRIERS

In his 2002 article, “Canada’s Internal Market – A Report Card”, Scott Sinclair argued that there is no evidence of a crisis in Canadian internal trade, and that in fact trade barriers within Canada are relatively small: “Even before the [*Agreement on Internal Trade*] came into effect, most serious studies found that the (efficiency) costs of internal trade barriers were fairly small, ranging from 0.05% of GDP to 0.10% of GDP. Some estimates were even lower.”²³⁴ Sinclair argued that the framing of certain issues as problems of trade distorted the discussion when, for example, on the topic of regulation of the matter actually concerned “the appropriate level[s] of consumer [and] environmental protection, professional standards, the use of the precautionary principle, regional economic development policies, value-added natural resource processing,” and other areas of provincial jurisdiction.²³⁵

Other academics have estimated that Canada would gain more from eliminating its remaining interprovincial trade barriers. In a 2022 publication, Ryan Manucha and Trevor Tombe estimate that reducing the internal trade costs from regulatory barriers in Canada could enlarge Canada’s economy by between 4.4 and 7.9 percent over the long term — resulting in between CAD\$110 and CAD\$200 billion per year.²³⁶

These competing perspectives provide fodder for the camps in a disagreement that David Cohen called “provincialists” on the one hand (those focused on the ability of local governments to engage in public policy that is more sensitive to local welfare and who believe that provincial trade barriers and protectionist strategies can be addressed through voluntary

²³⁰ Banks & Leach, *supra* note 225 at 872; *Turn Off the Taps* FC, *supra* note 229 at para 115.

²³¹ SA 2018, c P-21.5, s 4(2)(a).

²³² *Turn Off the Taps* FC, *supra* note 229 at paras 120, 128, 131.

²³³ *Turn Off the Taps* FCA, *supra* note 228 at paras 104–11.

²³⁴ Scott Sinclair, “Canada’s Internal Market – A Report Card” (2002) 2 *Asper Rev Intl Bus & Trade L* 201 at 201.

²³⁵ *Ibid* at 203.

²³⁶ Ryan Manucha & Trevor Tombe, *Liberalizing Internal Trade Through Mutual Recognition: A Legal and Economic Analysis* (Ottawa: Macdonald-Laurier Institute, September 2022), online (pdf): [perma.cc/W4YW-FAK5].

provincial agreements) and “nationalists” on the other (those who seek to prioritize a single Canadian market and wish to see much more power given over to the federal Parliament to regulate many aspects of things like transportation services, communication services, investment and financial services, and the distribution of energy and natural resources).²³⁷

It can be fairly easily concluded that the provincialist vision of Canada’s economic union has, to this point, largely won out. Outside of the Constitution’s restriction on provincial forays into regulating interprovincial commerce, on the ground today the provinces have retained the power to create barriers to trade. Chief among these are regulatory barriers that create practical difficulties for companies seeking to engage in interprovincial commerce.

Constitutional decisions, almost from the time of Confederation, have skewed towards granting more regulatory authority over markets to provincial governments, fragmenting “markets which would otherwise be organized without regard to provincial boundaries.”²³⁸ The first major effort at managing and moving forward with this entrenched characteristic of our constitutional order was the *Agreement on Internal Trade*, which came into force in July 1995.²³⁹

The *AIT* provided for a general “reciprocal non-discrimination principle” where provinces would not discriminate against goods, services, or investments from other provinces, as well as recognition of the right of exit and entry, goals for reducing regulatory barriers, and a non-judicial dispute resolution process.²⁴⁰ The *AIT* also provided that these principles would be subject to exceptions for legitimate provincial objectives (which included public safety, public order, the protection of human, animal, or plant health, the protection of the environment, consumer protections, and the protection of workers).²⁴¹

From its inception the *AIT* was criticized for a number of reasons. Critics argued that it failed to address government procurement policies and, more importantly, that the agreement allowed for the “legitimate objectives” to encompass virtually all significant areas of provincial regulatory jurisdiction.²⁴² The provinces could, effectively, “depart from the non-protectionist directive [of the *AIT*] by demonstrating that the purpose (and not the effect) of a regulatory measure [was] to achieve a provincial ‘legitimate objective’.”²⁴³ This approach, noted by Cohen in 1995, can be seen reflected in the Supreme Court of Canada’s application of section 121 of the *Constitution Act, 1867* in *Comeau*, as discussed above.

The *AIT* also faced criticism for the inability of its consensual arbitration scheme to force governments to adhere to the agreement’s principles. A similar concern was raised over the approach to solving this problem itself — principles of parliamentary sovereignty hold that

²³⁷ David Cohen, “The Internal Trade Agreement: Furthering the Canadian Economic Disunion” (1995) 25:2 Can Bus LJ 257.

²³⁸ *Ibid* at 260.

²³⁹ *Agreement on Internal Trade: Consolidated Version* (18 February 2015), art 504, online (pdf): [perma.cc/GA75-U7UF] [*AIT*].

²⁴⁰ *Ibid*, arts 401, 404.

²⁴¹ Cohen, *supra* note 237 at 262.

²⁴² *Ibid* at 263–66.

