Federal Court of Appeal | Cour d'appel fédérale

Date: 20160530

Docket: A-383-14

Citation: 2016 FCA 160

CORAM: **RYER J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

SYNCRUDE CANADA LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on November 3, 2015.

Judgment delivered at Ottawa, Ontario, on May 30, 2016.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: RYER J.A.
BOIVIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160530

Docket: A-383-14

Citation: 2016 FCA 160

CORAM: **RYER J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

SYNCRUDE CANADA LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

I. Introduction

[1] Federal regulations require that all diesel fuel produced, imported or sold in Canada contain at least 2% renewable fuel. Syncrude Canada Ltd. produces diesel fuel at its oil sands operations in Alberta, which it uses in its vehicles and equipment.

[2] Syncrude commenced an application in the Federal Court seeking declarations of invalidity of the regulations on constitutional and administrative law grounds. The Federal Court dismissed the application (2014 FC 776) and Syncrude appeals to this Court. For the reasons that follow, I would dismiss the appeal.

II. Legislative and regulatory scheme

[3] Section 139 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (CEPA) prohibits the production, importation and sale in Canada of fuel that does not meet prescribed requirements.

[4] Subsection 140(1) of the CEPA provides that the Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139. Regulations may be made prescribing the concentrations or quantities of an element, component or additive in a fuel, the physical and chemical properties of fuel, the characteristics of fuel related to conditions of use and the blending of fuels. Subsection 140(2) requires that the Governor in Council be of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from, directly or indirectly, the combustion of fuel. It was under this provision that the *Renewable Fuels Regulations*, SOR/2010-189 (RFRs) were promulgated.

[5] Subsection 5(2) of the RFRs requires 2% of diesel fuel to be renewable fuel. Every litre of renewable fuel mixed into other fuel creates one compliance unit (subsection 13(2) of the

RFRs), including if it is mixed outside of Canada and then imported (subsection 14(2)). A compliance unit represents one litre of renewable fuel in the total Canadian fuel supply. Pursuant to subsections 5(2) and 7(1) of the RFRs, a person must expend 2 compliance units for every 100 litres of fuel they produce, import, or sell. Compliance units can be acquired via the above procedure or by purchase in trade (subsection 20(1)).

[6] Subsection 272(1) of CEPA makes it an offence to breach section 139. If prosecuted by indictment, an offender is liable for a fine of between $500,000 and $6,000,000. On conviction for a second offence these penalties double.

[7] These legislative provisions are set forth in Annexes A and B to these reasons.

III. The development of the *Renewable Fuels Regulations*

[8] Toxic substances are defined in section 64 of CEPA as those which "…may have an immediate or long-term harmful effect on the environment or its biological diversity; constitutes or may constitute a danger to the environment on which life depends; or constitutes or may constitute a danger in Canada to human life or health." Greenhouse gases (GHGs) are gases which, when released, lead to the retention of heat in the atmosphere. Since 2005, six of the most significant GHGs have been listed as toxic substances in Schedule 1 of the CEPA. These include carbon dioxide, methane, and nitrous oxide.

[9] The Regulatory Impact Analysis Statement (RIAS) accompanying the addition of GHGs to Schedule 1 in 2005 stated that they were added as toxic substances because, as concluded in the Kyoto Protocol, they "have significant global warming potentials (GWPs), are long lived and therefore of global concern [and] have the potential to contribute significantly to climate change." The RIAS also noted that there has been a substantial rise in GHGs "as a result of human activity, predominately the combustion of fossil fuels" which could lead to an increase in frequency and intensity of heat waves, that in turn could "lead to an increase in illness and death": *Canada Gazette, Part II*, Vol. 139, No. 24, (November 21, 2005), pp. 2627, 2634 [2005 RIAS]. The 2005 RIAS cited both the *Montreal Protocol on Substances that Deplete the Ozone Layer* 16 September 1987, 1522 U.N.T.S. 3 and the Intergovernmental Panel on Climate Change, *Third Assessment Report*, 2000 (Cambridge, England: Cambridge University Press, 2002) as the scientific and policy basis for the addition of the six GHGs. The Panel concluded that "there is sufficient evidence to conclude that greenhouse gases constitute or may constitute a danger to the environment on which life depends, therefore satisfying the criteria set out in section 64 of the CEPA 1999" (2005 RIAS, p. 2634).

