Federal Court of Appeal | Cour d'appel fédérale

Date: 20210426

Docket: A-386-19

Citation: 2021 FCA 84

CORAM: **NADON J.A.**
RIVOALEN J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF ALBERTA

Appellant

and

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent

Heard by online video conference hosted by the registry

on October 15, 2020.

Judgment delivered at Ottawa, Ontario, on April 26, 2021.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: RIVOALEN J.A.
CONCURRING REASONS BY: NADON J.A.

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REASONS FOR JUDGMENT

NADON J.A. (Concurring Reasons)

[1] I have read the reasons which my colleague LeBlanc J.A. gives in support of his conclusion that the appeal should be allowed with costs in favour of the appellant, the Attorney General of Alberta (Alberta). Although I agree entirely with his proposed disposal of the appeal, I come to that conclusion for different reasons.

I. Introduction

[2] On May 18, 2018, the Lieutenant Governor of Alberta gave royal assent to the *Preserving Canada's Economic Prosperity Act*, S.A. 2018, c. P-21.5 (the Act) which was proclaimed into force on April 30, 2019. The Act authorises the Minister of Energy (the Minister) to establish a licensing regime for the export of natural gas, crude oil, and refined fuels. The Act leaves the parameters of the licensing regime to the Minister's discretion, having regard to the province's public interest. Before enacting a licensing regime, the Minister must have regard to whether an adequate pipeline capacity exists to maximise the return on crude oil and diluted bitumen produced in Alberta and whether adequate supplies and reserves of natural gas, crude oil, and refined fuels will be available for Alberta's present and future needs. The Minister may also have regard to any other matter that she considers relevant. The Act also authorises the Lieutenant Governor in Council to make regulations, including regulations necessary to enable the Minister to perform her duties under the Act.

[3] In the legislative debates leading to the passage of the Act, members of the Alberta legislature made statements suggesting that the Act's true purpose was political retaliation. That is, the Act would allow Alberta to restrict the flow of natural resources to British Columbia as a response to the latter's opposition to the Trans Mountain pipeline expansion. At all times material to these proceedings, the Minister had not yet established a licensing regime nor had the Lieutenant Governor in Council made any regulations under the Act.

[4] On May 1, 2019, the Attorney General of British Columbia (BC) commenced an action before the Alberta Court of Queen's Bench (the Alberta Court) seeking a declaration of invalidity in respect of the Act. Alberta responded to BC's action by filing a motion to dismiss it on the grounds that the Alberta Court had no jurisdiction to entertain the proceedings and that BC lacked standing to bring its action.

[5] Pending the resolution of the above issue, BC commenced an action, pursuant to section 19 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *FCA*) in the Federal Court on June 14, 2019, in which it sought a declaration that the Act was unconstitutional. More particularly, at paragraph 4 of its Statement of Claim, BC sets out the grounds upon which it relies for its assertion of unconstitutionality:

> 4. The Plaintiff says the Act is unconstitutional for the following reasons:
>
> a. The *Act* is a law in relation to interprovincial and international exports, and would therefore [be] beyond provincial competence under s. 91(2) of the *Constitution Act, 1867*, unless it can be saved by section 92A.
>
> b. Section 92A(2) of the *Constitution Act, 1867* authorizes provincial legislatures to make laws that would otherwise be outside provincial competence as a result of s. 91(2), but only if
>
> i. those laws are in relation to exports to another part of Canada of the "primary production" of non-renewable natural resources; and
>
> ii. such laws do not "authorize or provide for discrimination in prices or in supplies exported to another part of Canada."
>
> c. The *Act* purports to be in relation to the export of "refined fuels," including gasoline, diesel, aviation fuel, and locomotive fuel, which are not the primary production of petroleum resources, as defined in s. 92A and the Sixth Schedule to the *Constitution Act, 1867*.
>
> d. The *Act* authorizes discrimination in supplies of natural gas and crude oil exported to British Columbia.

> e. Section 121 of the *Constitution Act, 1867* guarantees that the articles of growth, produce, and manufacture of each province "shall...be admitted free into the other provinces." The *Act*'s essence and purpose is to increase the cost of trade in natural gas, crude oil, and refined fuels across the Albert[a]-British Columbia border for a tariff-like purpose, namely to punish British Columbia. The *Act* is therefore contrary to s. 121 of the *Constitution Act, 1867*.

[6] BC further says that its action constitutes a controversy between it and Alberta and that both provinces have enacted legislation signifying their assent to the Federal Court having jurisdiction in regard to controversies between their province and another province.

[7] Also of importance is BC's statement, found at paragraph 1 of its Statement of Claim, that it has commenced its action acting as *parens patriae* "on behalf of the public interest of the residents of British-Columbia".

[8] On July 19, 2019, Hall J. of the Alberta Court stayed BC's action until such time as the Federal Court made a determination as to whether it had jurisdiction in respect of the action commenced in that Court by BC on June 14, 2019.

[9] Two motions were heard by the Federal Court on September 12 and 13, 2019. First, Alberta brought a motion under Rule 221 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) asking the Court to strike BC's action because it disclosed no reasonable cause of action. More particularly, Alberta argued that the Federal Court had no jurisdiction to hear BC's action under section 19 of the *FCA*, and that the action was premature. Second, BC brought a motion for an interlocutory injunction seeking an order prohibiting the Minister from exercising her powers under the Act until such time as the matter raised in the proceedings had been finally disposed of.

[10] On September 24, 2019, Grammond J. (the Judge) dismissed Alberta's motion to strike and granted BC's motion for an interlocutory injunction (2019 FC 1195).

[11] On October 4, 2019, Alberta filed an appeal of the Judge's decision asking this Court to set aside the Judge's decision and to dismiss BC's action. Alberta also seeks its costs.

[12] For the reasons that follow, I would allow Alberta's appeal.

II. Legislation

[13] The relevant legislation at the heart of this appeal is reproduced immediately as follows:

***Federal Courts Act*, R.S.C. 1985, c. F-7**	***Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7**
Intergovernmental disputes	**Différends entre gouvernements**
19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies. [My emphasis.]	**19** Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable. [Je souligne.]

***Judicature Act*, R.S.A. 2000, c. J-2 (Alberta)**

Action by Attorney General or Minister of Justice and Solicitor General

25(1) The Court has jurisdiction to entertain an action at the instance of either

(*a*) the Attorney General of Canada, or

(*b*) the Minister of Justice and Solicitor General of Alberta,

for a declaration as to the validity of an enactment of the Legislature though no further relief is prayed or sought. [My emphasis.]

(2) An action under this section for a declaration as to the validity of an enactment is deemed sufficiently constituted if the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta are parties to it.

(3) A judgment in an action under this section may be appealed against as other judgments of the Court.

…

Jurisdiction of federal courts

27 The Supreme Court of Canada and the Federal Court of Canada, or the Supreme Court of Canada alone, according to the *Supreme Court Act* (Canada) and the *Federal Court Act* (Canada) have jurisdiction

(*a*) in controversies between Canada and Alberta;

(*b*) in controversies between Alberta and any other province or territory of Canada in which an Act similar to this Act is in force;

(*c*) in proceedings in which the parties by their pleadings have raised the question of the validity of an Act of the Parliament of Canada or of an Act of the Legislature of Alberta, when in the opinion of a judge of the court in which they are pending the question is material, and in that case the judge shall, at the request of the parties, and may without request if the judge thinks fit, order the case to be removed to the Supreme Court of Canada in order that the question may be decided.

***Supreme and Exchequer Courts Act*, S.C. 1875, c. 11**	***Acte de la Cour Suprême et de l'Échiquier*, S.C. 1875, ch. 11**
54. When the Legislature of any Province forming part of Canada shall have passed an Act agreeing and providing that the Supreme Court, and the Exchequer Court, or the Supreme Court alone, as the case may be, shall have jurisdiction in any of the following cases, viz.: - (1st) Of	**54.** Lorsque la législature d'une province formant partie du Canada aura passé un acte convenant et décrétant que la Cour Suprême et la Cour de l'Echiquier, ou la Cour Suprême seulement, selon le cas, auront juridiction dans aucun des cas suivants, savoir : (1.) Les

controversies between the Dominion of Canada and such Province; (2nd) Of controversies between such Province and any other Province or Provinces, which may have passed a like Act; (3rd) Of suits, actions, or proceedings in which the parties thereto by their pleadings shall have raised the question of the validity of an Act of the Parliament of Canada, when in the opinion of a Judge of the Court in which the same are pending such question is material; (4th) Of suits, actions, or proceedings in which the parties thereto by their pleadings shall have raised the question of the validity of an Act of the Legislature of such Province, when in the opinion of a Judge of the Court in which the same are pending such question is material; then this section and the three following sections of this Act shall be in force in the class or classes of cases in respect of which such Act so agreeing and providing, may have been passed. [My emphasis.]

contestations entre la Puissance du Canada et cette Province; (2.) Les contestations entre cette province et quelque autre province ou quelques autres provinces qui auront passé un acte semblable; (3.) Les poursuites, actions ou procédures dans lesquelles les parties auront, par leur plaidoyer, soulevé la question de la validité d'un acte du parlement du Canada, lorsque dans l'opinion d'un juge de la cour devant laquelle elle est pendante, cette question est essentielle; (4.) Les poursuites, actions ou procédures dans lesquelles les parties auront, par leur plaidoyer, soulevé la question de la validité d'un acte de la législature de cette province, lorsque, dans l'opinion d'un juge de la cour devant laquelle elle est pendante, cette question est essentielle; alors la présente section et les trois sections immédiatement suivantes du présent acte seront en vigueur dans la catégorie ou les catégories de cas à l'égard desquels tel acte convenant et décrétant comme susdit, pourra avoir été passé. [Je souligne].

55. The procedure in the cases firstly and secondly mentioned in the next preceding section shall be in the Exchequer Court, and an appeal shall lie in any such case to the Supreme Court. [My emphasis.]

55. La procédure dans les cas en premier et en second lieux mentionnés dans la section immédiatement précédente, aura lieu dans la Cour de l'Echiquier, et appel pourra être interjeté, dans tous les cas, à la Cour Suprême. [Je souligne.]

56. In the cases thirdly and fourthly mentioned in the next preceding section but one, the Judge who has decided that such question is material, shall order the case to be removed to the Supreme Court in order to the decision of such question, and it shall be removed accordingly, and after the decision of the Supreme Court, the said case

56. Dans les cas en troisième et en quatrième lieux mentionnés dans l'avant-dernière section immédiatement précédente, le juge qui aura décidé que cette question est essentielle ordonnera que la cause soit portée devant la Cour Suprême afin que cette question soit décidée, et elle y sera portée en conséquence; et après la décision de la Cour Suprême,

shall be sent back, with a copy of the judgment on the question raised, to the Court or Judge whence it came, to be then and there dealt with as to justice may appertain.

57. The next two preceding sections apply only to cases of a civil nature and shall take effect in the cases therein provided for respectively, whatever may be the value of the matter in dispute, and there shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor on any other point unless the value of the matter in dispute exceeds five hundred dollars.

la cause sera renvoyée, avec copie du jugement sur la question soulevée, à la cour ou au juge dont elle provient, pour y être alors décidée suivant la justice.

57. Les deux sections immédiatement précédentes ne s'appliqueront qu'aux causes d'une nature civile et s'appliqueront dans les cas qui y sont prescrits respectivement, quelle que soit la valeur de la matière en litige, et il n'y aura pas d'autre appel à la Cour Suprême sur aucun point qu'elle aura décidé dans aucun cas, ni sur aucun autre point, à moins que la valeur de la matière en litige ne dépasse cinq cent piastres.

***An Act respecting the Exchequer Court of Canada,* R.S. 1906, c. 140**

32. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in case of controversies, - [My emphasis.]

(a) between the Dominion of Canada and such province;

(b) between such province and any other province or provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies.

2. An appeal shall lie in such cases from the Exchequer Court to the Supreme Court.

***Loi concernant la Cour de l'Échiquier du Canada,* S.R. 1906, ch. 140**

32. Quand la législature d'une province a adopté une loi qui convient que la Cour de l'Echiquier doit avoir juridiction en cas de différend, - [Je souligne.]

(a) entre le Dominion du Canada et cette province;

(b) entre cette province et toute autre province ou toutes provinces qui ont adopté un loi semblable

la Cour de l'Echiquier a juridiction pour juger ces différends.

