

OPINION OF COUNSEL

Querist: An Taisce and Friends of the Earth
Subject: Legality of legislative ban on fracking

A. Introduction

1. I have been asked to advise Querist on the legal issues that arise due to a proposed legislative ban on fracking.

2. Tony McLoughlin, a Fine Gael TD, has a private members' bill that is due to be debated at the second stage in the Dáil on Thursday 27th October. It proposes a very simple scheme to ban fracking. The bill is entitled "Prohibition of the Exploration and Extraction of Onshore Petroleum Bill 2016" and runs to just three sections. Section 1 defines five different technical terms in relation to fracking. Section 2 seeks to prohibit fracking in the following way:

"Notwithstanding the provisions of any other Act of the Oireachtas no Minister, Agency, Planning Authority or Body acting on behalf of the State shall grant an authorisation and/or grant of any consent, licence, permit, lease or undertaking for the exploration or extraction of petroleum from shale rock, tight sands or coal seams in the Irish onshore and Ireland's internal waters."

B. Legal Issues

3. A number of legal issues arise from these facts:
 - (i) Would the ban on fracking be unconstitutional?
 - (ii) Would the ban on fracking be contrary to EU law?
 - (iii) Should the Long Title of the proposed legislation be changed?

C. Would the ban on fracking be unconstitutional?

4. The Oireachtas can enact any law as long as that law is not repugnant to the Constitution. The superior courts can strike down any law on the basis that it

is repugnant to the Constitution, a power that has been exercised on a number of occasions since 1937.

5. The only constitutional provisions that a ban on fracking might offend are those in relation to property rights, and are contained in two different articles:

ARTICLE 43

1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

ARTICLE 40.3.2

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

6. The courts have had difficulty reconciling these two articles and there is a long line of jurisprudence on this issue. It is not necessary to set out the full history of the court's analysis of these articles here. In *In Re The Health (Amendment)(No.2) Bill 2004*¹ the Supreme Court quoted the leading text book on Constitutional law and agreed with the authors² that the articles "*mutually*

¹ 2005 I IR 105

² Hogan and Whyte, *J. M. Kelly: The Irish Constitution* (4th ed., pp. 1978 to 1993)

inform each other"³. Thus while property rights are protected, this protection is not absolute. It is possible for the Oireachtas to limit those rights in the interests of the common good. In addition, while the State must protect property rights from an "*unjust attack*", it does not have to protect them from a "*just*" attack.

7. An attack on property rights manifests itself in two different ways. The first is where the property right is abolished, and the second is where it remains in place but is limited in some way.
8. Given that the proposed legislation does not abolish any property right, this Opinion will not examine the rules in that area.
9. If property rights are limited but not abolished the courts have developed a proportionality test to determine if the limitation is constitutionally permitted. This test is drawn from the jurisprudence of the European Court of Human Rights and has been used by the Canadian Supreme Court. It was originally introduced in Ireland in *Heaney v Ireland*⁴, and affirmed by the Supreme Court in *In re Planning and Development Bill, 1999*⁵ and *In Re The Health (Amendment)(No.2) Bill 2004*. The restrictions must:
 - (1) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (2) impair the right as little as possible; and
 - (3) be such that their effects on rights are proportional to the objective.
10. The ECHR case law confirms that in areas such as social and economic policy , including planning and by implication granting any permission or licence for an activity such as fracking, the State as a very wide discretion to determine

³ At 197

⁴ [1994] 3 IR 593

⁵ [2000] 2 IR 321

national and local policy (See *Buckley v. the United Kingdom*, 25 September 1996).

11. It is not clear if anyone would have a constitutionally protected property right to engage in fracking. In *Glencar Explorations Ltd v Mayo County Council*⁶ the court ruled that a ban on gold mining in the respondent's Development Plan was unlawful in circumstances where the applicant had a number of licences from the Minister for Energy. In the absence of holding those licences the applicant would likely not have had standing to take the case.
12. In general the State owns all petroleum and gas rights and can grant or refuse a licence to exploit those as per the relevant regulatory regime. Licences to extract these natural resources are valuable and there are already a number of prohibitions on exploration and development without a licence (see for example S6 of the Petroleum and Other Minerals Development Act 1960).
13. Even if a landowner were to successfully argue that they owned the natural resources found under their land, a ban on exploiting those resources is not an abolition of that ownership. Given that the ban can be lifted by the Oireachtas at any time, the ban would merely be a restriction.
14. But even if a property right exists, it is the ban on fracking has a clear objective of combatting climate change, protecting ground water and the environment in general. The ban does not appear to be arbitrary, unfair or irrational. Given the environmental damage caused by fracking a ban is likely the only way to eliminate its impact on ground water and therefore the effects of the ban can be said to be proportionate to the objective sought to be achieved.
15. As such I do not think that there would be any constitutional issues with banning fracking.

⁶ [1993] 2 IR 237

D. Would the ban on fracking be contrary to EU law?

16. EU law is supreme over national law. If the EU permits fracking then it is not possible for Ireland to prohibit it. But the EU does not appear to have a policy on fracking yet. The EU can only enact laws in policy areas where it has been given competence to do so by the Member States. In most areas the EU and the Member States share competence. According to the principle of subsidiarity where there is shared competence the decisions must be taken at the lowest possible level.
17. None of the policy areas that are exclusive competence of the EU cover fracking.
18. The Commission has said that all existing EU environmental legislation applies to fracking and it is currently formulating a policy on the environmental aspects of unconventional fossil fuels. Therefore it would appear that there is no prohibition in EU law against fracking, nor is there any right to engage in this type of activity.
19. A word of caution is necessary here. I have not had the time to fully examine the vast range of EU laws in this area and the above comments should be viewed in this light.
20. If there is a right under EU law to engage in fracking then this supersedes any national ban and the proposed legislation would simply be disapplied in any administrative decision or dispute as per *Amministrazione delle Finanze v Simmenthal SpA*.⁷

E. Should the Long Title of the proposed legislation be changed?

21. The Long Title in an act can be used to assist the court interpreting that act. For example, in *Kimpton Vale Developments Ltd v An Bord Pleanála*⁸ Hogan J

⁷ [1978] ECR 629

⁸ [2013] IEHC 442

made reference to the long title of the Environment (Miscellaneous Provisions) Act 2011. That Long Title stated, inter alia:

“To give effect to certain articles of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 and for judicial notice to be taken of the Convention”

22. Hogan J said that the effect of this is that courts must interpret the relevant provisions of the 2011 Act in a manner which best gives effect to the Aarhus Convention.
23. I am satisfied that the Long Title is correctly worded so as to clearly set out the aims of the proposed legislation.

F. Conclusion

24. It is the role of the Oireachtas to enact legislation and it has as very wide power to do so. The only restriction is that it cannot enact legislation that is contrary to the Constitution. I cannot see any constitutional issue with the proposed legislation.
25. Nor can I see any clash between the proposed legislation and EU law.
26. Nothing further occurs.

Gary Fitzgerald
Law Library Distillery Building,
Church Street, Dublin 7.

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