

THE EFFECT OF TARIFFS ON LOCAL AND INTERNATIONAL ENERGY TRADE

I. Executive Summary

The ongoing trade war initiated by the United States of America (the “U.S.”) in early 2025 has profoundly impacted Canada’s energy sector, disrupting long-standing trade relationships and market dynamics. The imposition of U.S. tariffs on Canadian energy products—including crude oil, natural gas, uranium, and refined petroleum—has increased costs for American buyers, reducing demand and forcing Canadian producers to seek alternative markets or adjust pricing strategies. Given Canada’s heavy reliance on energy exports to the U.S., these tariffs threaten domestic production, employment, and overall economic stability.

The retaliatory trade measures from Canada have further escalated tensions, prompting additional U.S. tariffs on key industries such as steel, aluminum, and automobiles. Although some exemptions were introduced under the Canada–U.S.–Mexico Agreement, a significant portion of Canadian exports remain subject to costly trade tariffs. These tariffs jeopardize energy supply chains, reducing cross-border economic efficiency while undermining both Canadian and American energy security.

Expanding Canada’s trade relationships with the European Union (“EU”), United Kingdom (“UK”), and China present varying degrees of favourability. The EU remains Canada’s most advantageous partner, with tariff-free energy trade under the Comprehensive Economic and Trade Agreement (“CETA”) and regulatory frameworks that align with Canadian environmental goals. The UK maintains similar conditions under the Transitional Trade Continuity Agreement, although future regulatory changes may introduce additional trade complexities. China, while maintaining lower tariffs on Canadian energy products, is an increasingly volatile trade partner, with shifting market demands and retaliatory measures affecting Canadian exports.

The Canadian government and some provinces have openly commented in recent months that barriers to interprovincial trade should be struck down or significantly curtailed. 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

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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 intra-provincial 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.

The trade war has prompted varied responses from Canadian provinces, reflecting their respective economic interests and vulnerabilities. Alberta and Saskatchewan, as major energy-producing provinces, have emphasized the need for trade diversification, advocating for new pipeline infrastructure to facilitate exports beyond the U.S. market. Alberta Premier Danielle Smith has also expressed concerns about the long-term economic impact of tariffs, calling for federal intervention to secure exemptions for Canadian crude oil. Ontario, deeply affected by automotive and steel tariffs, initially proposed retaliatory measures by imposing a surcharge on electricity exports to U.S. states but quickly suspended it under pressure. British Columbia, in turn, announced procurement restrictions favoring Canadian goods over U.S. imports and withdrew rebates for Tesla charging products as a symbolic countermeasure. Meanwhile, Quebec and Manitoba, heavily reliant on electricity exports, have taken a cautious approach—exploring diplomatic solutions while evaluating potential shifts in trade policy. Despite differing strategies, the provinces collectively recognize the urgency of mitigating economic fallout, with discussions ongoing about strengthening interprovincial energy trade and infrastructure to reduce dependency on foreign markets.

Given the uncertain landscape, Canada must consider diversification strategies, including increased domestic energy trade, infrastructure expansion, and international outreach to emerging markets. Interprovincial trade barriers pose additional challenges, but reducing regulatory obstacles could bolster Canada's resilience against external trade disruptions. The impact of tariffs on energy trade extends far beyond pricing - it influences supply chain integrity, economic growth, and geopolitical stability. As negotiations continue, Canada's policymakers and industry leaders must carefully assess long-term trade strategies to mitigate risks and enhance energy security.

II. Introduction

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

The U.S. trade war with Canada and Mexico took effect on 4 March 2025, as did Canada's retaliatory tariffs. The trade war developed and is ongoing. On 6 March 2025, the U.S. suspended tariffs on Canadian goods entering the U.S. which comply with the free trade Agreement between the U.S., the United Mexican States, and Canada (the "USMCA" or "CUSMA") that has been effective since 1 July 2020.¹

In effect, the 6 March 2025 U.S. suspension exempted from tariffs approximately 38% of Canadian products imported in the U.S. That exemption is ongoing.

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

The U.S. trade war with Canada and 56 other nations is ongoing and shows little sign of abating. On 4 April 2025, the U.S. announced that it intended to increase countervailing and anti-dumping duties on Canadian lumber products from 14.4% to 34.45%. Some commenters observed that the U.S. 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% tariff on Chinese products if China failed to suspend its retaliatory tariffs on U.S. products by 8 April.

This paper considers the purpose and effects of the U.S. 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.

U.S. tariffs on Canadian energy products directly increase the cost of exporting them to the U.S., the dominant export market for Canadian oil and gas. U.S. tariffs raise the price of Canadian energy products for U.S. buyers. Because U.S. tariffs on Canadian products directly increase cost to U.S. consumers and refiners, they may seek alternative sources, decreasing U.S. demand for Canadian energy. As a result, Canadian producers may

¹ In Canada, the USMCA is also styled the Canada–United States–Mexico Agreement (the "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.

decrease the price of products they sell to U.S. buyers to offset the tariff costs. This may render Canadian producers less competitive in the U.S. market, and such market forces may require Canadian producers to access alternative markets outside the U.S. or reduce extractive activities in Canada.

Any reduced Canadian energy production would likely lead to domestic job loss, reduce royalties payable to governments, and erode Canada's gross domestic product ("GDP").^{2,3}

Further, the U.S. 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 U.S. energy and petrochemical manufacturing sector needs.⁴ U.S. tariffs on Canadian energy products may disrupt the integrated energy supply chains between Canada and the U.S., which some perceive as a threat to U.S. energy security. Nearly 70% of oil imported in the U.S. comes from Canada by sea and by land via more than 450,000 kilometers of oil and gas pipelines linking Canada and the U.S. Tariffs on Canadian crude oil, natural gas, refined products, or critical input materials that cannot be sourced in the U.S. 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.⁵

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.⁶

² 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, GDP per capita (14 May 2024), online: Government of Canada <https://www160.statcan.gc.ca/prosperity-prosperite/gdp-pib-eng.htm>.

³ Doane Grant Thornton, "Impact of tariffs on Canadian businesses" (3 April 2025), online: https://www.doanegrantthornton.ca/insights/how-new-tariffs-could-affect-canadian-businesses/#faq_6131585_1.

⁴ Hannah Ritchie "The United States is the world's largest oil producer" (20 November 2024) *Data Insights*, online: Data Insights <https://ourworldindata.org/data-insights/the-united-states-is-the-worlds-largest-oil-producer#:~:text=The%20United%20States%20is%20the%20world%27s%20largest%20oil%20producer.,country%20from%201990%20to%202023> referencing the Statistical Review of World Energy Report (2024), online: Energy Institute . https://www.energystinst.org/_data/assets/pdf_file/0006/1542714/684_EI_Stat_Review_V16_DIGITAL.pdf

⁵ Canadian Energy Centre, "Why U.S. tariffs on Canadian energy would cause damage on both sides of the border" (14 January 2025), online: Canadian Energy Centre, <https://www.canadianenergycentre.ca/why-u-s-tariffs-on-canadian-energy-would-cause-damage-onboth-sides-of-the-border/>.

⁶ Canada Energy Regulator, "Energy in Canada" (28 November 2023), online: CER <https://www.cer-rec.gc.ca/en/about/publications-reports/annual-report/2018/energy-in-canada.html>.

Trade tariffs are 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 U.S. businesses and consumers, and create an economic burden on foreign exporters.⁷ Regulatory tariffs are schedules of tolls, conditions, classifications, practices or rules and regulations applicable to the provision of a service⁸ or the import of goods⁹ by a regulated company or person.

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

III. International Tariffs

The rules-based international trading order is a cornerstone of global economic stability.¹⁰ This international trading order traces its origins to the aftermath of World War II.¹¹ The General Agreement on Tariffs and Trade (“GATT”), made 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.¹²

At its core, GATT was built on principles aimed at fostering fairness, predictability, and cooperation 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.¹³ 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 GATT,¹⁴ thereby reducing the occurrence of unilateral action that would destabilize the international trade order.

⁷ Tax Foundation, “Tariff” (December 2018), online: Tax Foundation <https://taxfoundation.org/taxedu/glossary/tariffs/#:~:text=Search-Tariff,economic%20burden%20on%20foreign%20exporters>

⁸ See for example: *Canadian Energy Regulator Act (“CER Act”)*, S.C. 2019, c. 28, s. 10, s. 225.

⁹ See for example: The European Union’s Carbon Border Adjustment Mechanism.

¹⁰ Abdur Chowdhury et al (2021) “The Role of Multilateralism of the WTO in International Trade Stability” 20:5 World Trade Review 668; Sèna Kimm Gnangnon (2023) “Effect of the Duration of Membership in the GATT/WTO on Economic Growth Volatility” 65 Structural Change and Economic Dynamics 448.

¹¹ Cathleen D. Cimino-Isaacs & Rachel F. Fefer, “World Trade Organization: Overview and Future Direction, R45417” (18 October 2021), at p. 2, online: Congressional Research Service (“CRS”) <https://www.congress.gov/crs-product/R45417> [WTO: Overview and Future Direction]; Douglas A. Irwin, “The GATT in Historical Perspective” (1995) 85:2 American Economic Review 323; World Trade Organization, “World Trade Report 2007: Six Decades of Multilateral Trade Cooperation – What Have We Learnt?” (2007), at pp. 179-180, online: WTO https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report07_e.pdf (“WTO Report 2007”).

¹² WTO: Overview and Future Direction at pp. 3-4.

¹³ *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194 (entered into force 1 January 1948) at Art. I (“GATT 1947”).

¹⁴ GATT 1947 at Art. XXII.

From the 1960s through the 1980s, the rules-based system expanded to address emerging challenges following from the accession of many new contracting countries;¹⁵ the imposition of non-tariff measures and other unfair trade practices such as dumping;¹⁶ and concerns regarding the efficacy of the GATT dispute resolution mechanism.¹⁷ The most transformative shift came with the eighth round of negotiations in Punta del Este (the Uruguay negotiation round) which established the World Trade Organization (“WTO”) in 1995.¹⁸ The advent of the WTO also led to the introduction of a more robust, binding dispute resolution mechanism.¹⁹ The late 20th and early 21st centuries saw globalization surge, marked by China’s 2001 WTO accession, which integrated the world’s largest emerging economy into the system.²⁰

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 “America First” economic platform as part of his “Make America Great Again” campaign.²¹ 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 U.S. has blocked appointments to the body since 2016.²²

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

¹⁵ Initially dominated by industrialized nations, GATT’s membership grew from 23 founding signatories — including, Canada, the U.S., France and England — to over 120 by the 1990’s, including many developing nations: WTO Report 2007 at p. 289.

¹⁶ WTO Report 2007 at pp. 179 and 184-188; e.g., GATT 1947 at Art. VI: “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 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.” Contracting members are permitted to levy an “anti-dumping duty not greater than the margin of dumping in respect of such product”: GATT 1947 at Art. VI(2).

¹⁷ WTO Report 2007 at pp. 261-266.

¹⁸ WTO Report 2007 at pp. 190-192; WTO: Overview and Future Direction at p. 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 (“GATT 1994”) and other agreements covering trade in goods, services, and intellectual property: World Trade Organization, *Understanding the WTO: The Organization in Brief*, online: WTO https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm.

¹⁹ WTO Report 2007 at p. 193.

²⁰ WTO Report 2007 at pp. 243-244 and 253-256.

²¹ Robert J. Barro, “Trump’s Trade Follies” (2019), online: Project Syndicate, online: <https://www.project-syndicate.org/commentary/trump-trade-policy-mercantilism-by-robert-j-barro-2019-09>.

²² WTO Overview and Future Direction at pp. 46 and 51-56.

A. United States of America

The U.S. and Canada have one of the largest bilateral trade relationships in the world.²³

Canada was the third-largest source of U.S. goods imports in 2024, exporting \$413 billion worth of goods to the U.S., and the top destination for U.S. goods exports, importing \$349 billion worth.²⁴ Statistics Canada data for 2024 reveals that Canada exported 76% of its goods to, and imported half of its goods from, the U.S.²⁵ Canada is the largest supplier of U.S. energy imports (including crude oil, natural gas, and electricity).²⁶ 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 2024.²⁷

Unless the U.S. intends to embrace renewable energy with a hereto unseen fervour, the U.S. 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 U.S.. 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.²⁸ Alberta will be able (and despite claims to the contrary, needed²⁹) to continue to supply significant energy products to the U.S. for the foreseeable future.³⁰ In 2023, for example, the U.S. consumed 32.5 trillion cubic feet of natural gas³¹ and 7.39 billion barrels of petroleum.³²

²³ International Trade Administration, Washington, DC: U.S. Department of Commerce "Canada Market Overview", (2023), online: Trade.gov <https://www.trade.gov/knowledge-product/canada-market-overview>.

