Federal Court  Cour fédérale

Date: 20190924

Docket: T-982-19

Citation: 2019 FC 1195

Ottawa, Ontario, September 24, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Plaintiff

and

ATTORNEY GENERAL OF ALBERTA

Defendant

ORDER AND REASONS

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[1] Alberta has adopted the *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5 [the Act]. This Act empowers the Minister of Energy of Alberta [the Minister] to require anyone who wishes to export natural gas, crude oil or refined fuels from Alberta to obtain a licence and to impose terms and conditions on such exports, including their quantity and destination. One of the factors that the Minister must consider before imposing such requirements is "whether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta."

[2] British Columbia seeks a declaration that the Act is unconstitutional. It initially brought its action before the Alberta Court of Queen's Bench, which stayed the action on the basis that the Federal Court would have jurisdiction over it. British Columbia then brought an action in this Court. It argues that the Act regulates interprovincial commerce, which is an area of exclusive federal jurisdiction, and that it is not saved by the exceptions contained in section 92A of the *Constitution Act, 1867*. Moreover, it asserts that the Act contravenes the prohibition of interprovincial customs duties in section 121 of the *Constitution Act, 1867*. According to British Columbia, the only purpose of the Act is to allow Alberta to cut British Columbia's main source of petroleum products, in retaliation for its perceived opposition to the Trans Mountain pipeline expansion project.

[3] These reasons deal with two motions brought in the course of the action.

[4] First, Alberta brought a motion to strike British Columbia's action on the basis that it is not within the jurisdiction of the Federal Court and that it is premature.

[5] Second, British Columbia brought a motion for an interlocutory injunction preventing the Minister from exercising her powers under the Act. In the alternative, it seeks an interlocutory injunction that would require the Minister to give 42 days' notice before exercising those powers.

[6] I am dismissing Alberta's motion to strike. Pursuant to section 19 of the *Federal Courts Act*, RSC 1985, c F-7, this Court has optional jurisdiction over interprovincial disputes. By legislation, the two provinces involved have opted into that jurisdiction. Alberta did not show any convincing reason why this jurisdiction would not encompass disputes regarding the constitutional validity of provincial legislation. Moreover, it is not premature to bring the matter before the Court at this time, as British Columbia challenges the Act itself and not any specific measure taken pursuant to the Act.

[7] I am allowing British Columbia's motion for interlocutory injunction. British Columbia has met the criteria usually applied by the courts for the issuance of such an injunction. It has shown that the validity of the Act raises a serious issue. It has demonstrated that an embargo of the nature evoked by the members of Alberta's legislature when debating the Act would cause irreparable harm to the residents of British Columbia. I am rejecting Alberta's argument that this harm is speculative, because it is reasonably certain and its triggering lies entirely within Alberta's discretion. Lastly, British Columbia has shown that the balance of convenience is in its favour, given the strength of its case and the lack of any clear and identifiable negative consequences for Alberta if the injunction is granted.

I. Background

[8] To place the issues raised by these two motions in their proper context, I must first describe the circumstances that gave rise to the adoption of the Act and provide a summary of what the Act purports to accomplish. I will then outline the steps that British Columbia has taken in the Alberta Court of Queen's Bench and in this Court to challenge the Act.

A. *Genesis of the Act*

[9] The Trans Mountain pipeline was built in the 1950s and links Edmonton, Alberta, with Burnaby, British Columbia. It is the main pipeline by which petroleum products are carried from Alberta to British Columbia. The pipeline's owner, Kinder Morgan Canada Ltd. [Kinder Morgan], has proposed to expand its capacity by building an additional line along the original line. That project, known as the Trans Mountain expansion, or TMX, has sparked vigorous public debate and has given rise to a number of legal proceedings. It is not necessary to give a full account of those debates and proceedings here. It is sufficient to highlight the event that precipitated the adoption of the Act: Kinder Morgan's decision, announced on April 8, 2018, to suspend all non-essential work on the Trans Mountain expansion project.

[10] The following day, in the Alberta legislature, the Minister of Energy indicated that the government would soon introduce legislation regarding that situation. Bill 12, which became the Act, was then tabled on April 16, 2018. During the debates in the legislature, members of both main political parties made statements suggesting that the purpose of the Act is to inflict

economic hardship on British Columbia because of its opposition to the Trans Mountain expansion project. I will review these statements in more detail later in these reasons.

[11] The Act was adopted and received royal assent on May 18, 2018. It was proclaimed into force roughly a year later, on April 30, 2019, after a new government took office.

B. *Contents of the Act*

[12] The Act's central provision is section 2, which empowers the Minister to require exporters of petroleum products to obtain a licence. It is worded as follows:

> **2(1)** No person shall, without a licence, export from Alberta any quantity of natural gas, crude oil or refined fuels.
>
> **(2)** Subsection (1) applies only where the Minister by order requires a person or class of persons to obtain a licence.
>
> **(3)** Before making an order under subsection (2), the Minister shall determine whether it is in the public interest of Alberta to do so having regard to
>
> > (a) whether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta,
> >
> > (b) whether adequate supplies and reserves of natural gas, crude oil and refined fuels will be available for Alberta's present and future needs, and
> >
> > (c) any other matters considered relevant by the Minister.

[13] Section 4 empowers the Minister of Energy to set the terms and conditions of export licences, including "the point at which the licensee may export from Alberta any quantity of natural gas, crude oil or refined fuels," as well as restrictions on maximum quantities and

methods of exportation. Section 7 makes it an offence to breach the provisions of the Act or the terms of a licence. An individual offender is liable to a daily fine of up to $1,000,000, and a corporate offender is liable to a daily fine of up to $10,000,000. Section 10 provides immunity from suit for the Minister, the Crown or Crown employees for actions done pursuant to the Act. Section 11 empowers the Lieutenant Governor in Council to make regulations respecting a number of subjects, including applications for a licence and the terms and conditions of licences.

[14] The Act is also subject to a two-year "sunset clause:" pursuant to section 14, the Act is repealed two years after it is proclaimed into force. The Legislative Assembly, however, may extend that period by resolution.

[15] To this day, the Minister of Energy has not exercised the powers conferred by the Act and the Lieutenant Governor in Council has not made any regulations pursuant to the Act.

C. *Proceedings in Alberta*

[16] A few days after the Act was given royal assent, British Columbia commenced an action before the Alberta Court of Queen's Bench for a declaration that the Act is unconstitutional. That action was dismissed for prematurity, as the Act had not yet been proclaimed into force: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121.

[17] On May 1, 2019, the day after the Act was proclaimed into force, British Columbia brought a new action before the Alberta Court of Queen's Bench. It also sought an interlocutory

injunction. Alberta, for its part, sought to have the action dismissed on the basis that British Columbia lacked standing.

[18] On July 19, 2019, Justice Hall of the Alberta Court of Queen's Bench allowed Alberta's motion in part and stayed British Columbia's action: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550. Justice Hall held that under section 25 of Alberta's *Judicature Act*, RSA 2000, c J-2, only the Attorneys General of Canada and Alberta have standing to seek a declaration of unconstitutionality before the Alberta courts. He went on to consider whether the Federal Court would have jurisdiction over the matter pursuant to section 19 of the *Federal Courts Act* and concluded as follows, at paragraphs 43–44:

> While I have accepted the AGAB's argument that only the AGCanada and the AGAB have standing to seek a declaration of constitutional invalidity of Alberta legislation in the Alberta courts, absent a claim for any other relief, this conclusion does not leave the AGBC without recourse and it does not immunize the AGAB from a constitutional challenge to the *Act*.
>
> 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.

[19] I am informed that no appeal was taken of Justice Hall's order.

D. *Proceedings in this Court*

[20] On June 14, 2019, British Columbia filed the present action. I understand that the statement of claim is substantially similar to the one filed in the Alberta Court of Queen's Bench.

By order of my colleague Justice Alan Diner, the action was put in abeyance while the Alberta Court of Queen's Bench was considering Alberta's motion to dismiss.

[21] On August 14, 2019, at the request of both parties, my colleague Prothonotary Kathleen Ring ordered that the case be specially managed and, on August 15, the Chief Justice designated me as the case management judge. I ordered that the case no longer be held in abeyance. British Columbia then filed its motion for an interlocutory injunction and Alberta, its motion to strike, and I set a timetable leading to the hearing of those two motions. It was agreed that the evidence in support of British Columbia's motion would be the same as filed in support of a similar motion before the Alberta Court of Queen's Bench.

II. Alberta's Motion to Strike

[22] Alberta asks that British Columbia's action be struck on two grounds: it is not within the jurisdiction of the Federal Court, and it is premature. I am dismissing Alberta's motion to strike, because Alberta failed to identify any grounds to negate this Court's jurisdiction and because the matter is ripe for judicial decision.

[23] In the following pages, after explaining the test that guides the Court on a motion to strike, I will analyse Alberta's arguments with respect to jurisdiction and prematurity. As I consider that some of Alberta's arguments are better described as a challenge to British Columbia's standing to pursue this action, I will address them as such in a separate section.

A. *Applicable Test*

[24] Rule 221 of the *Federal Courts Rules*, SOR/98-106, provides that, on motion, the Court may strike out a pleading, such as British Columbia's statement of claim, if that pleading "discloses no reasonable cause of action" or "is otherwise an abuse of the process of the Court." In *R v Imperial Tobacco Ltd*, 2011 SCC 42 at paragraph 17, [2011] 3 SCR 45, the Supreme Court of Canada described as follows the test to be applied to a motion to strike:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action […]. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial […]

B. *Jurisdiction*

[25] A motion to strike may be grounded in the Court's lack of jurisdiction. Nevertheless, the test remains the same: the action will be struck only if it is plain and obvious that the Court does not have jurisdiction: *Alberta v Canada*, 2018 FCA 83 at paragraph 20 [*Alberta v Canada*]; *Apotex Inc v Ambrose*, 2017 FC 48 at paragraphs 36–39, [2017] 4 FCR 510; *Windsor (City) v Canadian Transit Co*, 2016 SCC 5 at paragraph 24, [2016] 2 SCR 617 [*Windsor*].

[26] Given that the jurisdictional issue was fully argued and that it does not turn on any findings of fact, I am in a position to decide it. I find that this Court has jurisdiction over British Columbia's action.