²⁴³ *Ibid* at 265.

any such agreement cannot bind a future legislature.²⁴⁴ The *AIT* was, after all, an executive agreement, and not in and of itself an actual law.²⁴⁵

The *AIT* could do nothing to alleviate the jurisprudence that existed prior to its conception, which allowed provinces to discriminate through government contracts, tax deductions or credits, or the ownership of resources.²⁴⁶ Government procurement, wine and beer pricing, investment incentives, and financial instruments all allow discriminatory trade regulation without directly impeding the flow of goods, “even though [such] direct regulation to achieve the same ends would ... run afoul of the distribution of ... powers.”²⁴⁷

Over a decade after the *AIT*, the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba entered into the *New West Partnership Trade Agreement*, which was ratified in 2010 and came into full effect in 2013.²⁴⁸ In comparison with the *AIT*, the *NWPTA* is a much smaller document (only 36 pages to the *AIT*’s 228). However, in certain ways the *NWPTA* enforces a greater depth of obligation on its signatory parties than the *AIT* did.²⁴⁹

The *NWPTA* included a broader definition of government entities that are subject to its procurement requirements.²⁵⁰ and included obligations on its parties in more significant areas of investment, subsidies, procurement, and labour mobility.²⁵¹ Most notably, the *NWPTA*’s obligations avoided the positive list approach taken in the *AIT* — meaning the *NWPTA*’s provisions apply to all sectors of its signatories’ economies unless explicitly excluded in the agreement.²⁵²

Nevertheless, the *NWPTA* still retained significant exceptions that allowed the western provinces to protect their powers to regulate significant areas of their economies, such as energy generation and environmental provisions regarding hazardous waste and materials.

As the *NWPTA* was coming into effect, the federal and provincial governments of Canada began negotiations to update the *AIT*. The result of these efforts was the new *CFTA*, which came into force in 2017.²⁵³ Like the *NWPTA*, the *CFTA* applies automatically to all areas of Canada’s economy, with exceptions carved out in the agreement.²⁵⁴ The *CFTA* also expanded coverage to the energy sector, which had not been included in the *AIT*.²⁵⁵

Part of the impetus for the renegotiation of the *AIT* was the ongoing Canada-Europe trade negotiations. Like the *NWPTA*, the international European trade deal was to be written in a

²⁴⁴ Katherine Swinton, “Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union” (1995) 25:2 Can Bus LJ 280 at 294.

²⁴⁵ *Northrop Grumman Overseas Service Corp v Canada (Attorney General)*, 2009 SCC 50 at para 11.

²⁴⁶ Swinton, *supra* note 244 at 296.

²⁴⁷ *Ibid.*

²⁴⁸ Canada’s New West Partnership, “New West Partnership Trade Agreement” (30 April 2010), online: [perma.cc/7RPG-DDML] [*NWPTA*].

²⁴⁹ Robin Hansen & Heather Heavin, “What’s New in the New West Partnership Trade Agreement - The *NWPTA* and the Agreement on Internal Trade Compared” (2010) 73:2 Sask L Rev 197 at 231.

²⁵⁰ *Ibid* at 232.

²⁵¹ *Ibid* at 233.

²⁵² *Ibid* at 232.

²⁵³ *CFTA*, *supra* note 144.

²⁵⁴ *Ibid*, Part VII, Annex I, Schedule of Ontario.

²⁵⁵ *CFTA*, *supra* note 144.

negative list structure. It would have been politically embarrassing if an international agreement gave foreign companies better access to the Canadian market than out-of-province Canadian companies as a result of the *AIT*'s positive list system.²⁵⁶ The *CFTA* also came with an expanded dispute settlement mechanism and an increased maximum monetary penalty. Like the *AIT* before it, the *CFTA* remains an executive agreement. Common exceptions still claimed by the provinces under the *CFTA* include regulations concerning health and safety, packaging and labelling, alcohol, professional credentialing, and energy. Also like the *AIT* (and other internal trade agreements) the *CFTA* provides a mechanism for reducing regulatory barriers — the committee on internal trade.

Beyond the provinces' enshrined rights to regulate their domestic energy production and their entrenched, separated, energy markets, there are also existing *CFTA* exceptions concerning energy that have not been lifted. Ontario, Nova Scotia, Manitoba, Quebec, Prince Edward Island, British Columbia, and Newfoundland and Labrador all have listed *CFTA* exceptions so they can regulate their energy markets and impose the fees and tariffs they see fit.²⁵⁷ New Brunswick, Saskatchewan, and Alberta do not have listed exceptions related to energy in the *CFTA*.

Arising from these circumstances is Canada's siloed system of energy regulation. Each province has its own generational mix, market structure, ownership model, oversight regime, and pricing mechanisms.²⁵⁸ This is the natural result of our constitutional order, as the provinces retain the power to control energy production in their jurisdictions. Interprovincial trade is also limited by geography. Canada's landscape presents practical hurdles that make investing in infrastructure (like pipelines and transmission lines) more expensive. A large part of Canada's refining capability in Ontario has long been separated from its main oil and gas producing regions in the west, making the financing of east-west pipelines difficult.²⁵⁹ As it stands, Canada does not have an extensive network of east-west transmission lines either. In fact, there are stronger transmission interties with US grids than between the provinces.²⁶⁰

At the time of writing, the uncertainty created by the US' threats of economic tariffs have spurred action within the framework of the *CFTA*. On 21 February 2025, the federal government announced it was removing 20 of the 39 exceptions for federal procurement policy under the *CFTA*.²⁶¹ On 21 March 2025, newly-elected leader of the Liberal Party (and

²⁵⁶ Ryan Manucha, "How WTO Jurisprudence Can Help Resolve Interpretive Uncertainties Generated by Canada's Domestic Free Trade Agreements" (2019) 19 *Asper Rev Intl Bus & Trade L* 273 at 282.