²⁴ Kyla H. Kitamura, "U.S.-Canada Trade Relations, IF12595"Washington, DC: Congressional Research Service, (17 March 2025), online: CRS <https://crsreports.congress.gov/product/pdf/IF/IF12595> ("U.S.-Canada Trade Relations").

²⁵ Bureau of Economic Analysis and United States Census Bureau, "U.S. International Trade in Goods and Services, Annual Revision" (April 2024), online: Bureau of Economic Analysis and U.S. Census Bureau <https://www.bea.gov/sites/default/files/2024-06/trad1324.pdf>.

²⁶ U.S. Energy Information Administration, *Canada Is the Largest Source of U.S. Oil Imports* (5 June 2020), online: EIA <https://www.eia.gov/todayinenergy/detail.php?id=43995>; U.S. Energy Information Administration, Canada: International Energy Data and Analysis (updated 30 May 2024), online: EIA <https://www.eia.gov/international/analysis/country/can>.

²⁷ U.S.-Canada Trade Relations; U.S. Energy Information Administration, Canada's crude oil has an increasingly significant role in U.S. refineries (1 August 2024), online: EIA <https://www.eia.gov/todayinenergy/detail.php?id=62664>.

²⁸ Government of Alberta, "New gas reserves take Canada into global top 10" (12 March 2025), online: Government of Alberta <https://www.alberta.ca/release.cfm?xID=9295876AE8795-B6ED-4611-C1B00FF3CE258A91>.

²⁹ At his address to the World Economic Forum on 23 January 2025, President Trump said "We don't need [Canada's] oil and gas. We have more than anybody": Wallis Snowdon and Janet French, "Trump Says U.S. doesn't need Canada's oil, gas, vehicles or lumber" (23 January 2025), online: CBC News <https://www.cbc.ca/news/canada/edmonton/trump-oil-and-gas-1.7439673>.

³⁰ Deborah Jaremko "Explainer: Why Canadian Oil Is So Important to the United States" (30 January 2025), online: Canadian Energy Centre <https://www.canadianenergycentre.ca/explainer-why-canadian-oil-is-so-important-to-the-united-states/>.

³¹ U.S. Energy Information Administration "How Much Natural Gas is consumed in the United States?" (updated 29 April 2024), online: EIA <https://www.eia.gov/tools/faqs/faq.php?id=50&t=8>.

³² U.S. Energy Information Administration "How Much Oil is Consumed in the United States?" (updated 9 October 2024), online: EIA <https://www.eia.gov/tools/faqs/faq.php?id=33&t=6>.

U.S.-Canada trade has in recent history been governed by the 1989 U.S.-Canada Free Trade Agreement; thereafter by the 1994 North American Free Trade Agreement (NAFTA); and presently by the 2020 Canada-United States-Mexico- Agreement (CUSMA).³³

On 1 February 2025, U.S. President Donald Trump issued Executive Order 14193, “Imposing Duties to Address the Flow of Illicit Drugs Across our Northern Border”.³⁴ This order sought to impose various trade tariffs on Canada. President Trump declared: (i) that Canada’s failure to act constitutes an unusual and extraordinary threat to the national security and foreign policy of the U.S.; and (ii) a national emergency under America’s National Emergencies Act (“NEA”)³⁵ and the International Emergency Economic Powers Act (“IEEPA”).³⁶

“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”.³⁷ In that order, “energy” and “energy resources” 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)”. Notably, “energy” and “energy resources” therefore does not capture electricity sales, which were subject to the 25% tariff accordingly.

Also on 1 February 2025, the Canadian government announced that it would respond to President Trump’s tariffs with 25% tariffs on \$155 billion (Canadian dollars) worth of goods imported from the U.S., pursuant to ss. 53(2) and 79(a) of the *Customs Tariff*.³⁸

On 3 February 2025, President Trump issued Executive Order 14197, titled “Progress on the Situation at our Northern Border”.³⁹ This executive order paused the rates of duty mandated by the 1 February 2025 executive

³³ Export Development Canada, “From NAFTA to CUSMA: What’s Changed?” (Ottawa: EDC, 2020), online: EDC <https://www.edc.ca/en/article/nafta-to-cusma.html>.

³⁴ United States, *Imposing Duties to Address the Flow of Illicit Drugs Across Our National Border, Presidential Proclamation* (9 February 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/02/imposing-duties-to-address-the-flow-of-illicit-drugs-across-our-national-border/>.

³⁵ United States, *National Emergencies Act*, 50 USC §§ 1601–1651 (2025), online: US House of Representatives <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter34&edition=prelim>.

³⁶ United States, *International Emergency Economic Powers Act*, 50 USC §§ 1701–1710 (2025), online: US House of Representatives <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>.

³⁷ United States, *Declaring a National Energy Emergency, Presidential Proclamation* (15 January 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/01/declaring-a-national-energy-emergency/>.

³⁸ *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.

³⁹ United States, *Progress on the Situation at Our Northern Border, Presidential Statement* (12 February 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/02/progress-on-the-situation-at-our-northern-border/>.

order from being implemented until 4 March 2025. The Canadian government responded on 3 February 2025 with an order in council⁴⁰ repealing the U.S. Surtax Order 2025.⁴¹

On 4 March President Trump's trade tariffs were imposed. Ontario retaliated on 10 March with a 25% surcharge on electricity exports to the U.S., prompting President Trump to threaten doubling tariffs on Canadian steel and aluminum. The surcharge was suspended the next day.⁴² On 12 March, the U.S. imposed 25% tariffs on global steel and aluminum imports, removing Canada's exemption. Canada responded on 13 March with reciprocal tariffs on \$29.8 billion CAD worth of U.S. goods.⁴³

Later in March 2025, President Trump announced a temporary exemption from tariffs on Canadian and Mexican automobile imports under CUSMA, later formalized through Executive Order 14231.⁴⁴ This order exempted CUSMA-compliant goods from tariffs while maintaining or adjusting tariffs on non-compliant goods, including a reduced 10% tariff on potash.⁴⁵

As of 19 March 2025, the U.S. has imposed:⁴⁶

- 10% tariffs on the following Canadian energy products: liquefied natural gas (HS 2711.11), coal (HS 2701.11 and 2701.12) and processed uranium (HS 2844.20);

⁴⁰ Canada, *Order in Council P.C. 2025-0076* (2 February 2025), online: Privy Council Office <https://orders-in-council.canada.ca/attachment.php?attach=46661&lang=en>.

⁴¹ Canada Border Services Agency, *Customs Notice 25-04: Certain Products Originating in the United States Subject to a Countermeasure* (2 February 2025), online: Government of Canada <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn25-04-eng.html>.

⁴² Government of Ontario, *Ontario Applies 25 Per Cent Surcharge on Electricity Exports to United States* (1 March 2025), online: Government of Ontario <https://news.ontario.ca/en/release/1005690/ontario-applies-25-per-cent-surcharge-on-electricity-exports-to-united-states>

⁴³ United States, *Adjusting Imports of Aluminum into the United States, Proclamation No 10756*, 89 Fed Reg 12365 (18 February 2025), online: Federal Register <https://www.federalregister.gov/documents/2025/02/18/2025-02832/adjusting-imports-of-aluminum-into-the-united-states>; United States, *Adjusting Imports of Steel into the United States, Proclamation No 10757*, 89 Fed Reg 12367 (18 February 2025), online: Federal Register <https://www.federalregister.gov/documents/2025/02/18/2025-02833/adjusting-imports-of-steel-into-the-united-states>. 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*), and removed exemptions that had been granted to Canada in addition to other countries: United States, *Fact Sheet: President Donald J. Trump Restores Section 232 Tariffs* (18 February 2025), online: The White House <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-restores-section-232-tariffs/>

⁴⁴ United States, *Amendment to Duties to Address the Flow of Illicit Drugs Across Our Northern Border, Presidential Proclamation* (1 March 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/03/amendment-to-duties-to-address-the-flow-of-illicit-drugs-across-our-northern-border-0c3c/>

⁴⁵ Canada–United States–Mexico Agreement, 10 December 2019, Can TS 2020 No 6.

⁴⁶ Tariff rates obtained from Government of Canada, Canada Tariff Finder (accessed 19 March 2025), online: <https://www.tarifffinder.ca/en/getStarted>.

- 25% tariffs on the following Canadian energy products: uranium ore / concentrates (HS 2612.10) and bitumen (HS 2714.90) and electricity (HS 2716.00);
- A 10% plus 5.25 cents/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% 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% 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).

On 26 March 2025, President Trump imposed a 25% tariff on imports of automobiles and certain automobile parts (from all countries) pursuant to s. 232 of the *Trade Expansion Act of 1962*.⁴⁷ Prime Minister Carney indicated in early April that Canada would be imposing a reciprocal 25% counter-tariff on American car imports that do not comply with CUSMA.⁴⁸

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”.⁴⁹

President Trump has made further significant changes with respect to the announced tariffs since, including by: (a) on 8 April 2025, significantly increasing the base U.S. tariff applicable to China from 34% to 84%;⁵⁰ (b) on 9 April 2025, suspending for 90 days the specific “reciprocal” tariffs from 2 April 2025 above a baseline 10% on all

⁴⁷ United States, *Adjusting Imports of Automobiles and Automobile Parts into the United States*, Presidential Proclamation (26 March 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/03/adjusting-imports-of-automobiles-and-automobile-parts-into-the-united-states>.

⁴⁸ Office of the Prime Minister, *Canada Announces New Countermeasures in Response to Tariffs from the United States* (3 April 2025), online: Prime Minister of Canada <https://www.pm.gc.ca/en/news/news-releases/2025/04/03/canada-announces-new-countermeasures-response-tariffs-from-united-states>.

⁴⁹ United States, *Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits*, Presidential Proclamation (1 April 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/04/regulating-imports-with-a-reciprocal-tariff-to-rectify-trade-practices-that-contribute-to-large-and-persistent-annual-united-states-goods-trade-deficits/>. 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”.

⁵⁰ United States, *Amendment to Reciprocal Tariffs and Updated Duties as Applied to Low-Value Imports from the People’s Republic of China*, Presidential Proclamation (8 April 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/04/amendment-to-reciprocal-tariffs-and-updated-duties-as-applied-to-low-value-imports-from-the-peoples-republic-of-china>.

countries other than China and further increasing the base U.S. tariff applicable to China from 84% to 125%;⁵¹ and (c) on 12 May 2025, suspending the previously imposed U.S. tariffs on China, temporarily replacing the 125% tariff rate with a tariff rate of 34% instead.⁵²

These subsequent significant announcements did not affect the previously announced tariff rates applicable to Canada. President Trump did, however, issue on 29 April 2025: (a) a proclamation that automobiles which undergo final assembly in the U.S. 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;⁵³ and (b) an executive order to clarify that certain tariffs (including the tariffs applicable to automobile and auto parts, the Northern border fentanyl/immigration “emergency” and steel and aluminum) generally do not “stack”, with the highest applicable duty applying instead of cumulative duties.⁵⁴

(i) Legal Basis for American Executive Orders

The U.S. Constitution empowers Congress, not the Executive, to “lay and collect duties” and to “regulate commerce”.⁵⁵

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 U.S., to the national security, foreign policy, or economy of the U.S., if the President declares a national emergency with respect to such threat.”⁵⁶

⁵¹ United States, *Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment*, Presidential Proclamation (9 April 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/04/modifying-reciprocal-tariff-rates-to-reflect-trading-partner-retaliation-and-alignment/>.

⁵² United States, *Modifying Reciprocal Tariff Rates to Reflect Discussions with the People’s Republic of China*, Presidential Proclamation (12 May 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/05/modifying-reciprocal-tariff-rates-to-reflect-discussions-with-the-peoples-republic-of-china/>.

⁵³ United States, *Amendments to Adjusting Imports of Automobiles and Automobile Parts into the United States*, Presidential Proclamation (29 April 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/04/amendments-to-adjusting-imports-of-automobiles-and-automobile-parts-into-the-united-states/>.

⁵⁴ United States, *Addressing Certain Tariffs on Imported Articles*, Presidential Proclamation (29 April 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/04/addressing-certain-tariffs-on-imported-articles/>.

⁵⁵ United States Constitution, art I, § 8, cls 1, 3.

⁵⁶ IEEPA, §1701.