[27] British Columbia grounds this Court's jurisdiction to hear its action in section 19 of the *Federal Courts Act* and parallel provincial statutes. Section 19 reads as follows:

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.	**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.

[28] Most Canadian provinces have enacted legislation accepting this Court's jurisdiction in such matters. British Columbia's *Federal Courts Jurisdiction Act*, RSBC 1996, c 135, s 1, recognizes this Court's jurisdiction over "controversies between British Columbia and any other province of Canada that has passed an Act similar to this Act." Section 27 of Alberta's *Judicature Act* does the same, with respect to "controversies between Alberta and any other province or territory of Canada in which an Act similar to this Act is in force."

[29] The concept common to the three relevant statutes is that, in English, of "controversy" and, in French, of "*litige*." One could be forgiven for thinking that there is obviously a "controversy" or "*litige*" between British Columbia and Alberta regarding the constitutional validity of the Act. Nevertheless, words in legislation should not be read in isolation and they sometimes take on a technical meaning. Thus, relying on the historical evolution of what became section 19 of the *Federal Courts Act* and authorities that have interpreted its language or similar

phrases, Alberta argues that Parliament never intended to allow this Court to judge the constitutional validity of provincial legislation.

[30] I underscore that Alberta's challenge is not based on constitutional grounds. Alberta does not assert that the declaration sought by British Columbia exceeds the bounds of section 101 of the *Constitution Act, 1867*, as delineated in cases such as *Quebec North Shore Paper v Canadian Pacific Ltd*, [1977] 2 SCR 1054, and *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752. Indeed, when this Court exercises jurisdiction over interprovincial disputes pursuant to section 19 of the *Federal Courts Act* and corresponding provincial legislation, the constitutional source of its jurisdiction is found not only, and perhaps not mainly, in section 101, but also in section 92(14), which grants provinces jurisdiction over the administration of justice: *Alberta v Canada*, at paragraph 34. This is an example of cooperative federalism that the courts have been loath to overturn: *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20 at paragraph 38, [2005] 1 SCR 292; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paragraph 18 [*Second Securities Reference*].

[31] Thus, Alberta's challenge to this Court's jurisdiction involves essentially an exercise in statutory interpretation. I will thus have resort to the usual methods of interpretation, namely, reviewing the wording, context and purpose of the relevant provision. Context includes other provisions of the same statute, other legislation and general constitutional principles. Purpose may be gleaned from an analysis of the statute itself as well as the circumstances in which it was enacted. I will also heed the Supreme Court of Canada's advice that legislation granting jurisdiction to the Federal Court must be given a generous and liberal, rather than a narrow,

interpretation: *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paragraph 34.

(1) Legislative History and Purpose of Section 19

[32] I will begin with a review of the circumstances that led to the enactment of what became section 19 of the *Federal Courts Act*. Not only will this elucidate the purpose of that provision; it will also dispose of Alberta's main argument – that Parliament specifically considered the issue of challenges to the validity of provincial legislation and chose to ascribe jurisdiction over such challenges to the Supreme Court only and not to the Exchequer Court, the ancestor of today's Federal Court.

[33] At Confederation the idea of judicial review was well understood. Colonial legislatures and governments exercised limited power. Courts had the power to strike down colonial legislation that contradicted Imperial legislation, as was made clear by the *Colonial Laws Validity Act, 1865*. Barry L. Strayer summarizes the situation as follows, in *The Canadian Constitution and the Courts*, 3rd ed (Toronto: Butterworths, 1988) at 14 [Strayer, *Constitution*].

> We can thus see that, as Confederation approached, the judges and lawyers in the colonies of British North America must have been familiar to some degree with the British doctrine of judicial review of colonial legislation. Courts in other colonies had exercised this function, some British North American courts had at least exercised an analogous function, and the English courts had not hesitated to deal with colonial legislative validity where it was relevant to their proceedings. The Judicial Committee, as the supreme judicial body of the colonial system, had provided ample precedents for judicial review. Its practice would have led the colonial courts to consider the question of validity where necessary, in anticipation of that issue being dealt with in London on appeal.

[34] One feature of that form of review must be underlined. Every judge in the country, whatever the level of court, is empowered to review the constitutional validity of legislation. Today, comparative constitutional lawyers call this "diffuse" or "decentralized" judicial review, as the mandate of applying the constitution is not entrusted to a single, specialized court. Using the example of the United States, Professor Favoreu and his colleagues describe the concept as follows in *Droit constitutionnel*, 21st ed. (Paris: Dalloz, 2019) at 257 [Favoreu, *Droit constitutionnel*]:

> [TRANSLATION]
>
> Applied to the American system, characterizing judicial review as "diffuse" means that any federal or State judge may review legislation on constitutional grounds … the judge seized of the matter in the first instance has jurisdiction to decide all the issues arising in a case, whether they be civil, criminal, administrative or constitutional.

[35] While the concept of judicial review was well known, the structure of the judicial institutions that would enforce the federal division of powers established by the new constitution was very much a matter of debate. Non-judicial means, such as the federal cabinet's disallowance power or arbitration (see, in this regard, *Alberta v Canada*, at paragraph 31), were used for some time. Nevertheless, the Fathers of Confederation foresaw that the courts would play a major role, although they disagreed as to whether the Judicial Committee of the Privy Council in London or a Canadian general court of appeal should be entrusted with the final determination of disputes regarding the division of powers: Strayer, *Constitution*, at 15–22. Moreover, there were many conceptual obstacles to the judicial resolution of disputes involving governments, including Crown immunity and the concept of the indivisibility of the Crown.

[36] In 1875, a significant step in adapting the judiciary to the new federal structure was taken with the enactment of the *Supreme and Exchequer Courts Act*, SC 1875, c 11. Relevant to this discussion are the means provided by Parliament for the resolution of intergovernmental disputes, including disputes as to the validity of legislation, which in that era would mostly be related to the division of powers.

[37] The first means was the federal government's reference power. Instead of waiting for a case to wind its way through the various levels of courts, the government could refer a question directly to the Supreme Court, in particular when the validity of legislation was at stake. This power has been used repeatedly ever since. A significant proportion of our constitutional law now stems from advisory opinions issued by the Supreme Court in reference cases.

[38] Two other means were also provided. As Alberta relies strongly on the wording of the relevant provision of the *Supreme and Exchequer Courts Act*, it is useful to set it out in full here, and to separate its various components for ease of reading:

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.: –	**54.** Lorsque la législature d'une province faisant partie du Canada aura passé un acte convenant et décrétant que la Cour Suprême et la Cour de l'Échiquier, ou la Cour Suprême seulement, selon le cas, auront juridiction dans aucun des cas suivants, savoir :
(1st) Of controversies between the Dominion of Canada and such Province;	(1.) Les contestations entre la Puissance du Canada et cette province;
(2nd) Of controversies between such Province and	(2.) Les contestations entre cette province et quelque autre

any other Province or Provinces, which may have passed a like Act;	province ou quelques autres provinces qui auront passé un acte semblable;
(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;	(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;
(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;	(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;
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.	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.

[39] Section 55 then states that the Exchequer Court will hear cases falling under the first and second categories mentioned in section 54, with an appeal lying to the Supreme Court. Section 56 sets out the procedure applicable to the third and fourth categories as follows:

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	**56.** Dans les cas en troisième et quatrième lieux mentionnés dans l'avant-dernière section immédiatement précédente, le juge qui aura décidé que cette

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 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.	question est essentielle ordonnera que la cause soit portée devant la Cour Suprême, afin que cette question y soit décidée, et elle y sera portée en conséquence; et après la décision de la Cour Suprême, 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.

[40] Alberta argues that the fundamental difference between the first two categories of cases, which fall within the jurisdiction of the Exchequer Court, and the last two, which fall under the exclusive jurisdiction of the Supreme Court, is that the last two categories of cases relate to the validity of legislation, whereas the first two do not. In other words, the "controversies" mentioned in the first two paragraphs cannot relate to the validity of legislation, which is only mentioned in the last two paragraphs. If something is mentioned in one place but omitted in another, the omission is significant – the Latin maxim, *inclusio unius, exclusio alterius*, is often used to convey the idea. It follows, according to Alberta, that Parliament intended to withhold from the Exchequer Court the power to strike down provincial legislation. With respect, this is a misreading of those provisions.

[41] Alberta's argument fails to appreciate that, through those sections, Parliament provided two fundamentally different vehicles for the resolution of disputes that were expected to arise in the new federal context. Given those differences, the maxim *inclusio unius, exclusio alterius* cannot be applied. Let me explain.

[42] At the time of Confederation, because of the then prevailing views of Crown immunity and indivisibility, there was no obvious judicial forum for the resolution of disputes between governments in a federal system. The first two paragraphs of section 54, the substance of which is now embodied in section 19 of the *Federal Courts Act*, thus created a new kind of jurisdiction, which would overcome the limitations flowing from Crown immunity and indivisibility. With respect to interprovincial disputes, they also provided a forum that is not a court of one of the provinces involved. In *R (Canada) v R (Prince Edward Island)*, [1978] 1 FC 533 (CA) at 558 [*Canada v PEI*], Chief Justice Jackett commented as follows on the purpose of those provisions:

> 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.

[43] (Here, the Chief Justice uses the phrase "municipal courts" as a synonym of "domestic courts," in opposition to international courts.)

[44] The last two paragraphs of section 54 create a very different mechanism. It was an attempt to implement what is now known, in other countries, as "concentrated" or "centralized" judicial review: Favoreu, *Droit constitutionnel* at 266; Juliane Kokott and Martin Kaspar, "Ensuring Constitutional Efficacy" in Michel Rosenfeld and András Sajó, eds., *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 795 at 807–15. The idea was that, contrary to the existing situation, ordinary courts would not decide constitutional issues arising in cases before them, but would rather refer them to a single, centralized constitutional court, which would be the Supreme Court: Peter H. Russell, "The

Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968) 6 Osgoode Hall LJ 1 at 7–8. There would be, in Professor Favoreu's words, [TRANSLATION] "a specific constitutional court endowed with a monopoly on constitutional interpretation:" Favoreu, *Droit constitutionnel*, at 266. The intention to implement such a system is made clear by the process laid out in section 56, although its use was not compulsory, but left to the discretion of the judge hearing the case.

