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# Two Western Canadian Provinces Asserting Provincial Sovereignty Seek to Challenge the Fundamentals of Canadian Constitutional Democracy and Order

by

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## Abstract

This article analyses how two western Canadian provinces, Alberta and Saskatchewan, have used the concept of provincial sovereignty to argue for a form of autonomy that violates the fundamentals of Canadian constitutional democracy and the rule of law. A former secessionist government in Quebec had used the sovereignty concept to claim a right to unilaterally declare independence regardless of the norms of the Canadian constitution. The Supreme Court of Canada, in a landmark decision in 1999 rejected the claim as a violation of the fundamental unwritten principles of the Canadian constitution. The two western provinces are using the provincial form of sovereignty to assert maximum autonomy in key areas of their economy and society in which they share jurisdiction with the central government. This article argues that these laws are being used to win or keep political power or to get the federal government to limit their legitimate roles in key areas. Finally, the article will discuss how the Alberta Sovereignty Act is triggering imitation by the US State of Utah and potentially dangerous consequences of such sovereignty laws.

## Keywords

Canadian Constitution; Autonomy of Provinces; Sovereignty; rule of law; independence of the judiciary; Supreme Court of Canada

## 1. Introduction

This article focuses on determining what are the real motivations, both political and legal, behind seemingly serious challenges to the Canadian rule of law and constitutional order from two Western Canadian provinces. In some regards, these challenges seemed similar to those from the formerly secessionist government in the province of Quebec.

The first two sections will focus primarily on the political motivations behind the proposed Alberta Sovereignty Act, while the following two sections will focus on challenges from the actual provisions of the Act, once introduced and then applied to a contested area of federal regulation. The examination of these actual provisions could reveal there less a threat to the Canadian constitution and more a form of seeking a stronger bargaining or leverage position in relations with the federal powers and government. However, the analysis will examine both the deleterious consequences for the Canadian constitutional order and the rule of law from the threats by the Alberta government to use the unconstitutional parts of the law as a form of bargaining or leverage against the federal powers and jurisdiction.

One such political consequence of Alberta's Sovereignty Act was the neighbouring province of Saskatchewan looked to be imitating its neighbouring province with the introduction of what seemed to be an equally unconstitutional law titled 'The Saskatchewan First Act'. This article in the sixth section also researches whether this was another attempt to create a more creative form of bargaining and leverage based on clearly unconstitutional provisions in the Act. However, like many parts of the Alberta Sovereignty Act, some of the most contentious provisions in the Saskatchewan law would most likely be ruled invalid by the Canadian Supreme Court based on its previous rulings. There are also challenges to both the Alberta and Saskatchewan laws by the indigenous peoples in both provinces who are claiming their own sovereignty rights have been violated by such laws.

Finally, the conclusion will discuss how the Alberta Sovereignty Act and its constitution challenging approach has been an incentive to the American State of Utah, and perhaps others, to follow suit with a similarly dubious state law. The conclusion then warns of the political and legally deleterious consequences of the implementation of such clearly unconstitutional laws or actions by subnational units of federal states. It focuses on the actions of the American State of Texas where state officials and agencies are ignoring and

violating federal powers and jurisdiction in the immigration and refugee area with dire consequences for the most vulnerable.

## 2. The provincial politics leading to the proposed Alberta Sovereignty Act

In June of 2022, Danielle Smith, the newly elected Premier of Canada's energy rich province, Alberta announced she would introduce in the Albert legislature, what she termed 'The Alberta Sovereignty Act'.

It would be based on a political document called the 'Free Alberta Strategy'[I] that she and the party promoted during the election.The threat of introducing such a popular but constitutionally dubious law during the election led to her politically right-wing party, the United Conservative Party (UCP), obtain the majority of votes and become the government of the province. Danielle Smith, as leader of the majority party, was appointed to the office of Premier of Alberta.Not just the title of the political document, but also some of the leaked content of the proposed law echoed for many Canadians, the position of the former province of Quebec secessionist government that had asserted the right to ignore fundamental norms in the Canadian constitution due to that province's unique nature and identity. Such claims would eventually lead to the claim that the province had a right to unilaterally declare independence and secession from Canada after a successful referendum[II].

The claim to sovereignty by the former Quebec government was used to try to unilaterally secede from the Canadian federation. In contrast most of the claims of sovereignty asserted by Alberta and followed later by a similar initiative in the neighbouring western province of Saskatchewan was an assertion of greater autonomy from the central government rather than a preliminary step towards a claim to secession. However, it is asserted that these autonomy sovereignty claims could accelerate to the potential for a similar undermining of Canadian national unity and are potentially equally destructive to the Canadian federation as the sovereignty claims of the former secessionist government in Quebec.

Some of the Canadian western provinces could also be encouraged to stake out their autonomy sovereignty claims discussed below as they witness the actions of the present Quebec government and the political party in power, the Coalition Avenir Québec (CAQ),

led by Premier Francois Legault.While this francophone nationalist government is not seeking secession from Canada, its main political agenda is to continually push for a substantially independent autonomous province within the Canadian federation. The CAQ, since its election on October 1, 2018, and re-elected in 2022, has pushed successfully for substantial autonomy in key shared jurisdictional areas in order to maintain the majority francophone culture and language and control over the major levers of the political and social economy in the province. In particular, it has used its political power in the federal Parliament to seek substantial autonomy in politically sensitive areas such as immigration levels and federal funds used for social and economic spending in the province[III].

## 3. The Proposed Alberta Sovereignty Act which propelled Premier Danielle Smith into power

The following analysis of proposed Sovereignty Act is based on the information and brilliant analysis provided in a legal blog by three constitutional experts at the faculty of law, University of Alberta (Olszynski, Watson Hamilton, e Fluker 2022).

The proposed Act would give the Alberta legislature the power 'to refuse enforcement of any specific Act of Parliament or federal court ruling that Alberta's elected body deemed to be a federal intrusion into an area of provincial jurisdiction' (Olszynski et al. 2022).