2. Dans tous les cas, il y a appel de la Cour de l'Echiquier à la Cour Suprême.

***Supreme Court Act*, R.S.C. 1985, c. S-26**	***Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26**
Inter-Governmental Disputes	**Différends entre gouvernements**
35.1 An appeal lies to the Court from a decision of the Federal Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces.	**35.1** Les décisions rendues par la Cour d'appel fédérale en matière de litige entre le Canada et une province, ou entre deux ou plusieurs provinces, sont susceptibles d'appel devant la Cour.

III. Decision of the Alberta Court

[14] Before setting out the Judge's reasons for concluding as he did, it will be useful, for a proper understanding of his decision and of the issues before us, to set out the reasons for which Hall J. of the Alberta Court concluded that a stay of BC's action should be granted pending a determination by the Federal Court as to whether it had jurisdiction under section 19 of the *FCA*. Hall J. concluded as he did for the following reasons.

[15] First, at paragraph 8 of his reasons, Hall J. indicated that the principal issue which he had to determine was whether the attorney general of a province had standing to seek declaratory relief with respect to the constitutionality of another province's legislation. In his view, that question required him to examine the law pertaining to direct standing and public interest standing in the context of proceedings instituted against the Crown.

[16] He indicated that one of the purposes of the law of standing is to ensure that persons harmed by unconstitutional legislation should have access to an independent and impartial

tribunal that can force a legislature to comply with the law and the Constitution. Hall J. also indicated that declaratory relief is one of the main reliefs sought in constitutional challenges and that a declaration that a statute is unconstitutional, whether a federal or a provincial statute, falls within the inherent powers of provincial superior courts.

[17] Hall J. then addressed the question of whether BC had standing to bring the action now before him. He indicated that BC took the position that it had standing to bring the action as the representative of the provincial public interest, adding that Alberta was of the view that BC could not establish direct or private standing because its rights were not and would not be directly affected by the Act.

[18] After a careful review of section 25 of the Alberta *Judicature Act*, R.S.A. 2000, c. J-2, (the *Judicature Act*) which provides that, in cases where no other relief is sought, only the Attorney General of Canada or the Minister of Justice and Solicitor General of Alberta may commence an action for a declaration as to the validity of legislation enacted by the Alberta legislature, and after considering the parties' respective arguments in regard thereto, Hall J. concluded that no provincial attorney general, other than the Minister of Justice and Solicitor General of Alberta, could commence proceedings in Alberta with respect to the validity of an enactment of the Alberta legislature.

[19] In making these remarks, Hall J. made it clear that any person, affected by a provincial law, could challenge the constitutional validity of an Alberta legislative enactment either in the context of litigation brought under subsection 24(1) of the *Canadian Charter of Rights and*

Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter), or in the context of, for example, a legitimate claim for damages or other relief. In the words of Hall J., at paragraph 22 of his reasons, "actions that go beyond seeking a bare declaration are not caught by section 25. Presumably, this is because the ability to claim damages and other relief requires that the plaintiff has been directly affected by the law, meaning that the plaintiff has direct standing to challenge it."

[20] Hall J. then made the point that because of the existence of section 19 of the *FCA*, BC was not without a remedy. He then referred to section 27 of the *Judicature Act*, pursuant to which, in his view, Alberta had agreed to grant the Federal Court jurisdiction with regard to interprovincial disputes. He stated that Parliament had enacted a matching provision to that of section 27 of the *Judicature Act*, *i.e.* section 19 of the *FCA*, adding that a similar provision had existed in federal legislation since 1875 when Parliament enacted section 54 of the *Supreme and Exchequer Courts Act*, S.C. 1875, c. 11.

[21] After a close examination of these provisions and some of the case law pertaining thereto, Hall J. concluded, at paragraph 39 of his reasons, that "[i]n my view, the current dispute between the AGBC and the AGAB falls within the scope of these definitions", *i.e.* the definitions of the word "controversy" as explained in *Fairford First Nation v. Canada (Attorney General)*, [1995] 3 F.C. 165 (F.C.T.D.), 1995 CanLII 3597 (FC), aff'd (1996), 205 N.R. 380 (F.C.A.), 1996 CarswellNat 1717 (WL Can); *Southwind v. Canada*, 2011 FC 351, 2011 CarswellNat 892 (WL Can) and *Alberta v. Canada*, 2018 FCA 83, 425 D.L.R. (4th) 366 [*Alberta v. Canada*].

[22] As a result, Hall J. explained that although he agreed with Alberta that, absent a claim for further relief, only the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta could seek a declaration regarding the validity of the laws of Alberta in the Alberta Court, that view did not leave BC without a recourse and it did not immunize Alberta from a constitutional challenge to the Act.

[23] At paragraph 44 of his reasons, Hall J. made the following remarks:

> The above discussion suggests that Parliament and the provincial legislatures have enacted the requisite legislation to give the Federal Court jurisdiction in interprovincial disputes of this nature, which further suggests the AGBC has standing to bring its action before that court. The Federal Court of Appeal's comments quoted above support this view, since it said that "without section 19 of the FC Act…" one province would have to sue in the other province's court, which implies that with section 19 of the *Federal Courts Act*, it is the Federal Court that is the proper forum.
>
> [Emphasis in the original.]

[24] Lastly, Hall J. turned to the question of whether he should exercise his discretion and grant BC public interest standing which, in his view, "is not necessarily ruled out by section 25 of the *Judicature Act*" (Hall J.'s reasons at para. 45).

[25] Although Hall J. appeared to be receptive to BC's request for public interest standing, he declined to come to a definite conclusion because of his view that BC's standing as of right in the Federal Court under section 19 of the *FCA* weighed against the granting of public interest standing. As such, "the combined effect of section 27 of the *Judicature Act* and section 19 of the *Federal Courts Act* ensures that the *Act* will not be so immunized" (Hall J.'s reasons at para. 52).

In other words, the existence of a recourse in the Federal Court ensures that the Act will not escape scrutiny.

[26] In the end, Hall J. stayed BC's action, leaving it to the Federal Court to determine whether or not it was prepared to accept jurisdiction in regard to the matters raised in BC's action.

[27] I now turn to the Federal Court's decision.

IV. The Federal Court's Decision

[28] As I have already indicated, the Judge disposed of two motions. With respect to BC's motion for an interlocutory injunction, he concluded that the test set out by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd*., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 164 N.R. 1; and in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, had been met, *i.e.* that an applicant must satisfy the Court that his or her case raises a serious issue to be tried, that he or she will suffer irreparable harm if the application is refused and that the balance of convenience is in his or her favour.

[29] Not only did the Judge find that BC's claim raised a serious issue, he found that BC had established a strong case that the Act was invalid. He further found that BC would suffer irreparable harm if the injunction were to be denied and that the balance of convenience was in favour of granting the injunction.

[30] With respect to Alberta's motion to strike, the Judge found that BC's constitutional challenge was within the jurisdiction of the Federal Court. He arrived at that conclusion by examining the words, context, and purpose of section 19 of the *FCA*. In his view, the word "controversies" was broad enough to include disputes concerning the constitutional validity of provincial legislation. More particularly, the Judge was of the opinion that there could be no doubt that there was a controversy between BC and Alberta with regard to the constitutionality of the Act.

[31] The Judge held that the circumstances surrounding the enactment in 1875 of section 54 of the *Supreme and Exchequer Courts Act*, which eventually became section 19 of the *FCA*, supported the broad ordinary meaning of the word controversy. The Judge also indicated that his review of these circumstances had led him to reject Alberta's argument that Parliament had expressly considered the issue of challenges to the validity of provincial legislation and that it had chosen to grant jurisdiction in regard thereto to the Supreme Court only.

[32] More particularly, the Judge dismissed, for its lack of merit, Alberta's argument that the second two paragraphs of section 54 of the *Supreme and Exchequer Courts Act*, which gave lower court judges the discretion to refer constitutional questions to the Supreme Court of Canada, was an indication that Parliament intended to limit the Exchequer Court's jurisdiction in respect of intergovernmental disputes to non-constitutional questions. In the Judge's view, the two mechanisms set out in section 54, *i.e.* the adjudication of intergovernmental disputes and referrals of constitutional questions to the Supreme Court, were "simply unrelated and they are not mutually exclusive" (Judge's reasons at para. 46).

[33] In addition to this brief summary of the Judge's reasons, I also wish to highlight some of the other remarks made by the Judge. At paragraph 30 of his reasons, concerning Alberta's Rule 221 motion, the Judge indicated that Alberta's challenge to BC's action was not based on constitutional grounds. In particular, Alberta's position was not that section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (the *Constitution Act, 1867*) constituted a bar to BC's action commenced under section 19 of the *FCA* but rather that, on a proper interpretation of the section, BC's challenge was not a controversy which fell within the ambit of section 19.

[34] At paragraph 48 of his reasons, the Judge held that the context of the enactment of section 19 of the *FCA* supported the view that "controversies" necessarily included controversies pertaining to the constitutionality of legislation.

[35] The Judge also addressed Alberta's argument that for an action to come within the ambit of section 19, there had to be issues pertaining to legal rights, obligations, or liabilities, which was clearly not the case herein. In order to answer that submission, the Judge considered some of the decisions (and there are very few) which dealt with section 19 of the *FCA* or its predecessor provisions. More particularly, the Judge considered the Supreme Court's decision in *Province of Ontario v. Dominion of Canada* (1909), 42 S.C.R. 1, 1909 CarswellNat 23 (WL Can), aff'd [1910] UKPC 40, [1910] A.C. 637 (P.C.) [*Ontario v. Canada 1909* cited to S.C.R.] and this Court's decisions in *The Queen in right of Canada v. The Queen in right of Prince Edward Island* (1977), 83 D.L.R. (3d) 492, [1978] 1 F.C. 533 (F.C.A.) [*Canada v. PEI* cited to D.L.R.] and *Alberta v. Canada*. Although in none of these cases did any party seek a declaration of unconstitutionality of either provincial or federal legislation, the Judge was of the view that this

consideration was of no relevance because he was satisfied that to the extent that a controversy could be decided on legal grounds, as opposed to moral or policy grounds, the controversy was one that fell within the purview of section 19. In support of that view, the Judge referred to my colleague Gauthier J.A.'s remarks in *Alberta v. Canada*, where she expresses herself as follows at paragraph 26 of her reasons:

> With respect to the subject matters covered by these provisions and more particularly by section 19 of the FC Act, it appears that there is no limit as to the type of controversy to which they would apply. At this stage and without the benefit of full arguments, the legislative evolution of section 19, as well as the manner in which both provisions have been applied, appears to support the broad scope suggested by the ordinary meaning of the words any "controversy" or "litige" in French.
>
> [My emphasis.]

[36] At paragraph 80 of his reasons, the Judge indicated that merely because BC's action was the first attempt ever by a provincial attorney general in Canadian legal history to obtain a declaration of invalidity of another province's legislation by way of section 19, this did not mean that the Federal Court was without jurisdiction. The Judge opined as follows:

> I would simply add that the fact that this is the first attempt to initiate such a challenge in this Court does not prove that we lack jurisdiction. We do not know whether this possibility was contemplated in the above-mentioned cases or in a case mentioned by Alberta, *Attorney-General for Manitoba v Manitoba Egg and Poultry Association*, [1971] SCR 689. The lack of positive precedent may have deterred lawyers. But there is no negative precedent either.

[37] Further, the Judge dealt with Alberta's argument that BC's action was premature. In the course of his discussion of that issue, he made the point that there existed a "live controversy" within the meaning of what was said by the Supreme Court in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99. Of particular relevance, in the

Judge's view, is the fact that members of the Alberta legislature had made statements to the effect that the purpose of the Act was to cause economic hardship to the province of British Columbia. Given these statements, the mere passage of the Act without any further action by the Minister was sufficient to conclude that there was a live controversy.

[38] As I am concluding that we should set aside the Judge's decision, I therefore need not address that part of his reasons which deal with BC's motion for an interlocutory injunction.

V. Alberta's Arguments

[39] In challenging the Judge's decision, Alberta makes a number of arguments. However, for present purposes, I will restrict myself to the following.

[40] First, it says that the Federal Court does not have jurisdiction under section 19 with respect to the making of a bare declaration of invalidity in regard to provincial legislation. It argues that such an issue is dealt with by its *Judicature Act* which does not allow any provincial attorney general, other than the Minister of Justice and Solicitor General of Alberta, to seek a declaration, absent a claim for further relief, with regard to the validity of Alberta legislative enactments.

[41] Alberta further says that the review of the constitutionality of provincial legislation falls clearly within the jurisdiction of provincial superior courts and that anyone affected by the Act may challenge its constitutionality before the Alberta Court. Hence, there is no jurisdictional void to fill in respect of the constitutionality of its laws or those of any other province.