²⁵⁷ *CFTA*, *supra* note 144, Part VII, Annex I, Schedules of Ontario, Nova Scotia, Manitoba, Quebec, Prince Edward Island, British Columbia, Newfoundland and Labrador.

²⁵⁸ Natural Resources Canada, *Powering Canada: A Blueprint for Success: Final Report of the Canada Electricity Advisory Council*, Catalogue No MI34-72/2024E-PDF (Ottawa: NRC, May 2024) online: [perma.cc/K27W-TWGV].

²⁵⁹ Alastair R Lucas, "The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision" (2018) 23:1 *Rev Const Stud* 25 at 28.

²⁶⁰ Electricity Canada, "The Integrated North American Grid", online: [perma.cc/6735-V3HR]; House of Commons, *Strategic Electricity Interties: Report of the Standing Committee on Natural Resources*, 42-1, No 7 (December 2017) at 7 (Chair: James Maloney), online: [perma.cc/N4FS-9B23] [Report on Natural Resources].

²⁶¹ Government of Canada, News Release, "Government of Canada Removing More Than Half of Federal Exceptions to the Canadian Free Trade Agreement to Strengthen Interprovincial Trade" (21 February 2025), online: [perma.cc/MZQ8-9YJ3].

Prime Minister) Mark Carney met with the Premiers and announced an intention to create a national energy and trade corridor to eliminate trade barriers.²⁶² The Conservative Party has likewise proposed the creation of an energy corridor to build a pipeline project connecting Alberta to Saint John, New Brunswick.²⁶³ At present, Canada does not have an easy way to replace its energy exports to the US with other buyers, should the need arise. Electricity sales to other countries are permanently prohibited by the three oceans that border Canada to the east, north, and west. Oil and gas exports to Asia are facilitated by the Transmountain pipeline. Significant exports directly to Europe or other customers to the east will have to wait until infrastructure can be completed to the east coast, which will take years. Legally speaking, a renewed pipeline to the east from Alberta will face the same hurdles all other pipelines in Canada's history have faced: large distances to cover, local opposition, and overlapping provincial environmental regulation, in addition to compliance with significant regulatory requirements federally and lack of regulatory or commercial certainty.

III. LOCAL RESPONSES TO TARIFFS AND INTRAPROVINCIAL ENERGY TRADE

Energy trade has not received significant intraprovincial attention, and there may be several good reasons for that. At the forefront, most Canadian provinces export energy products. Other reasons for not increasing intraprovincial trade in energy relate to regulatory obstructions, such as extensive processing time and physical barriers, such as a lack of infrastructure.

Canada's refining sector provides an example of the infrastructure issue. In the early 1970s, there were 40 refineries in Canada.²⁶⁴ At present, Canada has between 17 and 19 refineries.²⁶⁵ Natural Resources Canada and the Canadian Energy Regulator have reported that "distribution challenges arise from the fact that petroleum products are [produced and] refined in only a few geographic regions but they are consumed all across Canada. Of the western provinces, only Alberta and Saskatchewan produce more products than they consume. Manitoba and parts of British Columbia and most of the territories are supplied primarily from the three refineries in Edmonton."²⁶⁶

²⁶² The Canadian Press, "Carney, Premiers Seeking Plan for National Energy, Trade Corridor", *CTV News* (21 March 2025), online: [perma.cc/SE8Q-PH9H].

²⁶³ Lauren Krugel, "Conservatives' Energy Corridor Proposal Has 'Missing Pieces,' Says Energy Expert", *CBC News* (31 March 2025), online: [perma.cc/UV8C-7PG7].

²⁶⁴ Natural Resources Canada, "The Refining Sector in Canada" (20 December 2024), online: [perma.cc/6GXX-5A5R].

²⁶⁵ Canada Energy Regulator, "Provincial and Territorial Energy Profiles – Canada" (10 September 2024), online: [perma.cc/7GXA-JFVD] [CER, Provincial and Territorial Energy Profiles].

²⁶⁶ Natural Resources Canada, *supra* note 264.

FIGURE 1:

REFINED PETROLEUM PRODUCTION VS. SALES

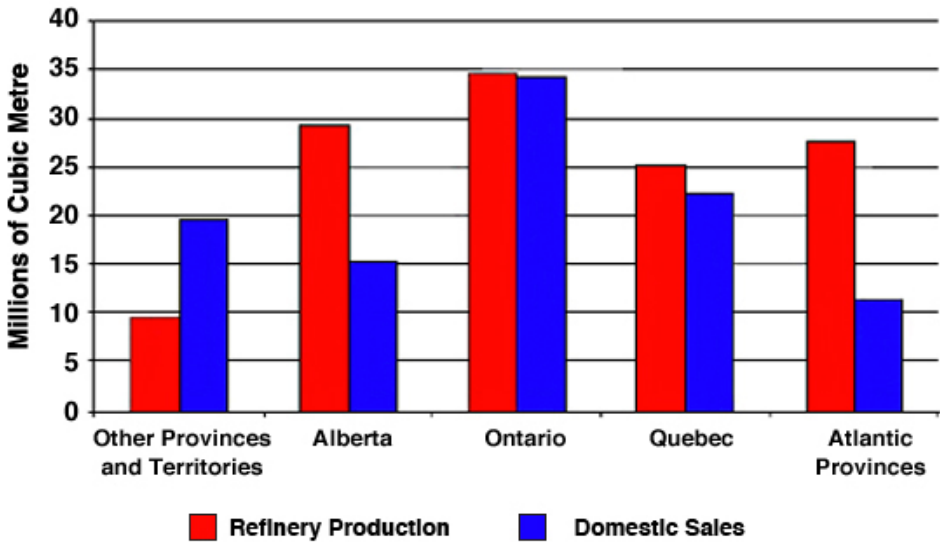


Figure 1: This figure comes from National Resources Canada,²⁶⁷ using data from Statistics Canada.²⁶⁸