It was expected by those in the government and their supporters that the Sovereignty Act would, for example, protect the vital provincial energy sector from any federal attempt to regulate energy projects that would be within its jurisdiction concerning environmental emissions that could impact beyond the province. There was hope by the supporters of the UCP that such federal regulation would be overridden by the Alberta legislation which would allow the project to go ahead and begin operation without any approval from the federal government. The areas that supporters of the Sovereignty Act expected to be used the most, was not only in the area of energy and natural resources regulation that includes shared federal jurisdiction with the province, but also in the area of firearms and other areas covered by the criminal law jurisdiction of the federal government (Olszynski et al. 2022).

The three Alberta constitutional law experts described above, almost immediately publicly argued that the proposed law was constitutionally dubious. This was because the law

as proposed was seeking to give the provincial legislature and the province's executive the power to order the public and private sector in Alberta to ignore or deem inapplicable valid federal laws normally deemed obligatory. This would be a stunning violation under any understanding of the Canadian Constitutional Order and the traditional notions of the rule of law. The same experts also asserted that the Alberta Sovereignty Law purported to give the Alberta executive and legislature the power to be the ultimate decider on what federal normally obligatory laws would be applicable in the province rather than the federal courts appointed by the federal government (Olszynski et al. 2022).

This is the antithesis of the fundamental principle of the independence of the courts and the rule of law as confirmed in several landmark rulings of the Canadian Supreme Court[IV]. Stunningly, some supporters of the proposed law acknowledged that the federal government could ask that the law may be struck down by a federal court as violating the national constitution, but the Alberta executive and legislature can still just ignore it (Dawson 2022).

For these supporters, it seemed that the centuries old norms of Canadian parliamentary democracy, the rule of law, the separation of powers between the legislature and the judiciary, along with the lawfully implemented laws of the federal government mean very little. Indeed, the purported Sovereignty Act would allow the Alberta legislature to claim paramountcy over the courts and allow partisan politicians to determine the validity of federal laws. Not surprisingly, the three Alberta constitutional experts mentioned above regarded the implementation of such a disregard of centuries old norms as a profound violation of the Canadian constitution that entrenches the independence and powers of the federally appointed courts under section 96 of the Constitution Act 1867 (Olszynski et al. 2022).

The purported Sovereignty Act also takes a sledgehammer to the constitutionally entrenched division of legislative powers between the federal government and the Canadian provinces. While there are perfectly constitutionally legitimate disagreements on whether the federal government has properly exercised a particular exercise of jurisdictional powers, since the birth of the country, it is the courts who determine which level has strayed outside of their permitted jurisdiction.

On numerous occasions the Canadian Supreme Court has ruled both levels of government are autonomous within their respective jurisdictions, but neither can claim to be totally sovereign when there are disagreements on whether powers have been properly exercised. Indeed, the rather than asserting that each level is sovereign within their allotted

powers under the national constitution, the Supreme Court of Canada in their rulings have urged both levels to engage in co-operative federalism and co-ordination between the exercise of powers which are often overlapping and require acceptance of a double jurisdictional exercise of many of the enumerated powers[V].

The level of blatant disregard for the foundations of Canada's constitutional and democratic order by the purported Sovereignty Law led constitutional experts, start to compare the attitude of the newly elected Alberta Premier to the use of sovereignty principle by the secessionist government in Quebec in the 1990s that also sought to ignore the letter and spirit of the Canadian Constitution. The then Quebec secessionist government claimed that it had the right to unilaterally declare Quebec's independence and status as an international sovereign power on the passing of a referendum allowing it to do so, regardless of whether the national Canadian constitution permitted it[VI].

Ultimately the Supreme Court of Canada had to rule on the constitutional constraints on any unilateral declaration of independence in the internationally renowned ruling in 1999 after the reference to the Court to determine the issue by the federal government[VII]. The federal government felt compelled to seek the ruling from the top court as the secessionist government in Quebec claimed that it did not have to seek the guidance of the courts in Quebec on its claim of unilateral independence. It claimed that its self-declared right to sovereignty after a successful referendum did not require it to do so (Mendes 2019).

In what seemed like an echo of the 1990s attitude of the secessionist government in Quebec, Premier Smith and her Alberta government seemed to be arguing under their proposed Sovereignty Act, that it is only their executive and legislature that can decide when the federal government is illegitimately violating what is within the provincial area of asserted exclusive powers. According to the proposed law, such decisions can be made even without seeking the advice of the courts as to whether it was an exclusive or shared jurisdiction that does allow federal involvement.

What should have been a reminder and warning to the Alberta government seeking to ignore the fundamental norms of the Canadian constitution was the decision of the Supreme Court of Canada in its historic 1990 ruling against the claim of the right to the unilateral declaration of independence by the former secessionist government in Quebec. The Court included statements that are also relevant to the use of the sovereignty principle and law being proposed by the Alberta government:

> For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. (*Reference re Secession of Quebec,* 1998 CanLII 793 (SCC), [1998] 2 SCR 217, para. 91).

In short, like the claim of unilateral declaration of independence by the separatist government in Quebec, the proposed Alberta Sovereignty Act seemed to defiantly thumb its nose at all the constraints of the Canadian constitutional and democratic order in order to claim a form of sovereignty that is also at odds with the norms of the Canadian constitution. In particular, like the secessionist Quebec government, the Alberta government and legislature was proposing to deny the Canadian courts, its role as the only proper constitutional adjudicator of transgressions in terms of division of powers, federalism and the rule of law under the national Canadian constitution.

## 4. The Introduction of the Alberta Sovereignty Act in the Alberta Legislature

However, this author and the three Alberta constitutional experts, mentioned above, wondered whether the proposed Sovereignty Act was more a political bluffing game that was aimed primarily for the UCP Party gaining power in the Alberta legislature. There was a suspicion that that Premier Smith and the governing party would not actually go through with passing what was clearly an unconstitutional law or, if they did pass it, they would not act unconstitutionally when applying the law to actual areas of conflict between the Alberta government and the federal government regarding existing or future federal laws.

When the Sovereignty Act was actually introduced in the Alberta legislature, there was some attempt to address the most clearly unconstitutional aspects of the proposed

legislation. Yet, what remained in the law introduced in the legislature demonstrated a continuing desire to breach the underlying foundations of the Canadian Constitution and the rule of law.