[42] Turning to the meaning of the word “controversy”, Alberta argues that there must be an actual or real dispute over rights and obligations so that the Federal Court may exercise its jurisdiction under section 19 of the *FCA*. In making this argument, Alberta relies on this Court’s decision in *Canada v. PEI* (reasons of Le Dain J. at 532-533) and on the Supreme Court’s decision in *Ontario v. Canada 1909* (reasons of Duff J. at 119).

[43] Alberta also says that the words of the heading to section 19 “Intergovernmental disputes” connote the existence of a concrete disagreement between two provinces or between a province and Canada, not an action for a bare declaration of invalidity of either provincial or federal legislation.

[44] Thus, as I understand Alberta’s submissions, it says that there is no controversy before the Federal Court since BC has not identified any right, obligation, or liability that exists between it and Alberta. Needless to say, BC does not agree with any of these submissions and it supports the Judge’s reasons in their entirety.

VI. Issue

[45] The parties frame the issue to be determined in a slightly different manner. In its memorandum of fact and law, at paragraph 16, Alberta sets out the issue to be disposed of as follows:

> Did the motions judge err in finding that the Federal Court has jurisdiction over AGBC’s application for a bare declaration of unconstitutionality of Alberta legislation? AGAB submits that the Motions Judge did so err.

[46] As for BC, it says, at paragraph 26 of its memorandum of fact and law, that the question to be determined is the following:

> Is it plain and obvious that an action by one province for a declaration of unconstitutionality of the legislation of another is not a "controversy" within the meaning of section 19 of the *Federal Courts Act*?

[47] Thus, the question which we must answer is whether BC's action falls within the ambit of section 19 of the *FCA*. More particularly, is there a "controversy" between the provinces of British Columbia and Alberta?

VII. Analysis

[48] Before proceeding, a few words on the applicable standard of review are in order.

[49] This is an appeal of the Judge's decision in respect of a motion to dismiss brought by Alberta pursuant to Rule 221 of our Rules. Both parties agree that the applicable standard is correctness as the question for determination is whether it is "plain and obvious" that the Federal Court does not have jurisdiction to hear BC's action under section 19.

[50] I agree with BC that the appeal should be dismissed if we agree with the Judge's view that the Federal Court has jurisdiction under section 19 or if we conclude that there is an arguable case to that effect. For the reasons which I will now explain, it is my view that there is no arguable case that the Federal Court has jurisdiction in the present matter.

[51] I begin by stating the obvious. Section 19 confers jurisdiction on the Federal Court to adjudicate controversies between two provinces or between a province and Canada. The Federal Court's jurisdiction under section 19 is premised on the parties before the Court, *i.e.*, in this case the provinces of Alberta and British Columbia, having given their consent to the Court's jurisdiction over the controversy. I would further say that the Federal Court's jurisdiction under section 19 is a jurisdiction over matters in respect of which it would not normally have jurisdiction.

[52] The Judge's reasoning, as I understand it, is that there exists a controversy between the provinces of British Columbia and Alberta because the Attorney General of BC is challenging the constitutionality of the Act and that the controversy is "live" because the purpose of the Act is to punish the province of British Columbia for its lack of support in regard to the Trans Mountain pipeline expansion project.

[53] There is no dispute between the parties that statutory provisions, like section 19 herein, are to be interpreted according to the "modern principle" of statutory interpretation which requires us to read the words of the provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and the object of the statute and the intention of the legislating body (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21). Thus, looking at the text, context and purpose of section 19, what do the words "of controversies between … that province and any other province" mean?

[54] My contention is that there is no controversy between BC and Alberta within the meaning of section 19 of the *FCA*. Because neither the legislative history of the provision nor the context of its enactment provide, in my respectful opinion, any guidance to us with respect to the meaning of section 19, it is imperative that I closely review the very few cases which have dealt with section 19 or its predecessor provisions. It is important to note that, other than the cases which I will be examining, nothing has been written about section 19. In effect, the parties were unable to provide us with any article or case comment dealing with section 19. Nor has my own research revealed anything in that regard (other than an article by Brendan Downey et al., "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 Alta. L. Rev. 273, where the authors discuss at pages 306 to 311 the case now before us). Without speculating, I believe that the reason for the absence of any authority on the subject is that the cases heard so far by the Federal Courts and the Supreme Court of Canada were all cases which undoubtedly fell under section 19. Hence no debate has arisen concerning the Court's jurisdiction under section 19.

[55] The cases will show that section 19 was enacted to allow the Federal Court to deal with controversies of a different nature than the one which is now before us. The cases will also show that in every proceeding commenced under section 19 a province or Canada had direct standing to commence the proceedings (all of the cases pertain to either suits commenced by Canada against a province or by a province against Canada; there are no cases where a province has commenced a suit against another province). Put differently, it is my view that an action commenced under section 19 is one which pits the Crown against the Crown wherein Crown interests or rights must be asserted, which is clearly not the case in this appeal.

[56] In examining the meaning of the provision, it is also important to keep in mind that the meaning ascribed to the provision by the Judge leads to results which, in my view, are untenable. More particularly, the Judge's reasoning would allow the Federal Court to assume jurisdiction over matters which, I say, neither the provinces nor Canada ever intended to submit to the Federal Court under section 19.

[57] I begin with the Supreme Court's decision in *Attorney-General of Ontario v. Attorney-General of Canad*a, (1907), 39 S.C.R. 14, 1907 CanLII 70 [*Ontario v. Canada 1907* cited to S.C.R.]. The question then before the Supreme Court can be explained as follows.

[58] At the time of Confederation in 1867, the then Province of Canada (Upper and Lower Canada) held assets in the nature of special funds in regard to which it was a debtor and liable for interest therein. By section 111 of the *British North America Act, 1867*, (U.K.), 30 & 31 Vict., c. 3 (the *British North America Act*), the Dominion of Canada succeeded to the above liability. In an arbitration award made in 1870, pursuant to section 142 of the *British North America Act* (now the *Constitution Act, 1867*), to adjust the debts and assets of Upper and Lower Canada, the funds were adjudged to be the property of Ontario. Hence, Canada paid Ontario interest at the rate of 5% until 1904. In that year, Canada claimed to be entitled to reduce the rate of interest to 4%, or if unacceptable to Ontario, to pay to the province the principal amount.

[59] Affirming the decision of the Exchequer Court, the Supreme Court of Canada, Idington J. dissenting, held that following the arbitration award, Canada had the right to pay the principal to

the province with any accrued interest thereon and thus to be free from any liability in respect of the funds.

[60] For present purposes, I will only refer to Idington J.'s reasons as he is the only one who dealt with section 19. At page 44 of the case report, he indicated that when the rights claimed by the parties were created "there was no court to determine which might be right or wrong. When we look at it as a case of the Crown against the Crown it is anomalous indeed." Then at page 45, he referred to section 32 of the *Exchequer Court Act*, R.S.C. 1906, c. 140 (the *Exchequer Court Act 1906*) (a predecessor of section 19) and said that it gave the Exchequer Court jurisdiction in regard to the determination of the rights arising from the special funds. This led him to write, at pages 45 to 46, that section 32 imposed on the Exchequer Court and on the Supreme Court "in a most drastic manner… , the duty of settling the controversy whether arising from contract or trust."

[61] The next case which I wish to consider is the Supreme Court's decision in *Ontario v. Canada 1909*, in which the issue before the Supreme Court was whether Ontario was liable to reimburse Canada for expenses incurred by it in order to obtain the surrender of lands occupied by the Saulteaux Tribe of the Ojibway First Nation (the Band).

[62] More particularly, on October 3, 1873, a treaty was entered into between Canada and the Band (the treaty is known as the North-West Angle Treaty No. 3), pursuant to which the band surrendered about 49,300 square miles to Canada in return for financial and other compensation. At the time the treaty was entered into, the boundary between Ontario and Manitoba had yet to

be determined. However, when the boundary between the two provinces was defined in 1884, 30,500 square miles of the surrendered lands were in Ontario.

[63] In 1903, Canada brought a suit in the Exchequer Court pursuant to section 32 of the *Exchequer Court Act 1906* against Ontario claiming reimbursement of a percentage of the outlay made in extinguishing Indian title over land now part of Ontario. A majority of the Supreme Court allowed Ontario's appeal against the decision of the Exchequer Court and thus found that Ontario was not liable to reimburse Canada.

[64] Idington and Duff JJ. (with whom Maclennan J. concurred) wrote separate reasons for the majority. At page 101 of the case report, Idington J. explained that although the language of section 32 of the *Exchequer Court Act 1906* was sufficiently wide to encompass claims based on "principles of honour, generosity or supposed natural justice," no one had argued that the Exchequer Court was entitled to accept jurisdiction on that basis. He then stated:

> It seemed conceded that we must find a basis for the claim either in a contractual or (bearing in mind that the controversy is the Crown against the Crown for both parties act in the name of the Crown) quasi-contractual relation between the parties hereto or on some ground of legal equity.
>
> This is supplemented in the respondent's factum by an argument resting upon quasi-contracts of the civil law respecting which a long list of authorities is cited. But on argument that law and these authorities did not seem to be pressed.
>
> [My emphasis.]

[65] Duff J., in his reasons, addressed section 32 of the *Exchequer Court Act 1906*, at pages 118 and 119 of the case report. He first stated that the section granted the Exchequer Court

jurisdiction to determine a controversy such as the one before the Court. He then made the following remarks:

> I think that in providing for the determination of controversies the Act speaks of controversies about rights; pre-supposing some rule or principle according to which such rights can be ascertained; which rule or principle could, it should seem, be no other than the appropriate rule or principle of law. I think we should not presume that the Exchequer Court has been authorized to make a rule of law for the purpose of determining such a dispute; or to apply to such a controversy a rule or principle prevailing in one locality when, according to accepted principles, it should be determined upon the law of another locality. This view of the functions of the court under the Act does not so circumscribe those functions as greatly to restrict the beneficial operation of the statute. Whatever the right of the Dominion in such a case as the present it is difficult to see how the province could (apart from the statute and without its consent given in the particular case) be brought before any court to answer the Dominion's claim. The statute referred to and the correlative statute of the province once for all give a legal sanction to such proceedings, and provide a tribunal (where none existed) by which, at the instance of either of them, their reciprocal rights and obligations touching any dispute may be ascertained and authoritatively declared.
>
> [My emphasis.]

[66] The Supreme Court's decision was appealed to the Privy Council which dismissed the appeal (*The Dominion of Canada v. The Province of Ontario*, [1910] UKPC 40, [1910] A.C. 637). After stating that the Exchequer Court had been granted jurisdiction by statutes of Canada and of Ontario with respect to controversies between them, Lord Loreburn L.C. made the following statement at page 3 of the case report:

> When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

[67] I now turn to this Court's decision in *Canada v. PEI*. The issue before the Court was whether the federal government was in breach of one of the terms upon which Prince Edward Island (PEI) had been admitted to Canada pursuant to section 146 of the *British North America Act*. More particularly, when PEI was admitted to Canada on June 26, 1873, one of the terms of its entry was that the "Dominion Government" ensure that a ferry service would, at all times, be established and maintained between PEI and the mainland of Canada.

[68] By reason of a strike which prevented the ferry service established by Canada from operating between August 21, 1973 and September 2, 1973, PEI commenced an action, pursuant to section 19 of the *FCA*, seeking damages and costs against the federal government.

[69] Although the Federal Court, Trial Division (Federal Court), found that Canada was in breach of its duty in regard to the maintenance of the ferry service, it concluded that the breach did not give rise to an action for damages. Consequently, PEI's action was dismissed.

[70] On appeal by Canada and on cross-appeal by PEI from the Federal Court's decision, this Court dismissed the appeal and allowed the cross-appeal. Accordingly, the judgment below was set aside and the matter was returned to the Federal Court for further proceedings with respect to the question of damages.

[71] Chief Justice Jackett and Le Dain J. wrote for the majority, with Pratte J. dissenting. For present purposes, I will refer only to the reasons given by the Chief Justice and Le Dain J. who both dealt, in the course of their reasons, with section 19 of the *FCA*.

[72] At pages 502 to 503 of his reasons, the Chief Justice expressed the view that the case before the Court was a matter that clearly fell within section 19, *i.e.* a dispute between Canada and PEI as to whether PEI was entitled to be compensated for the breach of a term of its entry into Canada.