[10] A Notice of Intent to develop the RFRs was subsequently published in the *Canada Gazette Part I*, Vol. 140, No. 52, (December 30, 2006). The Notice observed that:

> Use of renewable fuels offer significant environmental benefits, including reduced greenhouse gas (GHG) emissions, less impact to fragile ecosystems in the event of a spill because of their biodegradability and reduction of some tailpipe emissions, such as carbon monoxide, benzene, 1,3-butadiene and particulate matter. However, ethanol use may result in increased emissions of volatile organic compounds, nitrogen oxides and acetaldehyde.

[11] The "Rationale for Action" in the Notice of Intent stated that "use of renewable fuels can significantly reduce emissions" and that the projected environmental benefit of replacing 5% of Canadian transportation fuel would represent a reduction in GHG emissions equivalent to the emissions of almost 675,000 vehicles.

[12] The RIAS accompanying the publication of the RFRs in 2010 (*Canada Gazette, Part II*, Vol. 144, No. 18, September 1, 2010) stated that GHGs are a significant air pollutant and contributor to climate change. The stated objective of the RFRs was to reduce GHGs, "thereby contributing towards the protection of Canadians and the environment from the impact of climate change and air pollution."

IV. The Federal Court decision

[13] The 2% renewable fuels requirement came into force July 1, 2011, at the same time amendments were made to the RFRs. The accompanying RIAS reiterated and expanded upon the scientific, environmental and policy justifications and consequences of the renewable fuel requirement made in the September 2010 RIAS: *Canada Gazette, Part II*, Vol. 145, No. 15 (July 20, 2011).

[14] Syncrude challenged the constitutional validity of subsection 5(2) of the RFRs. It alleged that the subsection was not a valid exercise of Parliament's criminal law power under subsection 91(27) of the *Constitution Act 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 because it lacked a criminal law purpose and intruded into provincial legislative

responsibility for non-renewable natural resources. Syncrude further alleged that the provision was *ultra vires* the regulation-making power of section 140 of CEPA because the Governor in Council was required to form an opinion that the regulation would reduce air pollution, an opinion which the Governor in Council could not reasonably have held. Syncrude also raised challenges arising from the legislative procedure and process leading to the promulgation of the RFRs.

[15] Relying on *R v. Hydro-Québec*, [1997] 3 S.C.R. 213, 151 D.L.R. (4th) 32 [*Hydro-Québec*] the judge found that a valid criminal law purpose existed in the protection of the environment from pollution. He also found that the evidence adduced by Syncrude suggesting that the RFRs would not be effective in achieving their environmental goals to be irrelevant to the characterization of their dominant purpose, and that the criminal law power does not require a total or direct prohibition of the conduct in question. He rejected the argument that, in order to be a legitimate use of the criminal power, the requirement of renewable fuels had to be either an absolute requirement or, alternatively, greater than 2 %.

[16] The judge then considered Syncrude's alternative argument that the RFRs were a colourable device to establish a domestic market for renewable fuels, and hence a matter within provincial legislative competence under subsection 92(13) of the *Constitution Act, 1867*. After a review of the evidence, the judge concluded that while the RFRs had economic consequences and goals, the creation of demand for renewable fuels was a necessary and integral part of the strategy to reduce GHGs. The reason the government wanted to create a demand for renewable

fuels was to lower GHGs over the long-term. The dominant purpose of the RFRs was the protection of the environment by the reduction of air pollution.

[17] The judge then turned to the Attorney General's alternative argument that, assuming subsection 5(2) was not itself a valid exercise of the criminal law power, it would nonetheless be saved by the ancillary powers doctrine. This doctrine permits legislation to be upheld if it is connected to an otherwise valid legislative scheme and furthers its legislative purpose. Applying the criteria in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453 and *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 [*Quebec v. Canada*], the judge found that subsection 5(2) of the RFRs would be saved by the ancillary powers doctrine. In addressing the ancillary power question, the judge correctly observed that it was unnecessary to do so, having found as he did that subsection 5(2) was valid.