The provincial government introduced on November 29, 2022, Bill 1 titled 'The Alberta Sovereignty Within a United Canada Act'[VIII]. In the preamble to the actual provisions of the law, the government lead by Premier Smith seemed to be imitating the perspectives of former separatist Quebec governments regarding the unique identity and sovereignty of the province. The Bill proclaimed in the preamble before the operative provisions, that Albertans had a 'unique culture and shared identity'[IX]. The Bill also argued that the province under the Canadian constitution was not 'subordinate to the Government of Canada'[X]. Some in the Indigenous peoples in the province would argue about whether there is one unique culture and shared identity in Alberta. Indeed there was severe criticism of the Alberta Premier for equating the oppressive treatment of indigenous peoples in the province and Canada by the federal government with how the federal government was treating the province of Alberta.[XI]

One indigenous tribe, the Onion Lake Cree Nation has started legal action[XII] against the Alberta government alleging that the law ignores it own form of sovereignty in terms of infringement of its own treaty rights and promised to start an action to declare it of no force and effect. The indigenous tribe alleged that the government also did not consult them or determine what the impact of the law would be for the indigenous groups in the province.

Given the past examples of detrimental environmental impact of natural resources in Alberta on the indigenous peoples in the province, especially during the production from the extensive tar sands, many in those indigenous communities may wish to have the federal government's jurisdiction over the deleterious environment impact on indigenous peoples in the province not be limited by the actions of the Alberta legislature[XIII].

It was clear that the main focus of the preamble and indeed the law was to warn the federal government about violating Alberta's 'sovereign provincial rights', and against any 'unjustified and unconstitutional infringements of Albertans under the Canadian Charter of Rights and Freedoms. The preamble also stressed that the Executive, not only the legislature as a whole, could take 'measures that the Lieutenant Governor in Council should consider taking in respect of actions of the Parliament of Canada and the Government of Canada that are unconstitutional or harmful to Albertans'[XIV].

The substance of the Bill defines extremely broadly what federal initiatives could come within the countermeasures that the legislature and government could use against them and goes beyond federal laws to include "program, policy, agreement or action, or a proposed or anticipated federal law, program, policy, agreement or action"[XV]. In another publication, two Alberta constitutional experts have correctly stated that this definition is essentially unbounded to could include any federally proposed but not yet legislated policy in the energy or environment areas (Olszynski and Bankes 2022). The 19th Century architects of Canada's federation would probably never have dreamed that in the future, a provincial government felt comfortable in threatening unconstitutional actions against federal laws and regulations that may or may not substantially affect provincial powers.

In a similar fashion, the actual provisions of the Sovereignty law labelled Bill 1 also defines what provincial entities the legislature and executive can issue directives to, regarding what they can or can't do to counter the federal initiatives. These directives could also be extremely broad, even extending to the education and health sectors or who receive grants or funds from the government. The law surprisingly stated that the government can even issue these constitutionally suspect directives to its own officials when acting as the Crown or Ministers which could be regarded as a promise to itself that they can and will behave unconstitutionally.

However, when it comes to precisely what this Sovereignty Act does to demand provincial entities to do or not do to act as countermeasures to the federal regulations, laws or even proposals, the façade of a fig leaf of acting tough and daring to act unconstitutionally become clear when one examines the Interpretation Section 2 of the Bill which sets out critical provisions on how the law can be interpreted and applied. It states:

> Nothing in this Act is to be construed as
> (a) authorizing any order that would be contrary to the Constitution of Canada,
> (b) authorizing any directive to a person, other than a provincial entity, that would compel the person to act contrary to or otherwise in violation of any federal law, or
> (c) abrogating or derogating from any existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the Constitution[XVI].

As the Alberta constitutional experts described above have concluded, these actual limitations on who and what the provisions of the Sovereignty law applies to, could make

the professed desire to disregard the foundations of the Canadian constitution more of a fig leaf than an actual threat to the Canadian constitutional order (Olszynski and Bankes 2022).

The wording in section 2 (a) acknowledges the supremacy of the Canadian Constitution. Even the more constitutionally suspect provision in Section 2(b) seems to limit any order regarding non-enforcement of federal laws that apply only to provincial entities. As the Alberta constitutional experts have observed, even without a provincial directive to contest a valid federal law, provincial entities could contest federal laws in the courts at any time, which happens frequently. Indeed, on the actual wording of the Bill, nothing in it actually gives, private or public entities the authority to ignore or nullify valid federal laws (Olszynski and Bankes 2022).

These interpretation provisions reveal the fig leaf behind the political posturing by the Alberta government that includes the Government executive threatening to disobey the Canadian constitutional order. Other provisions relating to the scope of the Act seem to set up the division of powers equivalent of the pre-emptive use of the massively controversial "override" clause, namely Section 33 of the Canadian Charter of Rights and Freedoms. This much critiqued clause if used in legislation allows legislatures to pass laws that would likely violate the Charter. The clause would prevent the courts from striking down or deem inoperative such laws if they are passed and they do violate key provisions of the Charter[XVII].

First under the Alberta Sovereignty law, a resolution of the legislature must first specify that in its own opinion, without any court ruling that 'a federal initiative' is either unconstitutional in that it intrudes into an area of provincial legislative jurisdiction or it violates the rights and freedoms of one or more Albertans under the Charter, or that it causes or may cause 'harm to Albertans' under Section 3(b) (i) and (iii) of the Act[XVIII].

In the case of the resolution that alleges harm to Albertans, the resolution would have to set out what the nature of the harm is. The Cabinet in Smith's government, in its role as Governor in Council, must identify what measures they should consider taking, regarding such federal initiatives. It will not be the courts, but only the elected members of the Alberta legislature passing the resolutions on what actions of the federal government are unconstitutional. Then under Section 4 of the Act, the cabinet can then take the actions needed, if it is satisfied that doing so 'to the extent that it is necessary or advisable' in order to carry out a measure that is identified in the resolution. The Cabinet may then direct a Minister responsible for an Act by order to do the following actions under Section 4[XIX]:

> suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that the Lieutenant Governor in Council may prescribe, or specify or set out provisions that apply in addition to, or instead of, any provision of an enactment, subject to the approval of the Lieutenant Governor in Council.