[73] The Chief Justice indicated that the Federal Court had erred in considering the proceedings commenced by PEI as an “action”, as that word was usually understood in the judicial system, whose function was to settle disputes between ordinary persons. He then went on to examine the question from the standpoint of the nature and character of the section 19 proceedings. This led him to write, at pages 512 to 513:

> I doubt that either Canada or a province is a person in the sense that it would, as such, be recognized as falling within the jurisdiction of a Superior Court having the jurisdiction of the common law Superior Courts. In any event, the Trial Division would, in my view, have no jurisdiction in a dispute between two such political entities apart from section 19 of the *Federal Court Act*, … and the "agreeing" provincial Act. In my view, this legislation (section 19 and the provincial "Act") creates a jurisdiction differing in kind from the ordinary jurisdiction of municipal courts to decide disputes between ordinary persons or between the Sovereign and an ordinary person. It is a jurisdiction to decide disputes as between political entities and not as between persons recognized as legal persons in the ordinary municipal courts. Similarly, in my view, this legislation creates a jurisdiction differing in kind from international courts or tribunals. It is a jurisdiction to decide a dispute in accordance with some "recognized legal principle" (in this case, a provision in the legal constitution of Canada, which is, vis-à-vis international law, Canadian municipal law).
>
> The effect of the enactment of the original forerunner of section 19, once the "agreeing" provincial legislation was passed, was, as I see it, to convert a legal (statutory) right of a "province" without a legal remedy into a legal right with a remedy, albeit a remedy that can be nothing more than a judicial declaration.
>
> On this view of the nature of a proceeding under section 19, the parties thereto are the political entities, in this case the Province and Canada, which cannot be described any more accurately, as I conceive them, than the peoples or public for the time being of the geographical areas involved. In effect, it is a claim by the people for the time being of Prince Edward Island against the people for the time being of all Canada. In my view, it does not matter whether such parties are

> referred to in the proceedings by the geographical names or by reference to the executive governments that represent the inhabitants of the geographical areas and that must be their spokesmen for the purposes of the dispute.
>
> [My emphasis.]

[74] In a footnote, number 38 on page 514 of his reasons, the Chief Justice further stated that:

> While describing the executive government as "Her Majesty in right of" may or may not be particularly appropriate, there is no question, reading the proceedings in the light of section 19, that it is the Province and Canada that are the true parties to the dispute …

[75] I now turn to the reasons of Le Dain J. Of relevance are pages 532 to 533 where he says:

> Prince Edward Island invokes the jurisdiction of the Federal Court to determine a controversy between Canada and a province which is conferred by section 19 of the *Federal Court Act* …
>
> The Province adopted the necessary enabling legislation for purposes of this jurisdiction in 1941 by the *Judicature Act Amendments*, 1941…
>
> The constitution of Canada, of which the Order in Council admitting Prince Edward Island into the Union forms part, attributes rights and obligations to Canada and the Provinces as distinct entities, however these entities and their precise relationship to such rights and obligations should be characterized. Section 19 of the *Federal Court Act* and the necessary provincial enabling legislation create a jurisdiction for the determination of controversies between these entities, involving such rights and obligations among others. Like the Chief Justice, I am, with respect, of the opinion that neither the doctrine of the indivisibility of the Crown nor that of Crown immunity, whether processual or substantive, should be an obstacle to a determination of intergovernmental liability under this provision, which clearly contemplates that Canada and the provinces are to be treated in law as separate and equal entities for purposes of the determination of a controversy arising between them. The term "controversy" is broad enough to encompass any kind of legal right, obligation or liability that may exist between governments or their strictly legal personification. It is certainly broad enough to include a dispute as to whether one government is liable in damages to another. It is not clear whether the judicial power conferred by section 19 includes the power to award consequential as well as declaratory relief, but I assume, given the nature of the parties to a controversy, that what was contemplated was a declaration. The proceedings in the present case are brought as an action for damages by Her Majesty the Queen in the right of Prince Edward

> Island against Her Majesty the Queen in the right of Canada but since the proceedings are clearly intended to invoke the jurisdiction of the Court under section 19 the style of cause and the nature of the relief sought are in my respectful opinion matters of form that should not be permitted to defeat the substance and merits of the claim. I can see no reason why the proceedings should not be treated broadly as a claim for a determination or declaration by the Court that the Province is entitled to be compensated in damages for the alleged breach of duty by Canada.
>
> [My emphasis.]

[76] The next decision worthy of consideration is that of this Court in *Canada v. Quebec (Attorney General)*, 2008 FCA 201, 381 N.R. 298 [*Canada v. Quebec*]. In that case, at the invitation of Canada, Quebec commenced proceedings under section 19 of the *FCA*. Although six questions for determination were before the Federal Court, on appeal, the parties agreed that only three questions should be addressed by this Court. These questions are described by Hugessen J. in an Order dated September 5, 2001 as follows:

> [TRANSLATION]
>
> Did the Minister of Finance of Canada (the Minister) make a reviewable error in his findings, namely
>
> 1 - that the adoption of the *Act to Amend the Retail Sales Tax Act and other fiscal legislation* to make it possible to apply the QST to the GST is not a change made by Quebec to its tax structure within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(i) of the Regulations for the 1991-1992 fiscal year;
>
> 2 - that the increased mark-up of the SAQ for the 1991-1992 fiscal year is not an increase in the mark-up on goods sold to the public by that agency within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(viii) of the Regulations for the 1991-1992 fiscal year; and
>
> 3 - that the increased mark-up rate of the Société des loteries et courses du Québec for the 1991-1992 fiscal year is not an increase in the mark-up of goods sold to the public by that agency within the meaning of paragraph 6(1)(*b*) of the Act and subparagraph 12(1)(*b*)(viii) of the Regulations for the 1991-1992 fiscal year.

[77] These questions were the result of Quebec commencing a declaratory action against Canada on October 17, 1995, wherein it challenged the Federal Minister of Finance's decision dated November 29, 1994, to reject its application for a stabilization payment for its revenue for the 1991-1992 fiscal year filed on September 28, 1993. More particularly, Quebec argued that Canada had failed to recognize the changes it had made to the structure of its taxes, namely the Quebec Sales Tax, as a result of Canada's introduction of the new Goods and Services Tax and in challenging the increase and the marks-ups of the Société des alcools du Québec and the Société des loteries et courses du Québec on goods and services sold to the public by Quebec.

[78] One of the issues which our Court had to decide was the nature of the remedy available under section 19 of the *FCA*. After indicating that the Federal Court had concluded that section 19 proceedings were not applications for judicial review under subsection 18(1) of the *FCA* but rather proceedings the purpose of which was to determine the merits of the dispute, Létourneau J.A., at paragraph 11 of his reasons, held that the section did not pertain to administrative disputes between a government and an individual, but rather concerned controversies "between two political entities under the same indivisible Crown." He further stated, at paragraph 13 of his reasons, that the applicable procedure to a section 19 proceeding was "dependent on and a function of the true nature of the dispute between the parties."

[79] Finally, I wish to refer to this Court's decision in *Alberta v. Canada*. In that case, seven First Nations, parties to Treaty No. 7 of 1877, began an action against Her Majesty the Queen in right of Alberta and Her Majesty the Queen in right of Canada for breach of trust and fiduciary obligations.

[80] More particularly, the First Nations argued that they had not relinquished title to Treaty No. 7 land and that they opposed the transfer of lands and rights and resources of that land from Canada to Alberta under the *Natural Resources Transfer Agreement*, 1930 [Schedule II of the *Constitution Act*, 1930, being Item 16 of the Schedule to *The Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11].

[81] In September 2001, a prothonotary of the Federal Court granted Alberta's motion to be removed as a defendant on the grounds that the Federal Court did not have jurisdiction in regard to the plaintiffs' claim against it. On December 18, 2003, Canada filed its statement of defence in the Federal Court action.

[82] On March 31, 2010, Canada applied for a stay of the action against it so as to assert a Third Party Claim against Alberta. Canada did so by way of an action commenced in April 2010 in the Court of Queen's Bench of that province seeking contribution and indemnity from Alberta with regard to any judgment that might be rendered by the Federal Court against it in favour of the plaintiffs.

[83] Then, on February 18, 2014, Canada sought an order from the Federal Court granting it leave to commence a Third Party Claim against Alberta in that Court, which motion was granted by a prothonotary. That decision was upheld on appeal by a judge of the Federal Court. The judge's decision was appealed to this Court (2018 FCA 83). At paragraph 22 of her reasons for the Court, Gauthier J.A. said as follows:

> Despite the temptation to give a definite answer to the question of jurisdiction so that Canada could immediately discontinue the Third Action [in the Alberta Courts], I can only conclude that it is not plain and obvious that the Federal Court does not have jurisdiction over the controversy (or "litige" in French) between Canada and Alberta on the basis of section 19 of the FC Act.

[84] After noting at paragraph 24 of her reasons that section 19 did not apply to controversies between individuals and Alberta, Gauthier J.A. indicated that there appeared to be "no limit as to the type of controversy to which [section 19] would apply." Further, at paragraph 30 of her reasons, she indicated that section 19 offered a pragmatic and practical approach to resolve intergovernmental disputes and that it was now clear that the section provided only concurrent jurisdiction to the Federal Court. By that, she meant that provinces could sue each other in a provincial Superior Court but only "before the defending's [*sic*] provincial Crown's courts" (at para. 29).

[85] What do these cases stand for and what principles can we deduce from them? The cases clearly show the following. First, they reveal that the controversies to be heard under section 19 are not "ordinary" disputes between citizens and the Crown or between citizens. This is carefully explained by Chief Justice Jackett in *Canada v. PEI* where, at pages 512 to 513, he makes a distinction between the jurisdiction under section 19 and that of the "municipal courts", *i.e.* the superior courts of the provinces. More particularly, he makes it clear that jurisdiction under section 19 is to allow for the determination of disputes between political entities and not between a government and ordinary persons.

[86] In this perspective, the words of Idington J. at page 101 of his reasons in *Ontario v. Canada 1909* are relevant. Idington J. says that the controversy under section 19 must be one

pitting “the Crown against the Crown for both parties act in the name of the Crown”. Also of relevance are Le Dain J.’s remarks at page 533 in *Canada v. PEI* where he speaks of section 19 as a jurisdiction to determine disputes between Canada and the provinces or between the provinces. Further, in *Canada v. Quebec*, Létourneau J.A. explained, at paragraph 11, that section 19 was a jurisdiction conferred on the Federal Court to settle disputes between “political entities under the same indivisible Crown.”

[87] In my respectful view, the cases exemplify the types of disputes which fall under section 19, *i.e.* the Crown versus the Crown, a province against Canada, or a government against a government, wherein the parties assert “Sovereign” or “Crown” rights against each other. It is because such cases do not occur often that there is a paucity of decisions concerning section 19. I have no doubt that if the Judge is correct in his approach, then section 19 jurisprudence will be dramatically increased. Contrary to the Judge, I do not believe that it is the absence of case law regarding the section which explains why lawyers have been reluctant to commence proceedings under section 19. In my view, it is the distinct nature of the cases falling under section 19 which explains why there is not much jurisprudence on the subject.

[88] This leads me to say that because the above disputes were clearly within the purview of section 19, the comments made in those cases and more particularly those made by Le Dain J. in *Canada v. PEI* and by Gauthier J.A. in *Canada v. Alberta*, with regard to the meaning of the word “controversy” and to the effect that the word should be given a broad interpretation, must be understood in the context of those cases. In other words, to the extent that the controversy or

the dispute is one where “Sovereign” or “Crown” interests and rights are being pursued, then I fully agree that the word “controversy” should be given a broad interpretation.

[89] However, all of this begs the question which we must answer here, *i.e.* whether BC is asserting “Sovereign” or “Crown” interests or rights against Alberta. If not, then we need not pursue the matter any further because the controversy is not within section 19, however broadly construed.

[90] All of the above cases pertain to actions or proceedings which could only be commenced by a province or by Canada. None of the disputes concerned individuals or persons who might be affected by a statute. Considering the nature of the controversies before the Court in those cases, only the respective provincial governments or Canada could litigate the matters raised in the proceedings. No private rights were claimed or asserted by the parties in those cases. On the contrary, the rights asserted were rights which could only be asserted by the Crown, either in the right of Canada or in the right of a province.

[91] Perhaps I can give an example of a controversy which would no doubt fall under section 19. The boundary between Quebec and Ontario (in Eastern Ontario) is the middle of the Ottawa River which divides the two provinces. Should one of the provinces enact legislation or take other means to assert that its boundary includes the whole of the Ottawa River, the other province would surely challenge that assertion. In such a scenario, there cannot be any doubt that only the province or its government could institute proceedings to challenge the other province’s decision to include in its territory the whole of the Ottawa River. Such a dispute or controversy

would clearly fall within section 19 so as to allow the Federal Court to determine the controversy.