Under the IEEPA the President of the U.S. is authorised to take executive action in response to a declared “national emergency”. The IEEPA empowers the President of the U.S. to “regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or 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”.⁵⁷

The IEEPA has never previously been used to impose tariffs.⁵⁸ While past U.S. presidents have imposed tariffs in response to identified national security threats, they have done so pursuant to s. 232 of the *Trade Expansion Act* of 1962.⁵⁹ The *Trade Expansion Act* differs from the IEEPA in part because it: (a) requires (prior to the imposition of tariffs) an investigation and report that has to be issued within 270 days; and (b) focuses on imports that “threaten to impair” U.S. national security.⁶⁰

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 U.S. 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.⁶¹

There is some judicial guidance regarding the scope of presidential powers, namely the U.S. Court of Customs and Patent Appeals judgment in the matter of *United States v. Yoshida International Inc* (“*Yoshida62 *Yoshida**

⁵⁷ IEEPA, §1702(a)(1)(B).

⁵⁸ 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, 2 April 2025), online: US Congress <https://www.congress.gov/crs-product/IN11129>. The IEEPA has been used to impose sanctions in response to various identified threats, against, e.g., Venezuela’s state-owned oil company, Iran, foreign based hackers and terrorist organizations. As of 15 January 2025, 69 national emergencies invoking IEEPA had ever been declared, 39 of which were still in effect. The first state of emergency declared in relation to IEEPA, from 1979 in response to the Iran hostage crisis, is still in effect: Christopher A. Casey and Jennifer K. Elsea, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, R45618 (Washington, DC: Congressional Research Service, 30 January 2024), online: US Congress <https://www.congress.gov/crs-product/R45618> (“IEEPA: Origins, Evolution and Use”).

⁵⁹ Rachel F. Fefer, *Section 232 of the Trade Expansion Act of 1962*, IF10667 (Washington, DC: Congressional Research Service, 1 April 2022), online: CRS <https://crsreports.congress.gov/product/pdf/IF/IF10667>. In his first term, President Trump initiated eight section 232 investigations. Two of these resulted in President Trump imposing tariffs, for steel and aluminum: U.S. Department of Commerce, *The Effect of Imports of Steel on the National Security* (11 January 2018), online: U.S. Department of Commerce https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-with_redactions_-20180111.pdf and U.S. Department of Commerce, *The Effect of Imports of Aluminum on the National Security* (17 January 2018), online: U.S. Department of Commerce https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_aluminum_on_the_national_security_-with_redactions_-20180117.pdf.

⁶⁰ United States, United States Code, Title 19, Chapter 7 (2025 ed) at §1862, online: US House of Representatives <https://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter7&edition=prelim>.

⁶¹ See, e.g., Peter E. Harrell, “The Case Against IEEPA Tariffs” (31 January 2025), online: Lawfare <https://www.lawfaremedia.org/article/the-case-against-ieepa-tariffs> and Addar Levi, “IEEPA Tariffs: How Many Legal Challenges?” (18 February 2025), online: Lawfare <https://www.lawfaremedia.org/article/ieepa-tariffs--many-legal-challenges>.

⁶² *United States v Yoshida International Inc.*, 526 F.2d 560, 568-69 (Cust. & Pat.App.1975) (QL) (“*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)⁶³ to briefly impose a 10% tariff on all imports into the U.S. in response to an identified monetary crisis. Specifically, the emergency the President identified was that the U.S. 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 U.S.’s major trading partners in such a way as to overvalue the U.S. dollar.

The import surcharge was challenged by several importers who alleged that Nixon lacked the authority to impose the tariff. The U.S. Court of Customs and Patent Appeals in *Yoshida* 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’”⁶⁴ 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”⁶⁵ and was “a reasonable response to the particular national emergency declared therein.”⁶⁶ In this regard, the Court in *Yoshida* found that delegated emergency powers must be exercised in reasonable relation to the power delegated and the emergency giving rise to the action: “The 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.”⁶⁷

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.⁶⁸

As of 15 May 2025, at least seven lawsuits have been filed in the U.S. targeting the validity of President Trump’s tariffs.⁶⁹ For instance, on 16 April 2025, California filed a lawsuit challenging the tariffs;⁷⁰ on 23 April 2025, 12

⁶³ IEEPA: Origins, Evolution and Use.

⁶⁴ *Yoshida*, p. 9.

⁶⁵ *Yoshida*, p. 15.

⁶⁶ *Yoshida*, p. 18.

⁶⁷ *Yoshida*, p. 14.

⁶⁸ IEEPA: Origins, Evolution and Use.

⁶⁹ Paul Wiseman and 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: The Globe and Mail: <https://www.theglobeandmail.com/investing/markets/indices/TTUT/pressreleases/32370600/trump-trade-war-faces-legal-challenge-as-businesses-states-argue-his-tariffs-exceeded-his-power/>.

⁷⁰ Office of the Governor of California, *Statement on Federal Trade Measures and California’s Economic Interests* (16 April 2025), online: Governor of California https://www.gov.ca.gov/wp-content/uploads/2025/04/FILE_8502.pdf.

other states followed suit.⁷¹ The first of these cases to go to a hearing seeking injunctive relief against the tariffs — V.O.S. Selections Inc. v. Trump, initiated by several small businesses — was heard by the U.S. Court of International Trade on 13 May 2025. Argument at that hearing (and the pleadings filed in that and the other claims) focussed on the significance of *Yoshida* as a precedent and the other issues which we have identified above.⁷²

(ii) U.S. Tariffs are Inconsistent with Other Legal Obligations

The question arises whether the extensive tariffs from the U.S. are consistent with: (a) the U.S.' obligations under WTO and CUSMA; and (b) what relief is available for aggrieved parties. This paper 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.

a. WTO

The American tariffs may breach the U.S.' obligations as a member nation to the WTO. The WTO's most-favoured nation principle generally prohibits countries from discriminating against particular trading partners. The tariffs the U.S. has imposed also exceed the upper bound rates which the U.S. had committed to stay below as part of its WTO membership.⁷³ Canada's delegation has already initiated the necessary preliminary consultation process with the U.S. before the WTO's Dispute Settlement Body with such complaints.⁷⁴

The U.S.' obligations within the WTO, however, are subject to carveouts and exceptions. Specifically, Article XXI of the WTO terms provide that "Nothing in this Agreement shall be construed to: [...] (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its national security interests [...] (iii) taken in time of war or other emergency in international relations.⁷⁵ The U.S. predictably relied on this

⁷¹ *The New York Times*, "States File Lawsuit Against Trump Tariffs, Alleging Overreach" The New York Times (24 April 2025), online: The New York Times <https://www.nytimes.com/interactive/2025/04/24/us/states-tariffs-lawsuit-complaint.html>.

⁷² Ankush Khadri, "Trump's Tariffs Are Headed to the Supreme Court. Will They Survive?" (21 April 2025), online: *Politico Magazine* <https://www.politico.com/news/magazine/2025/04/21/trump-tariffs-supreme-court-legal-arguments-00299467>; Alison Durkee, "Key Trump Tariff Hearing: Court Weighs Potential Block, But Doesn't Hint How It Will Rule" (13 May 2025), online: *Forbes* <https://www.forbes.com/sites/alisondurkee/2025/05/13/key-trump-tariff-hearing-court-weighs-potential-block-but-doesnt-hint-how-it-will-rule/>; and Ian Millhiser, "The first federal court hearing on Trump's tariffs did not go so well for Trump" (13 May 2025), online: *Vox* <https://www.vox.com/economy/412966/supreme-court-tariffs-donald-trump-trade-vos-selections>.

⁷³ World Trade Organization, *United States: Tariff Profile*, online: WTO https://www.wto.org/english/resestat/daily_update/tariff_profiles/US_e.pdf.

⁷⁴ See, e.g., official correspondence dated 4 March 2025, regarding President Trump's initial February 2025 executive orders: World Trade Organization, United States – Certain Measures on Steel and Aluminum Products – Communication from Canada, WTO Doc G/L/1562 (4 March 2025), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/L/1562.pdf&Open=True>.

⁷⁵ World Trade Organization, *GATT Analytical Index: Guide to GATT Law and Practice – Article XXI*, online: WTO https://www.wto.org/english/resestat/ebooksp_e/gatt_ai_e/art21_e.pdf

exception on 14 March 2025, when it filed correspondence responding to Canada's request for consultation, stating as follows:⁷⁶

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.

The U.S. previously relied on Article XXI in defence of the tariffs President Trump imposed on steel (25%) and aluminum (10%) in his first term. The U.S. 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. The tariffs remained in place with respect to other countries, however, and the WTO proceedings brought by Norway, China, Switzerland and Turkey proceeded. The U.S. responded to these proceedings by relying on Article XXI and arguing (as they purport to now) that the U.S.' determination of its national security needs was "self-judging" and not susceptible to review by a WTO dispute settlement panel.

On 9 December 2022, the WTO issued its decisions in all four proceedings.⁷⁷ 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".⁷⁸ 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."⁷⁹ 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", and found that the measures at issue did not qualify as such.⁸⁰

⁷⁶ World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Request for Consultations by Canada*, WTO Doc WT/DS634/2 (23 March 2023), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/634-2.pdf&Open=True>.

⁷⁷ World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS564/R (9 December 2022), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/564R.pdf&Open=True>; World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS556/R (9 December 2022), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/556R.pdf&Open=True> ("WT/DS556/R"); World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS552/R (9 December 2022), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/552R.pdf&Open=True>; World Trade Organization, *United States – Certain Measures on Steel and Aluminum Products – Report of the Panel*, WTO Doc WT/DS544/R (9 December 2022), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/544R.pdf&Open=True>.

⁷⁸ Klint W. Alexander "Extraordinary Power: The Use of Emergency Economic Powers to Impose Tariffs" (2023) 73:1 American University Law Review, online: https://aulawreview.org/wp-content/uploads/2023/09/2_Alexander_Print.pdf.

⁷⁹ See, e.g., WT/DS556/R at para. 7.143.

⁸⁰ See, e.g., WT/DS556/R at paras. 7.159 to 7.166.

The U.S. 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".⁸¹

In January of 2023, the U.S. appealed the panel's decision.⁸² 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.⁸³

b. CUSMA

CUSMA was signed by the U.S., Canada and Mexico in 2018 as a free trade agreement to replace its predecessor NAFTA.⁸⁴ Two key differences between NAFTA and CUSMA are as follows:

- CUSMA does not include an "energy proportionality clause." Elimination of the proportionality clause in CUSMA reaffirms Canada's sovereignty over its energy resources. Canada can now reduce or halt energy exports to the U.S. without violating the agreement, provided such measures are applied uniformly (e.g., not targeting the U.S. specifically).⁸⁵
- 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.⁸⁶

⁸¹ Office of the United States Trade Representative, Statement from USTR Spokesperson Adam Hodge (9 December 2022), online: USTR <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge>.

⁸² See, e.g., World Trade Organization, United States – Certain Measures on Steel and Aluminum Products – Communication from the United States, WTO Doc WT/DS544/14 (30 January 2023), online: WTO <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/544-14.pdf&Open=True>.

⁸³ Brandon J. Murrill, Washington, DC: Congressional Research Service "The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the 'Rules-Based Trading System'?" (16 December 2019), online: CRS <https://www.congress.gov/crs-product/LSB10385>.

⁸⁴ Global Affairs Canada, *Canada–United States–Mexico Agreement (CUSMA): Summary* (28 January 2020), online: Government of Canada https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary_sommaire.aspx?lang=eng.

⁸⁵ Global Affairs Canada, *Canada–United States–Mexico Agreement (CUSMA): Energy Provisions* (11 July 2019), online: Government of Canada https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/energy_energie.aspx?lang=eng.

⁸⁶ DLA Piper "USMCA Investor-State Dispute Settlement Provisions: Mexico" (30 September 2017), online: DLA Piper <https://www.dlapiper.com/es-pr/insights/publications/2020/09/do-not-use---usmca-investor-state-dispute-settlement-provisions-mexico>.

Under Chapter 31 of CUSMA, Canada has the right to pursue state-to-state dispute settlement.⁸⁷ 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.⁸⁸ If a panel decides that certain tariffs violate CUSMA, then the parties must seek to resolve the dispute within 45 days of the decision (e.g., 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.⁸⁹

In this case, the U.S. 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: "Nothing in this Agreement shall be construed to: [...] (b) 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."

(iii) Economic Considerations

It is generally true that U.S. refineries (especially refineries in the Midwest and Gulf Coast, or "Petroleum Administration for Defence District" 2 and 3), are highly dependent on Canadian crude oil for inputs.⁹⁰ These American refineries are uniquely configured to process Canadian crude, which as a feedstock is much heavier than (and not easily substituted for) the lighter crudes which are produced from the U.S. shale patch.⁹¹ 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 U.S. has separate longstanding concerns about Venezuela as a trading partner.⁹² Indeed, on 27 February 2025,

⁸⁷ Global Affairs Canada "Canada–United States–Mexico Agreement (CUSMA): Dispute Settlement" (9 May 2023), online: Government of Canada <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/settlement-reglement.aspx?lang=eng>.