[18] With regard to the claim that the RFRs were not validly promulgated, the judge found that the Governor in Council had formed the requisite opinion under subsection 140(2) that they would reduce air pollution and that this opinion did not have to be ultimately correct as a matter of science. In the judge's view, Syncrude was asking the Court to substitute its view for that of the Governor in Council as to whether the RFRs could, in the language of subsection 140(2), "make a significant contribution to the prevention of, or reduction in, air pollution."

[19] Syncrude also advanced alternative administrative law arguments which the judge rejected. Amongst these, it contended that the Minister denied Syncrude procedural fairness by

failing to convene a board of review before promulgating the RFRs and that the failure to convene the board of review rendered the opinion of the Governor in Council unreasonable.

V. Issues on appeal

[20] It is important to define at the outset what is, and what is not, in issue in this appeal. Syncrude does not challenge the constitutionality of the enabling provisions - sections 139 and 140 of CEPA. Syncrude does not contend that the definition of "air pollution" in subsection 140(2) of CEPA is overbroad, nor does it contest that GHGs contribute to air pollution, and that their reduction is a proper objective of the criminal law power. Syncrude concedes that, if the dominant purpose of the RFRs were in fact to combat climate change, there would be no constitutional infirmity. Rather, the core of Syncrude's challenge is that subsection 5(2) is not aimed at the reduction of air pollution, but is an economic measure aimed at the creation of a local market, a matter within subsection 92(13), or is directed to non-renewable natural resources, a matter of provincial legislative competence under section 92A of the *Constitution Act, 1867*.

[21] Syncrude advances two main errors in the decision below.

[22] First, Syncrude submits that the judge erred by considering subsection 5(2) in the context of the CEPA regime as a whole before examining the subsection in isolation. It also submits that the judge failed to consider relevant evidence beyond the RIAS which, in its view, points to the true and colourable purpose of the RFRs. Before this Court, Syncrude maintains its position that,

properly characterized, the RFRs are an economic measure, and intrude on provincial responsibility for natural resources, or are colourable attempts to achieve those purposes. It further argues that the RFRs are not a valid exercise of the criminal law power because, as a requirement of 2%, and allowing certain exemptions, they do not completely prohibit or ban the use of fossil fuels.

[23] Syncrude contends that the consumption of fossil fuels is not inherently dangerous and that this undermines the notion that the RFRs have a valid criminal law purpose. Syncrude contrasts the pollutants it cites as legitimate evils, such as lead and sulphur, with GHGs. As the judge noted, "[i]n Syncrude's view, there is no evil to be suppressed": Reasons, para. 79.

[24] However, as the respondent points out, Syncrude's submission at paragraph 66 of its factum that "the production and consumption of petroleum fuels is not inherently dangerous" is inconsistent with its concession that GHG emissions contribute to the evil of climate change. Syncrude's position is problematic and at times concedes the correlation between GHGs, global warming and the consumption of fossil fuels.

[25] Syncrude's second ground of appeal is that the judge erred in failing to conclude that the Governor in Council did not, and could not, hold the requisite opinion under subsection 140(2) that the RFRs would reduce air pollution. The remainder of Syncrude's challenges to the statutory validity of the RFRs raised in the Federal Court were not pursued in this Court.

VI. Analysis

A. *Standard of review*

[26] For questions of constitutionality, the standard of review is correctness: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58, [2008] 1 S.C.R. 190 [*Dunsmuir*]. However, to the extent that Syncrude raises a non-constitutional objection to subsection 5(2), a different standard of review is engaged.

[27] On questions of whether the RFRs were lawfully enacted (pursuant to CEPA), the Supreme Court of Canada has reaffirmed in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)* 2013 SCC 64 at para. 24, [2013] 3 S.C.R. 810 [*Katz*] that regulations can be struck down only if they are "shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate." The regulations must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose. It remains that "it would take an egregious case" to strike down regulations on the basis that they are *ultra vires* the enabling statute: *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at 111, 143 D.L.R. (3d) 577.