The Act under Section 4 also gives the Cabinet the power to 'direct a Minister to exercise a power, duty, or function of the Minister, including by making a regulation under an enactment for which the Minister is responsible'[XX].

Finally under the Act, a provision that could potentially give rise to the most likely constitutionally challenged actions under Section 4 (1) (b) and (c) of the Act, the cabinet may issues directives against complying with federal initiatives which could be within the legitimate federal jurisdiction directed at provincial entities and its members, officers and agents[XXI]. The section also again suggests the cabinet can also issues directives to the Crown and its Ministers and agents[XXII].

Since the establishment of constitutional democracy in Canada, it is the courts not provincial executives or resolutions of provincial legislatures that can decide which provincial laws can still operate, notwithstanding a conflicting law of the federal government passed under its division of powers in Section 91 the Constitution Act, 1867 and 1982. There is no "override" clause similar to section 33 of the Canadian Charter of Rights and Freedoms under Sections 92 and 92A of the Canadian Constitution Act 1867. There is no such clause outside the Charter which allows a provincial legislature or executive to unilaterally deem federal laws invalid or allows conflicting provincial regulations or laws to continue operating regardless of what would be a serious breach of the national rule of law.

It is suggested that the Sovereignty Act as it was originally politically announced, or the text of the Act when introduced in the legislature, was intended to be a political fig leaf designed for Premier Smith's party to gain and keep power. However, when looking at its actual provisions, especially the provisions in the interpretation Section 2, the Bill would not trigger actual constitutional battles between the province and the federal government. However, politically motivated unconstitutional laws can damage the unity of the federation. It does it by shattering accepted norms of the Canadian constitutional democracy and understanding of the rule of law by even suggesting it can be ignored. These include the

norms relating to the separation of powers, the rule of law and the accepted division of powers between the federal government and the provinces.

## 5. The first threatened use of the Alberta Sovereignty Act; another political fig leaf?

In November 2023, the Alberta government using the Sovereignty Act, introduced an Alberta legislature resolution[XXIII] to resist and counter the federal government's proposed *Clean Electricity Regulation* (CER)[XXIV] when it came into force. These regulations aimed at fulfilling Canada's climate change goals would likely be within the federal government's powers to reduce fossil fuel emissions to protect the national environment and fulfill Canadas climate change obligations[XXV].

In part the intention to defy the CER regulations was encouraged by a Supreme Court ruling[XXVI] against the federal Impact Assessment Act (IAA)[XXVII] which Alberta successfully argued that there was an overreaching of the use of federal jurisdiction over certain designated natural resources and energy projects within the province. In the wake of the Supreme Court's ruling the aim of this Alberta legislature's resolution was to prepare the ground for an attack on the CERs.

The resolution would order the Alberta Electric System Operator and the Alberta Utilities Commission to ignore the regulations when they come into force 'to the extent legally permissible'[XXVIII]. The resolution also proposed the setting up a provincial Crown corporation as a way to protect the provincial companies that provide electricity in the province[XXIX].

However, the political use of the sovereignty law became apparent when it was revealed that the federal proposed Clean Electricity Regulations was only in draft form, and that its aim would be to get Canada's electricity national grid to net zero emissions by 2035. Yet, Premier Danielle Smith claimed, without any concrete evidence, that the 2035 deadline would result in the province having blackouts and massively increased electricity costs for Albertans[XXX]. Her government also claimed, again without real evidence, that, even with that far off distant objective, presently, investors are reluctant to invest in new power generation

especially involving fossil fuels in light of the future because of the proposed regulations even though the federal electricity regulations had yet to be finalized[XXXI]. Predicting such dire consequences in the future, without much real evidence, the Alberta legislature was prepared to act in a blatantly unconstitutional manner in the present.

Part of this Alberta legislature's resolution's goal would be to establish a new Crown corporation that would encourage and commission the building of new private gas fired plants or buy existing ones which would not certainly be in accord with the federal regulations that aimed at reducing and ultimately eliminating generation of electricity by fossil fuels plants[XXXII]. The proposed new Crown corporation would be the promoter of private sector electricity and its own generator of electricity, if necessary, by establishing its own fossil fuel plants. Thes plants, if actually created, would most likely be in defiance of the federal regulations. However, Premier Smith and her government and legislature was still prepared to argue their actions were justified whether in defiance of the national constitution or not, claiming without much substantive evidence that these plants were critical to prevent shortage of electricity in Alberta about a decade into the future[XXXIII].

Premier Smith then admitted that the resolution was also intended to be part of the legal battle that the province was prepared to fight with the federal government over the final version of the CER regulations. Premier Smith suggested that if the federal government were to extend their net zero goal to 2050, instead of 2035, the actions proposed by the anti-federal government resolution by the Alberta legislature would not be needed. Indeed the Premier is reported to have asked 'Why don't we just work together on a 2050 target?'[XXXIV]

Given this almost admission of yet another political fig leaf by the Alberta Premier, the federal Minister of the Environment, Guilbeault reacted by asserting that this threat of potentially unconstitutional actions against what was still draft regulations of the CER was intended to be primarily politically 'symbolic'[XXXV].

Minister Guilbeault claimed that in the ongoing negotiations with the Alberta , the Sovereignty Act was not mentioned. In addition, the federal Energy and Natural Resources Minister, Jonathan Wilkinson had also 'signalled to the Alberta officials that the federal government has already signalled its flexibility on final details of the CER in order to deal with fear of electricity shortages and acknowledged Alberta's concerns about newer gas plants becoming stranded assets according to a report by City News Edmonton'[XXXVI].

In February of 2024, the federal government stated they were open to considering a series of 10 major changes to its draft clean electricity regulations (CER) that Minister Guilbeault claimed would give more flexibility in how the CER standards are met. An analysis by an Alberta media investigation and survey found that the Alberta public were largely in favour of the regulations, but the energy and power providers continued to be significantly opposed (Black 2024). Minister Steven Guilbeault claimed that this media investigation reflected the public and private sectors feedback in Alberta he's received, and that the CER is intended to help transition Canada to a net-zero electricity grid in 2035. However the Alberta government remained adamant that entire regulations be abandoned. It increasingly started to look that the main agenda for using this first use of a potentially unconstitutional sovereignty law was to leverage the federal government to push back the ultimate fossil fuels net-zero emissions goal to just 15 years.