⁸⁸ Canada–United States–Mexico Agreement, 10 December 2019, Can TS 2020 No 6, ch 31.

⁸⁹ Nina M. Hart, "Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism", IF11399 (Washington, DC: Congressional Research Service, 3 January 2020), online: CRS <https://www.congress.gov/crs-product/IF11399>.

⁹⁰ U.S.–Canada Trade Relations; U.S. Energy Information Administration, Canada's crude oil has an increasingly significant role in U.S. refineries (1 August 2024), online: EIA <https://www.eia.gov/todayinenergy/detail.php?id=62664>.

⁹¹ Institute for Energy Research, *U.S. Refineries and Canadian Crude Oil* (28 January 2025), online: <https://www.instituteforenergyresearch.org/international-issues/u-s-refineries-and-canadian-crude-oil/>; Alex Kimani, "Why U.S. Refiners Won't Ditch Canadian Crude" (3 February 2025), online: OilPrice.com <https://oilprice.com/Energy/Crude-Oil/Why-US-Refiners-Wont-Ditch-Canadian-Crude.html>; Meghan Potkins "Calling Trump's Bluff on Canadian Oil" (4 April 2025), online: Financial Post <https://financialpost.com/commodities/energy/calling-trump-bluff-on-canadian-oil>.

⁹² Evan Dyer, "Cutting off oil is Canada's nuclear option. What would it mean if it happens?" (19 January 2025), online: CBC News <https://www.cbc.ca/news/politics/crude-oil-tariffs-united-states-canada-1.7434926>; Deborah Jaremko, "A Matter of Fact: Canada, Not Venezuela, Is the Solution for U.S. Energy Security" (7 March 2022), online: <https://www.canadianenergycentre.ca/a-matter-of-fact-canada-not-venezuela-is-the-solution-for-u-s-energy-security/>.

President Trump signed an executive order “Continuation of the National Emergency with Respect to Venezuela”, continuing for 1 year a previous declaration of emergency with respect to “the situation in Venezuela”;⁹³ 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 U.S. from any country that imports Venezuelan oil, whether directly from Venezuela or indirectly through third parties.”⁹⁴

B. European Union

In the face of the U.S.’ 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% of Canadians were in favour of Canada joining the EU.⁹⁵

The EU is dependent on imports for 70% of its hard coal consumption, 97% of its oil consumption and 90% of its fossil gas consumption⁹⁶ and is one of the world’s largest importers of fossil energy.⁹⁷ Canada and the European Union have a significant trade relationship governed primarily by the CETA, which has been provisionally in force since September 2017.⁹⁸ Under CETA, no trade tariffs are applicable to Canadian energy products which it exports, including crude oil, liquefied natural gas, coal, uranium ore / concentrates and processed uranium, bitumen and refined petroleum products (e.g., Gasoline, and Diesel / fuel oil).⁹⁹

⁹³ United States, *Continuation of the National Emergency With Respect to Venezuela, Notice*, (28 February 2025), online: Federal Register <https://www.federalregister.gov/documents/2025/02/28/2025-03463/continuation-of-the-national-emergency-with-respect-to-venezuela>. 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”. The original emergency declaration was made by President Obama on 8 March 2015: United States, *Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela, Executive Order No 13692*, (11 March 2015), online: Federal Register <https://www.federalregister.gov/documents/2015/03/11/2015-05677/blocking-property-and-suspending-entry-of-certain-persons-contributing-to-the-situation-in-venezuela>.

⁹⁴ United States, *Imposing Tariffs on Countries Importing Venezuelan Oil, Presidential Proclamation* (15 March 2025), online: The White House <https://www.whitehouse.gov/presidential-actions/2025/03/imposing-tariffs-on-countries-importing-venezuelan-oil>.

⁹⁵ Abacus Data “What Canadians Think About Canada Joining the European Union” (10 March 2025), online: Abacus Data <https://abacusdata.ca/what-canadians-think-about-canada-joining-the-european-union>.

⁹⁶ Regulation (EU) 2024/1787 of the European Parliament and of the Councils of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation 2019/942 (“EU Methane Regulation”), s. (6.3), online: EU [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifouS7wqaNAXWVD1kFHYfGCpwQ-NAhQhQICRAC&url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FEN%2FTXT%2FPDF%2F%3Furi%3DCELEX%3A32024R1787%23%3A~%3Atext%3D\(15\)%2520Regulation%2520\(EU\)%2C69%26text%3Dlevels%2520that%2520promote%2520the%2520reduction%2Ccompetitiveness%2520of%2520the%2520Union%27s%2520economy.%26text%3DTo%2520ensure%2520harmonised%2520implementation%2520of%2Cfor%2520venting%2520and%2520flaring%2520equipment.&usq=AOvVaw0GaTTYc_Li8-hDZXikHsE1&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifouS7wqaNAXWVD1kFHYfGCpwQ-NAhQhQICRAC&url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FEN%2FTXT%2FPDF%2F%3Furi%3DCELEX%3A32024R1787%23%3A~%3Atext%3D(15)%2520Regulation%2520(EU)%2C69%26text%3Dlevels%2520that%2520promote%2520the%2520reduction%2Ccompetitiveness%2520of%2520the%2520Union%27s%2520economy.%26text%3DTo%2520ensure%2520harmonised%2520implementation%2520of%2Cfor%2520venting%2520and%2520flaring%2520equipment.&usq=AOvVaw0GaTTYc_Li8-hDZXikHsE1&opi=89978449)

⁹⁷ EU Methane Regulation, PDF p. 1, recordal (5).

⁹⁸ 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.

⁹⁹ Tariff rates obtained from Government of Canada, Canada Tariff Finder, online: <https://www.tarifffinder.ca/en/getStarted>.

The EU's *Methane Regulation*¹⁰⁰ establishes a legal framework for the measurement, reporting, and verification of methane emissions from imported oil, gas, and coal. 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.¹⁰¹ 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").¹⁰² 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 leakage¹⁰³ 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".¹⁰⁴ 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 2020.¹⁰⁵ Under the TCA, which came into force on 1 April 2021, the same Canadian energy products that enjoyed 0% tariffs under CETA remain tariff-free.¹⁰⁶

¹⁰⁰ EU Methane Regulation *supra*.

¹⁰¹ Valerio Giovannini, Thomas Delille and Wolfgang Maschek "What Importers Need to Know" (16 October 2024), online: Squire Patton Boggs <https://www.sustainabilityinbusiness.blog/2024/10/eu-methane-regulation-what-importers-and-exporters-need-to-know/#:~:text=The%20European%20Union%27s%20Methane%20Regulation,in%20detail%20in%20this%20insight>.

¹⁰² EU Carbon Border Adjustment Mechanism (28 March 2025), online: https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en

¹⁰³ Carbon leakage occurs when companies based in the EU move carbon-intensive production abroad to countries where less stringent climate policies are in place than in the EU, or when EU products get replaced by more carbon-intensive imports.

¹⁰⁴ CBAM, online: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_614

¹⁰⁵ Global Affairs Canada, *Brexit: Information for Canadian Companies* (accessed 4 April 2025), online: Government of Canada <https://www.tradecommissioner.gc.ca/united-kingdom-royaume-uni/information-brexit-renseignements.aspx?lang=eng>. 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.

¹⁰⁶ Tariff rates obtained from Government of Canada, Canada Tariff Finder (accessed 19 March 2025), online: <https://www.tarifffinder.ca/en/getStarted>; Canada–United Kingdom Trade Continuity Agreement, 9 December 2020, Can TS 2021 No 2, art 2 (entered into force 1 April 2021).

The TCA does not have a fixed expiration date,¹⁰⁷ but contemplates Canada and the United Kingdom negotiating towards and concluding a “new Canada-United Kingdom free trade agreement”.¹⁰⁸ Formal negotiations between Canada and the UK for a permanent free trade agreement began in March of 2022, but have stalled since January of 2024.¹⁰⁹

The UK has been a net importer of gas since 2004 and has the second-largest liquefied natural gas (“LNG”) regasification infrastructure in Europe.¹¹⁰ In 2024, the U.S. supplied 11% of the UK’s natural gas. While the UK’s demand for gas is decreasing, its domestic production is unlikely to supply its demand in the near future.¹¹¹

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.¹¹² There are no special regulatory requirements that apply to the cross-border imports or exports of oil or oil products.¹¹³

D. China

China is Canada’s second largest trading partner after the U.S..¹¹⁴ 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 abide by 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.¹¹⁵ Chinese trade tariffs on Canadian energy products are currently as follows:¹¹⁶

¹⁰⁷ Canada-United Kingdom Trade Continuity Agreement, 9 December 2020, Can TS 2021 No 2, art V.

¹⁰⁸ Canada-United Kingdom Trade Continuity Agreement, 9 December 2020, Can TS 2021 No 2, art IV.

¹⁰⁹ Janyce McGregor and John Paul Tasker, “U.K. walks away from trade talks with Canada” (25 January 2024), online: CBC News <https://www.cbc.ca/news/politics/canada-uk-trade-cheese-1.7094817>.

¹¹⁰ J. Derrick and J. Bremen, *Oil & Gas Laws and Regulations United Kingdom 2025* ICLG (21 February 2025) (“Oil and Gas Laws, U.K.”), online: <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/united-kingdom>

¹¹¹ J. Jackman “Where does the UK get its gas from?” (30 April 2025), online: Sunsave Energy <https://www.sunsave.energy/blog/uk-gas-sources>

¹¹² Draft legislation: carbon border adjustment mechanism (24 April 2025), online: Gov. UK <https://www.gov.uk/government/consultations/draft-legislation-carbon-border-adjustment-mechanism>

¹¹³ Oil and Gas Laws, U.K., online: <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/united-kingdom>

¹¹⁴ Colin Scarffe “The Canada-China Global Commerce Picture and Supply Chain Links” (2020), online: Government of Canada <https://www.international.gc.ca/trade-commerce/economist-economiste/analysis-analyse/china-canada-2020-commerce-chine.aspx?lang=eng>.

¹¹⁵ China recently imposed tariffs against Canada of 100% on Canadian canola oil, canola meal and peas, as well as 25% tariffs on certain pork, fish and seafood products: Agriculture and Agri-Food Canada “Government of Canada Announces Support for Agricultural Sector Following the Imposition of Tariffs by China” (22 March 2025), online: Government of Canada <https://www.canada.ca/en/agriculture-agri-food/news/2025/03/government-of-canada-announces-support-for-agricultural-sector-following-the-imposition-of-tariffs-by-china.html>.

¹¹⁶ <https://wits.worldbank.org/tariff/trains/en/country/CHN/partner/CAN/product/all#>. Tariff rates obtained from World Bank, World Integrated Trade Solution (WITS) “Tariffs Applied by China on Imports from Canada” (2022), online: WITS <https://wits.worldbank.org/tariff/trains/en/country/CHN/partner/CAN/product/all>.

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

China has seen a large uptake in new energy vehicles (“NEVs”),¹¹⁷ 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 (US\$41.3 billion) in 2025”.¹¹⁸ This uptake in NEVs have 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.¹¹⁹ 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 when compared to 11.3 million barrels per day in 2023.¹²⁰ China did however increase its imports from Canada, while reducing its imports from the U.S. in the same period.¹²¹

Increased consumption tax is expected to further drive down demand for crude oil, as refiners will only be able to offset consumption tax 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 Yuan 400-500/mt (US\$54.59-\$68.24/mt).¹²² While environmental regulatory tariffs in the strict sense is not expected to play a big role in access to the Chinese markets, other regulatory tariffs may depress demand.

¹¹⁷ A new energy vehicle is a category of vehicle that includes battery-electric vehicles, plug-in hybrids, and fuel-cell electric vehicles.

¹¹⁸ E. Downs, Center on Global Energy Policy at Columbia “Oil and Gas Industry Takeaways from China’s ‘Two Sessions’” (26 March 2025), online: Columbia <https://www energypolicy.columbia.edu/oil-and-gas-industry-takeaways-from-chinas-two-sessions>.

¹¹⁹ Ibid.

¹²⁰ U.S. Energy Information Administration “China’s crude oil imports decreased from a record as refinery activity slowed” (11 February 2025), online:

<https://www.eia.gov/todayinenergy/detail.php?id=64544#:~:text=China%2C%20the%20world%27s%20largest%20importer,countries%20increased%20while%20others%20decreased>.

¹²¹ Ibid.

¹²² Daisy Xu, Market Specialist - Oil and Oceana Zhou, Market Specialist – Oil, “CHINA DATA: Feedstock fuel oil imports to fall further in 2025 amid rising tax burden” *S&P Global* (8 January 2025), online: S&P Global <https://www.spglobal.com/commodity-insights/en/news-research/latest-news/crude-oil/010825-china-data-feedstock-fuel-oil-imports-to-fall-further-in-2025-amid-rising-tax-burden>.