[92] The case before us is clearly not one which falls in such a category of controversies. The dispute herein is, in reality, one between a province and ordinary persons in the sense explained by Chief Justice Jackett in *Canada v. PEI* in that anyone harmed by the Act, whether individuals or corporations, will be in a position to challenge the constitutional validity of the harming legislation. It goes without saying that such challenges are not uncommon in Canada since every year there are many constitutional challenges brought before the superior courts of the provinces with regard to the validity of provincial or federal legislation.

[93] There is no doubt, in the present matter, that the Act can be challenged and probably will be challenged, if the Minister denies a licence to an individual or a corporation to export natural gas, crude oil or refined fuels. If it is true that the purpose of the Act is to punish British Columbians, it may well be that a licence to export these products to British Columbia will be denied and hence a challenge will be mounted, not by BC in its Sovereign capacity, but by those harmed by the legislation or by any person or group of persons seeking to challenge the Act on the basis of public interest standing.

[94] As the Judge says in his reasons, no provincial attorney general has ever begun a challenge, by way of section 19, such as the one now before our Court. In other words, no provincial attorney general has ever sought a bare declaration of invalidity of another province's

legislation in the Federal Court. Nor has, to my knowledge, the Attorney General of Canada ever challenged provincial legislation in the Federal Court pursuant to section 19.

[95] Such challenges are not, in my respectful view, challenges that fall within the purview of section 19. This is because section 19 cannot have been enacted to provide a parallel forum to that of the provincial superior courts so as to allow the Attorney General of Canada to challenge provincial legislation or to allow provincial attorneys general to challenge either federal legislation or another province's legislation in the Federal Court. As I have already indicated, the above cases are all perfect examples of the type of disputes for which section 19 was enacted, *i.e.* the determination of rights and interests between the political entities of this country. This can only mean that jurisdiction under section 19 is something other than the "ordinary" jurisdiction pursuant to which the courts pronounce on the constitutional validity of a statute.

[96] I will now highlight some of the possible legal challenges which, in my view, might come to the Federal Court, by way of section 19, if the Judge's decision is found to be correct. The Supreme Court's decision in *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 [*Comeau*] provides a good example of what might happen if we were to support the Judge's approach. As in the present matter, *Comeau* is a case where a challenge was brought to the constitutionality of provincial legislation. Mr. Comeau alleged that the provincial legislation at issue was unconstitutional by virtue of section 121 of the *Constitution Act, 1867*.

[97] Mr. Comeau, a resident of New Brunswick, drove to the province of Quebec on October 6, 2012, and purchased a large quantity of beer and a few bottles of spirits from three different

stores in Quebec. On his return to New Brunswick, he was stopped by the Royal Canadian Mountain Police which had been monitoring New Brunswick visitors to liquor stores situated in Quebec. It was determined that Mr. Comeau's purchases were in excess of the limit prescribed by paragraph 43(*c*) of the *New Brunswick Liquor Control Act*, R.S.N.B. 1973, c. L-10 (the *Liquor Act*). He was charged under paragraph 134(*b*) of the *Liquor Act* and ordered to pay a fine of $240 plus administrative fees.

[98] Mr. Comeau challenged his conviction on the grounds that by reason of section 121 of the *Constitution Act, 1867*, paragraph 134(*b*) of the *Liquor Act* was unconstitutional.

[99] The matter was heard by the New Brunswick Provincial Court which sided with Mr. Comeau (2016 NBPC 3, 448 N.B.R. (2d) 1). The Crown, pursuant to subsection 116(3) of the *Provincial Offences Procedure Ac*t, S.N.B. 1987, c. P-22.1 sought leave to appeal the decision to the New Brunswick Court of Appeal which refused to grant leave (2016 CanLII 73665).

[100] As a result, the Crown appealed the matter to the Supreme Court of Canada. The principal issue before the Court was whether paragraph 134(*b*) of the *Liquor Act* infringed section 121 of the *Constitutional Act, 1867*. The Supreme Court held that the impugned legislation did not infringe section 121 of the *Constitutional Act, 1867*.

[101] Let us assume, for example, that prior to the events giving rise to the constitutional challenge in *Comeau*, the province of Quebec had adopted a liberal approach to the sale and trade of beer, wine, and liquor. By liberal approach, I mean that Quebec would have taken the

position that its citizens could purchase, outside of Quebec, any quantity of beer, wine, and liquor and return with these products to the province without incurring any taxes or fines. On that premise, Quebec could have challenged the New Brunswick legal provision at issue in *Comeau* before the Federal Court under section 19 on the basis that the New Brunswick legislation was harmful to its interests, as represented by the Société des Alcools du Québec (SAQ), and to those of the various retail operations in Quebec which sell beer and/or wine. Thus Quebec could have taken the position that its challenge to the constitutional validity of the New Brunswick legal provisions constituted a controversy between it and New Brunswick, hence giving rise to a challenge under section 19.

[102] With some imagination, one can think of other possible challenges that could be made against both federal and provincial legislation which would fall under the purview of section 19. I will provide another example of what I mean. Quebec's language legislation has, during the last 50 years, given rise to political discontent, not only inside the province, but outside of the province. Under the Judge's approach, it seems to me that the provincial attorneys general of the other provinces could, on their own or together, launch a challenge against Quebec's language legislation under section 19, arguing that their challenge of the language legislation constitutes a controversy between their province(s) and Quebec, and thus that the Federal Court has jurisdiction.

[103] I repeat what I have already said, *i.e.* that section 19 cannot have been enacted to allow provinces to challenge each other's legislation or to allow the Attorney General of Canada to pursue his constitutional challenges of provincial legislation in the Federal Court. Adopting the Judge's broad interpretation of section 19 would open the door to intrusion by one province into

the affairs of other provinces. I do not believe that this was the intention of the provinces when they enacted the enabling legislation granting the Federal Court jurisdiction over intergovernmental disputes.

[104] Contrary to the situation in *Comeau*, the Act has yet to cause any harm to any person since no one has been denied a licence to export natural gas, crude oil, or refined fuels to British Columbia or elsewhere in Canada. This is due to the fact that no licensing regime has been established by the Minister, nor have any regulations been made. Presumably, if a licensing regime is established and regulations are enacted, a situation may occur where a licence will be denied in regard to the export of the aforementioned products. At such time, it will be open to the individuals or corporations denied the licence to challenge the constitutionality of the Act before the Alberta Court.

[105] In further support of my view, I wish to point out that, pursuant to section 35.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (the *Supreme Court Act*), entitled "inter-governmental disputes", there is an appeal as of right to the Supreme Court of Canada against a decision rendered by this Court in a matter commenced under section 19 of the *FCA*. This appeal provision existed in various forms prior to the enactment of section 35.1 of the *Supreme Court Act* in 1990. In particular, a provision with virtually identical language could be found in section 32 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10. Prior to that, similar language could be found in subsection 32(2) of the *Exchequer Court Act 1906* and section 55 of the *Supreme and Exchequer Courts Act* of 1875.

[106] As far as I can tell, no appeal as of right exists from a decision of a provincial court of appeal to the Supreme Court unless the decision pertains to a criminal matter such as was the case in *Comeau*. Nor do I believe that decisions of this Court can be appealed to the Supreme Court of Canada without leave being granted by the Supreme Court. My only explanation for section 35.1 of the *Supreme Court Act* is that controversies brought before the Federal Court under section 19 are controversies of the type dealt with by the cases which I have reviewed above, *i.e.* cases which clearly involve disputes regarding "Sovereign" or "Crown" rights and interests. Such disputes were presumably viewed as exceptional matters which explains why the Exchequer Court, and now the Federal Court, were given jurisdiction over matters in respect of which they would otherwise not have had jurisdiction and why such cases can be appealed, as of right, to the Supreme Court of Canada.

[107] In the present matter, as I have already indicated, BC is not asserting its "Sovereign" or "Crown" interests but, as it says at paragraph 1 of its Statement of Claim, it is acting on behalf of the residents of British Columbia, *i.e.* ordinary persons.

[108] It also bears noting that it does not appear that this Court or the Federal Court have ever declared a provincial law to be unconstitutional. Whether we could do so is open, in my respectful opinion, to serious doubt (see reasons of Karakatsanis J. in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 at paras. 59-65 [*Windsor*]).

[109] One further comment is necessary before concluding. As I indicated earlier, the jurisdiction of the Federal Court under section 19 stems from consent having been given by the

provinces involved in the matter. Alberta's position is that it never consented to give the Federal Court jurisdiction over a matter such as the one now before us. In making this argument, Alberta says that its consent to the Court's jurisdiction cannot be taken from section 27 of its *Judicature Act*. The Judge dismissed this argument holding that section 27 did provide the necessary consent.

[110] This, in my view, raises the question, which we need not answer in this appeal, as to whether the Federal Court can or should assume jurisdiction when one of the parties to the litigation says that it does not consent to the Court exercising jurisdiction over the "dispute". It also raises the question of whether Alberta could have withdrawn its consent, if indeed found in section 27, after the commencement of the proceedings by BC, by enacting legislation to that effect. In *Ontario v. Canada 1909*, Duff J., at page 119 of his reasons, indicated that the province of Ontario could not be taken before the Court to answer Canada's claim, apart from the consent given by it in a provincial statute "and without its consent given in the particular case". This seems to suggest that a case cannot proceed under section 19 unless both parties willingly agree to do so.

VIII. Conclusion

[111] For these reasons, I can only conclude that it is "plain and obvious" that BC's challenge of the Act does not constitute a "controversy" falling under section 19 of the *FCA*. I would therefore dispose of the appeal in the manner proposed by LeBlanc J.A.

"M. Nadon"

J.A.

LEBLANC J.A.

[112] I agree with my colleague, Nadon J.A., that this appeal should be allowed, but my conclusion is based on grounds that differ from his. In particular, I find that the Federal Court does have the jurisdiction, under section 19 of the *FCA*, to entertain proceedings in the nature of the one brought by BC in the instant case. At a minimum, it is not plain and obvious that it does not.

[113] That said, I am not satisfied that the legal test for granting declaratory relief has been met. As noted by my colleague, at all material times to these proceedings, the statutory devices required to make the Act operative, that is a licensing scheme articulated by a set of regulations, had yet to be put in place. As such, when this appeal was heard, no dispute of the kind giving rise to declaratory relief had yet arisen. In fact, such a dispute may never arise.

[114] For the facts and legislative provisions relevant to this appeal, as well as for the procedural history that led to it, I refer to my colleague's reasons.

I. The Present Matter Raises a "Controversy" Within the Meaning of Section 19

[115] My colleague's position that the "controversy" forming the basis of BC's action against Alberta in the present case does not fall within the ambit of section 19 of the *FCA* stems from a review of the cases that have dealt with that provision or its predecessors. Those cases, according to my colleague, show that section 19 was meant to deal with controversies of a different nature, namely government versus government disputes wherein the parties assert against each other

"Sovereign" or "Crown" rights, *i.e.* rights that can only be asserted by the Crown, either in her federal or provincial capacity, through proceedings that can only be commenced by a province or Canada.

[116] None of those cases, he points out, concerned persons who might have been affected by a statute and who would have had every right to challenge the constitutional validity of the harming legislation, be it provincial or federal, by resorting to the supervisory power of the provinces' superior courts. That would be the case here, for an individual or corporation being denied an export licence by the Minister. If the true purpose of the Act is indeed to punish British Columbians, the Act could also be challenged by any person or group of persons on the basis of public interest standing.

[117] In sum, those cases, according to my colleague, are "all perfect examples of the type of disputes for which section 19 was enacted, *i.e.* the determination of rights and interests between political entities", which is "something other than the 'ordinary' jurisdiction pursuant to which the courts pronounce on the constitutional validity of a statute." This is all the more so, he adds, in light of the fact that the Federal Court's ability to declare a provincial law unconstitutional, which is what that Court is being asked to do in the case at bar, is open to "serious doubt" as a result of comments made in *obiter* by the majority of the Supreme Court of Canada in *Windsor*.

[118] With respect, I would not limit the scope of Federal Court jurisdiction under section 19 of the *FCA* to the type of controversies that formed the basis of the cases discussed by my

colleague. In my view, section 19, as determined by the Judge, is capable of a broader interpretation.

[119] I would make two observations before fleshing out my reasons on this point. First, as noted by my colleague, Alberta is not claiming that BC's action is barred by section 101 of the *Constitution Act, 1867*, pursuant to which Parliament established the Federal Courts as "additional Courts for the better Administration of the Laws of Canada." In other words, Alberta does not assert that BC's action must be struck because it fails to meet the three-prong test established by the Supreme Court in order to support a finding of Federal Court jurisdiction under section 101. This longstanding test, commonly known as the "*ITO* test", requires that there be a statutory grant of jurisdiction by Parliament as well as an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. It also requires that the law on which the case is based be "a law of Canada" pursuant to section 101 (*ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641 at 766 S.C.R.; *Windsor* at para. 34).