[28] I note that in *Katz*, the Supreme Court opted not to integrate this standard of review for the *vires* of regulations promulgated by the Governor in Council or by a Lieutenant Governor in Council into the *Dunsmuir* scheme for judicial review of administrative decision-making. Consequently, a review of federal or provincial regulations must not be confused, for example, with the standard of a review applied to a municipality's enactment of bylaws. The latter is

subject to a reasonableness review pursuant to the *Dunsmuir* framework, owing to the fact that municipalities do not have inherent legislative power under the *Constitution* and instead only "legislate" pursuant to the authority delegated to them by statute: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 14-15, 20-22, [2012] 1 S.C.R. 5. In consequence, federal regulations of the type at issue in the case at bar are subject to the *Katz* criteria.

[29] While the decision below arose from a judicial review of the Governor in Council's decision, the judge was called upon to make factual findings. When considering on appeal a decision in which the judge both reviewed an administrative decision and made separate factual findings, those factual findings attract deference on the *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 standard of palpable and overriding error: *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 350 D.L.R. (4th) 400; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 253 A.C.W.S. (3d) 677; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209. This standard applies regardless of whether the factual findings are characterised as "adjudicative, social, or legislative": *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 48-56, [2013] 3 S.C.R. 1101.

[30] In sum, the question of whether subsection 5(2) of the RFRs is constitutional is reviewed on a standard of correctness. The question of whether the Governor in Council validly enacted subsection 5(2) pursuant to CEPA is assessed against the *Katz* standard of inconsistency with the enabling statute. Any factual findings made by the judge in the course of his analysis are reviewed on a standard of palpable and overriding error.

B. *Methodology*

[31] I will deal briefly with the contention that the judge erred in his methodology, specifically, that he did not read the legislation in the manner required for the purpose of constitutional analysis.

[32] Syncrude submits that the judge erred in his approach to the analysis of the pith and substance of the impugned provision. It suggests that the correct approach is to examine the impugned provision in isolation first, and that only if the pith and substance cannot be resolved in that manner, is it appropriate to examine the provision in the context of the entire scheme. Because the judge started with the purpose and object of CEPA, Syncrude submits, his constitutional analysis was in error.

[33] Syncrude's reliance on *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 [*AHR*] to contend that the first stage must be absolutely quarantined from consideration of the broader context is problematic as a matter of doctrine.

[34] The Supreme Court of Canada has articulated the framework for determining the validity of a law made pursuant to the criminal law power. In *AHR*, the Chief Justice observed that where the challenge is to only one or more of the provisions of a piece of legislation, as opposed to the legislation as a whole, the inquiry *might* begin with consideration of the challenged provision or provisions alone. If the provision does not, on its face, intrude into the other jurisdiction, then there is no need to make further inquiry. The Chief Justice continued, however, and noted at

paragraph 17 that "the impugned provisions must be considered in their proper context" and it might be necessary to consider the impugned provision in light of the entire scheme in order to understand its true purpose and effect.

[35] This methodology has a long antecedence: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 68 O.R. (2d) 512 [*General Motors*]. *General Motors* affirms that the impugned provision must be examined in two stages, firstly by looking at the provision itself and secondly, as situated within the context of the broader statute. However, the first stage only stops the analysis if the provision is both independently comprehensible and demonstrably *valid*. Consequently, if analysis of the provision in isolation requires greater legislative context to be understood, or the provision is on its face of doubtful validity, then a broader analysis is inevitable.

[36] The judge did precisely what the Supreme Court of Canada mandated – he looked at subsection 5(2) and accepted that, when read alone or without reference to its enabling statute it might be considered a matter within provincial jurisdiction. The judge then considered the purpose and effect of subsection 5(2) and how it fit into the regulatory scheme. He framed his analysis in light of the Supreme Court of Canada's direction in *Ward v. Canada (Attorney General)*, 2002 SCC 17, at paragraph 19, [2002] 1 S.C.R. 569 [*Ward*], that "[t]he question is not <u>whether</u> the *Regulations* prohibit the sale so much as <u>why</u> it is prohibited" (emphasis in original). The question of whether the judge was correct in his conclusion aside, there was no error in his analytical framework.