This would suggest a real opportunity to increase intraprovincial trade in Alberta and Saskatchewan by increasing its refinery production. However, no significant increase in refinery production is possible unless further facilities are constructed.

Bolstering interprovincial energy trade may provide greater opportunity for intraprovincial trade as well. By making raw energy products available, local refining or production of dependent products could increase, which in turn could increase intraprovincial trade by avoiding importing additional products.

²⁶⁷ *Ibid.*

²⁶⁸ *The Supply and Disposition of Refined Petroleum Products in Canada, April 2004*, No 45-004-X2004004 (Ottawa: Statistics Canada, 2004), online: [perma.cc/9BRE-837M].

A. ELECTRICITY

Canada is typically a net exporter of electricity.²⁶⁹ All of Canada’s international trade in electricity is with the US and mostly occurs from the provinces of Quebec, Ontario, Manitoba, and British Columbia.²⁷⁰ As shown below, there are more international interties with the US than there are between the provinces of Canada. The figure below is reproduced from a market snapshot on electricity trade produced by the Canadian Energy Regulator (CER):²⁷¹

FIGURE 2:

CER-REGULATED INTERNATIONAL POWER LINES

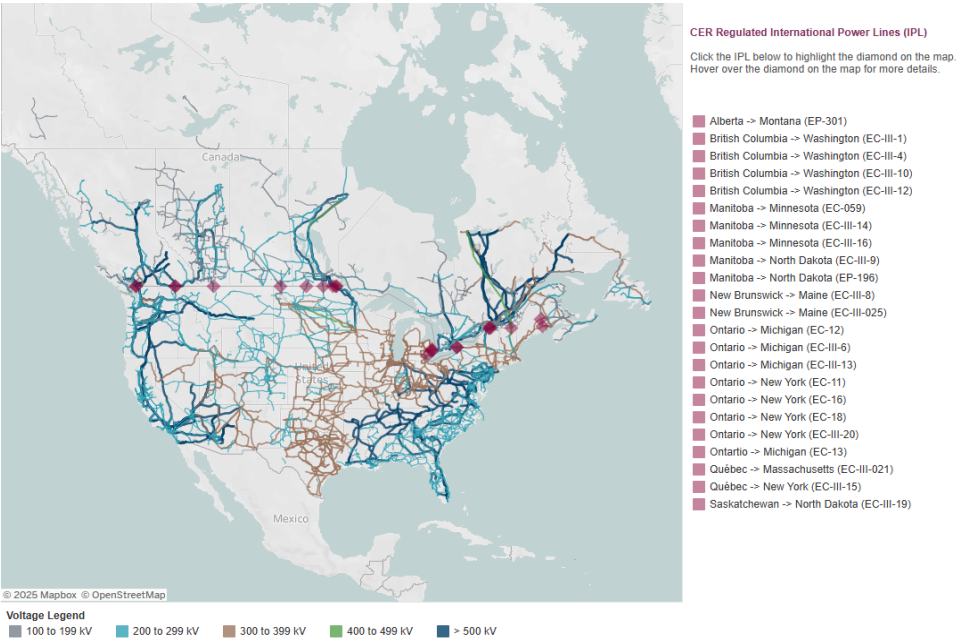


Figure 2: This figure is a screenshot from OpenStreetMap 2022, licensed under the Open Data Commons Open Database License (ODbL) by the OpenStreetMap Foundation.

This is significant when compared to the interprovincial interties, as mapped in a Natural Resources Canada submission to the House of Commons, showing then existing and proposed interties:

²⁶⁹ Canada Energy Regulator, “Electricity Trade Summary” (2 July 2025), online: [perma.cc/L2E2-4CNN].

²⁷⁰ CER, Provincial and Territorial Energy Profiles, *supra* note 265.

²⁷¹ Canada Energy Regulator, “Market Snapshot: Electricity Trade — Who Regulates What in Canada?” (22 January 2025), online: [perma.cc/535C-PD73].

FIGURE 3:

EXISTING AND PROPOSED TRANSFER CAPABILITY BETWEEN CANADIAN AND US JURISDICTIONS

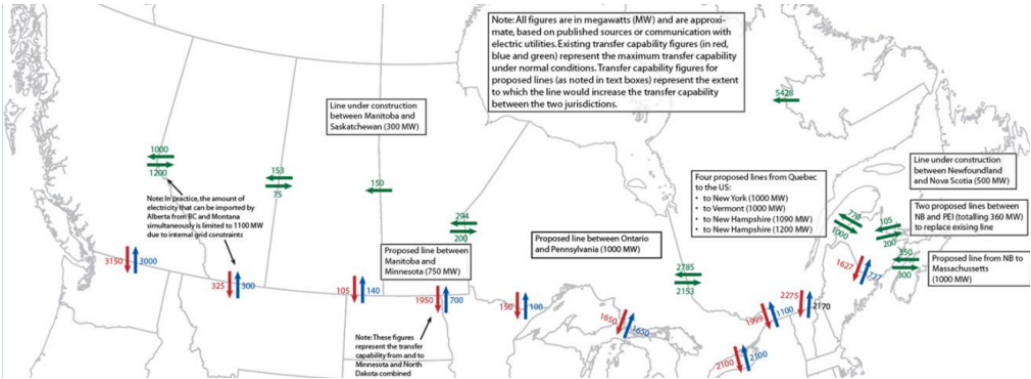


Figure 3: This figure is reproduced from the Standing Committee on Natural Resources' report to the House of Commons.²⁷²