[45] In making recourse to this process optional, Parliament perhaps anticipated that it could not deprive provincial superior courts of the jurisdiction to apply the constitution: *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307. This optional nature may explain why the process appears never to have been used. In any event, it was repealed in 1974 as part of the overhaul of the Supreme Court's jurisdiction, and concentrated judicial review remains foreign to our constitutional tradition.

[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.

[47] Quite the contrary, the goals pursued by Parliament in enacting what became section 19 suggest that it should receive a generous interpretation. As Chief Justice Jackett noted, the aim was to create a new jurisdiction to deal with intergovernmental disputes. It would have been obvious to the members of Parliament – several of whom had participated in the Confederation debates during which the issue was expressly raised – that such disputes would include issues regarding the compliance of legislation with the constitutional division of powers. Other than in the course of private litigation, there was no obvious judicial forum to resolve such issues. Provincial governments were not yet empowered to refer questions to the court of appeal of their province and could not refer a question directly to the Supreme Court: James L Huffman and MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 Minn L Rev 1251 at 1259.

[48] Thus, contrary to Alberta's submissions, the legislative history of section 19 does not show that constitutional issues fall outside its purview. To the contrary, the context in which it was enacted tends to demonstrate that it should be given a wide interpretation and that its authors understood that the "controversies" that this Court must resolve would include controversies as to the validity of legislation.

[49] Alberta also argues that irrespective of the scope of section 19 of the *Federal Courts Act*, any claim made against Alberta under that provision must also come within the purview of section 27 of its *Judicature Act*. That is obviously true. Given, however, that those provisions form part of an interlocking federal-provincial statutory scheme, I am reluctant to ascribe them different meanings in the absence of an explicit indication to that effect. Alberta says that such

an indication is provided by other provisions of the *Judicature Act*. The Alberta legislature would not, as the argument goes, have given the Federal Court a wider jurisdiction over constitutional issues than to the province's own courts. With respect, this is speculative. In addition to being based on assumptions that I do not wish to discuss here, this argument overlooks that it is equally possible that the Alberta legislature shared Parliament's wish to provide a national forum for the resolution of intergovernmental disputes, including those involving the validity of legislation, and intended to fill any gaps that might have existed in that respect.

(2) Wording and Implied Limitations

[50] Alberta also argues that the word "controversy" should not receive a broad meaning, but should rather be interpreted according to certain Canadian precedents or in a manner similar to the phrase "cases and controversies" in the constitution of the United States. Of course, I am bound by the pronouncements of higher courts as to the meaning of section 19. A careful review of the cases invoked by Alberta, however, does not evince any intention of narrowing the scope of section 19 in the manner suggested. Moreover, the American jurisprudence regarding "cases and controversies" has simply not been applied in Canada.

[51] Alberta argues that for a case to come under section 19, it must involve a "legal right, obligation or liability." That phrase is taken from the reasons of Justice Le Dain in *Canada v PEI*, at 583. Justice Le Dain, however, did not set out to describe the outer limits of section 19. He was using those terms to make the point that Prince Edward Island's claim in that case fell squarely within section 19. The full passage is as follows:

> 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.

[52] Justice Le Dain simply did not address the issue of whether a challenge to the validity of legislation could be described as a "controversy." Likewise, the reference to "contract or trust" in *Ontario (Attorney General) v Canada (Attorney General)* (1907), 39 SCR 14 at 45–46 was more a description of the issue at hand than of the outer limits of the predecessor to section 19.

[53] Another early Supreme Court case provides more insight into the scope of section 19. *Province of Ontario v Dominion of Canada* (1909), 42 SCR 1, aff'd [1910] AC 637 (PC), was not a challenge to the validity of legislation, but a claim by Canada to be reimbursed by Ontario for the annuities paid according to a treaty with certain Indigenous peoples of that province. After the treaty was made, the Privy Council held that, contrary to Canada's assumption, the "extinguishment" of aboriginal title benefitted Ontario. Canada's claim to reimbursement was not based on a right recognized by statute or the common law, but on general concepts of equity and on an analogy with the concept of quasi-contract in the civil law tradition. It is in that context that Justice Duff wrote the following passage, quoted in Alberta's memorandum, at 118–119:

> The "Exchequer Court Act" confers upon that court jurisdiction to decide a controversy such as this. It says nothing about the rule to be applied in reaching a decision; but it is not to be supposed that (acting as a court) that court is to proceed only upon such views as the judge of the court may have concerning what (in the circumstances presented to him) it would be fair and just and proper that one or the other party to the controversy should do. 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.

[54] Likewise, Justice Idington wrote, at 101:

> We should, I think, first consider the nature of the jurisdiction given by section 32 of the "Exchequer Court Act" in assigning to that court the power to determine "controversies" arising between the Dominion and a province that has acceded thereto.
>
> The language is comprehensive enough to cover claims founded on some principles of honour, generosity or supposed natural justice, but no one in argument ventured to say the court was given any right to proceed upon any such ground. 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.

[55] In making these remarks, both justices were emphasizing Canada's need to identify a legal basis for its claim. "Rights," "contract" or "legal equity" were potentially the most relevant legal concepts in that particular case, although the Court eventually dismissed Canada's claim, as it had not contracted with Ontario for the reimbursement of the treaty annuities. Insofar as we can deduce anything regarding the meaning of "controversy" in section 19 of the *Federal Courts Act*, it is that such a controversy must be able to be decided on legal grounds, as opposed to moral or policy grounds.

[56] Alberta also relies heavily on the American jurisprudence dealing with Article III of the United States constitution, which uses the words “cases” and “controversies” to delineate the jurisdiction of the federal judiciary. Those concepts have been interpreted as putting important restrictions on what is known as a “facial challenge,” that is, a challenge to the validity of legislation considered in the abstract, independently of its application to specific, individual circumstances: *Washington State Grange v Washington State Republican Party*, 552 US 442 (2008). They have also resulted in stringent standing requirements which discourage declaratory judgments: *Rescue Army v Municipal Court*, 331 US 549 (1947).

[57] Needless to say, the case law interpreting Article III of the United States constitution does not apply in Canada. Courts have often noted that the Canadian approach is more generous. For instance, the Supreme Court of Canada wrote that “the principles enunciated by the United States Supreme Court on standing are more restrictive than those that are applicable in Canada:” *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 248. Likewise, “facial challenges” are readily accepted in Canada. Recent examples include *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], and *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*]. In the *Secession Reference*, at paragraph 13, the Supreme Court of Canada rejected the application of the American “cases and controversies” doctrine as a guide to the interpretation of section 101 of the *Constitution Act, 1867*. In the same fashion, it should not inform the interpretation of section 19 of the *Federal Courts Act*.

[58] Alberta also tries to read in a limitation to the effect that this Court could not issue a declaratory judgment, or at least a declaration of constitutional invalidity, in the exercise of its section 19 jurisdiction. Alberta invoked cases where the constitutional limits of this Court's jurisdiction flowing from section 101 of the *Constitution Act, 1867* were explored, including *Windsor, Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604, [2018] 1 FCR 386, and *Deegan v Canada (Attorney General)*, 2019 FC 960. This, however, is beside the point. As I have mentioned above, this Court's section 19 jurisdiction is not constrained by section 101: *Alberta v Canada* at paragraph 34. The lack of any mention of declaratory judgments in section 19, in contrast to section 18, is not conclusive. A better comparator would be section 17, under which declaratory judgments may doubtless be issued. Moreover, declaratory judgments have been issued in cases heard under section 19, in particular *Canada v PEI*.

[59] Thus, there are no obstacles to a broad interpretation of the kinds of "controversies" that may be submitted to this Court pursuant to section 19. Alberta's arguments have not lessened the force of Justice Johanne Gauthier's remarks in *Alberta v Canada*, at paragraph 26:

> 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.

[60] Thus, I find no reason to exclude challenges to the validity of legislation from the ambit of section 19 of the *Federal Courts Act*.

(3) Crown Immunity

[61] Alberta argues that it is immune from suit in the Federal Court. As it states in its memorandum, "in the absence of clear statutory authority from the sovereign, a sovereign's laws are not assailable under the principle of Crown immunity." This argument fails, for several reasons.

[62] Once a common law rule, Crown immunity is now encapsulated in section 17 of the *Interpretation Act*, RSC 1985, c I-21, which reads as follows:

17. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.	**17.** Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives.

[63] In *Alberta Government Telephones v Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 SCR 225, at 281, the Supreme Court of Canada explained in what circumstances Crown immunity is displaced:

> It seems to me that the words "mentioned or referred to" in s. [17] are capable of encompassing (1) expressly binding words ("Her Majesty is bound"), (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*, and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

[64] Alberta's adhesion to the mechanism provided by section 19 necessarily implies a waiver of Crown immunity. All disputes coming under the purview of section 19 are, by definition, suits against the Crown. By enacting section 27 of its *Judicature Act*, Alberta waived Crown immunity by necessary implication: see, by way of analogy, *Canada (Attorney General) v Thouin*, 2017 SCC 46 at paragraph 24, [2017] 2 SCR 184. Moreover, Crown immunity would "wholly frustrate" section 19, or render it entirely inoperative.

[65] Indeed, in *Canada v PEI*, at 583, Justice Le Dain expressed the view 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 [section 19] […]

[66] More recently, in *Alberta v Canada*, at paragraph 25, Justice Johanne Gauthier stated that "[t]here is thus no doubt that no issue of Crown immunity arises in respect of Alberta when sections 19 and 27 of the aforementioned statutes apply."

