

May 2, 2019

## Bill 12: a reprise

By: Nigel Bankes

**Legislation Commented On:** *Preserving Canada's Economic Prosperity Act*, [SA 2018, c P-21.5](#)

**Case Commented On:** *British Columbia (Attorney General) v Alberta (Attorney General)*, [2019 ABQB 121 \(CanLII\)](#)

I commented on *Preserving Canada's Economic Prosperity Act (PCEPA)* when it was first introduced in the spring of 2018: see ["A Bill to Restrict the Interprovincial Movement of Hydrocarbons: a.k.a. Preserving Canada's Economic Prosperity \[Act\]"](#) (18 April, 2018). At that time, I expressed doubts as to the constitutional validity of elements of Bill 12 as it then was, especially those provisions pertaining to refined products as well as any implementation measures that might involve discrimination by destination with respect to any exports. I remain of that opinion.

What has changed since then is that *PCEPA* has now been [proclaimed](#) (April 30, 2019); that is to say, it now has the force of law in Alberta. Prior to proclamation, *PCEPA* was of no legal significance. It was that absence of legal significance that led Justice Hall in his judgment in *British Columbia (Attorney General) v Alberta (Attorney General)* in February of this year to dismiss British Columbia's challenge to the legislation. Justice Hall concluded that any such attack, at least by way of a declaration as to invalidity, was premature:

[22] The claim of AGBC is premature, because the *Act* is not law [in force](#) in Alberta. The Statement of Claim is hereby struck.

[23] Should the Alberta Government proclaim the *Act* in force, the AGBC may recommence a claim. (emphasis in original)

That obstacle has now disappeared and British Columbia has filed a new [statement of claim](#) (May 1, 2019). The legislation is not yet operative *in practical terms*. It will not be unless and until Minister Savage makes an Order under section 2, and the Lieutenant Governor in Council makes some regulations under section 11 to provide the necessary administrative infrastructure for implementing the licensing scheme. This may mean that certain challenges to the legislation might still be considered premature until we see the Order and the regulations. One example would be a request for relief based on discrimination. I say that such a claim might still be premature simply because *PCEPA* itself does not require a discriminatory application of the licensing provisions based on destination; thus a court would need to see the particulars of any Ministerial Order and licences before making any determination as to validity based on the discriminatory effect (or facial discrimination) of any such Order and licences.

However, it does seem reasonable to think that some issues are justiciable now. One important such issue is the crucial question as to whether refined fuels as defined in *PCEPA* (section 1(g)) qualify as primary production from non-renewable natural resources within the meaning of section 92A and the Sixth Schedule of the *Constitution Act, 1867* (for details see earlier post). Absent the cover of section 92A, this legislation must be invalid.

In this regard, it is pertinent to compare BC's [original statement of claim](#) with the statement of claim filed May 1. The original statement of claim sought only one (very broad) remedy, namely "A declaration that the *Act* is inconsistent, in whole or in part, with the Constitution of Canada and is of no force or effect." (at para 39)

The new statement of claim is more nuanced. It maintains the broad application for relief of the original statement of claim, but in addition and in the alternative, seeks a series of more precise declarations as to invalidity directed at the refined fuels issue. The Attorney General of Alberta will find it very difficult to argue that this set of issues is not yet ripe for determination. And if the Attorney General is sure as to the validity of this legislation as it pertains to refined fuels, then perhaps that opinion should be tabled in the Legislature. Absent a clear case for validity with respect to the application of this legislation to refined fuels, it seems reckless to continue down this *PCEPA* path.

---

This post may be cited as: Nigel Bankes, "Bill 12: a reprise" (May 2, 2019), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2019/05/Blog\\_NB\\_BILL12\\_May1.docx.pdf](http://ablawg.ca/wp-content/uploads/2019/05/Blog_NB_BILL12_May1.docx.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