This physical barrier to trade, coupled with the fact that, historically, Canada has produced more electricity than it consumes (and other provinces are therefore not a significant market for produced electricity) there are regulatory and market obstacles to an integrated national grid.

The different electricity market structures across provinces and regulatory regimes pose challenges in creating a national, integrated electric system. As the CER notes, “most provinces have government-owned utilities that generate and distribute electricity,” but “[o]thers, such as Alberta and Ontario, have competitive markets for electricity generation and distribution, with broad participation by privately-owned utilities.”²⁷³ This difference in market approach however results in large price differences²⁷⁴ and disconnected markets. While cost-of-service regulation (in transmission and distribution) and tariff design are mostly similar in all provinces, each one has its own regulatory body that, by mandate, ignores what is going on in other provinces.²⁷⁵

Considering the future, and the projected rise in the consumption of electricity, there exist good reasons to improve the ability of provinces to export electricity within Canada. The Canadian Climate Institute projects that “Canadian electricity demand will be 1.6 to 2.1 times higher by 2050 compared to the present. To meet that demand, Canada's electricity generation capacity will need to be 2.2 to 3.4 times” higher than today.²⁷⁶ There is therefore reason to believe that domestic markets for electricity will exist in the near future. Other reasons to

²⁷² Report on Natural Resources, *supra* note 260 at 8.

²⁷³ CER, Provincial and Territorial Energy Profiles, *supra* note 270.

²⁷⁴ Rylan Urban, “Electricity Prices in Canada 2023” (3 September 2023), online: [perma.cc/V2WT-XDCT].

²⁷⁵ Pierre-Olivier Pineau, “Improving Integration and Coordination of Provincially-Managed Electricity Systems in Canada”, online (pdf): [perma.cc/W2MH-7NJY].

²⁷⁶ Canadian Climate Institute, “The Big Switch – Electricity in Canada”, online: [perma.cc/3JWM-DJ76].

improve provinces' ability to export electricity include grid stability, self-sufficiency, and national security.

Proposals by the Canadian Institute for Climate Choices to bring this future about include:

- Enhancement of bilateral provincial projects through renewed federal support;
- A negotiated free trade agreement in electricity; and
- A harmonized electric trade system.²⁷⁷

B. CRUDE OIL AND REFINED PETROLEUM PRODUCTS

The CER has reported that:

Canada produced 5.1 million barrels per day (MMb/d) of crude oil in 2023, when Canada was ranked as the fourth largest oil producer in the world. Since 2013, Canada's crude oil production has increased by 41 percent. Canadian oil production mainly comes from swestern Canada, which accounted for about 96 percent of total production in 2023. The remainder was produced mostly in Newfoundland and Labrador. Alberta was Canada's largest producer of oil in 2023 (at 84 percent of the total), followed by Saskatchewan and Newfoundland. These are also the only three provinces that produce heavy oil.²⁷⁸

The CER defines Refined Petroleum Products (RPPs) as "a range of products that are refined from crude oil, like gasoline, diesel, heating oil, and jet fuel." RPPs are products of refineries. According to the CER, "RPPs are the second largest type of energy consumed by end users in Canada." The CER describes provincial refining capacity as follows:

Canada has 17 refineries with a total capacity of approximately 1.93 MMb/d as of 2024. Alberta has the largest share of refining capacity (30%), followed by Ontario and Quebec (21 percent each), New Brunswick (17%), Saskatchewan (8%), British Columbia (4%), and Newfoundland (1%). In 2023, Canadian refineries operated at 89% of capacity, on average, and consumed 1.6 MMb/d of crude oil.²⁷⁹

Regarding the export of crude oil, the CER states that "Canada's crude oil primarily serves export markets. In 2023, Canada exported an average of 4.0 MMb/d (nearly 80% of its total production). Nearly all these volumes are exported to the U.S. Since 2010, exports have increased by 104%."²⁸⁰

Despite western Canadian provinces' production, crude oil is imported by eastern Canadian provinces. The CER explains that

Canadian refineries are primarily supplied with crude oil by pipeline, but refineries on the east coast have no pipeline access and rely on marine and rail for supply.

²⁷⁷ Pineau, *supra* note 275 at 16–18.

²⁷⁸ CER, Provincial and Territorial Energy Profiles, *supra* note 265.

²⁷⁹ *Ibid*

²⁸⁰ *Ibid*.

...