[67] Alberta also argues that provinces are immune from suit in the Federal Court. In practical terms such suits may be rare, but as an abstract proposition this is not true. Each provision granting jurisdiction to this Court must be examined independently: *Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133 at paragraphs 50–53, [2017] 3 FCR 3. Section 17 of the *Federal Courts Act* deals with suits against the Crown, which is defined in section 2 as "Her Majesty in right of Canada." A province cannot be sued on that basis. This explains one of the cases cited by Alberta, *Greely v* "*Tami Joan*" *(The)* (1996), 113 FTR 66. The same is true of section 18, which underpins a large proportion of the cases brought before this Court. That

section provides for the review of decisions made by a "federal board, commission or other tribunal," the definition of which expressly excludes "any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province." A province, however, may be sued in this Court for patent infringement under section 20: *Bessette v Quebec (Attorney General)*, 2019 FC 393 [*Bessette*]. I acknowledge that this Court has held otherwise with respect to copyright claims: *Trainor Surveys (1974) Ltd v New Brunswick*, [1990] 2 FC 168 (TD). This discrepancy may be explained by the explicit statement that the *Patent Act*, RSC 1985, c P-4, s 2.1, binds the Crown and the lack of a corresponding statement in the *Copyright Act*, RSC 1985, c C-42: *Bessette*, at paragraph 98. Be that as it may, section 19 clearly contemplates suits against provincial governments and it is difficult to understand how Alberta can claim immunity in the face of section 27 of its own *Judicature Act*.

[68] There is a more fundamental reason why Alberta cannot invoke Crown immunity. As it finds its source in statute or the common law, the concept of Crown immunity is inimical to the principle of the supremacy of the Constitution. When the constitutional validity of legislation is at stake, the legislature cannot immunize itself from review without undercutting the whole foundation of the constitutional edifice.

[69] In *British Columbia Power Corporation v British Columbia Electric Company*, [1962] SCR 642 at 644–5 [*BC Power*], the Supreme Court of Canada rejected the argument that Crown immunity made it impossible to appoint a receiver of certain property until the constitutional validity of certain legislation was determined by the courts:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

[70] A slightly different case concerned the Saskatchewan legislature's attempt to immunize itself from the obligation to reimburse taxes collected under a statute if that statute was later found to be constitutionally invalid. In *Amax Potash Ltd v Government of Saskatchewan*, [1977] 2 SCR 576, the Supreme Court of Canada, on the strength of its previous decision in *BC Power*, struck down the legislation that purported to bar recovery. It stated, at 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be *ultra vires* the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be *ultra vires* because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

[71] The Supreme Court of Canada came back to this issue in *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539. At the relevant time, no one could sue the provincial Crown in British Columbia without first obtaining a *fiat*, that is, the authorization of the government. In that case, the government had refused Air Canada a *fiat* to institute proceedings to recover taxes paid under legislation that was alleged to be constitutionally invalid. The Court found that the government was bound to give the *fiat*, given the constitutional nature of the claim: "[a]ll executive

powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives" (at 545).

[72] For all those reasons, Alberta cannot claim it is "immune" from the jurisdiction of this Court pursuant to section 19 of the *Federal Courts Act*.

C. *Standing*

[73] Certain arguments made by Alberta with respect to this Court's jurisdiction are, in fact, related to British Columbia's standing to initiate the present action.

[74] Alberta submits that "[t]o the extent that there are impacts on the constitutional order, those rights belong to the federal Crown, not to the provinces." It would follow, as the argument goes, that only Canada has standing to protect its own jurisdiction. A province could not challenge another province's legislation.

[75] I must confess that it is difficult for me to understand this argument. After all, it is well established that anyone can challenge the validity of legislation that is sought to be applied against them: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 313–15. Over the course of the last half-century, courts have gradually recognized, through the concept of public interest standing, that citizens may, in appropriate circumstances, challenge the validity of a law without having to break it first: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524. Thus, one fails to see why an Attorney

General would be not able, in appropriate circumstances, to challenge the validity of the legislation of another province, when everyone else can.

[76] Alberta attempts to ground this purported incapacity in Canada's federal structure. An Attorney General, it is said, can act only with respect to matters that fall within his or her province's jurisdiction and within that province's territory.

[77] While most of a provincial Attorney General's activities will usually stay within those bounds, it cannot be said that there is an absolute prohibition on initiating lawsuits in other circumstances. In particular, Canada's federal nature implies that there will be situations where a province will have an interest in another province's actions, especially when the prohibition on extraterritorial legislation or other rules related to economic integration are at stake. Challenging another province's legislation is not necessarily an affront to that other province's "equal sovereignty:" *1068754 Alberta Ltd v Québec (Agence du revenu)*, 2019 SCC 37 at paragraph 83.

[78] This is illustrated by *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297. Although that case began as a reference by the Newfoundland government to that province's Court of Appeal, it was very much a challenge by Quebec to the validity of a Newfoundland statute, which was eventually found to encroach upon rights located outside the province. Likewise, one component of the *Second Securities Reference* was a challenge by Quebec and Alberta to the validity of an intergovernmental agreement to which they were not parties. No one seriously objected to the process, although, once again, this was a reference.

[79] Insofar as Alberta's standing argument leads to the more general proposition that a province's legislation is immune from any kind of challenge in another province's justice system, this is belied by *Hunt v T&N plc*, [1993] 4 SCR 289. That case dealt with an action in the courts of British Columbia against a Quebec corporation. That corporation declined to produce certain documents on discovery, because of a Quebec statute that prohibited the removal of those documents from the province when this was done to comply with a judicial order. The plaintiff in British Columbia sought to challenge the validity of the Quebec statute. The Supreme Court of Canada held that British Columbia courts could entertain a challenge to the validity of the Quebec statute, especially as "the issue relate[d] to the constitutionality of the legislation of a province that has extraprovincial effects in another province" (at 315).

[80] 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.

[81] Therefore, the country's constitutional structure does not deprive British Columbia of the standing to bring this action.

D. *Prematurity*

[82] The last ground on which Alberta seeks to have British Columbia's action dismissed is prematurity. The action, it is submitted, is "premised on the pure conjecture that the Minister of

Energy will use her power under the Act in a way that is unconstitutional." Indeed, to this date, neither the Minister nor the Lieutenant Governor in Council has taken any measure pursuant to the Act.

[83] Almost by definition, actions for declaratory judgment invite objections of that kind. Such actions have sometimes been described as a form of "preventive justice:" *R in right of Newfoundland v Commission Hydro-Electrique de Québec*, [1982] 2 SCR 79 at 100–103 [*Hydro-Québec*]; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 457. Declaratory judgment "is available without a cause of action, and courts make declarations whether or not any consequential relief is available:" *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paragraph 143, [2013] 1 SCR 623. The development of the doctrine of public interest standing also requires a more flexible approach to the issue of prematurity. Thus, declaratory judgments are available in circumstances where rights have not been violated, but merely threatened.

[84] It is not easy to distill from the cases an abstract rule governing the availability of declaratory judgment. Nevertheless, the situations in which a court will grant a declaratory judgment were recently summarized by the Supreme Court of Canada in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11, [2016] 1 SCR 99:

> The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties […].

[85] Beyond concerns related to the proper allocation of scarce judicial resources, the requirement of a "live controversy" is linked to evidentiary requirements. One of the reasons why courts have been reluctant to issue a declaratory judgment before legislation is applied in a specific situation is that such a situation provides a factual context that helps courts understand the practical effects of the legislation. In Charter cases, those effects can be crucially important in proving that an individual's rights have been breached. Moreover, evidence is necessary for a proper section 1 analysis. Even so, in certain circumstances, courts have entertained actions for declaratory judgments against unconstitutional statutes, even when the statutes had not been directly applied to the plaintiffs: *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199; *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569; *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19; *Bedford*; *Carter*; *B.C. Freedom of Information and Privacy Association v British Columbia (Attorney General)*, 2017 SCC 6, [2017] 1 SCR 93. In those cases, the Court was able to determine whether the impugned legislation was valid without placing it in a particular factual matrix.

[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*.

[90] In this regard, *Hydro-Québec* is a case in point. Hydro-Québec sought a declaratory judgment against Churchill Falls (Labrador) Corp Ltd with respect to the consequences of Churchill Falls's eventual default under its contract with Hydro-Québec for the supply of electricity. Churchill Falls had not defaulted yet and, in fact, asserted that it had every intention to perform. The potential default stemmed from a request made by the Newfoundland government, which Churchill Falls had challenged in the courts of that province. While Hydro-Québec's rights would not be affected until the resolution of the case in the Newfoundland courts, the Supreme Court of Canada found that Hydro-Québec's motion for declaratory judgment was not premature: *Hydro-Québec*, at 105–107.

[91] I must emphasize that the foregoing discussion relates to the alleged prematurity of the action. The issue of the prematurity of the motion for an interlocutory injunction raises different concerns and will be addressed later.

[92] As a result, Alberta's motion to strike British Columbia's action is dismissed. I must then consider whether an interlocutory injunction should issue.

III. British Columbia's Motion for an Interlocutory Injunction

A. *Analytical Framework*

[93] An interlocutory injunction is a temporary measure aimed at safeguarding the rights of the parties until a decision is rendered on the merits of the case. An interlocutory injunction is an equitable remedy. As such, it bears a discretionary character, which means that a judge may take

into consideration all relevant factors in deciding whether to issue such an injunction. Nevertheless, to ensure a degree of consistency, courts have developed an analytical framework that guides their reasoning.

[94] In a line of well-known cases, the Supreme Court of Canada discussed this analytical framework, especially as it pertains to cases involving constitutional law issues: *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 [*Metropolitan Stores*]; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR — MacDonald*]; *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 764; *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196. This analytical framework was recently summarized by the Alberta Court of Appeal in *PT v Alberta*, 2019 ABCA 158 at paragraphs 32–34:

> Generally, the moving party seeking interim injunctive relief must demonstrate (1) on a preliminary assessment of the merits of the case, that there is a serious question to be tried, that is, the application is not frivolous or vexatious; (2) the applicant will suffer irreparable harm if the application is refused, "irreparable" referring to the nature of the harm and not its magnitude; and (3) the balance of convenience favours granting the relief: ***RJR-MacDonald*** at 334-335, 341.
>
> Since legislation can be understood as expressing a reasoned choice by the legislature, "only in *clear cases* will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed" [emphasis added]; "[i]t follows that in assessing the balance of convenience," the court must proceed on the assumption that the law "is directed toward the public good and serves a valid public purpose": ***Harper v Canada (Attorney General)***, 2000 SCC 57 at para 9, [2000] 2 SCR 764 [***Harper***].
>
> As said in ***RJR-MacDonald*** at 342: "In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined [at the balance of convenience] stage."