IV. Interprovincial Trade Barriers

Increased interprovincial trade has been proposed as part of Canada's response to trade and tariff uncertainty. Trade barriers have however become synonymous with any discussion regarding Canada trading with itself. It is therefore unsurprising that provincial responses and plans to counter trade tariff provisions mention breaking down trade barriers.¹²³ Reports of other responses have varied between Alberta's promise to keep dialogue open¹²⁴ to Ontario's threat of terminating the export of electricity.¹²⁵

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, but provinces have quite correctly identified that steps should be taken to protect intra-provincial trade and commerce:

- Ontario has announced a 6-month tax deferral scheme, as well as the payment of certain rebates to businesses.¹²⁶
- British Columbia ("B.C.") has implemented a series of counter-measures including ceasing trade in American liquor, directing that all B.C. government and Crown corporations will buy goods and services from Canada and other countries first, disallowing for CleanBC or B.C. 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 U.S.¹²⁷
- Saskatchewan is implementing changes in its procurement with the goal to prioritize Canadian suppliers and reducing or eliminating procurement from the U.S.¹²⁸

¹²³ See for example: First Minister's statement on eliminating internal trade barriers in Canada (5 March 2025), online: Canada <https://www.pm.gc.ca/en/news/statements/2025/03/05/first-ministers-statement-eliminating-internal-trade-barriers>.

¹²⁴ Matthew Black "Smith hopeful, but unsure, that Alberta oil and food production will escape Wednesday's U.S. tariffs" *Edmonton Journal* (1 April 2025), online: Edmonton Journal <https://edmontonjournal.com/news/politics/smith-hopeful-but-unsure-that-alberta-oil-and-food-production-will-escape-wednesdays-u-s-tariffs>.

¹²⁵ Max Saltman "Ontario premier threatens to 'shut off electricity completely' for US if trade war escalates" CNN (11 March 2025), online: CNN Business <https://www.cnn.com/2025/03/10/business/canada-electricity-us-tariffs-doug-ford/index.html>.

¹²⁶ Bloomberg "Finance Minister breaks down Ontario's response to U.S. tariffs (7 April 2025) online: BNN Bloomberg <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwizh8XI88aMAxWRG1kFHDPePJwQwqsBegQIDBAF&url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3D5H6hZCDArgA&usq=AOvVaw107tTmJSmDHVQjbRNvOPzz&opi=89978449>

¹²⁷ B.C.'s response to unjustified U.S. tariffs (updated 22 April 2025), online: B.C. <https://www2.gov.bc.ca/gov/content/employment-business/tariffs>

¹²⁸ Saskatchewan's Tariff Response Related to Capital Projects and Procurement (21 March 2025), online: Saskatchewan https://taskroom.saskatchewan.ca/employee-resources/saskatchewans_tariff_response_related_to_capital_projects_and_procurement

- New Brunswick has unveiled a four pillar program which includes establishing support for New Brunswickers, establishing support for New Brunswick businesses, breaking down trade barriers and promoting products and services made in New Brunswick.¹²⁹

The Canadian government and some provinces have openly commented in recent months that barriers to interprovincial trade should be struck down or significantly curtailed. Questions arise as to whether the federal government can achieve this outcome on its own, or whether free interprovincial trade will also require provincial law reform. The answer 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 ss. 91 and 92 of the *Constitution Act, 1867*.¹³⁰

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 intra-provincial 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 Canada Free Trade Agreement provides a ready-made framework for the elimination of regulatory barriers. As will be explored below, the prevailing trend in constitutional jurisprudence necessitates an

¹²⁹ Understanding the impact of the U.S. tariffs on New Brunswick, online: Government of New Brunswick <https://www2.gnb.ca/content/gnb/en/corporate/promo/tariffs.html>

¹³⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5. (the “*Constitution Act, 1867*”).

approach to facilitating interprovincial energy trade that centres on cooperative federalism and negotiation between the provinces.

A. The Constitutional Structure of Trade Within Canada

i. The Trade and Commerce Power

S. 91(2) of the *Constitution Act, 1867* grants exclusive jurisdiction over “The Regulation of Trade and Commerce” to the federal parliament of Canada. 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.¹³¹ The ‘general’ commerce branch underpins the federal government’s power over competition legislation and other such matters, and is outside the scope of this paper.

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 federal parliament the exclusive jurisdiction to regulate international trade with Canada.¹³² As it stands today, the s. 91(2) power grants parliament exclusive jurisdiction over international and interprovincial trade, but only if the federal law distinguishes between commerce that is bound for extra-provincial export. If the law does impact entirely intra-provincial 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 struck down a law that only purports to govern interprovincial trade, but the development of the case law shows how federal 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 (the “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

¹³¹ Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007–) (loose-leaf updated 2023) (“Constitutional Law of Canada”) at § 20:1.

¹³² See *Gold Seal v A.-G. Alta* (1921), 62 S.C.R. 424 (S.C.C.); *Caloil v A.-G. Can.*, [1971] S.C.R. 543.

of a particular business or trade in a single province.¹³³ The federal trade and commerce power, on the other hand, was held to include “political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.”¹³⁴

Since *Parsons*, it has been generally accepted that *intra*-provincial trade and commerce is a matter within provincial power under the “property and civil rights in the province”.¹³⁵

During the years following the *Parsons* decision, the JCPC further curtailed the trade and commerce power. In 1922, Viscount Haldane held that s. 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.”¹³⁶ This and other decisions¹³⁷ struck down federal laws attempting to regulate general aspects of the economy that ignored provincial boundaries (combinations, prices, labour) in favour of the provincial property and civil rights power.¹³⁸

The JCPC (and the Supreme Court of Canada) continued applying this view of the trade and commerce power through the first half of the 20th century. In *The King v Eastern Terminal Elevator Co.*,¹³⁹ the Supreme Court of Canada struck down a federal statute attempting to regulate grain trade, through the licensing and regulation of grain elevators. The court held that the licensing and regulation of local works like grain elevators made the entire scheme invalid.¹⁴⁰ In *A.-G. B.C. v A.-G. Can.* (the Natural Products Marketing reference)¹⁴¹ the JCPC made a similar ruling, holding that the establishment of marketing schemes for natural products 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.¹⁴²

¹³³ *Citizens' Insurance Co. v Parsons* (1881), 7 App. Cas. 96, [1881] UKPC 49 (“*Parsons*”) at 113.

¹³⁴ *Parsons* at 113.

¹³⁵ Section 92(13) of the *Constitution Act, 1867*.

¹³⁶ *Re Board of Commerce Act*, [1922] 1 A.C. 191, 60, 198.

¹³⁷ See *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, 410.

¹³⁸ Constitutional Law of Canada, § 20:2.

¹³⁹ [1925] S.C.R. 434.

¹⁴⁰ Constitutional Law of Canada, § 20:2.

¹⁴¹ [1937] A.C. 377.

¹⁴² Constitutional Law of Canada, § 20:2.

In its last decision on s. 91(2), the JCPC in the *Margarine Reference*¹⁴³ 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.¹⁴⁴

Following the abolition of appeals to the JCPC, the Supreme Court of Canada broadened the application of the trade and commerce power. In *Re Farm Products Marketing Act*¹⁴⁵ 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 “intra-provincial”, indicating that federal power could extend to some transactions which were not wholly interprovincial.¹⁴⁶ Following the *Farm Products Marketing Act* reference, the Manitoba Court of Appeal was asked to decide whether federal power could apply to an entirely local operation where wheat was produced and sold as feed to local farmers within the province.¹⁴⁷ The court in *Klassen* held that the production quotas established under the act, 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 intra-provincial trade was found to be incidental to the principal purpose of the Act, which was to regulate the interprovincial and export trade in grain.¹⁴⁸ Despite *Klassen* being a clear departure from previous jurisprudence on whether federal laws would regulate wholly intra-provincial transactions, the Supreme Court of Canada refused leave to appeal the decision.¹⁴⁹

In *Caloil v. A.-G. Can.*¹⁵⁰, 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.¹⁵¹ The court upheld the act as “an incident in the administration of an extra-provincial marketing scheme” and as “an integral part of the control of imports in the furtherance of an extra-provincial trade policy.”¹⁵²

¹⁴³ *Canadian Federation of Agriculture v A.-G. Que.*, [1951] A.C. 179.

¹⁴⁴ Constitutional Law of Canada, § 20:2.

¹⁴⁵ [1957] S.C.R. 198 (S.C.C.) at 204, 209, and 231.

¹⁴⁶ See *Carnation Co. v Que Agricultural Marketing Bd.*, [1968] S.C.R. 238, 245-246.

¹⁴⁷ *R. v Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.) (“*Klassen*”).

¹⁴⁸ Constitutional Law of Canada, § 20:3.

¹⁴⁹ Constitutional Law of Canada, § 20:3.

¹⁵⁰ [1971] S.C.R. 543 (S.C.C.) (“*Caloil*”).

¹⁵¹ Constitutional Law of Canada, § 20:3.

¹⁵² *Caloil* at 551.

Despite the expansion of the federal government's power under s. 91(2) in cases like *Klassen* and *Caloil*, the pendulum swung back towards provincial authority in *Dominion Stores v The Queen*¹⁵³, where the Supreme Court of Canada struck down part of the *Canada Agricultural Products Standard Act*.¹⁵⁴ 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.¹⁵⁵

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*¹⁵⁶ 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.¹⁵⁷ The court also reaffirmed the rule that the trade and commerce power does not authorize the regulation of individual industries.¹⁵⁸

While the federal government now seems to have the power to regulate interprovincial trade in a way that incidentally impacts intra-provincial activity, the extent of that power remains unclear. The constitutional validity of a trade statute or regulation will ultimately depend on whether it is, in pith and substance, aimed at the regulation of interprovincial trade regulation for a common Canadian-wide market.¹⁵⁹ Estey J. put the question as follows: "...if 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."¹⁶⁰ As can be seen from the *Dominion Stores* decision, the interpretation of those 'shadings'

¹⁵³ [1980] 1 S.C.R. 844 (S.C.C.) ("Dominion Stores").

¹⁵⁴ R.S.C. 1970, c. A-8.

¹⁵⁵ Constitutional Law of Canada, § 20:3.

¹⁵⁶ R.S.C., 1985, c. F-27.

¹⁵⁷ *Labatt Breweries v A.-G. Can.*, [1980] 1. S.C.R. 914 (S.C.C.) ("Labatt Breweries"), 939, 943.

¹⁵⁸ *Labatt Breweries* at 941.

¹⁵⁹ *Saputo Inc. v Canada (Attorney General)*, 2011 FCA 69 ("Saputo") at para. 58.

¹⁶⁰ *Labatt* at 942-943.

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 tax, etc. 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 cooperation where a province's right to incidentally affect interprovincial trade overlaps with federal Parliament's right to incidentally affect intra-provincial commerce.¹⁶¹

ii. Section 121 and Interprovincial 'Tariffs'

Another provision in the *Constitution Act, 1867* that precludes the imposition of trade barriers by the provinces is s. 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.

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*,¹⁶² an individual was charged under s. 134(b) of the New Brunswick *Liquor Control Act*¹⁶³ 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 s. 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.¹⁶⁴ However, the Supreme Court also found that s. 121 did not preclude measures directed at other goals that have

¹⁶¹ *Saputo* at paras. 55-56.

¹⁶² 2018 SCC 15 (“*Comeau*”).

¹⁶³ R.S.N.B. 1973, c. L-10.

¹⁶⁴ *Comeau* at para. 53.

incidental effects on the passage of goods across provincial borders or that form rational parts of broader legislative schemes with purposes unrelated to impeding provincial trade.¹⁶⁵

In *Comeau* the Supreme Court found that s. 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.¹⁶⁶ The effect that s. 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.¹⁶⁷

Professors Hogg and Wright note that *Comeau* leaves s. 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.¹⁶⁸

However, following *Comeau* the Alberta Court of Appeal applied its principles to strike down a provincial law under s. 121, and not s. 91(2), of the *Constitution Act, 1867*. In *Steam Whistle Brewing Inc. v Alberta Gaming and Liquor Commission*,¹⁶⁹ the Alberta Court of Appeal considered whether several provincial regulatory body mark-up schemes on liquor sales violated s. 121.

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 s. 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).¹⁷⁰ Second, a court looks at whether the primary purpose of the law 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. Such a purpose is a strong indicator that the primary purpose is to restrict trade.¹⁷¹

¹⁶⁵ *Comeau* at paras. 53, 114.

¹⁶⁶ *Comeau* at para. 122.

¹⁶⁷ *Comeau* at para. 125.

¹⁶⁸ Constitutional Law of Canada, § 20:3.

