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On Wednesday, May 16, 2018, the Alberta Government passed a law giving itself broad powers over the export of oil products.[1] Bill 12 passed its third and final reading, which means it is only waiting for Royal Assent. The Bill is the latest development in a dispute between Alberta and British Columbia over Kinder Morgan’s Trans Mountain pipeline expansion. David Eby, the Attorney General of British Columbia, accused Alberta of passing Bill 12 to “punish the residents of British Columbia.”[2] This gives rise to the question of whether Bill 12 is constitutional.

What exactly does Bill 12 do?

Bill 12 allows the Alberta Minister of Energy to control individuals or corporations who export oil products. Section 2 says that no one can export oil products without a licence.[3] However, this restriction does not apply automatically. It applies only if the Minister orders an exporter to obtain a licence.[4] To make such an order, the Minister would have to determine if it is in the public interest.[5] The reasons given for making such orders are to maximize return on oil exports and make sure that enough oil products stay in Alberta to meet Alberta’s needs.[6]

Licences can restrict where, when, how, and what amount of oil products a person can export.[7] If a corporation does not follow the terms of a licence, the Bill sets out a penalty of up to $10,000,000 per day.[8]

Is Bill 12 Constitutional?

All legislation must respect the division of powers as set out in the *Constitution Act 1867*.[9] Bill 12 could potentially impact two powers, one federal and one provincial. On the one hand, the federal government has power over “the regulation of trade and commerce.”[10] This includes the goods sold and moved between provinces. On the other hand, the provincial government has power over the export of non-renewable resources to other provinces.[11] For Alberta’s legislation to be valid, it would have to fall under this second, provincial power.

To figure out whether the legislation is valid, a court would first have to characterize the law’s purpose. Characterizing a law is a two-step process. The court would first determine Bill 12’s overarching purpose—also known as its pith and substance. On that basis, the court would then determine which area of constitutional authority it falls under—either provincial or federal. The court would first look at the words of Bill 12 itself. But it would also look at other evidence of what the government intended Bill 12 to do.

How the courts characterize a law can be a contentious matter. There are often multiple ways of describing a law's main thrust. Different ways of characterizing a law can lead to a finding of either provincial or federal jurisdiction over the subject matter.

Bill 12 seems to aim at controlling the export of oil products by putting certain restrictions on exporters. The words of Bill 12 itself support this characterization, as do comments that the Government of Alberta made when passing the bill.[12] At first glance, this indicates that it falls under section 92A(2) of the *Constitution Act,* 1867. If so, it would be a valid exercise of provincial power to create legislation under that section. A full reading of section 92A(2), however, shows that there may be some restrictions on that power:

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 … in the province … , but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.[13]

First, section 92A(2) states that provinces cannot make laws that discriminate in prices or supplies exported to other provinces. There is nothing in the plain wording of Bill 12 that suggests it discriminates against other provinces. But the exact meaning of section 92A(2) is uncertain, as courts have never examined it. How the Bill is used by the Alberta government might be found to be discriminatory.

Second, section 92A(2) only relates to "primary production from non-renewable natural resources." This may mean that provinces can only make laws about raw products, such as crude oil, but not about refined fuels. Refined fuels include gasoline, diesel, and kerosene. Bill 12 allows Alberta to control not only crude oil exports, but also refined fuels. So a court could find that certain parts in the Bill that deal with refined fuels are invalid, while leaving the rest of Bill 12 intact.

It seems, then, that Bill 12 is likely valid legislation overall, at least as it relates to crude oil and natural gas.

What about targeting B.C.?

But Even if Bill 12 is valid, the Government of Alberta could use it in unconstitutional ways. Bill 12 allows the Minister of Energy to impose restrictions on exports of oil products. If Alberta imposes restrictions in a way that discriminates against B.C., it could lose the protection of section 92A(2). For example, if Alberta issued a licence that only prevented a corporation from exporting oil to B.C. and not to other provinces, that licence could be constitutionally invalid.

Bill 12 could also be affected by the Supreme Court of Canada's recent judgment in *R v Comeau*[14]—popularly known as the "free the beer" case. *R v Comeau* set out that laws are unconstitutional when they "in essence and purpose impede the passage of goods across interprovincial borders."[15] Bill 12 comes in the midst of a trade war between Alberta and B.C. This could indicate that it is targeted at causing harm to B.C. by reducing exports.

However, there is nothing in Bill 12 itself that suggests this. Therefore, deciding whether Bill 12 is constitutional will probably come down to how a court chooses to establish the purpose of Bill 12. This will come through a combination of examining the language of the Bill and the surrounding evidence of why the Alberta government passed the legislation in the first place.

[1] Bill 12, *Preserving Canada's Economic Prosperity Act*, 4th Sess, 29th Leg, Alberta, 2018 (third reading 17 May 2018) [Bill 12].

[2] Richard Zussman, "B.C. Government threatens to sue Alberta over 'turn off the taps' legislation" (16 May 2018), *Global News*, online: <https://globalnews.ca/news/4213380/b-c-c12-reaction/>.

[3] Bill 12, supra note 1 at s 2(1).

[4] *Ibid* at s 2(2).

[5] *Ibid* at s 2(3).

[6] *Ibid*.

[7] *Ibid* at s 4(2).

[8] *Ibid* at s 7(2)(a).

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

[10] *Ibid* at 91(2).

[11] *Ibid* at 92A(2).

[12] See "Bill C-12, Preserving Canada's Economic Prosperity Act", 3rd reading, Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess (16 May 2018) at 1153-1154 (Hon Margaret McCuaig-Boyd).

[13] *Ibid*.

[14] *R v Comeau*, 2018 SCC 15.

[15] *Ibid* at para 8.