[95] The last part of this quote underscores the special considerations that come into play where an interlocutory injunction is sought in constitutional cases. In a nutshell, we should be mindful that the considered judgment of the legislature should be overturned only by a considered judicial decision, which is often only possible after a trial on the merits. I will return to these special considerations when I analyse each element of the framework.

[96] A more general point should be made at this juncture. The power to issue injunctions, including interlocutory injunctions, is an equitable and discretionary power. The criteria set forth in *RJR — MacDonald* and similar cases are not intended to suppress judicial discretion. As the Saskatchewan Court of Appeal wrote in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 at paragraph 26 [*Mosaic Potash*], they are not an "inflexible straightjacket" nor "watertight compartments." Indeed, in *Metropolitan Stores*, at 127, Justice Beetz noted that the case law regarding those criteria was "relatively fluid" and that its analysis "is the function of doctrinal analysis rather than that of judicial decision-making."

[97] One example of that fluidity is the relationship between the strength of the plaintiff's case and the two other criteria. Even though a plaintiff is not required to show more than a "serious issue to be tried," as we will see below, it stands to reason that where a plaintiff shows a very strong case, the Court may be less demanding with respect to the other criteria. It is also said that the strength of the case may be taken into account when assessing the balance of convenience, which amounts to the same thing. Robert J. Sharpe summarizes this approach in his treatise,

Injunctions and Specific Performance (Toronto: LexisNexis, looseleaf ed.) at paragraph 2.280 [Sharpe, *Injunctions*]:

> The weight to be placed upon the preliminary assessment of the relative strength of the plaintiff's case is a delicate matter which will vary depending upon the context and circumstances. As the likely result at trial is clearly a relevant factor, the judge's preliminary assessment of the merits should, as a general rule, play an important part in the process. However, the weight to be attached to the preliminary assessment should depend upon the degree of predictability which the factual and legal issues allow.

B. *Serious Issue to be Tried*

[98] In *RJR — MacDonald*, at 337, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold and is satisfied where "the application is neither vexatious nor frivolous."

[99] British Columbia argues that the Act is legislation with respect to interprovincial commerce that is not authorized by section 92A(2) of the *Constitution Act, 1867*. In its memorandum, Alberta offered a number of arguments in response to British Columbia's case. At the hearing, however, it conceded that the Act's validity raises a serious issue. Despite this concession, I must form my own independent view of the matter. This will be useful for the third stage of the analysis, balance of convenience, where the strength of the plaintiff's case is a relevant consideration. I will begin the analysis with a brief description of the process through which courts characterize legislation. I will then provide a summary of the relevant heads of jurisdiction. I will then apply those principles to the Act.

(1) The Process for Classifying Laws

[100] In *Morgentaler*, at 481–2, the Supreme Court of Canada described the analytical process to be used for determining whether legislation was enacted by the appropriate order of government:

> Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under ss. 91 and 92 of the *Constitution Act, 1867*. […]
>
> A law's "matter" is its leading feature or true character, often described as its pith and substance […]. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided […] both the purpose and effect of the law are relevant considerations in the process of characterization […].

[101] That method has been followed ever since: *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at paragraphs 52–54, [2002] 2 SCR 146; *Canadian Western Bank*, at paragraphs 25–30; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paragraphs 19, 184, [2010] 3 SCR 457; *Reference re Securities Act*, 2011 SCC 66 at paragraphs 63–67, [2011] 3 SCR 837 [*Securities Reference*].

[102] In determining a statute's pith and substance, courts are guided by "the substance and not the form of the law:" *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paragraph 23, [2015] 3 SCR 250. They look at the factual situation that gave rise to the enactment of a statute to understand its purpose and intended effects: *Central Canada Potash Co Ltd v Government of Saskatchewan*, [1979] 1 SCR 42 at 75 [*Central Canada Potash*];

Morgentaler, at 482–483; *Securities Reference*, at paragraphs 63–64, 98–99; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at paragraph 36, [2016] 1 SCR 467 [*Châteauguay*]; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at paragraph 105 [*Environmental Management Act Reference*].

[103] Legislative debates may provide useful evidence of a statute's pith and substance. For example, in *Morgentaler*, the Court relied on the debates in the Nova Scotia legislature to find that legislation that was ostensibly directed at the privatization of medical services was really aimed at regulating abortion and at preventing Dr. Morgentaler from opening a clinic in Halifax. The sequence of events that precipitated the adoption of the challenged measure may also provide an indication of its pith and substance, as in *Châteauguay*, at paragraph 43. On the other hand, courts are not bound by preambles or statements of purpose found in the legislation: *Reference re Validity of Section 5 (a) of the Dairy Industry Act*, [1949] SCR 1 at 47-48; *Canadian Western Bank*, at paragraph 27.

[104] Before applying those principles to the Act, I wish to stress that a division-of-powers analysis does not involve a judgment concerning the merits or wisdom of the legislation under review: *Morgentaler*, at 488; *Securities Reference*, at paragraph 90. Neither is motive relevant. In this regard, the opinions of members of the Alberta legislature concerning the actions of the government of British Columbia have no bearing on the issues before me. Moreover, once legislation is found to relate to a matter within the jurisdiction of the enacting body, the negative effects on another government's policies are not independent grounds for review: *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693.

(2) Interprovincial Commerce, Natural Resources and the Division of Powers

[105] The division of powers established by sections 91–95 of the *Constitution Act, 1867* attempts to strike a balance between federal and provincial powers. In the *Reference re Secession of Quebec*, [1998] 2 SCR 217, at paragraph 58, the Supreme Court of Canada explained the *raison d'être* of federalism:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.

[106] Nevertheless, one of the goals of the framers of the Canadian constitution was to unify the colonies from an economic point of view. To that end, they empowered Parliament to legislate concerning matters that were critical to economic integration. In *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1099, Justice La Forest emphasized

> […] the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the *Charter*; see *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole […].

[107] In this regard, section 91(2) gives Parliament exclusive jurisdiction over "the Regulation of Trade and Commerce" (variously translated as "*la réglementation du trafic et du commerce*" or "*la réglementation des échanges et du commerce*" in the non-official French versions of the *Constitution Act, 1867*). This has been interpreted to cover at least the regulation of international and interprovincial commerce. As a result, provinces cannot enact legislation dealing with interprovincial commerce. See, for instance, *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357; *Texada Mines Ltd v Attorney-General of British Columbia*, [1960] SCR 713.

[108] An exception to that principle was carved out in 1982, by the addition of section 92A to the *Constitution Act, 1867*. Section 92A is often called the "resources amendment" and was adopted for the following reasons.

[109] By the operation of sections 92(5) and 109, provinces have jurisdiction over, and ownership of, public lands and, more generally, natural resources: see, for an overview, Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013). While ownership of public lands was withheld from the Prairie provinces upon their creation in 1870 or 1905, that situation was corrected by the *Constitution Act, 1930*, and Alberta, Saskatchewan and Manitoba were put on an equal footing with the other provinces in this regard.

[110] Nevertheless, the judgments of the Supreme Court of Canada in *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan*, [1978] 2 SCR 545, and *Central Canada Potash* made it clear that the provinces could not enact comprehensive schemes for the management of their

own natural resources if those schemes resulted in indirect taxation or restrictions on interprovincial commerce. Against the backdrop of the upheaval in international energy markets in the 1970s, these cases prompted the Prairie provinces to seek a constitutional amendment that would overcome those limitations. That was the genesis of section 92A: J Peter Meekison, Roy J Romanow and William D Moull, *Origins and Meaning of Section 92A* (Montreal: Institute for Research on Public Policy, 1985). Relevant to this case is the second paragraph of that section, which reads as follows:

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.	(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

[111] The sixth schedule to the *Constitution Act, 1867*, which was also added in 1982, defines "primary production" as excluding "a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil."

[112] Another component of the *Constitution Act, 1867* designed to create a common market is section 121, which reads: "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." The Supreme Court of Canada recently considered the meaning of section 121 in *R v Comeau*, 2018 SCC 15, [2018] 1 SCR 342. The Court summarized its analysis as follows, at paragraph 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.

(3) Analysis

[113] I must now assess whether British Columbia has raised a serious issue that the Act oversteps the bounds of provincial jurisdiction. For the following reasons, I find that it has. I will first explain that the Act's pith and substance is the regulation of oil exports. I will then show that the Act is not saved by section 92A(2) of the *Constitution Act, 1867*, as it is not limited to "primary production" and it authorizes discrimination between provinces.

[114] Even a cursory review of the Act shows that it is directed at the regulation of oil exports. Its main operative provision, section 2(1), states that "No person shall, without a licence, export from Alberta any quantity of natural gas, crude oil or refined fuels." On its face, this kind of legislation falls under Parliament's jurisdiction over interprovincial commerce pursuant to section 91(2).

[115] This is subject, of course, to section 92A(2). In this regard, Alberta argues that section 92A(2) should not be considered to be an exception to section 91(2). I disagree. While the interrelation between the relevant provisions may be the subject of further argument at trial, at this stage, I find that the section's history shows that it was intended to provide the provinces, under certain conditions, a certain degree of relief from the consequences of the exclusive federal jurisdiction. Therefore, it seems 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).

[116] British Columbia argues that the Act fails to comply with two of those conditions. The first one is that section 92A(2) covers only "primary production," which is defined in the sixth schedule, quoted above, as excluding refined oil products. In an apparent breach of section 92A(2), section 2(1) of the Act not only covers crude oil and gas, but it is also directed at "refined fuels."

[117] Alberta responds that the reference to "refined fuels" is "necessarily incidental" to the exercise of its power to regulate the export of crude oil, and thus valid: *City National Leasing Ltd v General Motors of Canada Ltd*, [1989] 1 SCR 641 [*General Motors*]. While I understand that the Trans Mountain pipeline carries both crude oil and refined fuels, it has not been shown to me why it would be necessary to regulate the export of refined fuels to successfully regulate the export of crude oil. The Trans Mountain pipeline is a federal undertaking and a province cannot regulate what it carries: *Environmental Management Act Reference*, at paragraph 105. In any

event, I doubt very much that the doctrine of ancillary powers laid out in *General Motors* can be applied so as to read out the explicit limitations of section 92A(2) whenever this is thought to be convenient.