The opposition leader in the Alberta legislature, Rachel Notley, said that her party would oppose the resolution, claiming it was an illegal stunt, undermined investment certainty in the province, challenged the respect for the rule of law and indeed could breach indigenous treaty rights in the province[XXXVII].

It has led this author to wonder if the use of the "sovereignty" position by the Premier of Alberta was designed to be more of a constant bargaining strategy with the federal government, rather than a first step towards exceptional and potentially unconstitutional autonomy demands in the way that past and present governments in Quebec had used and continue to use against the federal government, with the threat of secessionism in the background. However, the danger is that in Alberta and other western Canadian provinces while the threat of separation from Canada has not gained as prominent a place as in Quebec, there are individuals in Alberta who have more extreme views on the need to make province far more autonomous from the federal government. Some groups with this attitude include one party that does have a secessionist platform could use the sovereignty law and political tactics of Premier Smith and her government to make national unity in Canada more fragile[XXXVIII].

## 6. The Alberta façade of using the sovereignty principle for political advantage and leverage catches on next door in Saskatchewan.

In November 2022, the Government of Saskatchewan introduced Bill 88 into the provincial legislative assembly, titled 'The Saskatchewan First Act'[XXXIX]. This legislation was first introduced in the Saskatchewan legislature before the Alberta government had introduced the text of that province's Alberta Sovereignty Act.

Like the Alberta law, the Preamble to Bill 88 attempted to describe the constitutional identity of the province as a precursor of going beyond what the Canadian constitution would permit. It emphasized in section 3 that the province had autonomy and exclusive jurisdiction to natural resources and other areas of exclusive jurisdiction in 'several aspects of Saskatchewan's economy' in the key provisions of the Canadian Constitution Acts, 1867 and 1982[XL]. This assertion was made regardless of whether in fact and law such blanket assertions were correct.

The Preamble then accused the federal government of intrusions into the province's areas of exclusive legislative jurisdiction 'causing economic harm and uncertainty to Saskatchewan residents and enterprises'[XLI].

Bill 88 then proceeds to create in section 7, a tribunal to assess these harms to the province and to amend the provincial constitution that would affirm the provinces exclusive legislative jurisdiction to make the province an equal partner in the Canadian federation.

In furtherance of this goals Part 1 of Bill 88 has two key sections. The first, focusing on the purpose of the Act, declares some general principles regarding provincial autonomy in areas of exclusive jurisdiction. These include the promise that the provincial government through the proposed law would provide certainty regards the process and principles to ensure the inapplicability of federal initiatives that would 'bring uncertainty, disruption and economic harm'[XLII] to the province. These seem familiar echoes from the Alberta Sovereignty Act that potentially permits unconstitutional behaviour whenever it is the legislature or the executive that decides what federal initiatives are too harmful to those in the province.

It is in the second section of Bill 88, that the Saskatchewan law focuses on how the province will use the constitutional principle called interjurisdictional immunity established

by the Supreme Court of Canada to defend the asserted areas of provincial jurisdiction. Under this principle, in certain (and in recent times increasingly very limited circumstances), a valid federal law can be made inapplicable in the province, to the extent that it impairs the core content of a province's legislative authority and vice versa a valid provincial law can be made inapplicable if it impairs the core content of any law passed under the federal legislative authority.

The second section of Bill 88 then continues the constitutional assertions that the province has exclusive jurisdiction on all matters listed in the provincial areas of power in the Constitution Acts, 1867 and 1982, ignoring the reality that some of the enumerated areas include shared jurisdiction with the federal government. This section of the Bill then makes it clear that the focus of the principle of interjurisdictional immunity 'applies to exclusive provincial legislative jurisdiction to the same extent that it applies to exclusive federal legislative jurisdiction.' To cement this self-described exclusive autonomy of the province from the federal government, the section then declares key areas that fall within the core content of the province's exclusive jurisdiction to which the principle of provincial interjurisdictional immunity will apply. It basically lists all the key areas that are most likely to limit the powers of the federal government. According to the Bill, the list of areas within the exclusive jurisdiction of the province, agriculture, natural resources, energy, including electrical energy, and the area most likely to draw conflict from the federal government, the regulation of environmental standards including the regulation of greenhouse gas and other emissions. The areas listed as the exclusive jurisdiction of the province, according to well established Supreme Court of Canada jurisprudence are subject to some form of shared jurisdiction with the federal government depending on what are the actual or potential impacts of provincial actions on other provinces or impact on areas within federal powers[XLIII].

This second section of Bill 88 concludes by asserting the right of the Saskatchewan government to deem by regulation, the core content of any other prescribed matter in these areas which can therefore be protected by the provincial form of interjurisdictional immunity and thereby take paramountcy to other federal laws and regulations. This dubious use of the principle of interjurisdictional autonomy would dramatically extent the areas of asserted autonomy free of any interference by the federal government.

The second section of Bill 88 also proposes two amendments to the provincial constitution, namely The Saskatchewan Act, 4-5 Ed VII, c 42, 1905, which is ironically a federal statute that established the province and government of Saskatchewan under the imperial UK Constitution Act, 1871. This part of the Bill seeks to further its provincial sovereignty claims by proposing additions to the provincial constitution affirming exclusive jurisdiction over all matters that fall to the provinces under the Constitution Act, 1867. Again most controversially these claimed areas of exclusive jurisdiction that would be added to the provincial constitution would include areas that involve shared jurisdiction claims by the federal government. The Bill asserts that these amendments would also constitute an amendment to the entire Canadian Constitution established in 1867. This author would strongly assert that no province, whether it is Quebec, Alberta or Saskatchewan, has the ability to unilaterally amend the Canadian constitution just by amending their own provincial constitution. This more novel form of unconstitutional claims to sovereignty is further discussed below.