Imports of crude oil increased by almost 5% in 2023, from 467 thousand barrels per day (Mb/d) in 2022 to 490 Mb/d in 2023. In general, provinces with refineries located further from western Canadian production sources — namely Ontario, Quebec, and New Brunswick — consistently import the most crude oil.²⁸¹

There are good reasons to improve provinces' ability to ship crude oil and RPPs. While domestic trade in crude oil and RPPs cannot replace trade with the US, increased domestic trade, and ceasing imports of products that are produced domestically in such quantities seems like a logical step. Should domestic production be shipped from western Canada to eastern Canada, the case for more refineries, and global shipping may make more economic sense.

C. NATURAL GAS AND LIQUEFIED NATURAL GAS

The CER provides the following description and statistics regarding Canada's production, use, and export of natural gas and liquefied natural gas:

- Canada consumed an average of 11.9 billion cubic feet per day (Bcf/d) of natural gas in 2023.²⁸² In 2023, Canada exported an average of 8.1 Bcf/d of natural gas and imported 2.5 Bcf/d. The net export value of natural gas in 2023 was \$10.1 billion.²⁸³
- Almost all of Canada's exported natural gas is transported to the US via pipelines, while a very small amount is exported by trucks or ships as compressed natural gas or LNG.
- Most natural gas imports are delivered through pipelines from the US into Ontario. Natural gas is also imported to serve New Brunswick and Nova Scotia.²⁸⁴

Similar to crude oil and RPPs, increased ability to ship natural gas and LNG could only strengthen Canada's economic resilience and self-sufficiency.

It is clear in law that provinces have the exclusive power to legislate in respect of the sale of goods and services within the province, which does not extend from one province to another. This means that the provinces have law-making powers necessary to remove any or all intraprovincial trade barriers. We propose that provinces look toward increasing interprovincial energy trade as a means of protecting and increasing intraprovincial energy trade.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ Canada Energy Regulator, "Natural Gas Trade Summary" (28 March 2025), online: [perma.cc/4T9L-SBM6].

²⁸⁴ CER, Provincial and Territorial Energy Profiles, *supra* note 265.

D. PUBLIC INTEREST REGULATION

Almost uniformly across Canada, provincial energy regulators make determinations on issues related to facility approvals in the public interest. On a federal level, the CER says that it regulates “pipelines, energy development and trade in the Canadian public interest.”²⁸⁵ But what exactly is the public interest, and is this concept broad enough to include trade tariffs and a “Team Canada” approach?

Politically, in Saskatchewan, it seems that the answer is yes — given Premier Scott Moe’s statements regarding pre-approval of pipeline projects.²⁸⁶ Federally, this was an election issue. The Liberal Party leader has indicated that, should the Liberal Party return to power, there is no political appetite for repealing the so-called “No Pipelines Bill,”²⁸⁷ or factually, the *Impact Assessment Act*.²⁸⁸ The Conservative Party, on the other hand, promised to repeal the *IAA*.²⁸⁹ While the *IAA* was not enacted with the stated purpose of curtailing energy projects, the Canada West Foundation’s research concluded that assessment timelines for most projects assessed under the *IAA* were far exceeding the legislated 180 days period in the Planning Phase (or Phase 1) of the process, with a mean of 332 days before moving to Phase 2.²⁹⁰

The CER, under section 183(2) of the *CER Act*,²⁹¹ considers not only the existence of actual or potential markets, or the economic feasibility of a pipeline, amongst the host of other statutorily prescribed factors when determining its recommendation on any application for a certificate in respect of a pipeline, but also under section 183(2)(l), “any public interest that the [CER] considers may be affected by the issuance of the certificate or the dismissal of the application.”²⁹²

Provincially, regulators differ in the factors each considers relevant when determining whether to approve pipelines and other energy infrastructure. In some cases, such as section 7(d) of New Brunswick’s *Pipeline Act*,²⁹³ express provision is made for the regulator to consider “such other matter as it considers relevant in the public interest.”²⁹⁴ Another example is section 17(1) of the *Alberta Utilities Commission Act*,²⁹⁵ which provides that the Alberta Utilities Commission (in addition to other factors it may take into account), must “give consideration to whether construction or operation of the proposed hydro development,

²⁸⁵ Canada Energy Regulator, “Our Responsibilities” (21 July 2021), online: [perma.cc/WS66-8LU3]. See also *CER Act*, *supra* note 9, ss 4, 11.

²⁸⁶ Alexander Quon, “Premier Scott Moe Says All Pipelines Through Sask. Are Now Pre-approved. Experts Say that Doesn’t Mean Much”, *CBC News* (28 February 2025), online: [perma.cc/C9YP-VM8E].

²⁸⁷ EnergyNow Media, “MORE OF THE SAME: Mark Carney Admits He Will Not Repeal the Liberal’s Bill C-69 – The ‘No Pipelines’ Bill”, *Energy Now* (2 April 2025), online: [perma.cc/3KFS-L3J8].

²⁸⁸ SC 2019, c 28, s 1 [*IAA*].

²⁸⁹ Ben Cousins, “Here’s Why Bill C-69 is Shaping Up as a Campaign Wedge Issue”, *Financial Post* (3 April 2025), online: [perma.cc/48ZW-FH6A].

²⁹⁰ Marla Orenstein, *Federal Impact Assessment Act Under Review: Measuring Progress on Projects & Timelines*, Report for the Canada West Foundation (Calgary: CWF, May 2023) at 13, online (pdf): [perma.cc/32X2-5MJF].

²⁹¹ *CER Act*, *supra* note 9.

²⁹² *Ibid.*, s 183(2)(l).

²⁹³ SNB 2005, c P-8.5.

²⁹⁴ *Ibid.*, s 7(d).