[37] Against this legislative and jurisprudential landscape, I turn to the central question – the dominant purpose of the RFRs.

C. *Characterization of subsection 5(2) of the RFRs*

[38] There are two stages to the division of powers analysis. The first is an inquiry into the essential character of the law, or, as is often said, its pith and substance. The second is "to classify that essential character" by reference to the heads of power under the *Constitution Act, 1867*: *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 15, [2000] 1 S.C.R. 783 [*Firearms Reference*].

[39] The characterization exercise is informed by both the law's purpose and its effect. Purpose is gleaned first, from the law itself, as stated by Parliament, but also from extrinsic sources such as Hansard and government policy papers: see *Firearms Reference* at paragraph 17 for a discussion of the use of extrinsic evidence in the characterization exercise. The purpose can also be informed by reference to the mischief to which the law is directed.

[40] Following identification of purpose, the inquiry turns to the legal effect of the law – how does the law operate and what effect does it have? At this stage, the court may consider both the legal and practical effect of the law. Having regard to Syncrude's argument, which is predicated on the ineffectiveness of a renewable fuel requirement, the language of the Supreme Court in *Firearms Reference*, at paragraph 18, is highly instructive:

> Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler, supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) *(Alberta Bank Taxation Reference)*; and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be "colourable".

[41] The application of these principles to the regulation in issue leads to the conclusion that subsection 5(2) is directed to maintaining the health and safety of Canadians, as well as the natural environment upon which life depends. At the risk of repetition, the following points can be derived from the enabling statutory framework in support of this conclusion:

- The RFRs were enacted under subsection 140(2) of CEPA, which requires the Governor in Council be of the opinion that the regulation could make a significant contribution to the reduction of air pollution.

- Subsection 3(1) of CEPA defines "air pollution" as a condition of the air arising from any substance that directly or indirectly endangers health and safety.

- Six substances which comprise GHGs were added to Schedule 1 of CEPA in 2005. Section 64 of CEPA defines a toxic substance as one which may have an immediate or long-term harmful effect on the environment, or its diversity, or may constitute a danger to human life or health.

- Subsection 140(1) contemplates a wide range of regulations in respect of fuel, including "the concentrations or quantities of an element, component or additive in a fuel; the physical or chemical properties of a fuel; the characteristics of a fuel […] related to […] conditions of use; [and] the blending of fuels […]."

- In imposing a 2% renewable fuel requirement subsection 5(2) is directed to the reduction of toxic substances in the atmosphere. The Order in Council promulgating subsection 5(2) stated that the regulation "would make a significant contribution to the prevention of, or reduction in, air pollution, resulting from, directly or indirectly, the presence of renewable fuel gasoline, diesel fuel or heating distillate oil."

[42] The RFRs impose requirements respecting the concentration of renewable fuels and thus limit the extent to which GHGs that would otherwise arise from the combustion of fossil fuel are emitted. GHGs are listed as toxic substances under Schedule 1 of CEPA. By displacing the combustion of fossil fuels, the renewable fuel requirement reduces the amount of "air pollution" arising from the GHGs (toxic substance) which would otherwise enter the atmosphere. In sum, the purpose and effect of subsection 5(2) is unambiguous on the face of the legislative and

regulatory scheme in which it is situated. It is directed to the protection of the health of Canadians and the protection of the natural environment.

[43] Resort to the RIAS confirms this conclusion. The Supreme Court of Canada has endorsed reliance on the RIAS for the purpose of constitutional analysis: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 155-157, [2005] 1 S.C.R. 533.

[44] The September 1, 2010 RIAS expressly stated that the RFRs were aimed at a reduction of GHG emissions. The RIAS highlighted the projected reduction in GHG emissions and cited the underlying data for those conclusions: see Regulatory Impact Analysis Statement 2010/9/1 - *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1673, 1677, 1687, 1699-1700, 1705-1706.