The third part of Bill 88 also proposed 'The Economic Impact Assessment Tribunal'. Under this section of Bill 88, it would give the provincial executive the ability order economic impact assessments of federal initiatives that could cause economic harm to the province. These include 'a federal law or policy that may have an economic impact on a project, operation, activity, industry, business or resident in Saskatchewan'. The Tribunal can issue reports including the extent of the economic impacts and any unintended consequences of federal initiatives and suggest steps to minimize any negative economic impacts. Part 3 of the Bill also proposes a Crown immunity protection for any actions or proceedings arising out of the Act[XLIV].

As regards which part of Bill 88 would face most constitutional challenge, the first section of Bill 88 seem to be more of a general warning that the government will focus on demanding as much autonomy as is possible under the present division of powers under the Canadian constitution even if it means ignoring the established jurisprudence on shared areas of jurisdiction especially in areas that go to the province's social, economic and political identity.

It is the second section of Bill 88, in two key areas outlined that does potentially trigger future constitutional challenges by the federal government. First, Bill 88 seems to give the provincial legislature, not the courts, the exclusive power to assert what in Canadian constitutional law framework is titled 'interjurisdictional immunity' which aims at protecting

core areas of provincial areas of jurisdiction. While it is the Supreme Court of Canada that has given provinces the right to assert this principle against federal laws and initiatives, the Court has warned against extending it to novel areas[XLV]. A fundamental norm of how jurisdictional battles are resolved in Canada is that it is the courts, not the federal or provincial governments, to decide on their own what is a protected core area of provincial power that comes under the 'interjurisdictional immunity' principle.

Most controversially, as with the Alberta Sovereignty law, this part of Bill 88 emphasises that in the areas that is claimed to be within the exclusive jurisdiction of the province, such as the environment and regulation of emissions, the interjurisdictional immunity principle can be triggered by the government, rather than by the federal courts. Dealing with Alberta's and other provincial claims to have exclusive jurisdiction over emissions that impact on the environment beyond provincial boundaries, the Supreme Court in several rulings has made it clear that these are areas of shared jurisdiction that makes it unlikely that the principle of jurisdictional immunity will prevail[XLVI].

It could be legitimately questioned whether the purpose of this part of Bill 88 was an attempt to force the Supreme Court to depart from its previous rulings in these key areas that require co-operative federalism in such areas of shared jurisdiction. If that was a key goal, it seems to have failed from the most recent 2023 ruling of the Court in the landmark *Reference Re Impact Assessment Act*[XLVII]. In this case Alberta attempted to extend the concept of interjurisdictional immunity to federal impact assessments on major projects carried on or financed by federal authorities on federal lands that is likely to have adverse environmental impact. In a majority ruling the court dismissed this attempted expansion of the principle in the following key paragraph[XLVIII]:

> In addition, more recently this Court has held that the doctrine of interjurisdictional immunity must be applied with restraint and is generally reserved for situations already covered by precedent (Canadian Western Bank, at paras. 77-78; COPA, at para. 36; Rogers Communications, at para. 63; References re GGPPA, at para. 124). As was found in the Reference re Genetic Non-Discrimination Act, "[i]n keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed 'watertight compartments' approach has long since been overtaken and the doctrine of interjurisdictional immunity has been limited" (para. 22).

The other potential constitutionally suspect provision of Bill 88 is the assertion that any amendment to the Constitution of the Province can also be an amendment to the national Constitution Act, 1867. If the intent is to add new sections to the provincial constitution, which is derived from an imperial federal statute, then it also requires an amendment to the national constitution. That would require more than provincial actions under Section 43 of Constitution Act 1982 Act. Under this provision of the Canadian constitution, changes that applies to one or more but not all provinces, to be made by proclamation on the authorization of resolutions passed by the Senate, the House of Commons, and the relevant legislature. Given the constitutional problems that are likely to arise from possible assertions of provincial interjurisdiction immunity in areas of shared jurisdiction just by the Saskatchewan legislature, those resolutions seeking to amend the provincial jurisdiction are unlikely to be approved by the Canadian parliament.

It is on the Saskatchewan government attempt to usurp the separation of powers that we can see the similarity with the Alberta Sovereignty Act. At its core, both so called sovereignty laws are an attempt to undermine the fundamental norms of Canadian constitutional democracy including those relating to how disputes over shared jurisdictions are to be resolved.

On March 16, 2023, the Saskatchewan governing party voted to pass the Saskatchewan First Act despite the strong opposition of First Nations and Métis indigenous groups in the province. These indigenous communities claimed that despite the assertion of a provincial identity in the Act, their own culture, traditions and identity were being ignored and potentially violated.

In media reports[XLIX] during the opposition to the Act in the provincial legislature, the Federation of Sovereign Indigenous Nations (FSIN), that represents Saskatchewan's First Nations alleged that the Act infringed on their treaty rights and that the province did not have the legal authority to assert exclusive jurisdiction over natural resources. The FSIN asserted that treaties signed by Saskatchewan First Nations took precedence and pre-dated the creation of the provincial government. The organization asserted they would take legal action, just as the Onion Lake Cree Nation in Alberta promised to do against that province's Sovereignty Act. The Saskatchewan indigenous peoples will most likely also argue Bill 88 would infringe on their inherent and treaty rights to land, water and resources.

The opposition in the provincial legislature has also voiced strong disagreement with the Act[L]. Just as with the Alberta Sovereignty Act, the Saskatchewan attempt to use the provincial sovereignty principle may be doomed to failure for not only undermining foundational norms of Canadian constitutional order and democracy, but also ignoring the disagreement on who and what constitutes the core of provincial forms of sovereignty within a federal state.

It is suggested that like the Alberta Sovereignty Act, the Saskatchewan First Act has been developed not only against the possible unconstitutional incursions by the federal government in areas listed as provincial jurisdiction but also as a form of bargaining leverage over areas these western provinces know they have shared jurisdiction with the federal government. Implied in this attempt to further limit the legitimate role of the federal government in these shared jurisdiction areas, is the threat of western Canadian alienation if they don't get much more autonomy in these areas. However, if this is the real political agenda of these constitutionally dubious provincial laws, it also provides potential "raw meat" for those that politically thrive on western Canadian citizens alienation. These individuals could then agitate for more extreme actions that undermine unity in Canada, including proposing or threatening secession. This danger could be exacerbated if these constitutionally dubious laws are eventually struck down by the Canadian Supreme Court for undermining the foundations of Canadian democracy and legal order.