²⁹⁵ SA 2007, c A-37.2.

power plant, energy storage facility, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.”²⁹⁶ In others, such as British Columbia’s *Energy Resource Activities Act*,²⁹⁷ or Alberta’s *Responsible Energy Development Act*,²⁹⁸ there are no express provisions related to the public interest. However, if regard is had to the mandate and purpose of the established regulators, it is readily apparent that this is regulation in the public interest:

- Under the *REDA*, the mandate of the regulator includes providing “for the efficient, safe, orderly and environmentally responsible development of energy resources and mineral resources in Alberta through the Regulator’s regulatory activities”,²⁹⁹ and
- Under the *Energy Resource Activities Act*, “[t]he purpose of the regulator is to regulate energy resource activities in a manner that protects public safety and the environment, supports reconciliation with Indigenous peoples and the transition to low-carbon energy, conserves energy resources and fosters a sound economy and social well-being.”³⁰⁰

Further support for the proposition that energy regulation is public interest regulation may be found in documents such as the *Atlantic Accord*,³⁰¹ which includes in its purpose “to provide for the development of oil and gas resources offshore Newfoundland for the benefit of Canada as a whole and Newfoundland and Labrador in particular.”³⁰²

The factors considered in the regulatory adjudication of rates and tolls is consistent with a public interest approach. Federally, the CER must set tolls that are just and reasonable, and may not allow “any unjust discrimination in tolls, service, or facilities against any person or locality.”³⁰³ Similar language may be found in provincial legislation regarding tariffs.³⁰⁴

Regulation in the public interest, while broad, is not open-ended. A board’s jurisdiction (and the factors it may consider) must be interpreted within the entire context of the governing legislation.³⁰⁵ As held by the Federal Court of Appeal, “[p]ublic interest determinations made in a regulatory context engage discretionary considerations usually within the expertise of the

²⁹⁶ *Ibid*, s 17.

²⁹⁷ SBC 2008 c 36.

²⁹⁸ SA 2012, c R-17.3 [*REDA*].

²⁹⁹ *Ibid*, s 2(1)(a).

³⁰⁰ *Energy Resources Activities Act*, *supra* note 297, s 4.

³⁰¹ *The Atlantic Accord: Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil And Gas Resource Management and Revenue Sharing* (11 February 1985), online (pdf): [perma.cc/ZP9H-XDA7].

³⁰² *Ibid*, s 2(a).

³⁰³ *CER Act*, *supra* note 9, ss 230, 235.

³⁰⁴ See e.g. *Electric Utilities Act*, SA 2003, c E-5.1, s 121(2).

³⁰⁵ *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paras 7, 46.

[b]oard.”³⁰⁶ Factors such as sound financial management³⁰⁷ or prudence,³⁰⁸ and even possibly government approval,³⁰⁹ have been found to be relevant to determinations in the public interest.

Arguably, trade tariffs, and the direct impacts which these tariffs will have on Canada’s economy, cannot be disregarded when considering sound financial management or prudence. Prudent, in this context, means reasonable.³¹⁰ Regulators ought not turn a blind eye to economic realities facing project proponents, generators, or the Canadian public — in fact, they are statutorily enjoined not to.

IV. CONCLUSION: HOW DO TARIFFS STACK UP?

The heavy reliance on US trade made Canada particularly vulnerable to tariffs and future trade restrictions imposed by the US government. The recent wave of tariffs imposed by the US and affecting Canadian energy trade varies significantly in magnitude and consequences. At the top of the list are the US tariffs on Canadian crude oil and refined petroleum products, which impose both percentage-based duties and fixed per-barrel charges. These tariffs directly raise costs for US refiners, forcing them to seek alternative sources or pay higher prices. Given that nearly 70 percent of US oil imports come from Canada, these tariffs have a profound impact on both sides of the border, disrupting long-established supply chains and prompting adjustments in pricing, production, and trade routes. The knock-on effects on Canadian producers, refinery operations, and employment make these some of the most consequential tariffs imposed.

Coming in second are the US countervailing and anti-dumping duties on Canadian lumber, which nearly tripled from 14.4 percent to 34.45 percent. While not directly targeting energy, this increase reflects a broader protectionist strategy that has ripple effects on industries adjacent to energy, such as construction and manufacturing. High tariffs on lumber drive up costs for infrastructure projects, including energy infrastructure. Additionally, retaliatory tariffs from Canada on US goods, including steel and aluminum, further complicate trade relationships and increase costs for energy related industries that rely on these materials.

Ranked third are the US tariffs on LNG and electricity exports, which impose a 10 percent duty on LNG and a 25 percent duty on electricity. Given Canada’s role as a key energy supplier to the US, especially in electricity exports from provinces like Quebec and Manitoba, these tariffs create economic inefficiencies and could force Canadian suppliers to seek new export markets. Unlike crude oil and refined petroleum — where supply chain dependencies make alternatives difficult — electricity can theoretically be sourced domestically in the US, further weakening Canada’s leverage in negotiations.

³⁰⁶ *Sawyer v TransCanada Pipeline Limited*, 2017 FCA 159 at para 2, Rennie JA.

³⁰⁷ *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 180 [*Quebec v Canada*].

³⁰⁸ *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 136 [*Ontario Energy Board*].

³⁰⁹ *Quebec v Canada*, *supra* note 307 at 181.

³¹⁰ *Ontario Energy Board*, *supra* note 308 at para 99.