[118] Hence, British Columbia has raised a serious issue that the Act, in its application to refined fuels, exceeds the powers conferred by section 92A(2).

[119] According to British Columbia, the Act breaches the requirements of section 92A(2) in another respect: it "authorize[s] or provide[s] for discrimination … in supplies exported to another part of Canada" (in French, it "*autoris[e] ou prévo[it] […] des disparités dans les exportations destinées à une autre partie du Canada*"). Alberta denies that the Act does anything of that nature and asserts that discrimination could only result from concrete measures taken under the Act. It argues that the Act, on its face, pursues legitimate provincial purposes.

[120] I disagree with Alberta's position. At first blush, the concepts of "authorizing" and "providing," in section 92A(2), are distinct. "Authorizing," in its ordinary meaning, includes the delegation of a power that may be used so as to create discrimination. In this regard, the Act allows the Minister to issue licences that contain restrictions concerning the point of export from Alberta. This obviously allows for discrimination between provinces located to the west and to the east of Alberta.

[121] Most importantly, a detailed review of the legislative debates shows that the whole point of the Act is to impose a form of discrimination on British Columbia.

[122] As mentioned above, the Alberta government announced its intention to table Bill 12, which became the Act, on April 9, 2018, the day after Kinder Morgan announced that it would suspend all non-essential work on the Trans Mountain expansion project and suggested that the project would not be viable. It is fair to say that all members who spoke were alarmed by the announcement and by its consequences on Alberta's oil and gas industry. While the causes of the project's suspension may be the subject of debate, many members laid the blame on the conduct of the British Columbia government. (I pause here to note that it is not my role to decide whether British Columbia's actions were constitutionally valid, lawful or wise, and I express no opinion on those matters.)

[123] It is in this context that the Minister of Energy repeated several times that the government would soon introduce legislation aimed at restricting the flow of petroleum products being exported to British Columbia. The following remarks accurately summarize what the Minister repeatedly said:

> As we've said many times, we're going to use every tool in our tool box to fight the decisions B.C. is making. As I mentioned, in the forthcoming days there will be legislation dropped – and I hope you will be supporting that – to restrict resources to B.C., to inflict economic pain upon them so that they realize what their decisions mean.
>
> (Alberta Hansard, April 9, 2018, page 441)

[124] On the same day, the Leader of the Opposition rose to point out that he had been calling for similar measures for several months. He said:

> We cannot let this stand, Madam Speaker, which is why for nine months I have been calling on this government to have a real fight-back strategy. To begin with, I called last July for symbolic measures like the wine boycott. I called for safety inspections of

> B.C. product passing through Alberta. I said that we should be prepared to consider tolling B.C. gas that goes through Alberta pipelines to U.S. markets if they seek to block this energy pipeline and violate the Constitution to which I refer. I've said that we should be prepared to do what Peter Lougheed did in 1980 in being prepared to turn off the taps of the shipments of oil that currently fuel the Lower Mainland economy.
>
> (Alberta Hansard, April 9, 2018, page 451)

[125] Indeed, the expression "turn off the taps," used by the Leader of the Opposition, is the phrase by which the Act has become colloquially known.

[126] After Bill 12 was formally introduced, members on both sides of the Legislative Assembly continued to explain its purpose in relation to the British Columbia government's actions regarding the Trans Mountain expansion project, even though references were also made to the concept of maximizing the return from Alberta's natural resources. For example, when making the final speech on the bill's second reading, the Minister of Energy said:

> First, this bill responds to a particular situation that members in this Assembly understand all too well, namely the roadblocks that have resulted in the delays to the Trans Mountain pipeline expansion. These roadblocks have been thrown up by the government of British Columbia, which claims that it has the right to delay a project which has received approval from the government of Canada.
>
> (Alberta Hansard, May 7, 2018, pages 854–5)

[127] From those statements, one can conclude that: (1) the Act seeks to limit the exportation of petroleum products from Alberta; (2) the application of the Act was only ever contemplated in relation to British Columbia. I will draw other conclusions from those statements when I address the issue of irreparable harm.

[128] The fact that the Act was intended to impose supply discrimination on British Columbia is confirmed by section 2(3) of the Act, which sets out the factors that the Minister must take into consideration before triggering the requirement to obtain oil export licences. The first factor is "whether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta." In the context where the only pipeline capacity expansion currently under consideration is the Trans Mountain expansion project, this factor is a transparent manner of enabling the Minister to stop exports on the basis of her opinion as to the progress of that project.

[129] To counter that conclusion, Alberta suggests that the Act may serve other, non-discriminatory purposes. It points out that its preamble sets outs goals that are not inherently discriminatory and that are well within provincial jurisdiction, such as "maximizing the value of Alberta's natural energy resources for Canadians" and "ensuring the interests of Albertans are optimized prior to authorizing the export from Alberta of natural gas, crude oil or refined fuels." It also says that members of the Legislative Assembly have described the Act in such general terms on a number of occasions.

[130] However, where legislation has been found, in pith and substance, to relate to a matter that is not within the powers of the enacting legislature, it will usually be declared to be wholly invalid. For example, the legislation and regulations at issue in *Morgentaler* were declared to be invalid in their entirety because they related to abortion, even though the regulations prohibited the provision of certain other medical procedures in private clinics. Likewise, in the *Securities Reference*, the Supreme Court stated that Parliament could regulate certain aspects of securities

for certain purposes. It nevertheless held that the proposed federal legislation was invalid in its entirety, as its goal was to eviscerate provincial jurisdiction over securities. It was for Parliament, and not the Court, to design a scheme that would pass constitutional muster.

[131] At this stage of the analysis, however, I need only say that on the evidence before me, Alberta has not negated the serious issue raised by British Columbia that the Act breaches section 92A(2) for authorizing discrimination.

[132] Given the foregoing conclusion, I need not address British Columbia's argument based on section 121 of the *Constitution Act, 1867*. I will simply note that the application of section 121 to provincial legislation adopted under section 92A(2) gives rise to a conceptual difficulty. Section 92A(2) explicitly empowers provinces to legislate regarding exports to other provinces. This would logically entail some restrictions on the free flow of goods across the country. How this is to be reconciled with section 121 is, to my knowledge, an issue that has never received serious consideration. For that reason, I will say nothing further about section 121.

C. *Irreparable Harm*

[133] Irreparable harm is the second component of the *RJR — MacDonald* framework. British Columbia asserts two forms of irreparable harm that would result from the operation of the Act. The first type of harm relates to the consequences of an oil embargo of the kind alluded to by members of the Legislative Assembly. Such an embargo would deprive British Columbia of essential fuel supply, which could result in severe economic consequences as well as, depending on the duration of the embargo, threats to public safety. Second, British Columbia contends that

the mere threat of implementation of the Act casts a shadow on the relationship between Alberta and British Columbia and exerts illegitimate pressure on British Columbia's autonomy to govern itself as it sees fit. In response, Alberta questions the sufficiency of the evidence, but, most importantly, argues that the harm is hypothetical, as Alberta has given no indication as to whether, when or how it will implement the Act.

[134] I find that the first kind of harm alleged by British Columbia is sufficient to ground an interlocutory injunction, even though its realization ultimately depends on Alberta's will. In the following pages, I will outline the applicable principles and review the evidence filed by the parties. I will then review the parties' arguments and explain why I conclude that the injunction sought by British Columbia is needed to prevent irreparable harm.

(1) Principles and Burden of Proof

[135] When assessing irreparable harm, the basic question is whether the immediate intervention of the Court is warranted in order to protect the rights of the plaintiff until the trial. In civil and commercial matters, irreparable harm has often been defined in terms of the inadequacy of damages to compensate the consequences of the breach of the plaintiff's rights. It is unusual to award damages in public law cases, particularly in constitutional law cases. In such cases, a broader perspective as to what may constitute irreparable harm is warranted. Thus, in *RJR — MacDonald*, at 341, the Supreme Court of Canada summarized this aspect of the framework in one broad question:

> […] the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the

> harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[136] The burden of proving irreparable harm falls upon the party seeking an injunction. It has been difficult to describe the standard of proof, because the exercise is necessarily forward-looking and, as the Saskatchewan Court of Appeal noted, it "involves, and must involve, a weighing of risks rather than a weighing of certainties" (*Mosaic Potash*, at paragraph 58). In that exercise, one must take into account "*both* the likelihood of the harm occurring and its size or significance" (*ibid*, at paragraph 59). In reviewing assertions of irreparable harm, this Court has often used strong language that may be thought to amount to a requirement of certainty. However, such language is mainly used to impress on applicants the need to provide evidence that goes beyond mere speculation or hypotheses about future harm, in cases that fall well short of the mark. In a recent case, Justice David Stratas of the Federal Court of Appeal provides a useful review of the jurisprudence and summarizes the applicable test as follows: "The burden on a moving party seeking a stay is to adduce specific, particularized evidence establishing a *likelihood* of irreparable harm" (*Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at paragraph 30, emphasis mine).

(2) The Evidence

[137] The evidence of harm filed by British Columbia consists of the affidavit of Mr. Michael Rensing, who is the Director of the Low Carbon Fuels Branch in the Ministry of Energy, Mines and Petroleum Resources. Several themes are present in his affidavit.

[138] First, Mr. Rensing provides basic data regarding British Columbia's oil consumption and sources of supply. He states that approximately 55% of British Columbia's gasoline and 71% of its diesel are imported from Alberta. Moreover, the Parkland refinery, which is British Columbia's largest, depends almost exclusively on Alberta crude oil. As a result, Mr. Rensing states that British Columbia depends on Alberta for over 80% of its gasoline and diesel.

[139] Second, Mr. Rensing explains that it would be very difficult for British Columbia to obtain refined fuels from other sources in a short period of time, if it were necessary to replace the current supplies from Alberta. Existing pipelines and port facilities cannot accommodate such a change, and the shipping of oil products by rail is currently operating at full capacity.