## 7. Conclusion: future harmful actions in Canada and beyond that can flow from such dubious sovereignty laws passed by subnational components of federal states

The analysis of both the Alberta Sovereignty Law and the Saskatchewan First Law above has attempted to prove that these laws seem to be developed to threaten the traditional constitutional order of Canada primarily for gaining or retaining power by provincial politicians by using the sovereignty concept or unique provincial identity similar to how present and former secessionist Quebec governments had done so. However when the actual provisions of the Alberta and Saskatchewan laws are examined, the threat to the Canadian

constitutional order may not seem as severe as first thought. Many of the most contentious provisions in the Alberta Sovereignty Law don't actually force provincial actors to disobey the national constitution. Likewise, some of the Saskatchewan First Law provisions, such as its use of the interprovincial immunity concept will unlikely to be accepted by the courts given the past rulings of the Canadian Supreme Court.

However, the deleterious consequences of these subnational attempts to imitate the sovereignty concept used by a former secessionist Quebec government in the past, could include the following. First, it may encourage politically more extreme actors in these provinces to promote secessionist agendas as is evidence in Alberta. It may encourage other provincial governments to follow suit with similar sovereignty based laws to create more bargaining and leverage with the federal government. These laws politically encourage disregard of the fundamentals of the Canadian democratic order, the norms of the accepted rule of law and long accepted division of powers jurisprudence, all of which undermine the strength of these concepts that are the foundations of the Canadian national state.

They can also undermine the rights of most disadvantaged populations who may rely on the powers of the federal government as we are witnessing with the claims of the indigenous populations in the two western Canadian provinces.

Finally, as we shall see with one American state, the Alberta Sovereignty Law could encourage similar subnational governments in federal states to follow suit in other countries and result in the rights of the most disadvantaged who rely on federal powers and jurisdiction also being at risk.

Astonishingly to some, these dubious Canadian sovereignty laws are now a catalyst for constitutionally suspect actions that at least one of the states in the US are now using against the US federal government.

On January 19, 2019, the Utah State legislature was asked to pass a law called the 'Utah Constitutional Sovereignty Act'. A Canadian media report (Vanderklippe 2024) gave the following statement from one of the legislators who led on proposing the law:

> "I'll give the credit where the genesis came from: Alberta," said Scott Sandall, the Republican state senator who drafted the bill. "We share some of the common concerns about federal overreach and in that way I think we partner, even across the border," he said.

Some Utah academics consider the law, if passed, will be largely symbolic and unconstitutional, like the Alberta Sovereignty Act. It seems from these experts that the focus of this Alberta inspired law is on countering federal environmental measures. It also aims at allowing Utah to ignore some of the federal directives and regulations on ozone and other environmental measures that are deemed federal overreach or harmful to Utah and state residents. Utah Gov. Spencer Cox signed into law the Utah Act on Jan. 31, 2024. As with the Alberta and Saskatchewan laws, this US version was voted largely along party lines in the Utah legislature[LI].

As was discussed with the western Canadian sovereignty laws, while the main goals of the proponents of these laws may be to gain or maintain political standing and leverage, they also have dangerous intended and unintended consequences.

In particular, we may be seeing in the US, these constitutionally suspect sovereignty laws or claims by subnational governments in federal states could be used attack the most vulnerable in society. This is most vividly seen in the US with the ongoing legal and political fights between the US federal government and Texas authorities who have sought to override federal jurisdiction in immigration and related areas claiming the State was exercising its sovereignty rights.

The US Supreme Court ruled on January 22, 2024, that the US federal authorities could cut the razor wire deployed by Texas at the border with Mexico in defiance of the Biden or Administration's opposition to this attempt by Texas that claimed such border security and immigration enforcement action was within its sovereignty rights[LII].

The action by Texas authorities was despite a 2012 ruling of the US Supreme Court in Arizona v. US[LIII] that border and immigration enforcement was within the powers of the federal government and that it pre-empted the state's immigration and refugee processing laws.

In a majority 5 to 4 ruling, the Court stated that Texas had to allow federal authorities to conduct operations in the border area in order to take in migrants for processing[LIV].The Court confirmed the federal actions even if they were acting against Texas state laws and actions that attempted to stop the US border patrol access to a part of the border under Texas state control. Such prior state actions by Texas authorities preventing prior federal action had resulted in some of the migrants, including children being downed while the Texas

authorities had installed floating razor-sharp barriers and had also arrested and jailed thousands of migrants under Texas state joint public safety and military actions.

It is suggested that before both the Alberta Sovereignty Act and the Saskatchewan First Act are ruled unconstitutional, there could be similar vulnerable victims of the ultimately illegal actions of the two western Canadian provincial governments. It is also clear that both sovereignty laws of the two western Canadian provinces will be facing challenges in the Canadian courts on whether they infringe on another form of internal sovereignty, namely those of the indigenous peoples in those provinces. These challenges have been aggravated by the failure to consult with these same communities. Increasingly, the traditional perspectives on division of powers within the Canadian constitution is being challenged by the indigenous peoples who argue that their claims to sovereignty based on treaty and inherent aboriginal self governance must not be regarded as an inferior form of claims to autonomy.

In addition, these constitutionally dubious provincial sovereignty laws could encourage other Canadian provinces, including Quebec, to follow suit with similar refusals to accept the fundamental constitutional norms on the independence of the judiciary and the rule of law. These sovereignty laws could even raise the secessionist threats beyond Quebec to include the western Canadian provinces, thus endangering further the foundations of constitutional democracy and the rule of law in Canada.

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[I] See the scope of the initiatives in the strategy on the government site at https://www.freealbertastrategy.com/the_strategy

[II] See the discussion of the use by Quebec of the concept of sovereignty to claim a unilateral right to secede from Canada that was rejected by the Canadian Supreme Court in Mendes (2019).