[120] As this Court pointed out in *Alberta v. Canada*, section 19 is a "unique provision" in the sense that it does not appear to be grounded solely in Parliament's legislative authority under section 101 of the *Constitution Act, 1867*; it is also grounded in the power of provincial legislatures "to confer to a statutory court jurisdiction over controversies or 'litiges' in French in respect of subject matters that could fall within section 92 of the *Constitution*" (*Alberta v. Canada* at paras. 24, 34).

[121] Put differently, on its own, section 19 does not confer any jurisdiction on the Federal Court. For that to happen, concurrent legislation needs to be adopted by the provinces willing to avail themselves of that jurisdiction, described by this Court as "an example of cooperative federalism" and, more particularly, as providing "a pragmatic and practical approach to deal with intergovernmental disputes" (*Alberta v. Canada* at para. 30). The effect of that cooperative scheme, in my view, is to provide Canada and willing provinces with a judicial forum for the adjudication of their disputes – a forum that due to Crown immunity concerns did not exist prior to that cooperative scheme's first enactment in 1875 (*Province of Ontario v. Dominion of Canada* (1909), 42 SCR 1, at 119, aff'd [1910] AC 637 (PC); *Alberta v. Canada* at para. 28) – and to grant the Federal Court jurisdiction over matters that it would not otherwise have under the Constitution.

[122] Though it appears highly unlikely that the *ITO* test need be satisfied when it comes to section 19, *i.e.* that a substratum of federal law must nourish the section 19 grant of Federal Court jurisdiction, this issue is not before us and is best left for another day.

[123] The sole question to be determined, then, as pointed out by the Judge, is one of statutory interpretation. This brings me to my second observation. Alberta's arguments on appeal are well summarized by my colleague in his reasons and there is no need to repeat them here. However, it became clear during oral submissions that the primary issue to be resolved is whether BC's action arises from a live or actual controversy and not, assuming it does, whether the Federal Court has jurisdiction to entertain it. Indeed, Alberta now concedes that it is not plain and obvious that the Federal Court lacks jurisdiction to determine intergovernmental disputes where

the constitutional validity of provincial legislation is at issue, as long as a live or real controversy underlies such a dispute.

[124] I take it, then, that Alberta no longer stands by what the Judge described as its main argument, *i.e.* that Parliament, when it first enacted section 19 (then section 54 of the *Supreme and Exchequer Courts Act*), considered the issue of challenges to the validity of legislation, federal or provincial, but opted to assign jurisdiction over such matters to the Supreme Court only.

[125] Although jurisdiction is a matter of law that does not flow from the parties' consent or failure to object (see *e.g. Canada v. Peigan*, 2016 FCA 133, 483 N.R. 63 at para. 109), I would highlight that before this Court Alberta did not take the position that the Federal Court, irrespective of the nature of the controversy it is being asked to determine under section 19, is devoid of any authority to deal with the constitutional validity of provincial legislation.

[126] I now turn to the scope and meaning of section 19 and in particular to the issue of whether it is broad enough to encompass, in appropriate circumstances, interprovincial controversies that raise questions related to the constitutional validity of provincial legislation. As the Judge correctly pointed out, addressing that issue requires an analysis of the wording, context, and purpose of section 19 (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26).

[127] In my view, as I indicated at the outset of these reasons, such controversies do fall under the purview of section 19, and I reach that conclusion for substantially the same reasons as those given by the Judge. In particular, I endorse his thorough analysis of the legislative history and purpose of section 19. That history underscores the obstacles that prevented judicial resolution of disputes involving governments at the time of Confederation. Those obstacles derived mainly from concerns related to the concepts of Crown immunity and indivisibility of the Crown. As the Judge points out, the enactment of the *Supreme and Exchequer Courts Act* in 1875 marked, in such a context, a "significant step in adapting the judiciary to the new federal structure" as, among other things, it provided means for the judicial resolution of such disputes (Judge's reasons at para. 36). Among those means was the authority conferred upon the Exchequer Court by subsections 54(1) and (2) of that statute (now section 19). Given this country's new constitutional order, intergovernmental disputes over the validity of legislation arising from division of powers concerns were certainly foreseeable at the time of Confederation and it is reasonable to conclude, as did the Judge, that such concerns were on Parliament's mind when it created this new jurisdiction.

[128] As I indicated above, I understand that Alberta abandons the argument that in adopting section 54 of the *Supreme and Exchequer Courts Act*, Parliament considered the issue of challenges to the validity of legislation but through subsections 54(3) and (4) of that statute, assigned the authority to decide such matters solely to the Supreme Court. If I have misstated Alberta's position on that point, then I agree with the Judge that this argument must fail. As the Judge noted, subsections 54(3) and (4) of the *Supreme and Exchequer Courts Act* created a very different judicial mechanism than the one contemplated by subsections 54(1) and (2) of the same

statute. Subsections 54(3) and (4) enabled judges seized of a suit, action, or proceeding raising issues as to the constitutional validity of federal or provincial legislation to remove the case directly to the Supreme Court of Canada for determination.

[129] The Judge held that this removal mechanism was aimed at everyday litigation and was unrelated to the one granting the Exchequer Court jurisdiction over intergovernmental disputes. In that regard, he stated the following:

> [46] The difference between the two mechanisms provided for in section 54 must be emphasized and demonstrates why Alberta's argument fails. The first mechanism is exclusively geared towards disputes between governments and is aimed at providing a forum when none was thought to exist. The second one pertains to constitutional issues arising in everyday litigation, in particular litigation between private parties. It is easy to understand why Parliament wanted only constitutional questions to be referred to the Supreme Court by other courts. This does not mean, however, that the constitutional validity of a provincial statute could never be challenged under the Exchequer Court's jurisdiction over intergovernmental disputes. The two mechanisms provided for in section 54 are simply unrelated and they are not mutually exclusive.

[130] He concluded there was nothing in the history of section 19 disclosing any intention on the part of Parliament to leave constitutional issues out of its purview.

[131] My colleague opines that this view is irreconcilable with that which is set out in the section 19 case law. For the reasons that follow, I do not agree.

[132] First, the express language used in section 19 contemplates controversies between provinces without any qualifiers as to the kinds of legal interests that can be asserted, be they constitutional, statutory, contractual, or other.

[133] Second, as pointed out by the Judge, referring to *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385, legislation granting jurisdiction to the Federal Court should benefit from a generous and liberal interpretation rather than a narrow one (Judge's reasons at para. 31), subject, I would add, to the limitations flowing from section 101 of the *Constitution Act, 1867*. However, one must keep in mind the above-mentioned caveat as to the applicability of that provision to the section 19 grant of Federal Court jurisdiction.

[134] Third, I agree with the Judge that the case law dealing with section 19 does not set out the outer limits of that provision. In particular, none of those cases address the issue of whether a challenge to the constitutional validity of legislation could, in appropriate circumstances, fall within the meaning of a section 19 "controversy".

[135] Turning to these cases, my colleague first considered *Ontario v. Canada 1907*, focussing on the dissenting reasons of Idington J. as he was the only judge on the panel to have discussed – albeit briefly – section 19 (then section 32 of the *Exchequer Court Act 1906*). Even if Idington J.'s reasons provide some basis for the position that the Federal Court lacks jurisdiction to entertain BC's action in the case at bar, which I do not believe they do, they are not echoed in the majority's reasons for judgment. This was a case where, in the eyes of the majority, the Exchequer Court's ability to determine the controversy between Ontario and Canada was not in issue. In any event, I agree with the Judge that Idington J.'s reference to the terms "contract or trust" was more a description of the subject matter of that case (the execution of an arbitration

award resulting from the application of sections 111 and 142 of the *British North America Act*) than of the outer limits of section 19 jurisdiction.

[136] The case of *Ontario v. Canada 1909*, the second decision examined by my colleague, is not, in my respectful view, of assistance either. That case considered whether the Exchequer Court had jurisdiction to determine Ontario's liability to indemnify Canada for payments that the latter had made under a First Nations treaty. Duff J. ruled that the precursor to section 19 permitted the Exchequer Court to resolve disputes over reciprocal rights and obligations (*Ontario v. Canada 1909* at 119). However, there was no disagreement between the parties that the term "controversy" covered these matters, the issue in that case being whether Canada's claim was based on some recognized legal principle. The question for this Court is rather whether the matters at issue in *Ontario v. Canada 1909* exhaust the subject matters that can be determined under section 19. Duff J.'s reasons are entirely silent on this point. I agree with the Judge that if there is anything to be gleaned from that case respecting the meaning of "controversy", it is that a section 19 claim must be brought within some legal grounds, as opposed to moral or policy grounds.

[137] My colleague then turned to this Court's decision in *Canada v. PEI* where, again, there was no dispute as to whether the matter at issue fell within the ambit of section 19. On the contrary, there was a clear consensus that it did. That case was concerned with the type of relief the Federal Court could award under section 19, as the province of Prince Edward Island was seeking damages from Canada.

[138] Of particular note for the purposes of the present matter is Chief Justice Jackett's rather broad description of the jurisdiction conferred by section 19, *i.e.* that it is "a jurisdiction to decide a dispute in accordance with some 'recognized legal principle' (in this case, a provision in the legal constitution of Canada, which is, vis-à-vis international law, Canadian municipal law)" (*Canada v. PEI* at 514). In the Chief Justice's view, that jurisdiction could therefore include matters of a constitutional nature.

[139] LeDain J.A.'s concurring reasons seem to echo this wide conception of section 19 jurisdiction. In a passage at page 532, he states that, together with the necessary provincial enabling legislation, section 19 created a jurisdiction for the determination of controversies between Canada and the provinces involving, *inter alia*, the rights and obligations attributed to those distinct entities by the Constitution of Canada, which includes the Order in Council setting out the terms of Prince Edward Island's admission into the newly created Union. It is in that light, in my respectful view, that LeDain J.A.'s statement that "[t]he term 'controversy' is broad enough to encompass any kind of legal right, obligation or liability that may exist between Governments or their strictly legal personification" is to be understood (*Canada v. PEI* at 532).

[140] In my view, it is clear that nothing in this passage suggests that LeDain J.A. intended to define the limits of the term "controversy". Disputes over legal rights or obligations are simply examples of controversies contemplated by section 19. The only limit, as far as I see it, is that the dispute brought before the Federal Court must be based on some "recognized legal principle" as opposed to "ideas of abstract justice" (see *Canada v. PEI* at 514, n. 35). In other words, I fail to

read in *Canada v. PEI* any limitation of the sort that would affect the Federal Court's jurisdiction under section 19 to entertain BC's action.

[141] The next case examined by my colleague is this Court's decision in *Canada v. Quebec*. That case involved a dispute between the two governments resulting from the rejection, by the Minister of Finance of Canada, of an application for a stabilization payment submitted by the province under the Income Stabilization Program set out in the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*, R.S.C. 1985, c. F-8. As pointed out by Létourneau J.A., that dispute had been brought by Quebec as a section 19 proceeding "upon Canada's invitation" (*Canada v. Quebec* at para. 2). The Federal Court's jurisdiction was therefore not a contentious issue between the parties.

[142] A preliminary issue before the Federal Court in *Canada v. Quebec* was that of the applicable standard of review. Canada was contending that Quebec's challenge of the Finance Minister's decision was in the nature of a judicial review and that it was therefore governed by the rules applicable to judicial review proceedings, including deference owed to the decision-maker and inadmissibility of evidence not before the decision-maker; Quebec was claiming, however, that its challenge was in the nature of an action. The Federal Court ruled that section 19 required that the dispute between Quebec and Canada be resolved by applying legal principles to the facts established by the evidence at trial.

[143] Létourneau J.A. found that it was neither useful, nor necessary for the Federal Court to engage with that preliminary issue as the parties had "agreed to identify, define and clarify the

dispute around and based on the questions of law they submitted to the Federal Court" (*Canada v. Quebec* at para. 13-14). It is in such particular context that he observed that "[t]he proceeding applicable under section 19 [was] dependent on and a function of the true nature of the dispute between the parties" (*Canada v. Quebec* at para. 13). This statement, in my view, does not provide any insight into the scope of the term "controversy". Rather, it has to do with the procedural framework that applies to a section 19 proceeding.