[140] Third, Mr. Rensing provides information regarding the potential consequences of a stoppage of oil shipments from Alberta. He makes the rather obvious point that shortages may result in price increases, and also provides an example of a situation where the fear that an incident could disrupt the operation of the Parkland refinery led to an increase of the price of gasoline of 10 cents per litre in some localities, even though the supply was not actually disrupted. He also points out that a fuel shortage would have disproportionate impacts on remote communities and some energy-intensive industries.

[141] Mr. Rensing was cross-examined. While the main thrust of his affidavit remains unaffected, his answers underscored the inherent difficulty of predicting the consequences of a stoppage of oil shipments from Alberta. In particular, the price of gasoline is already subject to significant fluctuations. Moreover, the existence of storage facilities associated with existing

pipelines, marine terminals or refineries could possibly delay the impact of a shipping stoppage. Mr. Rensing also stated that, to his knowledge, British Columbia has not made any contingency plans to address a potential stoppage of oil shipments from Alberta.

[142] In response to the motion, Alberta filed the report of the British Columbia's Utilities Commission's *Inquiry into Gasoline and Diesel Prices in British Columbia* issued on August 30, 2019. This inquiry was launched in reaction to drastic increases in the retail price of gasoline in recent months. One of the main conclusions of this inquiry is that there is an "unexplained differential" of 13 cents per litre in the price of gasoline in southern British Columbia. This, like many of the Commission's findings, is not directly relevant to the issue before me.

[143] Nevertheless, the Commission's report contains basic information about the supply chain for gasoline and diesel in British Columbia that confirms what Mr. Rensing stated in his affidavit. Thus, the Commission wrote the following:

> The infrastructure for importing and storing refined products has largely developed around the capacity of the Trans Mountain Pipeline (TMPL). This includes port facilities, primarily in the Lower Mainland and Vancouver Island for offloading refined products. If the province had to replace refined products that are currently supplied by TMPL, there is inadequate infrastructure in BC to transport, receive, store and distribute large quantities of refined fuels from any market other than Alberta. This underlines the need to consider whether there is a need for further infrastructure development. Doing so could create flexibility and the ability to manage shortages should they occur. (at 6)
>
> […]
>
> BC refineries are capable of producing approximately 30 percent of the province's gasoline needs and the remaining 70 percent is imported. The principle [*sic*] sources relied upon for imported gasoline and diesel supply have historically been Edmonton and the PNW (Washington state refineries). (at 34)

> […]
>
> Based on import data sourced from the Ministry of Finance, the largest source of diesel imports is Alberta with approximately 60 percent originating there followed by [Western United States] with approximately 20 percent and smaller amounts coming from [United States Gulf Coast] and others. (at 35-36)
>
> […]
>
> With respect to gasoline the results are somewhat similar, with Alberta providing an approximate range of 72 percent to 84 percent of refined gasoline imports. (at 36)

[144] The statements of the members of the Alberta Legislative Assembly that I reviewed above are also relevant to the issue of irreparable harm. These statements make it abundantly clear that the purpose of the Act is to inflict economic harm to British Columbia through an embargo on the exportation of petroleum products to that province.

[145] In addition to that evidence, I think I can fairly take judicial notice of the extent to which our society is dependent on petroleum products, in particular gasoline and diesel, for its daily functioning.

(3) Analysis

[146] The first kind of harm alleged by British Columbia is that which would result from the disruption of its supply of petroleum products. The evidence clearly shows that British Columbia depends on Alberta for a very large portion of its gasoline and diesel. It is obvious that an embargo on exports to British Columbia will cause a considerable increase in the price of gasoline and diesel in that province. Depending on the duration of the embargo, it may also lead

to fuel shortages which may, in turn, endanger public safety in various ways. It is obvious that such an embargo will have immediate negative consequences for British Columbia's treasury and, most importantly, for British Columbia residents. On the evidence before me, I also find that it would be impossible for British Columbia residents to quickly obtain sufficient quantities of fuels from other sources.

[147] These consequences are irreparable, as that concept is understood in *RJR — MacDonald*. They could not be undone in any meaningful way. Given the present state of the law, it is highly unlikely that they could be compensated in damages. In addition to the procedural and evidentiary difficulties of pursuing a claim based on multifaceted damage potentially affecting a large portion of British Columbia's population, any claim in damages would likely be met by a defence of immunity. In cases such as *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347 at paragraphs 13–19, and *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at paragraphs 78–82, [2002] 1 SCR 405, the Supreme Court of Canada held that damages cannot normally be awarded for acts done pursuant to legislation that is later declared unconstitutional.

[148] It is of no consequence that the precise manner in which the Act would be implemented is unknown and that it is difficult to predict the extent of the harm that an oil embargo would cause. In *RJR — MacDonald*, at 341, noted that what matters is "the nature of the harm suffered rather than its magnitude." Alberta's objections to the evidence given by Mr. Rensing relate mainly to his inability to predict the extent to which an embargo would be successful. This, however, is not

what Mr. Rensing set out to prove, and it is immaterial, as it relates to the extent of the harm and not its nature.

[149] Alberta's main answer to the allegations of irreparable harm, however, is that there is no evidence that the Minister will actually use the powers conferred by the Act, let alone use them in an unconstitutional manner. Accordingly, British Columbia would not have established that there is a high likelihood of harm. This is what a plaintiff who is seeking an injunction before the harm occurs – a "*quia timet*" injunction – must show. There would be, indeed, a presumption that, should the Minister ever exercise her powers under the Act, she will do so in a manner that complies with the constitution. In other words, as the occurrence of any harm remains speculative at this time, the interlocutory injunction would be premature.

[150] There are several reasons why I cannot give effect to Alberta's submissions.

[151] First, Alberta's position begs a fundamental question. As I have mentioned above, there is a serious issue as to the validity of the Act in its totality. There can be no such thing as a valid exercise of discretion pursuant to invalid legislation.

[152] Second, Alberta does not offer any examples of what a valid exercise of discretion under the Act would be. The record provides no clue as to the nature of such measures. Alberta concedes that the validity of the Act raises a serious issue and does not explicitly argue that an embargo on crude oil, gasoline and diesel shipments to British Columbia would be

constitutionally valid. In the circumstances of this case, the idea that the Act could be applied in a constitutionally valid manner lacks an air of reality.

[153] Third, the uncertainty about whether or how the Act will be implemented results entirely from Alberta's conduct. After the passage of the Act, members of the cabinet have carefully refrained from making any statements in this regard. In the course of the proceedings in the Alberta Court of Queen's Bench or in this Court, Alberta has refused to give any indication or assurance in this regard and has declined to undertake to give any form of notice before the Act is implemented. Alberta, however, should not benefit from uncertainty it has itself created.

[154] The courts' reluctance to issue *quia timet* injunctions derives from the inherent difficulty in assessing and balancing the consequences of harm that has not yet materialized. Sharpe explains the following in *Injunctions*, at paragraph 1.670:

> Thus, while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relate to the situation where the difficulties of prediction are more acute in that the plaintiff is asking for injunctive relief before any of the harm to be prevented by the injunction has been suffered.

[155] This prudent approach is not meant, however, to enable defendants to threaten harm and then to resist the issuance of an injunction on the basis that the likelihood of their acting on their threats is unknown. Neither is it meant to afford defendants an opportunity to inflict harm on plaintiffs before an injunction is issued. This is well understood in the labour context, where injunctions have been issued in response to threats of unlawful strikes, lock-outs or picketing: *Holland America Cruises v Gralewicz* (1975), 60 DLR (3d) 512 (BCSC). For example, the well-known case of *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, began as an application for

an interlocutory injunction to enjoin picketing before any picketing had actually taken place. Yet, Justice McIntyre for the majority of the Supreme Court had no difficulty in finding that the union's threat, if carried out, would cause harm to the plaintiff:

> On the basis of the findings of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. (at 588)

[156] Indeed, when legislation is intended to cause a particular consequence, it is no answer to say that the realization of that consequence is uncertain or that it depends on the exercise of discretionary powers. Consider, for example, the situation in the *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704. The proposed legislation at issue in that case provided for the holding of consultative elections. It said that the Prime Minister had to consider the results of such elections before making appointments to the Senate, but did not say that it was required to appoint the candidate who won the election. The Supreme Court denied that the Prime Minister's theoretical discretion to ignore the results of the election had any relevance (at paragraph 62):

> It is true that, in theory, prime ministers could ignore the election results and rarely, or indeed never, recommend to the Governor General the winners of the consultative elections. However, the purpose of the bills is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections […]. A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.

[157] To put this in perspective, it is instructive to recall that the first measure taken by the new Alberta government, upon taking office, was to bring the Act into force. On that occasion, the new Premier wrote an op-ed in the Vancouver Sun explaining why this was done:

> On Tuesday, at the first cabinet meeting of our new Alberta government, we proclaimed into law the Preserving Canada's Economic Prosperity Act, which gives our government the ability to curtail oil shipments from Alberta.
>
> We did not proclaim this law to reduce energy shipments to B.C., but to have the power to protect Alberta's ability to get full value for our resources should circumstances require.
>
> […]
>
> Unfortunately, since coming into office in July 2017, the B.C. government has opposed the expansion project every step of the way, most recently in the B.C. Court of Appeal.
>
> […]
>
> By proclaiming this law, we are showing that we are serious about protecting Canada's vital economic interests. This does not mean energy shipments will immediately be reduced but that our government will now have the ability to actually use the law should circumstances require.

[158] These statements leave the reader in a state of uncertainty as to the application of the Act. This is not, however, the kind of uncertainty that Alberta can invoke to its advantage. Accepting Alberta's argument that this application is premature would likely, in practice, shield the operation of the Act from effective review. I conclude that the harm alleged by British Columbia meets the test for an interlocutory injunction.

[159] Given my conclusion as to the first kind of harm alleged by British Columbia, it is not strictly necessary for me to deal with irreparable harm of the second kind. In this regard, I will

simply note that British Columbia failed to bring any concrete evidence of this harm, even though it asserts that it is already occurring. Moreover, this "harm to the relationship" seems similar to that which was recently rejected by the Alberta Court of Appeal in *Alberta Union of Provincial Employees v Alberta*, 2019 ABCA 320 at paragraphs 22–23, although in a different context.