[III] See, for example the views in this regard of how Alberta is learning from Quebec nationalism by leading Quebec academics (Béland e Lecours 2023). The authors argue that Quebec has become an exemplary model for Alberta as it seeks greater autonomy from the federal government and also seek to establish it as important to the federation as Quebec. The authors argue that not only political statements by Alberta politicians seem to mimic Quebec in demands for greater autonomy. In addition the use of referendums, for example on equalization, to pressure favourable action from the federal government and ultimately even a potential federal party elected to the federal parliament that could also be examples of a provincial strategy that follows similar Quebec actions. See also Rocher (2023) and Dumont (2005).

[IV] The leading Supreme Court of Canada rulings on this fundamental principle of the rule of law in Canadian federation include *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 (CanLII); *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 and *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC).

[V] The Supreme Court of Canada in *Reference re Securities Act*, 2011 SCC 66 (CanLII) stated that there can be no subordination of one level of government over another in the following words: 'It is a fundamental principle

of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another' (at para 7).

[VI] See Mendes (2019) for a detailed discussion on the political events in Quebec leading to the decision of the federal government to seek a reference to the Supreme Court of Canada on Quebec's claim to unilateral declaration of independence and secede from Canada.

[VII] *Reference re Secession of Quebec,* 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

[VIII] See the full text of the legislation, Bill 1, Fourth Session, 30th Legislature, 1 Charles III , Alberta Sovereignty within a United Canada Act, online at https://www.assembly.ab.ca/assembly-business/bills/bill?billinfoid=11984&from=bills

[IX] Ibid.

[X] Ibid

[XI] See the discussion in Heath Justice (2022).

[XII] See the report of the action by Amato (2022).

[XIII] See for example the controversy of the impact of the tar sands production on the health, safety and livelihoods of indigenous peoples living near the tar sands in Huseman and Short (2012).

[XIV] Supra, note VIII.

[XV] Ibid.

[XVI] Supra, note VIII. The fact that this interpretation section comes at the start of the Bill and not given much focus in the public discussion in Alberta, could well have been an intention to act tough politically, but not in constitutional reality.

[XVII] See the overview of this severely criticized override clause by the Library of the Canadian Parliament at the following website: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201817E

[XVIII] See the precise wording of these and related provisions in Bill 1, supra, note VIII.

[XIX] Ibid.

[XX] Ibid.

[XXI] Ibid.

[XXII] Ibid.

[XXIII] See the text of the resolution in the Alberta legislature, online at https://docs.assembly.ab.ca/LADDAR_files/docs/houserecords/gm/legislature_31/session_1/20230530_1200_01_gm.pdf

[XXIV] For a detailed description of the scope of these CAR regulations see the government site online at https://www.gazette.gc.ca/rp-pr/p1/2023/2023-08-19/html/reg1-eng.htmln

[XXV] See Ibid, the government's analysis of the need of the CAR regulations to meet Canada's proposed climate change obligations.

[XXVI] In the *Reference re Impact Assessment Act, 2023 SCC 23*, the Court did give a warning to the federal government that even when it is asserting federal jurisdiction over major projects within the province, it could not overreach into designated projects within areas of provincial jurisdiction, see the analysis of the ruling by Castrilli and Lindgren (2023).

[XXVII] Impact Assessment Act, S.C. 2019, c. 28, s. 1 online at https://laws.justice.gc.ca/eng/acts/i-2.75/index.html

[XXVIII] See *supra*, note XXIII.

[XXIX] Ibid.

[XXX] See the report of these claims by the Smith government in this CBC report: (Bellefontaine 2023).

[XXXI] Ibid.

[XXXII] Ibid.

[XXXIII] Ibid.

[XXXIV] Ibid.

[XXXV] See how one energy sector blog, *The Energy Mix* is asserting that both the Minister and other legal experts asserted that the use of the Sovereignty Act was increasingly being used as "political theatre", online at https://www.theenergymix.com/albertas-sovereignty-act-a-bunch-of-political-theatre-legal-experts-say/ Nov. 30, 2023.

[XXXVI] Ibid.

[XXXVII] As reported in the CBC report, supra note XXX.

[XXXVIII] See discussion of possible secessionist movements in Alberta (Wesley and Young 2022).

[XXXIX] Bill 88 – The Saskatchewan First Act of 2022. An Act to Assert Saskatchewan's Exclusive Legislative Jurisdiction and to Confirm the Autonomy of Saskatchewan.

To download the full text of the Bill see the online site of the provincial legislature at

https://publications.saskatchewan.ca/#/products/119675
[XL] See Ibid at the several subsections of section 3 of Bill 88.
[XLI] Ibid.
[XLII] Ibid.
[XLIII] See an overview of the distribution of exclusive and shared legislative powers by the federal and provincial governments in Canada by the Canadian Library of Parliament at https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201935E
[XLIV] Supra, note XXXIX.
[XLV] See for example the views of constitutional expert:
[XLVI] See the ruling of the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 S.C.R. 175. See also Wilkins (2019). Wilkins warns in same article, that it could be the federal government that could claim interjurisdictional immunity (IJU) for areas of shared jurisdiction with the province: 'The Constitution, therefore, I submit, protects matters of sufficient national importance even from conscientious, well-meant provincial attempts to address them. IJI, I have argued, protects these same matters from inadvertent, unplanned effects of valid provincial legislation when the province could not seek overtly to achieve those effects. Its function is to preserve the exclusivity of federal legislative authority over matters whose significance to the country as a whole is sufficient to require exclusivity.' (Wilkins 2019), p. 758.
[XLVII] *Reference re Impact Assessment Act* 2023 SCC 23.
[XLVIII] Ibid. at paragraph 359.
[XLIX] See the report by Hunter (2023).
[L] Ibid.
[LI] See the ABC News report on the final passing into law of the law at https://www.abc4.com/news/politics/cox-signs-utah-sovereignty-act-to-fight-back-on-federal-overreach/
[LII] See Erum Salam (and agencies) 'US supreme court allows border patrol to cut razor wire installed by Texas' The Guardian, January 22, 2024, online at https://www.theguardian.com/us-news/2024/jan/22/supreme-court-remove-texas-razor-wire-mexico-border-biden
[LIII] *Arizona v. US* (Supreme Court) 2012, 641 F. 3d 339
[LIV] *Dep't. of Homeland Sec. v. Texas*, No. 23A607, 2024 U.S. LEXIS 577, at *1 (U.S. Jan. 22, 2024).

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