[144] Finally, my colleague referred to this Court's decision in *Alberta v. Canada*, noting that the Court had resisted the temptation of giving a definite answer to the question of whether the Federal Court could entertain Canada's Third Party Claim against Alberta under section 19, as it was satisfied that it was not plain and obvious that the Federal Court lacked jurisdiction to do so. In particular, he referred to the Court's comment, at paragraph 26 of its reasons, that there appeared to be "no limit as to the type of controversy to which [section 19] would apply."

[145] According to my colleague, that comment, as well as those in other cases suggesting that the term "controversy" should be given a broad meaning, need to be understood in the particular contexts of those cases. In other words, he agrees that that term is entitled to a broad interpretation provided, however, that the controversy or dispute at hand be "one where 'Sovereign' or 'Crown' interests and rights are being pursued," as opposed to private rights. This means disputes that can only be commenced by a province or Canada and that involve rights capable of being asserted only by the Crown, either in the right of Canada or in the right of a province.

[146] To illustrate his point, my colleague gives the example of either Quebec or Ontario unilaterally enacting legislation that would modify its existing boundaries by extending them beyond the middle point of the Ottawa River to include the whole river. Such a course of action would contravene the amending formula entrenched in the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, in particular paragraph 43(*a*) regarding alterations to boundaries between provinces, and would in all likelihood be unconstitutional. My colleague states that in such a scenario, there would be no doubt that only the affected province could institute proceedings to challenge the other province's actions. This, he contends, would be a matter falling squarely within the ambit of section 19.

[147] My difficulty with this example is that riparian owners, private property owners on some of the islands which strew the Ottawa River, and utility companies owning and operating works on the river could all have direct or public interest standing to challenge such legislation in the appropriate judicial forum. Surely such changes in the boundaries would affect their interests in all sorts of ways, including by subjecting them to an entirely new set of provincial and municipal laws.

[148] Therefore, even if this scenario would no doubt give rise to an interprovincial dispute falling squarely within the ambit of section 19, I do not accept that this is because such legislation could only be challenged by Quebec or Ontario. In appropriate circumstances, a private party having either direct or public interest standing could initiate proceedings where an issue underlying a dispute between two political entities is at play, provided they do so in the appropriate court. In other words, one does not exclude the other.

[149] In my respectful view, it is for instance difficult to imagine that Prince Edward Island residents and businesses affected by the strike that paralyzed the ferry service Canada undertook to ensure as a condition for the province joining Confederation could not have initiated their own suit against Canada for the losses allegedly suffered as a result of that strike. Such a suit could not have been brought under section 19 of the *FCA* but it could have been initiated through section 17 of the *FCA*, which, as it read at the time, conferred on the Federal Court exclusive original jurisdiction over matters in which relief was claimed against the Federal Crown. Whether such a suit would have been successful is beside the point. What matters here is that it is not inconceivable that it could have been initiated section 17 proceedings if, for instance, the province had not pursued a section 19 proceeding against Canada as a result of the perturbations to the province's economy caused by the strike.

[150] Another example of this, in my view, is the Finlay matter that gave rise to two Supreme Court decisions, one on standing (*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 [*Finlay I* cited to S.C.R.]), and the other on the merits of Mr. Finlay's proceedings against Canada (*Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080, 101 D.L.R. (4th) 567 [*Finlay II* cited to S.C.R.]).

[151] Those decisions concerned the now repealed *Canada Assistance Plan*, R.S.C. 1985, c. C-1 (the Plan), by which the federal government was contributing to the cost of social assistance and welfare services provided by the provinces to persons in need. It was characterized as a "spending statute" authorizing the Government of Canada to enter into agreements with the provincial

governments to pay them contributions toward their expenditures on social assistance and welfare (*Finlay II*, *per* Sopinka J. at 1123-1124).

[152] Mr. Finlay, a Manitoba resident and recipient of social assistance allowances in that province, complained that the province had illegally reduced his monthly allowances in payment of a debt owing by him to the Crown for overpayment of allowance. After unsuccessfully exhausting his recourses against the province, he brought an action before the Federal Court seeking a declaration that the continued payments by Canada to Manitoba of contributions under the Plan were illegal, as being contrary to the statutory authority conferred by the Plan. That claim was met with a motion to strike on the basis that Mr. Finlay did not have the requisite standing to maintain it. Canada contended that the question of provincial compliance with the conditions of federal cost-sharing was not an issue appropriate for determination by a court, but was rather one that should be left to government review and inter-governmental resolution.

[153] The Supreme Court held that Mr. Finlay did not have sufficient personal interest in the legality of the federal cost-sharing payments to bring him within the general requirement for standing to challenge an exercise of statutory authority, noting that neither the Plan nor the federal cost-sharing payments made under it conferred rights on social assistance recipients, their entitlement to such assistance arising solely from the provincial legislation (*Finlay 1* at 621). However, it granted Mr. Finlay public interest standing. Acknowledging that there would no doubt be cases in which the question of provincial compliance with the conditions of federal cost-sharing would raise issues that are not appropriate for judicial determination, the Supreme Court held that

the particular issues of provincial non-compliance raised by Mr. Finlay's statement of claim were questions of law and, as such, were clearly justiciable (*Finlay I* at 632-633).

[154] Mr. Finlay's action was eventually dismissed on the merits. In a split decision, the Supreme Court, allowing Canada's appeal, concluded that deductions from an individual's social assistance to permit recovery of overpayments did not violate the Plan or the agreement between Manitoba and Canada (*Finlay II*, *per* Sopinka J. at 1129).

[155] That case demonstrates that a legal instrument binding political entities only without conferring any rights on individuals can nevertheless be the subject of legal proceedings initiated by a private party. This is so even though those political entities, alone, have direct standing to assert rights provided for in that instrument and though the private party may not have sufficient personal interest to initiate those proceedings.

[156] In sum, intergovernmental controversies do not necessarily preclude private parties from bringing claims, in the appropriate forum, in relation to the subject matter underlying such controversies. By the same token, disputes giving rise to private claims do not necessarily preclude claims by one government against another. In other words, the fact that a particular subject matter may give rise to private claims is not, in and of itself, fatal to Federal Court jurisdiction pursuant to section 19, as long as the requirements of that provision are met, *i.e.* there is a controversy between a province and Canada or between provinces.

[157] Thus, in the case before this Court, simply because an individual who is denied a licence by the Minister has redress before the courts does not preclude the Attorney General of BC, as representing the "people for the time being of [British Columbia] against the people for the time being of [Alberta]", the latter being represented by the Attorney General of Alberta (see *Canada v. PEI* at 514), from bringing its dispute regarding the validity of the Act before the Federal Court pursuant to section 19.

[158] I wish to make three comments before concluding on this point. First, I note that in his decision on BC's standing, Hall J. of the Alberta Court held that the present dispute likely falls within the scope of section 19 on the basis that it is a dispute between two political entities based on a recognized legal principle:

> [39] In my view, the current dispute between the AGBC and the AGAB falls within the scope of these definitions. It is a controversy between two political entities. The AGBC brought the action as the provincial government's representative, challenging the constitutionality of Alberta legislation, which is a dispute seeking adjudication in accordance with a recognized legal principle, namely the Constitution.

[159] Hall J's interpretation of "controversy" is, in my view, consistent with the section 19 jurisprudence.

[160] Second, as pointed out by BC, section 57 of the *FCA*, which establishes a regime for providing the Attorney General of Canada and his provincial counterparts with notice of a constitutional question raised before the Federal Courts or before a federal board with respect to the validity, applicability, or operability of an act of Parliament or of a provincial legislature,

provides compelling indicia that Parliament considers the Federal Court to be empowered to pronounce on the constitutional validity of provincial legislation.

[161] In *Windsor*, the majority stated that the Federal Court "clearly ha[d] the power, when the *ITO* test is met, to make findings of constitutionality and to give no force or effect in a particular proceeding to a law it finds to be unconstitutional" (*Windsor* at para. 71). It did not specify that this "law" could only be an act of Parliament.

[162] As stated above, there remains the issue of whether section 101 of the *Constitution Act, 1867* constrains the Federal Court's jurisdiction under section 19, as it does for other grants of that Court's jurisdiction. Assuming section 101 does not have this constraining effect, I agree with Gauthier J.A.'s holding in *Alberta v. Canada* that section 19 would not deprive the Superior Courts of their core jurisdiction to determine the constitutional validity of federal or provincial legislation, which is protected by section 96 of the *Constitution Act, 1867* (*Windsor* at para. 32). This is because the jurisdiction conferred upon the Federal Court by section 19 is now, after having been for a while the only judicial vehicle available for the determination of intergovernmental disputes, a concurrent one. As Gauthier J.A. stated at paragraph 35 of her reasons, this jurisdiction "is merely a useful tool available when the alternative is not the favoured option."

[163] Third, with respect, I do not share my colleague's view that the meaning ascribed by the Judge to section 19, if retained, would lead to untenable results. As an example of such untenable results, my colleague says that nothing would prevent a province from challenging Quebec's

language legislation pursuant to section 19, thereby opening the door to intrusion by one province into the affairs of another.

[164] However, disputes giving rise to a section 19 proceeding cannot be purely theoretical. If the challenge alluded to by my colleague were initiated under section 19, one could question whether the province bringing the challenge has standing or whether said challenge discloses a reasonable cause of action. One could also question the genuine interest of that province, as representing its population, in the resolution of a challenge of that sort.

[165] At the hearing of this appeal, BC conceded that section 19 could not be resorted to by a province to attack the policies of another province simply because these policies do not sit well with it. Here, the situation is very different. According to BC's Statement of Claim, one province is directly and openly threatening the well-being of another. Such a situation, which appears to be unprecedented in our constitutional history, presents, in my view, all the hallmarks of a "controversy" within the meaning of section 19.

[166] Indeed, here the constitutionality of the Act is challenged in part because it allegedly contravenes section 92A(2) of the *Constitution Act, 1867*. That section was enacted in 1982 and no law has ever been challenged on the basis of that provision. Section 92A(2) contemplates interprovincial matters as it speaks to exports from a province to "another part of Canada". It also prevents a producing province from discriminating in supplies exported to another province.

[167] Further, I doubt that section 35.1 of the *Supreme Court Act*, which provides for an appeal as of right to the Supreme Court of decisions rendered by this Court in the case of controversies between Canada and a province or between two or more provinces, supports the conclusions reached by my colleague as to the nature of the controversies contemplated by section 19. I note that section 35.1 was not raised by the parties or the Judge as a contextual element relevant to the interpretation of section 19. I therefore hesitate to ascribe any interpretative value to that provision in the present case.

[168] For all these reasons, I conclude that the case law examined by my colleague poses no obstacle to a broad interpretation of the kinds of "controversies" that may be considered by the Federal Court under section 19. These would include, in appropriate circumstances, challenges to the validity of legislation, including provincial legislation.

[169] That being said, the present dispute does not lend itself, in my view, to declaratory relief.

II. The Present Matter is Not an Appropriate Case for Declaratory Relief

[170] As stated above, BC claims that the Act exceeds Alberta's legislative authority over trade in non-renewable natural resources because it threatens an embargo on the exportation of refined fuels and crude oil. In doing so, the Act purportedly authorizes or provides for discrimination against another part of Canada in violation of section 92A(2) of the *Constitution Act, 1867*. BC further alleges that the Act violates section 121 of the *Constitution Act, 1867* as it imposes barriers on the admission of articles of growth, produce, or manufacture of one province into another for a "tariff-like purpose", namely to punish another province.

[171] In terms of remedy, BC asserts at paragraph 46 of its Statement of Claim that it seeks a declaration that the Act "is inconsistent with the Constitution of Canada and of no force and effect" or, in the alternative, that various parts of the Act are, for the same reason, of no force and effect.

[172] As previously noted, Alberta argues that BC's action is not properly before the Federal Court because it lacks jurisdiction to issue bare declarations on the constitutionality of legislation. In that regard, Alberta asserts that, as a general rule, challenges to the constitutional validity of legislation, be it federal or provincial, cannot be raised in the abstract.

[173] Put otherwise, Alberta's claim is that the declaratory relief sought by BC, *i.e.* a declaration of constitutional invalidity, should not be considered until the Minister takes action pursuant to the Act. In my view, this argument fundamentally raises the question of whether granting declaratory relief would be premature at this time, rather than whether the Federal Court has jurisdiction over the present dispute. As such, it should be assessed in light of the current state of the law on declaratory relief.

[174] In *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165 [*Ewert*], the Supreme Court set out a four-part test on when a court can grant declaratory relief. This test requires that (i) the court have jurisdiction over the subject matter; (ii) the dispute be real and not theoretical; (iii) the party raising the issue have a genuine interest in its resolution; and (iv) the responding party have an interest in opposing the declaration sought (*Ewert* at para. 81).