¹⁶⁹ 2019 ABCA 468 (“*Steam Whistle*”).

¹⁷⁰ *Steam Whistle* at para. 82.

¹⁷¹ *Steam Whistle* at para. 83.

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.”¹⁷² 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 mark-up scheme.¹⁷³

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, and upheld the lower court’s decision to invalidate the impugned regulations pursuant to s. 121.¹⁷⁴ It would therefore seem that s. 121 still retains some usefulness, despite the fact that s. 91(2) could potentially have been used to strike down the impugned Alberta regulatory schemes instead.

iii. Section 92(10) – provincial control over local works and undertakings and the exceptions for interprovincial transportation and communication

S. 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 s. 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. S. 92(10) is therefore relevant to interprovincial trade because it exempts works and undertakings connecting a province to the outside world from provincial control under s. 92(10)(a). S. 92(10)(c) also allows federal parliament to declare certain works to be within federal jurisdiction using what has been dubbed the ‘declaratory power’.

S. 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, ...

¹⁷² *Steam Whistle* at para. 103.

¹⁷³ *Steam Whistle* at para. 108.

¹⁷⁴ *Steam Whistle* at paras. 105, 110, 114.

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.

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 s. 92(10)(a) if they are operated as part of an interprovincial (or international) undertaking.¹⁷⁵

The essential scheme of s. 92(10) is to divide legislative authority over transportation and communication on a territorial basis.¹⁷⁶ To that end, the delineation between intra-provincial 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, not merely a physical one.¹⁷⁷ 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.¹⁷⁸

The courts have consistently refused to divide jurisdiction between federal and provincial legislatures over a single undertaking.¹⁷⁹ For example, in *A.-G. Ont. v. Winner*,¹⁸⁰ 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.¹⁸¹

¹⁷⁵ For pipelines see *Campbell-Bennett v Comstock Midwestern*, [1954] S.C.R. 207 (S.C.C.); *Sask. Power Corp. v TransCanada Pipelines*, [1979] 1 S.C.R.297 (S.C.C.); *Re National Energy Bd. Act*, [1988] 2 F.C. 196 (C.A.); *Re Bypass Pipelines* (1988), 64 O.R. (2d) 393 (C.A.), *Westcoast Energy v Can.*, [1998] 1 S.C.R. 322 (S.C.C.) (“Westcoast Energy”); *Re Environmental Management Act*, 2019 BCCA 181, aff’d 2020 SCC 1. For transmission lines see *Fulton v Energy Resources Conservation Bd.*, [1981] 1 S.C.R. 153 (S.C.C.); *Re Town of Summerside and Maritime Electric Co. (No. 2)* (1983), 3 D.L.R. (4th) 577 (P.E.I. S.C.T.D.).

¹⁷⁶ Constitutional Law of Canada, § 22:1.

¹⁷⁷ Constitutional Law of Canada, § 22:4.

¹⁷⁸ *YMHA Jewish Community Centre v Brown*, [1989] 1 S.C.R. 1532, 1552 (S.C.C.). Accord, *CPR v A.-G. B.C.*, [1950] A.C. 122, 142 (obiter dictum) (“Empress Hotel”).

¹⁷⁹ *Toronto v. Bell Telephone Co.*, [1905] A.C. 52 (J.C.P.C.).

¹⁸⁰ [1954] A.C. 541 (J.C.P.C.) (“Winner”).

¹⁸¹ Constitutional Law of Canada, § 22:5.

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* (1980),¹⁸² the court 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”. 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.¹⁸³ 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.¹⁸⁴

However, a company may engage in more than one undertaking. In the *Empress Hotel* case the JCPC held that CP 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.¹⁸⁵

This analysis is limited by the degree to which undertakings are operated in a common and single enterprise.¹⁸⁶ In *Westcoast Energy* the Supreme Court of Canada found that wells, 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.¹⁸⁷ 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 s. 92(10)(a).

For true interprovincial projects, jurisdiction for broad topics like environmental concerns have been ruled to fall under federal jurisdiction.¹⁸⁸ However, this does not mean that interprovincial undertakings are immune from

¹⁸² 44 O.R. (2d) 560 (O.N.C.A.).

¹⁸³ Constitutional Law of Canada, § 22:6.

¹⁸⁴ See *Re Tank Truck Transport* (1960), 25 D.L.R. (2d) 151 (Ont. H.C.) and *R. v Cooksville Magistrate’s Court; Ex parte Liquid Cargo Lines*, [1965] 1 O.R.84 (H.C.).

¹⁸⁵ *Empress Hotel* at 144.

¹⁸⁶ Constitutional Law of Canada, § 22:8.

¹⁸⁷ Constitutional Law of Canada, § 22:8.

¹⁸⁸ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at paras. 95-96.

provincial regulation. In *Coastal First Nations v. British Columbia (Environment)*,¹⁸⁹ the court, citing *Alberta (Attorney General) v. Moloney*¹⁹⁰ at para. 26, 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.¹⁹¹

In *Reference re Environmental Management Act (British Columbia)*,¹⁹² the British Columbia Court of Appeal reviewed the history of cases grappling with the distribution of powers with respect to environmental assessments.¹⁹³ Federal undertakings are not “enclaves” immune from provincial environmental laws, and both levels of government have jurisdiction over aspects of the environment.¹⁹⁴ 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 province. 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.¹⁹⁵ 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.”¹⁹⁶ 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.¹⁹⁷

The other relevant part of s. 92(10) is the declaratory power. This power has been used at least 472 times, mostly with respect to local railways.¹⁹⁸ The power is not limited to just works involved in transportation or communication.¹⁹⁹ 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.²⁰⁰

¹⁸⁹ 2016 BCSC 34 (“*Coastal First Nations*”).

¹⁹⁰ 2015 SCC 51.

¹⁹¹ *Coastal First Nations* at paras. 67-76.

¹⁹² 2019 BCCA 181 (“*EMA(BC)*”).

¹⁹³ *EMA(BC)* at paras. 62-91.

¹⁹⁴ *EMA(BC)* at para. 23.d.

¹⁹⁵ *EMA(BC)* at paras. 94-95,96.

¹⁹⁶ *EMA(BC)* at para. 101.

¹⁹⁷ *EMA(BC)* at para. 96.

¹⁹⁸ Constitutional Law of Canada, § 22:10.

¹⁹⁹ *Jorgenson v. A.-G. Can.*, [1971] S.C.R. 725; *Ontario Hydro v. Ont.*, [1993] 3 S.C.R. 327 (“*Ontario Hydro*”).

²⁰⁰ Constitutional Law of Canada, § 22:10.

iv. Section 92A – Energy in the Provinces

S, 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 export of energy and resources from their territorial jurisdiction. 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 s. 92A.

According to professors Hogg and Wright, s. 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.²⁰¹ With respect to s. 92A(1), the provinces already had power over the exploration, development, conservation, and management of resources within their territory under s. 92(13) (or 92(10) or 92(16)). What s. 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.²⁰² 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 s. 92A(1) over electrical generating facilities did not impinge on federal legislative authority under either the residuary peace, order, and good governance power or under the declaratory power in s. 92(10)(c).²⁰³ Thereafter, in *Westcoast Energy*, the 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).”²⁰⁴ This further confirmed that s. 92A(1) was restricted to intra-provincial activities.

There is little guidance in case law on the implications of s. 92A(2). In 2021 the Federal Court of Appeal noted that “no law has ever been challenged on the basis of [s. 92A(2)].”²⁰⁵ However, in the decision of the court

²⁰¹ Constitutional Law of Canada, § 30:30.

²⁰² Constitutional Law of Canada, § 30:30; Nigel Bankes and Andrew Leach, “Preparing for a Mid-Life Crisis: Section 92A at 40” (2023) 60:4 *Alberta Law Review* (“Bankes and Leach 2023”) at p. 872.

²⁰³ *Ontario Hydro* at 356.

²⁰⁴ *Westcoast Energy* at para. 82; Bankes and Leach 2023 at p. 866.

²⁰⁵ *Attorney General of Alberta v Attorney General of British Columbia*, 2021 FCA 84 at para. 166 (“*Turn Off the Taps* (FCA)”).

below,²⁰⁶ Grammond J. made preliminary comments interpreting s. 92A(2). Justice Grammond took the view that s. 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 related to interprovincial commerce and, if so, whether it is nevertheless valid because it complies with the conditions imposed by s. 92(A)(2).²⁰⁷

The *Turn Off the Taps* case concerned an act introduced in Alberta that allowed its Minister of Energy to require exporters of natural gas, crude oil, or refined fuel to obtain a license. S. 4 of the act allowed the Minister to set the terms of these export licenses, including restrictions on maximum quantities and methods of exportation.²⁰⁸ Grammond J. 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 breached s. 92A(2) for authorizing discrimination in energy exports.²⁰⁹

Grammond J.'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.²¹⁰

B. Interprovincial Trade Barriers

In his 2002 paper, *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 *AIT* came into effect, most serious students 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."²¹¹ Sinclair argued that the framing of certain issues as problems of trade distorted the discussion when, for example, on the topic of regulation the matter actually concerned the appropriate levels of consumer and environmental protection,

²⁰⁶ *Attorney General of British Columbia v. Attorney General of Alberta*, 2019 FC 1195, [2019] 2 F.C.R. 124 ("*Turn Off the Taps* (FC)").

²⁰⁷ Bankes and Leach 2023 at p. 872; *Turn Off the Taps* (FCA) at para. 115.

²⁰⁸ *Preserving Canada's Economic Prosperity Act*, S.A. 2018, c. P-21.5, s. 4(2)(a).

²⁰⁹ *Turn Off the Taps* (FC) at para. 120, 128, 131.

²¹⁰ *Turn Off the Taps* (FCA).

²¹¹ Scott Sinclair, "Canada's Internal Market – A Report Card" (2002) 2 *Asper Review of International Business and Trade Law* 201 ("Sinclair 2002").

professional standards, the use of the precautionary principle, regional economic development policies, value-added natural resource processing, and other areas of provincial jurisdiction.²¹²

Other academics have estimated that Canada would gain more from eliminating its remaining interprovincial trade barriers. In their 2022 paper,²¹³ 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 \$110 and \$200 billion per year.²¹⁴

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 believed that provincial trade barriers and protectionist strategies can be addressed through voluntary provincial agreements) and nationalists on the other (those who seek to prioritize a single Canadian market and wished 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).²¹⁵

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.²¹⁶ The first major effort at managing and moving forward with this

²¹² Sinclair 2002 at p. 203.

²¹³ Ryan Manucha & Trevor Tombe, "Liberalizing Internal Trade through mutual recognition: A legal and economic analysis" (2022) *The Macdonald-Laurier Institute* ("Manucha and Tombe, 2022").

²¹⁴ Manucha and Tombe, 2022 at p. 5.

²¹⁵ David Cohen, "The Internal Trade Agreement: Furthering the Canadian Economic Disunion" (1995) 25:2 *Canadian Business Law Journal* 257 ("Cohen 1995").

²¹⁶ Cohen 1995 at p. 260.

entrenched characteristic of our constitutional order was the Agreement on Internal Trade (the “AIT”), which came into force in July, 1995.²¹⁷

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.²¹⁸ 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).²¹⁹

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.²²⁰ 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”.²²¹ This approach, noted by Mr. David Cohen in 1995, can be seen reflected in the Supreme Court of Canada’s application of s. 121 of the *Constitution Act, 1867* in *Comeau*.

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 any such agreement cannot bind a future legislature.²²² The AIT was, after all, an executive agreement, and not in and of itself an actual law.²²³

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

²¹⁷ Canadian Free Trade Agreement, *Consolidated Version with 14th Protocol*, online: CFTA <https://www.cfta-alec.ca/wp-content/uploads/2024/04/Consolidated-with-14th-Protocol-final-draft.pdf> (“AIT”) at art. 504.

²¹⁸ AIT at art. 404.

²¹⁹ Cohen 1995 at p. 261.

²²⁰ Cohen 1995 at pp. 264, 266.

²²¹ Cohen 1995 at p. 265.

²²² Katherine Swinton, “Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union” (1995) 25:2 *Canadian Business Law Journal* 280, at p. 294 (“Swinton 1995”).

²²³ *Northrop Grumman Overseas Service Corp. v. Canada (Attorney General)*, 2009 SCC 50 at para. 11.

resources.²²⁴ 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.²²⁵

Over a decade after the AIT, the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba entered into the New West Partnership Trade Agreement (the “NWPTA”), which was ratified in 2010 and came into full effect in 2013. 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.²²⁶

The NWPTA included a broader definition of government entities that are subject to its procurement requirements.²²⁷ and included obligations on its parties in more significant areas of investment, subsidies, procurement, and labour mobility.²²⁸ 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.²²⁹

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 Canadian Free Trade Agreement (the “CFTA”), which came into force in 2017. Like the NWPTA, the CFTA applies automatically to all areas of Canada’s economy, with exceptions carved out in the agreement (such as Ontario’s exception to the agreement’s non-discrimination and

²²⁴ Swinton 1995 at p. 296.