D. *Balance of Convenience*

[160] At this last stage of the *RJR — MacDonald* framework, the Court must compare the harm that the plaintiff will sustain if the injunction is not granted and the harm imposed on the defendant if an injunction is granted, but the defendant is ultimately successful on the merits. More generally, it is acknowledged that the Court may take into consideration, at this stage, an open-ended range of factors that are relevant to the exercise of its discretion.

[161] Interlocutory injunctions aimed at preventing the application of legislation before its constitutional validity is finally determined are issued only in "clear cases:" *Harper*, at paragraph 9. They give rise to specific issues that have been addressed in *RJR — MacDonald* and similar cases. First and foremost, courts must presume that the legislation is enacted in the public interest. I will begin my assessment of the balance of convenience with that issue. Second, *RJR — MacDonald* also stands for the proposition that the concept of maintaining the status quo has little, if any, relevance in constitutional cases. For that reason, I will focus my analysis on an assessment of the harm that an injunction would cause to Alberta and not on the preservation of the status quo. I will also consider the strength of British Columbia's case. This analysis leads me to conclude that the balance of convenience favours British Columbia.

(1) Public Interest

[162] In *Metropolitan Stores* and *RJR — MacDonald*, the Supreme Court of Canada developed a presumption to the effect that, when assessing the balance of convenience, courts must presume that the legislation challenged was enacted in the public interest and will, in fact, serve the public interest. The origins of that presumption must, however, be kept in mind. In those two cases, the Court was faced with claims by private parties that their Charter rights should override, even at the interlocutory stage, the will of the legislature. In *RJR — MacDonald*, the Court wrote the following at 344–45:

> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> […]
>
> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

[163] As a result of that presumption of public interest, courts have warned that injunctions against the application of legislation would be granted only in clear cases, as I noted at the outset of this part of these reasons. On occasion, such injunctions have nevertheless been granted: *Law*

Society of British Columbia v Canada (Attorney General), 2001 BCSC 1593; *Québec (Procureur général) v Canada (Procureur général)* [the *Long-Gun Registry* case], 2012 QCCS 1614; *Alberta Union of Provincial Employees v Alberta*, 2014 ABQB 97 [*AUPE*]; *Tłı̨chǫ Government v Canada (Attorney General)*, 2015 NWTSC 9; *National Council of Canadian Muslims v Québec (Procureur général)*, 2018 QCCS 2766 [*Council of Muslims*].

[164] The force of that presumption may be reduced where, instead of a challenge initiated by a private party, the dispute involves two public authorities or two governments: *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 at paragraph 20; *Long-Gun Registry*, at paragraph 63. It may also be of less relevance in division of powers cases, given that justification under section 1 of the Charter is not involved.

[165] Be that as it may, the application of that presumption in this case raises a fundamental problem. I simply have no information as to the manner in which the Act pursues a public interest. As I noted above, Alberta fails to provide any example of a constitutionally valid exercise of the powers afforded by the Act and refrains from asserting that the kinds of embargo mentioned by members of the Alberta legislature when debating the Act would be constitutionally valid. Thus, what I have to presume remains a mystery. The presumption of public interest does not dispense the defendant from explaining to the Court what that interest is: *Council of Muslims*, at paragraph 73.

[166] Nevertheless, there is one aspect of this case where the public interest presumption set forth in *RJR — MacDonald* is particularly relevant. British Columbia argues that the negative

impact that the implementation of the Act would have on Alberta itself is a factor to be taken into account in the balance of convenience. In other words, restricting exports to British Columbia would necessarily harm the Alberta oil industry and a significant part of Alberta's population, which depends directly or indirectly on that industry's well-being. I disagree with British Columbia's position. If I were to take this factor into account, I would in fact be questioning the Alberta legislature's assessment that the benefits expected to result from the Act overcome its negative effects. This is a purely political question that falls to be decided in the ballot box rather than in the courts. I will not consider this factor in my assessment.

(2) Inconvenience for the Defendant

[167] This brings me to an assessment of the inconvenience that an injunction would impose on Alberta. What would Alberta be prevented from doing should an injunction issue?

[168] This, again, turns on the fact that Alberta does not give any example of a constitutionally valid exercise of the powers granted by the Act. If no such exercise is contemplated, then Alberta suffers little inconvenience.

[169] In this connection, British Columbia argues that existing Alberta legislation already provides for various types of measures aimed at maximizing the value of that province's natural resources, including non-discriminatory export restrictions: *Gas Resources Preservation Act*, RSA 2000, c G-4; *Oil and Gas Conservation Act*, RSA 2000, c O-6; *Oil Sands Conservation Act*, RSA 2000, c O-7; *Responsible Energy Development Act*, RSA 2012, c R-17.3. Pursuant to the

powers conferred by these laws, Alberta recently imposed production quotas aimed at increasing prices: *Curtailment Rules,* Atla Reg 214/2018.

[170] Alberta does not deny this. Alberta does not explain what could be done under the Act that could not be done under existing legislation.

[171] I would also note that if the Act was intended to serve a valid, non-discriminatory purpose, it is difficult to understand why it was made subject to a two-year sunset clause.

[172] The only remaining inconvenience for Alberta is that an injunction would prevent it from implementing an oil embargo of the kind envisaged by the members of the Alberta legislature during the debates. I ascribe little weight to that possibility, however, given the strength of British Columbia's case that the Act is constitutionally invalid. I now turn to that issue.

(3) Strength of Plaintiff's Case

[173] Even though a plaintiff need only show, at the first stage of the *RJR — MacDonald* framework, a "serious issue to be tried," which has been described as a "low threshold," a court may nevertheless consider the strength of the plaintiff's case when assessing the balance of convenience: *AUPE,* at paragraphs 109-110; *Council of Muslims,* at paragraphs 39 and 67.

[174] Given the strategy Alberta adopted in responding to British Columbia's motion for interlocutory injunction, I am driven to conclude that British Columbia's case is strong.

[175] Let us recall the main point of British Columbia's case. British Columbia says that the Act is invalid as a whole, because the oil embargo it is evidently meant to implement is a measure in respect of interprovincial commerce that is not authorized by section 92A(2).

[176] Alberta has chosen not to answer British Columbia's main point. Instead, it makes a number of arguments designed to divert the attention from the main issue. It argues:

- That some parts of the Act may be valid – but it does not say which ones and in what respects;

- That the Minister might exercise her powers under the Act in a manner that complies with the constitution – but it does not give any examples;

- That the Act pursues the goal of maximizing the value of Alberta's natural resources – but it never explains how this goal would be achieved, other than through an oil embargo against British Columbia;

- That we do not know whether the Act will ever be implemented – but it is unwilling to give any assurance to that effect.

[177] Alberta seeks to protect the Act by a web of presumptions – that the legislation is constitutionally valid, that the legislation was enacted for the public interest and that the Minister would act in a manner compatible with the constitution. But presumptions are what they are –

legal fictions. Constitutional law is concerned with the substance and not the form – the reality and not the legal fiction.

[178] The reality is that the Act was adopted to empower the Alberta government to impose an oil embargo on British Columbia. It was described as follows by the then Premier of Alberta:

> With the B.C. government seeking to limit what energy products can flow across provincial borders, we have the right to make that decision in terms of exporting for ourselves. Bill 12 gives us that power.
>
> (Alberta Hansard, May 16, 2018, page 1141)

[179] Perhaps Alberta has an argument to sustain the constitutional validity of such a measure. Perhaps it will reveal that argument at trial. But it has not revealed it to me. Alberta's strategic decision to concede that the validity of the Act raises a serious issue cannot prevent me from assessing the strength of British Columbia's case. Alberta's failure to present any argument to buttress the validity of the Act necessarily leads me to the conclusion that British Columbia has a strong case.

(4) Summary

[180] In conclusion, I find that the irreparable harm that British Columbia would suffer if the injunction is not granted far outweighs any inconvenience that the injunction might impose on Alberta.

[181] Hence, the *RJR — MacDonald* test is satisfied and British Columbia's motion for interlocutory injunction will be granted.

E. *Terms of Injunction*

[182] British Columbia seeks an order that would restrain the Minister from exercising her powers under the Act, unless she first obtains leave of this Court. This is meant to minimize the scope of the restriction that the injunction would impose upon the exercise of executive power. Alberta objects to such a term, arguing that this would constitute an impermissible interference with policy decisions. British Columbia states that in the event that this Court is not prepared to attach such a term, it seeks an injunction without the term.

[183] On this issue, I agree with Alberta. It is true that in constitutional matters, there is room for judicial creativity: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3. Such creativity, however, is not required in this case.

[184] It is unclear what the role of this Court would be if the Minister were to seek leave. Presumably, this Court could be asked to authorize an exercise of the powers conferred by the Act if the Minister shows that no breach of the constitution would result.

[185] When courts find that legislation is unconstitutional, the usual remedy is to strike down legislation and to let Parliament design a valid replacement. Courts typically do not engage in a rewriting of complex legislative regimes in an attempt to render them valid. While the analogy is imperfect, British Columbia's proposed term would involve this Court in a somewhat similar process, although on a case-by-case basis. It is not the Court's role to try to preserve what might be constitutionally valid in the Act.

[186] In any event, at the risk of repeating myself, I have not been given any example of a constitutionally valid exercise of the powers granted by the Act, which would make the proposed term useful. Thus, I decline to include the proposed term in my order.

IV. Disposition and Costs

[187] Alberta's motion to strike the statement of claim will be dismissed. British Columbia's motion for an interlocutory injunction will be granted. In both cases, British Columbia is awarded its costs.

ORDER in T-982-19

THIS COURT ORDERS that:

1. The defendant's motion to strike the statement of claim is dismissed with costs;

2. The plaintiff's motion for an interlocutory injunction is granted with costs;

3. The Minister of Energy for the Province of Alberta is prohibited from making an order under section 2(2) of the *Preserving Canada's Economic Prosperity Act*, SA 2018, c P-21.5, until a final judgment is rendered in this action, including any appeals.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-982-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF BRITISH COLUMBIA v ATTORNEY GENERAL OF ALBERTA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 12-13, 2019
ORDER AND REASONS:	GRAMMOND J.
DATED:	SEPTEMBER 24, 2019

APPEARANCES:

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Evan Dixon Paul Chiswell Mark MacAulay	FOR THE DEFENDANT

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