Finally, the broader US trade war measures affecting global imports, including those imposed on China, rank fourth in terms of impact on Canadian energy. While these tariffs do not directly target Canada, they create secondary effects by disrupting global markets, affecting demand for Canadian products, and heightening volatility. The unpredictability of US tariff policies fosters economic uncertainty, discourages long-term investments, and forces Canadian energy producers and policymakers to consider diversification strategies. In navigating this turbulent trade landscape, Canada must weigh its responses carefully — balancing countermeasures, infrastructure expansion, and trade diversification to minimize economic harm.

In response, policymakers and businesses in Canada are looking to diversify their export base by expanding trade relationships with other countries and within Canada itself.³¹¹ But with whom should we trade? And what should we do to increase trade with ourselves?

For Canadian businesses, Canadians, and Canadian trading partners, the actual amount of currently imposed tariffs will likely be just one factor to consider among many, with practical and logistical barriers arising from lack of adequate infrastructure to facilitate trade being predominate until the necessary infrastructure and logistics systems can be developed. Another major consideration (as demonstrated by the recent tariff volatility with countries including the US and China) should be certainty around tariffs going forward. Canada should focus on developing trade with countries that it has a free trade agreement with, or at least those which are not shirking their obligations as members of the WTO.

From a trade and regulatory tariff perspective, however, when comparing trade with the EU, UK, US, and China, increasing trade with the EU appears to be most favourable to Canada:

- The EU has no tariffs on Canadian energy products under *CETA*. Additionally, Canada benefits from the EU's *Methane Regulation*, which could give Canadian energy exports a competitive edge due to Canada's stringent environmental standards. The EU's CBAM does not yet apply to Canadian energy products, but future expansions could introduce new costs.
- Closely following the EU, the UK maintains tariff-free trade on Canadian energy products under the *TCA*, which is similar to *CETA* in respect of trade tariffs. However, negotiations for a permanent free trade agreement have stalled. The UK's CBAM, set to launch in 2027, could introduce new costs for Canadian exports. While the UK is a net importer of gas, its demand is decreasing, limiting future opportunities.
- Despite recent turmoil, the US ranks third. The US has imposed significant tariffs on Canadian energy products, including 10 percent tariffs on LNG and coal, 25 percent tariffs on uranium and electricity, and additional per-barrel tariffs on crude

³¹¹ Christopher S Cotton & Daniel Teeter, "Breaking Down Canada's Internal Trade Barriers" (2025) John Deusch Institute, Policy Paper 25-0301, online (pdf): [perma.cc/EA3Q-UT6K]. See also Government of Canada, Intergovernmental Affairs, News Release, "Committee on Internal Trade Breaks Down Barriers to Internal Trade" (28 February 2025), online: [perma.cc/F7WW-BT99].

oil and refined petroleum products. The US-Canada trade war has led to retaliatory tariffs, increasing uncertainty. While Canada remains the largest supplier of US energy imports, the political volatility surrounding tariffs makes the US a less favorable trading partner, but continued appetite for Canadian energy products raises its ranking above China.

- China has low tariffs on Canadian energy products (0 percent on LNG and crude oil, 3 to 6.5 percent on coal and petroleum fuels). However, China's retaliatory tariffs on Canadian agricultural products and its increasing domestic energy production reduce its attractiveness as a trade partner. Additionally, China's shift toward renewable energy and high-end chemical production is decreasing its demand for crude oil.

But what of Canada's trade with itself? The Canadian Chambers of Commerce estimate that the removal of interprovincial trading barriers could "add \$50 billion to \$130 billion to Canada's overall GDP" and could "serve to cut the Canada-U.S. productivity gap by as much as one-third."³¹² This seems to align with the Royal Bank of Canada's reference to a 2019 International Money Fund study that found that "the cost of non-geographic interprovincial trade barriers could be roughly equivalent to an average tariff of 21 percent on trade flows (for goods and services)."³¹³

Prime Minister Carney's government, following the 2025 federal election, has laid out energy-related policies aimed at improving Canada's energy infrastructure and engaging Indigenous communities. A CAD\$5 billion investment in infrastructure through a Trade Diversification Corridor Fund, aimed at facilitating trade diversification and the establishment of an east-west electricity grid has been announced. Regulatory reforms with a "One Window" approval process for large projects is planned. This is intended to result in faster and more efficient project development. Carbon pricing is back on the agenda, through the Output-Based Pricing System, and the implementation of a consumer carbon credit market tied to this system. A transition from a tax-based approach to incentives for greener consumption is envisioned.³¹⁴

Brett Steenbarger, writing on trading psychology, quoted Charles Darwin: "It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change."³¹⁵ Canada can, and should, adapt to the change.

³¹² Canadian Chamber of Commerce, "Addressing Barriers to Interprovincial Trade" at 2, online (pdf): [perma.cc/YD9G-6SV6].

³¹³ Salim Zanzana, "Six Questions About the Significance of Interprovincial Trade Barriers in Canada" (25 February 2025), online: [perma.cc/47J3-BSXP].

³¹⁴ Atlantica Centre for Energy, "Federal Election 2025: Prime Minister Carney's Energy-Related Policies" (30 April 2025), online: [perma.cc/95D4-MPV9].

³¹⁵ Brett N Steenbarger, *Trading Psychology 2.0: From Best Practices to Best Processes* (Hoboken, NJ: Wiley, 2015) at 1.