²²⁵ Swinton 1995 at p. 296.

²²⁶ R. Hansen & H. Heavin, “What’s New in the New West Partnership Trade Agreement - The NWPTA and the Agreement on Internal Trade Compared” (2010) 73:2 *Saskatchewan Law Review* 197 (“Hansen and Heaving 2010”) at p. 231.

²²⁷ Hansen and Heavin 2010 at p. 232.

²²⁸ Hansen and Heavin 2010 at p. 233.

²²⁹ Hansen and Heavin 2010 at p. 232.

market access clauses for regulations falling under its legislation regulating its energy market).²³⁰ The CFTA also expanded coverage to the energy sector, which had not been included in the AIT.²³¹

Part of the impetus for the re-negotiation of the AIT was the ongoing Canada-Europe trade negotiations. Like the NWPTA, the international European trade deal was to be written in a 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.²³² 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. The federal government retains two CFTA exceptions for oil and gas regulation in the Atlantic provinces. 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.²³³ New Brunswick, Saskatchewan, and Alberta do not have listed exceptions related to energy in the CFTA although Alberta, for example, does run its own designed and regulated energy market regardless.

Arising from these circumstances is Canada's siloed system of energy regulation. Each province has its own generation mix, market structure, ownership model, oversight regime, and pricing mechanisms.²³⁴ 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

²³⁰ Government of Ontario, *Schedule of Ontario: Canadian Free Trade Agreement (CFTA)*, online: Canadian Free Trade Agreement <https://www.ctfa-alec.ca/cfta-agreement/schedule-of-ontario-2>.

²³¹ *The Canadian Free Trade Agreement*, online: CFTA <https://www.ctfa-alec.ca/canadian-free-trade-agreement>.

²³² Ryan Manucha, "How WTO Jurisprudence Can Help Resolve Interpretive Uncertainties Generated by Canada's Domestic Free Trade Agreements" (2019) 19 *Asper Review International Business & Trade Law* 273 ("Manucha 2019") at p. 282.

²³³ Canadian Free Trade Agreement, *Annex I: Exceptions for Existing Measures, Part VII – Party Schedules*, online: CFTA <https://www.ctfa-alec.ca/cfta-agreement/schedule-of-canada-2>.

²³⁴ Natural Resources Canada, *Powering Canada: A Blueprint for Success* (May 2024), online: Government of Canada <https://natural-resources.ca/energy-sources/powering-canada-blueprint-success#a4>.

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.²³⁵ As it stands, Canada does not have an extensive network of east-west transmission lines either. In fact, there are stronger transmission interties with U.S. grids than between the provinces.²³⁶

As of the writing of this paper, the uncertainty created by the U.S.' 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.²³⁷ On 21 March 2025, newly-elected leader of the Liberal Party (and Prime Minister) Mark Carney met with the Premiers and announced an intention to create a national energy and trade corridor to eliminate trade barriers.²³⁸ The Conservative Party has likewise proposed the creation of an energy corridor to build a pipeline project connecting Alberta to Saint John, New Brunswick.²³⁹ At present, Canada does not have an easy way to replace its energy exports to the U.S. 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.

²³⁵ A. R. Lucas, "The National Energy Board and Energy Infrastructure Regulation: History, Legal Authority, and Judicial Supervision," (2018) 23:1 *Review of Constitutional Studies* 25 at p. 28.

²³⁶ Canadian Electricity Association, *The Integrated North American Grid* (2022), online: https://issuu.com/canadianelectricityassociation/docs/efic_studentmanual_web_2022/s/15907430; Canada, House of Commons, Standing Committee on Natural Resources, *Strategic Electricity Interties*, 42nd Parl., 1st Sess, No. 7 (December 2017) (Chair: J. Maloney), at p. 7, online: House of Commons <https://www.ourcommons.ca/Content/Committee/421/RNRR/Reports/RP9335660/rnrrp07/rnrrp07-e.pdf>.

²³⁷ Government of Canada, *Government of Canada Removing More Than Half of Federal Exceptions to the Canadian Free Trade Agreement to Strengthen Interprovincial Trade* (21 February 2025), online: Government of Canada <https://www.canada.ca/en/intergovernmental-affairs/news/2025/02/government-of-canada-removing-more-than-half-of-federal-exceptions-to-the-canadian-free-trade-agreement-to-strengthen-interprovincial-trade.html>.

²³⁸ The Canadian Press, "Carney, Premiers Seeking Plan for National Energy, Trade Corridor" (21 March 2025), online: CTV News <https://www.ctvnews.ca/politics/article/carney-says-canada-aims-to-have-free-internal-trade-by-july-1/>.

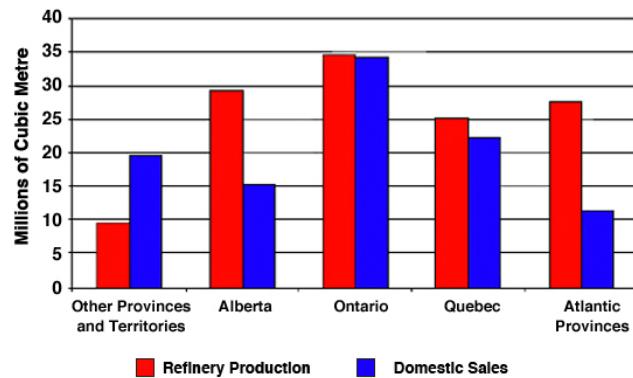
²³⁹ Lauren Krugel, "Conservatives' Energy Corridor Proposal Has 'Missing Pieces,' Says Energy Expert" (31 March 2025), online: CBC News <https://www.cbc.ca/news/canada/calgary/conservatives-energy-corridor-proposal-1.7498508>.

V. Local Responses to Tariffs and Intra-provincial Energy Trade

Energy trade has not received significant intra-provincial attention, and there may be several good reasons for that. At the forefront, most Canadian provinces export energy products. Other reasons for not increasing intra-provincial 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 1970's, there were 40 refineries in Canada.²⁴⁰ At present, Canada has 17 refineries. 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.²⁴¹

Refined petroleum product production vs. sales



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

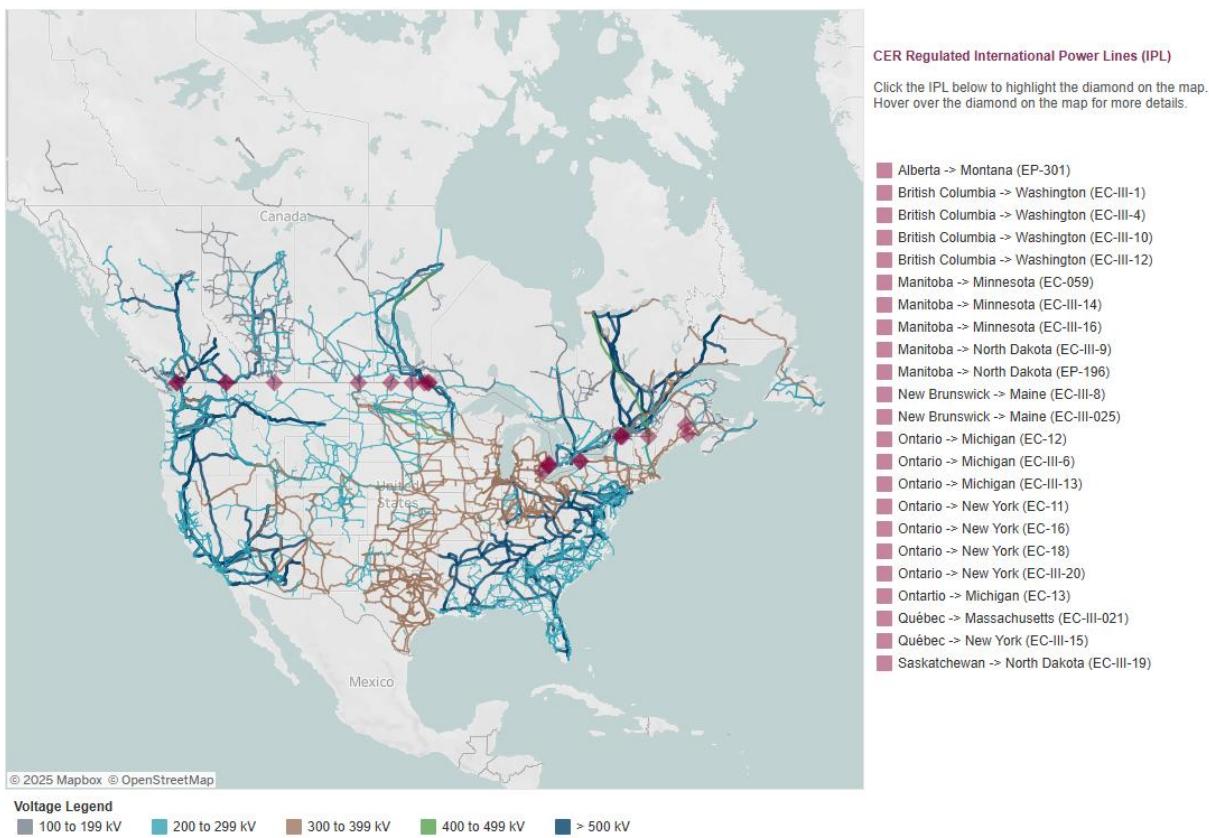
Bolstering interprovincial energy trade may provide greater opportunity for intra-provincial trade as well. By making raw energy products available, local refining or production of dependent products could increase, which in turn could increase intra-provincial trade by avoiding importing additional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

²⁴⁰ CER "The Refining Sector in Canada" (Modified: 20 December 2024), online: CER <https://natural-resources.canada.ca/energy-sources/fossil-fuels/refining-sector-canada>.

²⁴¹ *Ibid.*

A. Electricity

Canada is typically a net exporter of electricity.²⁴² All of Canada's international trade in electricity is with the U.S. and mostly occurs from the provinces of Quebec, Ontario, Manitoba, and British Columbia.²⁴³ As shown below, there are more international interties with the U.S. 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"):²⁴⁴



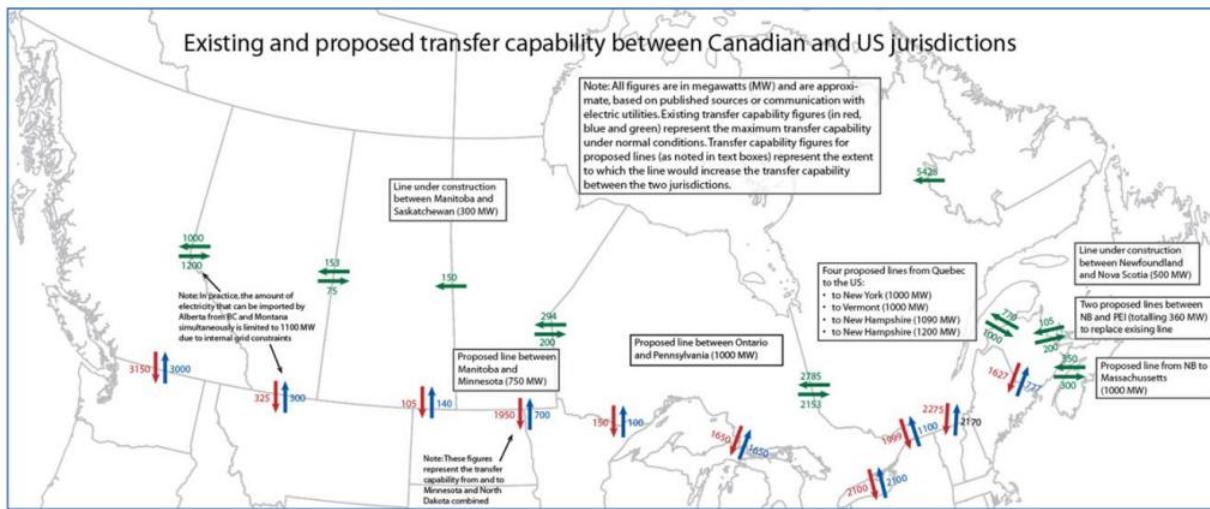
This is significant when compared to the interprovincial interties, as mapped in a Natural Resources Canada submission to the House of Commons, showing then existing and proposed interties.²⁴⁵

²⁴² CER "Electricity Trade Summary" (Modified: 7 April 2025), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/electricity/statistics/electricity-trade-summary/index.html>

²⁴³ CER "Provincial and Territorial Energy Profiles – Canada" (Modified 10 September 2024), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>.