[175] This test reaffirms, in essence, the test for declaratory relief set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745 [*Solosky* cited to S.C.R.], *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, and *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 [*Daniels*], all of which were considered in *Ewert*. In *Solosky*, the Supreme Court clarified the requirement that the dispute must be real and not hypothetical. On this point, it contrasted real disputes with situations "when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise" (*Solosky* at 832). In a subsequent case, *Operation Dismantle v. the Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, the Court referred to *Solosky* in support of the proposition that there has to be a "cognizable threat to a legal interest" before a court can consider declaratory relief (at 457 S.C.R.). More recently, in *Daniels*, the Court specified that a declaration can "only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties" (*Daniels* at para. 11).

[176] In responding to Alberta's prematurity objection, the Judge relied on the *Daniels* test (Judge's reasons at para. 84, citing *Daniels* at para. 11). He opined that while the requirement of a "live controversy" implies the need for a factual matrix, this is more often the case when the Charter is at play. In disputes involving division of powers issues, a factual matrix is less relevant given that the "pith and substance of legislation does not change according to the manner in which the law is applied" (Judge's reasons at para. 86). The Judge therefore held that in determining whether BC's action gives rise to a "live controversy" of the kind contemplated by *Daniels*, evidence as to the application of the Act is of little relevance. As such, the Judge took the view that declaratory relief is available to BC in the present matter even though there

are no regulations in place to operationalize the Act and the Minister has yet to use the powers conferred upon him by that legislation:

> [86] A factual background, however, is less necessary where the Charter is not in play, particularly in division-of-powers cases. The pith and substance of legislation does not change according to the manner in which the law is applied. Indeed, in *R v Morgentaler*, [1993] 3 SCR 463 at 485–488 [*Morgentaler*], the Supreme Court of Canada noted that evidence of a statute's practical effects is of little relevance in ascertaining the statute's pith and substance. Courts have often dealt with the merits of actions or motions for declaratory judgments regarding the compliance of legislation with the division of powers or other constitutional limits to legislative power: *Attorney General of Quebec v Blaikie*, [1979] 2 SCR 1016; *Potter v Québec (Procureur général)*, [2001] RJQ 2823 (CA); *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 474; *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank*]. While the procedural background of those cases varies, it appears that the Court in each case dealt with the constitutional issue without inquiring about the precise manner in which the legislation would be implemented.
>
> [87] Applying those principles, I am unable to give effect to Alberta's prematurity objection. The most basic reason is that British Columbia's action does not challenge any measure taken pursuant to the Act. It challenges the Act itself. It is what the Americans would call a "facial challenge." The Act is now in force. The main question will be to determine the Act's pith and substance and, according to *Morgentaler,* this does not require evidence regarding the application of the Act. Evidentiary difficulties are not an obstacle in this case.
>
> [88] Moreover, there is a "live controversy," as required by *Daniels*. In the course of the debates regarding the Act, members of the Alberta legislature have described it as targeting British Columbia. British Columbia, in turn, asserts that the Act is unconstitutional. This is certainly a live controversy. The practical utility of a declaration is beyond question.
>
> [89] The fact that the Lieutenant Governor in Council must make certain regulations and the Minister must make certain orders before the Act produces concrete effects is immaterial. In the particular circumstances of this case, the mere adoption of the act is a threat that is sufficient to give rise to a "live controversy" of the kind contemplated by *Daniels*.

[177] With respect, I find the Judge's reasoning problematic in relation to both components of BC's claim: (i) that based on section 121 of the *Constitution Act, 1867* and (ii) that based on section 92A(2) of the *Constitution Act, 1867*.

A. *The section 121 component of BC's claim*

[178] The Judge's approach is particularly problematic in regard to section 121. I begin by noting that the Judge did not address the question of when declaratory relief is appropriate in relation to a claim based on section 121. While he grounds his reasoning regarding the appropriateness of such a remedy in the present matter in a division of powers approach, the Supreme Court's ruling in *Comeau* indicated that alleged infringements of section 121 are not to be analyzed in the same way as alleged infringements of sections 91 and 92 of the *Constitution Act, 1867*. This is so because section 121 does not confer any power but rather limits the exercise of the powers, otherwise exhaustive, conferred on legislatures by sections 91 and 92 of the *Constitution Act, 1867* (*Comeau* at para. 72). *Comeau* set out the following conditions for establishing an infringement of section 121, which the Judge cited in his analysis of BC's motion for interlocutory injunction (Judge's reasons at para. 112, citing *Comeau* at para. 114):

> [114] In summary, two things are required for s. 121 to be violated. The law must impact the interprovincial movement of goods like a tariff, which, in the extreme, could be an outright prohibition. And, restriction of cross-border trade must be the primary purpose of the law, thereby excluding laws enacted for other purposes, such as laws that form rational parts of broader legislative schemes with purposes unrelated to impeding interprovincial trade.

[179] With respect to determining whether an impugned law imposes a charge on the basis of a provincial border, the Supreme Court noted the need for evidence in certain circumstances:

> [110] In some cases, evidence may be required to determine if an impugned law imposes a charge on the basis of a provincial border. Consider a fictional law that requires Alberta distillers to get a special licence to import rye. It is not plain on the face of the law whether the law (1) imposes any sort of charge on the movement of rye or (2) whether any such charge is linked to a distinction between goods related to a provincial boundary. If the cost of the licence is substantial or if it is very difficult to acquire, the measure may impede cross-border trade in rye. Similarly, if the only rye available to Alberta distillers is from Saskatchewan, the licence requirement may function like a tariff against a Saskatchewan good. On the other hand, if the licence is not burdensome to acquire or if the licensing requirement applies equally where Alberta enterprises have access to rye from within Alberta, the law may not impose a burden or charge based on a provincial border and s. 121 is not violated. [My emphasis.]

[180] The law referred to in the Supreme Court's fictional example, underlined in the passage above, is noteworthy in its resemblance to the Act. It is not plain on the face of the Act whether it (i) will impose any sort of charge on the movement of crude oil from Alberta to British Columbia or (ii) whether any such charge (if and when it is introduced by the Minister) will be linked to a distinction between goods related to the British Columbia-Alberta border. Without further action from the Minister, it is impossible to determine how onerous it will be for any British Columbian to import crude oil from Alberta.

[181] In light of the above, I believe the Judge erred in holding that "the mere adoption of the act is a threat that is sufficient to give rise to a 'live controversy'" (Judge's reasons at para. 89). In a section 121 analysis, a court must first establish that the impugned law in essence restricts the movement of goods across a provincial border before it can proceed to an inquiry into the law's purpose (see *Comeau* at para. 111). Put differently, consideration must first be given to the actual cost imposed on the movement of goods. An indeterminate threat (*e.g.* to "turn off the taps" or "inflict economic pain") that has not materialized into an actual charge is insufficient to establish a violation of section 121. As no charge or restriction has yet been imposed by Alberta

on the export of crude oil to British Columbia, it is impossible for a court to say anything about the Act's effects, if any, on a province's rights or obligations under section 121. Simply put, a section 121 dispute "has yet to arise and may not arise."

[182] It is therefore plain and obvious that, as matters currently stand with regards to the section 121 component of BC's claim, the legal test for declaratory relief has not been met. In this respect, I find BC's claim against Alberta to be premature.

B. *The section 92A(2) component of BC's claim*

[183] In the Judge's view, the fact that the Minister has yet to take action under the Act is not an obstacle to declaratory relief. This is because in division of powers cases, a law's constitutionality depends on its pith and substance, which "does not change according to the manner in which the law is applied" (Judge's reasons at para. 86). In the context of his analysis of BC's request for an interlocutory injunction, the Judge noted that the history of section 92A(2) shows that the provision was intended to provide provinces, under certain conditions, with relief from the consequences of exclusive federal jurisdiction over interprovincial trade and commerce under section 91(2) of the *Constitution Act, 1867*. He therefore found that "the proper analytical framework is to determine whether the impugned 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 section 92A(2)" (Judge's reasons at para. 115). The Judge was of the view that, in pith and substance, the Act regulates oil exports. Furthermore, and even though he did not have to decide that issue, the Judge found the Act was not saved by section 92A(2) (Judge's reasons at para. 113).

[184] Even if the Judge's characterization of the Act's pith and substance is accurate, I am not persuaded that declaratory relief should be granted in the absence of action taken pursuant to the Act. My hesitation has to do with the fact that the term "discrimination" in section 92A(2) raises a number of interpretive issues which have yet to be addressed by the courts. In the absence of a licensing scheme restricting the export activities of persons or classes of persons, it is my view that the Federal Court lacks a factual context sufficient to interpret and apply section 92A(2) in the present case.

[185] It has been noted that language contained in section 92A is of a more technical or specialized nature than that typically employed in a constitutional text (William D. Moull, "2: The Legal Effect of the Resource Amendment – What's New in Section 92A?" in J. Peter Meekison, Roy J. Romanow & William D. Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy, 1985) 33 at 34). With respect to the non-discrimination requirement in section 92A(2), it is unclear what kind of export restrictions are permissible (*e.g.* can a province restrict exports of a raw product to encourage its local processing industry?; see William D. Moull, "Section 92A of the Constitution Act, 1867" (1983) 61:4 Can. Bar. Rev. 715 at 725). One commentator has outlined certain challenges that arise in interpreting "discrimination" under section 92A(2) as follows:

> Moreover, the quantitative and qualitative indicia to measure discrimination are not specified. … With regard to quantity discrimination, will the export of the same amount of oil *per capita* to each province, irrespective of regional variations in per capita consumption, constitute non-discrimination; or does subsection 92A.(2) require that varying amounts of oil *per capita* be exported according to regional variations in consumption? Can Alberta withhold supplies from an industrial user in another province in order to develop its own petrochemical industry?

> [Brian W. Semkow, “Energy and the New Constitution” (1985) 23:1 Alta. L. Rev. 101 at 129.]

[186] In light of such interpretive difficulties, a court will have to carefully define the scope of the non-discrimination requirement in section 92A(2) before this provision can be invoked to declare an act unconstitutional. In my view, an interpretive exercise of this kind should not take place in the abstract. As recently stated by this Court, “constitutional issues should not be decided unless a full and adequate evidentiary record is before the Court” (*Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72 at para. 82, referring to *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 at 139 S.C.R.). Here, not only does the Federal Court find itself in uncharted territory, but it is being asked to construe section 92A(2) while speculating about the details of a hypothetical licensing scheme under the Act. I note that there is a factual vacuum with respect to the class(es) of persons required to obtain a licence, the person(s) whose requests will be denied, the province(s) that will be affected by such denials, and the terms and conditions of a possible future licence.

[187] I acknowledge that the Act allows the Minister to issue licences restricting exports from Alberta and that the legislative debates indicate the retaliatory character of the Act. At the same time, as noted by the Judge at paragraphs 126 and 129 of his reasons, the legislative debates also suggest possible non-discriminatory motivations behind the Act such as maximizing the return on Alberta’s natural resources. That being said, in my view, the fundamental issue is that the lack of a licensing scheme makes it difficult to conclude what constitutes discrimination under section 92A(2) and whether the Act falls outside of what is permitted by this provision. Moreover, how a court interprets section 92A(2)’s prohibition on discrimination may have significant policy

implications in affecting, for instance, provinces' economic development plans (see Marsha A. Chandler, "Constitutional Change and Public Policy: The Impact of the Resource Amendment (Section 92A)" (1986) 19:1 Can. J. Political Science 103 at 121).

[188] In the absence of Ministerial action restricting supply to British Columbia and without regulations and an operational licensing scheme, it would be prudent for a court to refrain from assessing the constitutional validity of the Act on the basis that it authorizes or provides for discrimination contrary to section 92A(2). Until Alberta imposes restrictions on exports through action taken pursuant to the Act, a section 92A(2) dispute has yet to arise and may not arise at all. Put otherwise, the dispute as it currently stands remains more theoretical than real. I therefore find the section 92A(2) aspect of BC's claim to be premature. As previously indicated, Alberta conceded during oral submissions that the Federal Court would have jurisdiction to hear the dispute once the Minister takes action under the Act.

[189] For these reasons, I am inclined to find that BC has not met the test for declaratory relief with respect to both the section 121 and section 92A(2) components of its action.

III. Conclusion

[190] Therefore, I would allow Alberta's appeal, I would set aside the Judge's decision and, rendering the judgment which ought to have been rendered, I would allow Alberta's motion and I would strike BC's Statement of Claim. Finally, I would grant Alberta its costs in this Court and below.

"René LeBlanc"
J.A.

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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