²⁴⁴ CER "Market Snapshot: Electricity Trade — who regulates what in Canada?" (Released: 22 January 2025), online: CER: <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2025/market-snapshot-electricity-trade-who-regulates-what-in-canada.html>

²⁴⁵ James Maloney, Chair "Strategic Electricity Interties Report of the Standing Committee on Natural Resources" House of Commons (December 2017), online: House of Commons <https://www.ourcommons.ca/Content/Committee/421/RNNR/Reports/RP9335660/rnnrrp07/rnnrrp07-e.pdf> at PDF p 18.



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 poses challenges in creating a national, integrated electric system. Most provinces have government-owned utilities that generate and distribute electricity, but others, such as Alberta and Ontario have competitive markets for electricity generation and distribution, with broad participation by privately-owned utilities.²⁴⁶ This difference in market approach however results in large price differences²⁴⁷ 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.²⁴⁸

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

²⁴⁶ CER “Provincial and Territorial Energy Profiles – Canada” (Modified 10 September 2024), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>.

²⁴⁷ Rylan Urban "Electricity Prices in Canada (Updated 3 September 2023)", online: Energy Hub <https://www.energyhub.org/electricity-prices/>

²⁴⁸ Pierre-Olivier Pineau "Improving integration and coordination of provincially-managed electricity systems in Canada" *Canadian Institute for Climate Choices*, PDF p 1, online: <https://climateinstitute.ca/wp-content/uploads/2021/09/CICC-Improving-integration-and-coordination-of-provincially-managed-electricity-systems-in-Canada-by-Pierre-Olivier-Pineau-FINAL.pdf>

demand, Canada's electricity generation capacity will need to be 2.2 to 3.4 times higher than today.²⁴⁹ There is therefore reason to believe that domestic markets for electricity will exist in the near future. Other reasons to 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:²⁵⁰

- enhancement of bilateral provincial projects through renewed federal support;
- a negotiated free trade agreement in electricity;
- a harmonized electric trade system.

B. Crude Oil and Refined Petroleum Products:

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%. Canadian oil production mainly comes from western Canada, which accounted for about 96% 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% of the total), followed by Saskatchewan and Newfoundland. These are also the only three provinces that produce heavy oil.²⁵¹

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%.²⁵²

Refined Petroleum Products ("RPPs") are a range of products that are refined from crude oil, like gasoline, diesel, heating oil, and jet fuel. RPPs are the second largest type of energy consumed by end users in Canada. 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% each), New Brunswick (17%), Saskatchewan

²⁴⁹ Canadian Climate Institute "Making Electricity Systems Bigger", online <https://climateinstitute.ca/reports/big-switch/#:~:text=In%20a%20net%20zero%20future,3.4%20times%20bigger%20than%20today>.

²⁵⁰ Pierre-Olivier Pineau "Improving integration and coordination of provincially-managed electricity systems in Canada" *Canadian Institute for Climate Choices*, online: <https://climateinstitute.ca/wp-content/uploads/2021/09/CICC-Improving-integration-and-coordination-of-provincially-managed-electricity-systems-in-Canada-by-Pierre-Olivier-Pineau-FINAL.pdf>

²⁵¹ CER "Provincial and Territorial Energy Profiles – Canada" (Modified 10 September 2024), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>

²⁵² *Ibid.*

(8%), British Columbia (4%), and Newfoundland (1%).²⁵³ In 2023, Canadian refineries operated at 89% of capacity, on average, and consumed 1.6 MMb/d of crude oil.²⁵⁴

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. 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.²⁵⁵

Exports of Canadian RPPs are primarily from the Saint John Refinery in New Brunswick. Smaller volumes are also exported to the U.S. from Quebec, Alberta, Ontario, and B.C. Quebec, Ontario, British Columbia, and the Atlantic provinces are the primary importing regions for RPPs.²⁵⁶

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 U.S., 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

Canada consumed an average of 11.9 Bcf/d of natural gas in 2023.²⁵⁷ In the same year, 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.²⁵⁸ Almost all of Canada's exported natural gas is transported to the U.S. 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

²⁵³ Ibid.

²⁵⁴ CER "Weekly Crude Run Summary and Data" (Modified 15 May 2025), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/statistics/weekly-crude-run-summary-data/index.html>

²⁵⁵ CER "Provincial and Territorial Energy Profiles – Canada" (Modified 10 September 2024), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ CER "Natural Gas Trade Summary" (Modified 28 March 2025), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-commodities/natural-gas/statistics/natural-gas-trade-summary/index.html>

through pipelines from the U.S. into Ontario. Natural gas is also imported to serve New Brunswick and Nova Scotia.²⁵⁹

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, and which does not extend from one province to another. This means that the provinces have law-making powers necessary to remove any or all intra-provincial trade barriers. We propose that provinces look toward increasing interprovincial energy trade as a means of protecting and increasing intra-provincial energy trade.

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".²⁶⁰ 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.²⁶¹ 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 more pipelines Act",²⁶² or factually, the *Impact Assessment Act*.²⁶³ The Conservative Party, on the other hand, promised to repeal the *Impact Assessment Act*.²⁶⁴ While the *Impact Assessment Act* 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 *Impact Assessment Act* were far exceeding the legislated 180

²⁵⁹ CER "Provincial and Territorial Energy Profiles – Canada (Modified 10 September 2024), online: CER <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/provincial-territorial-energy-profiles/provincial-territorial-energy-profiles-canada.html>

²⁶⁰ <https://www.cer-rec.gc.ca/en/about/who-we-are/what-we-do/responsibility/> retrieved on March 15, 2025. See also: CER Act, ss. 4, 11

²⁶¹ CER "Our Responsibilities (Modified 21 July 2021), online: CER <https://www.cbc.ca/news/canada/saskatchewan/pipe-line-pre-approval-sask-1.7469987>.

²⁶² EnergyNow Media "MORE OF THE SAME: Mark Carney Admits He Will Not Repeal the Liberal's Bill C-69 – The 'No Pipelines' Bill" (2 April 2025), online: EnergyNow <https://energynow.ca/2025/04/more-of-the-same-mark-carney-admits-he-will-not-repeal-the-liberals-bill-c-69-the-no-pipelines-bill/>.

²⁶³ *Impact Assessment Act*, S.C. 2019, c. 28, s. 1.

²⁶⁴ Ben Cousins "Here's why Bill C-69 is shaping up as a campaign wedge issue" *Financial Post* (3 April 2025), online: Financial Post <https://financialpost.com/federal-election/bill-c-69-campaign-wedge-issue>.

days period in the Planning Phase (or phase 1) of the process, with a mean of 332 days before moving to phase 2.²⁶⁵

The CER, under s. 183(2) of the *CER Act*,²⁶⁶ 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 ss. 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”.

Provincially, regulators differ in the factors each considers relevant when determining whether to approve pipelines and other energy infrastructure. In some cases, such as s. 7(d) of New Brunswick’s *Pipeline Act*,²⁶⁷ express provision is made for the regulator to consider “such other matter as it considers relevant in the public interest”. Another example is s. 7 of the *Alberta Utilities Commission Act*,²⁶⁸ 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, 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, storage facility, line or pipeline and the effects of the development, plant, storage facility, line or pipeline on the environment”. In others, such as British Columbia’s *Energy Resource Activities Act*,²⁶⁹ or Alberta’s *Responsible Energy Development Act* (“*REDA*”),²⁷⁰ 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”; and

²⁶⁵ Marla Orenstein “Federal Impact Assessment Act Under Review” (May 2023), PDF p 13, online: Candawest Foundation <https://cwf.ca/wp-content/uploads/2023/04/CWF-Federal-IAA-Under-Review-Report-MAY2023.pdf>.

²⁶⁶ *Supra*, FN 8.

²⁶⁷ *Pipeline Act*, 2005, c P-8.5, s. 7.

²⁶⁸ SA 2007, c A-37.2.

²⁶⁹ SBC 2008 c 36, s. 4.

²⁷⁰ 2012, c R-17.3, s. 2(1).

- Under the *Energy Resource Activities Act*, the 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”.

Further support for the proposition that energy regulation is public interest regulation, may be found in documents such as the Atlantic Accord,²⁷¹ 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”.

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.²⁷² Similar language may be found in provincial legislation regarding tariffs.²⁷³

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.²⁷⁴ Public interest determinations made in a regulatory context engage discretionary considerations usually within the expertise of the board.²⁷⁵ Factors such as sound financial management²⁷⁶ or prudence,²⁷⁷ and even possibly government approval,²⁷⁸ 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 and/or prudence. Prudent, in this context means

²⁷¹The 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 https://www.cnlopb.ca/wp-content/uploads/guidelines/aa_mou.pdf s. 2(a).

²⁷²CER Act, ss. 230 and 235.

²⁷³ See for example Alberta’s *Electric Utilities Act*, SA 2003, c E-5.1, s. 121(2).

²⁷⁴ *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, at paras [7] and [46].

²⁷⁵ *Sawyer v Transcanada Pipeline Limited*, 2017 FCA 159, at para [2].

²⁷⁶ *Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113 (SCC), s. V.A.

²⁷⁷ *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 at para [136].

²⁷⁸ *Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113 (SCC), s. V.A.

reasonable.²⁷⁹ 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.

VI. Conclusion: How do Tariffs Stack Up?

The heavy reliance on U.S. trade made Canada particularly vulnerable to tariffs and future trade restrictions imposed by the U.S. government. The recent wave of tariffs imposed by the U.S. and affecting Canadian energy trade varies significantly in magnitude and consequences. At the top of the list are the U.S. 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 U.S. refiners, forcing them to seek alternative sources or pay higher prices. Given that nearly 70% of U.S. 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 U.S. countervailing and anti-dumping duties on Canadian lumber, which nearly tripled from 14.4% to 34.45%. 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 U.S. 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 U.S. tariffs on LNG and electricity exports, which impose a 10% duty on LNG and a 25% duty on electricity. Given Canada's role as a key energy supplier to the U.S., 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 U.S., further weakening Canada's leverage in negotiations.

²⁷⁹ *Ontario (Energy Board) v Ontario Power Generation Inc.*, 2015 SCC 44 at para [136].

Finally, the broader U.S. 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 U.S. 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.²⁸⁰ 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 U.S. 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 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, U.S. 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.

²⁸⁰ Queen's University John Deutsch Institute for the Study of Economic Policy: Breaking Down Canada's Internal Trade Barriers. Christopher S. Cotton and Daniel Teeter. March 2025 ("Cotton and Teeter"https://www.econ.queensu.ca/sites/econ.queensu.ca/files/wpaper/qed_wp_1529.pdf) See also: Government of Canada, *Committee on Internal Trade Breaks Down Barriers to Internal Trade* (28 February 2025), online: Government of Canada <https://www.canada.ca/en/intergovernmental-affairs/news/2025/02/committee-on-internal-trade-breaks-down-barriers-to-internal-trade.html>.

- 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 U.S. ranks third. The U.S. has imposed significant tariffs on Canadian energy products, including 10% tariffs on LNG and coal, 25% tariffs on uranium and electricity, and additional per-barrel tariffs on crude oil and refined petroleum products. The U.S.-Canada trade war has led to retaliatory tariffs, increasing uncertainty. While Canada remains the largest supplier of U.S. energy imports, the political volatility surrounding tariffs makes the U.S. 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% on LNG and crude oil, 3-6.5% 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".²⁸¹ 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% on trade flows (for goods and services)".²⁸²

Prime Minister Mark 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 \$5 billion investment in infrastructure through a Trade Diversification Corridor Fund, aimed at facilitating trade diversification and the

²⁸¹ Canadian Chambers of Commerce "Addressing Barriers to Interprovincial Trade: Canadian Chambers of Commerce", PDF p 2, online: Canadian Chambers of Commerce <https://chamber.ca/wp-content/uploads/publications/documents/Chamber%20Site/Addressing%20Barriers%20to%20Interprovincial%20Trade.pdf>

²⁸² Salim Zanzana "Six questions about the significance of interprovincial trade barriers in Canada" (25 February 2025), online: RBC <https://www.rbc.com/en/thought-leadership/economics/featured-insights/six-questions-about-the-significance-of-interprovincial-trade-barriers-in-canada/>

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.²⁸³

Brett Steenbarger, referencing Charles Darwin when writing about trading psychology, said that "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."²⁸⁴ Canada can, and should, adapt to the change.

²⁸³ Atlantica Centre for Energy "Federal Election 2025: Prime Minister Carney's energy-related policies" (Updated 30 April 2025), online: Atlantica <https://www.atlanticaenergy.org/federal-election-2025-energy-related-promises/>.

²⁸⁴ Brett N. Steenbarger *Trading Psychology 2.0: From Best Practices to Best Processes*, first edition Wiley Trading, 2015.