[45] The July 20, 2011 RIAS, (*Canada Gazette, Part II*, Vol. 145, No 15) notes at page 1429 that the Governor in Council was of the opinion that the proposed regulations "could, through the presence of renewable fuel, make a significant contribution to the prevention of, or reduction in, air pollution." It observed that "[t]he most significant source of GHGs […] is the combustion of fossil fuels" and that GHGs are "the primary contribution to climate change": pp 1435-36. The RIAS reiterates, at considerable length and in considerable detail the environmental and health benefits of a renewable fuel requirement.

[46] The purpose and effect of subsection 5(2) having been determined, the inquiry turns to the scope of the criminal law power and whether subsection 5(2) fits within its ambit.

D. *Scope of the criminal law power*

[47] In broad terms, the jurisprudence of the Supreme Court of Canada establishes a three-part test for a valid exercise of the criminal law power. A valid exercise of the criminal law power requires a) a prohibition, b) backed by a penalty, c) for a criminal purpose: *AHR*. Only the last of these is contested in the case at bar.

[48] Supreme Court jurisprudence as far back as the *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] S.C.R. 1, [1949] 1 D.L.R. 433 [*Margarine Reference*] has described the nature of the criminal purpose requirement as a requirement that the law be aimed at suppressing or reducing an "evil." Put in more contemporary language, to have a valid criminal law purpose the law must address a public concern relating to peace, order, security, morality, health or some other purpose (*AHR* at para. 43), but it must stop short of pure economic regulation.

[49] Protection of the environment is, unequivocally, a legitimate use of the criminal law purpose. The Supreme Court of Canada has held that "the protection of a clean environment is a public purpose […] sufficient to support a criminal prohibition […] to put it another way, pollution is an 'evil' that Parliament can legitimately seek to suppress": *Hydro- Québec* at para.

123. In dissent although not on this point, at paragraph 43, Chief Justice Lamer and Iaccobucci J. echoed La Forest J.'s view:

> To the extent that La Forest J. suggests that this legislation is supportable as relating to health, therefore, we must respectfully disagree. We agree with him, however, that the protection of the environment is itself a legitimate criminal public purpose, analogous to those cited in the *Margarine Reference, supra*. We would not add to his lucid reasoning on this point, save to state explicitly that this purpose does not rely on any of the other traditional purposes of criminal law (health, security, public order, etc.). To the extent that Parliament wishes to deter environmental pollution specifically by punishing it with appropriate penal sanctions, it is free to do so, without having to show that these sanctions are ultimately aimed at achieving one of the "traditional" aims of criminal law. The protection of the environment is itself a legitimate basis for criminal legislation.

[50] It is useful to recall that, in *Hydro-Québec* at paragraph 150, the disputed regulation was directed to "providing or imposing requirements respecting the quantity or concentration of a substance listed in Schedule 1 that may be released into the environment either alone or in combination with others from any source" and therefore was a valid use of the criminal law power. Subsection 5(2) of the RFRs operates in the same manner.

[51] More recently, in AHR the Supreme Court observed that pollution was one of the "new realities" facing Canada, and that Parliament needed flexibility in making decisions as to the types of conduct or activity that required the sanction of criminal law: para. 235.

E. ***The ineffectiveness of the RFRs***

[52] I turn to Syncrude's principal argument – that the RFRs are ineffective in achieving their purpose. Syncrude urges that "the evidence of practical effects of the RFRs overwhelmingly contradict the suggestion that the dominant purpose of the RFRs is to reduce GHG emissions."

[53] This argument does not succeed on either an evidentiary or legal basis.

[54] Syncrude points to evidence which suggests, on certain assumptions, that the actual reduction in GHGs arising from the transition to renewable fuels is illusory, and in fact, the RFRs contribute to GHGs. Syncrude emphasised a 2008 external report commissioned for Natural Resources Canada. That report stated that the upstream GHG emissions for some renewable fuels could be as much as twice that of fossil fuels. The appellant posits that this, combined with an admission on cross-examination that there are no reductions in downstream emissions from renewable fuels, indicates that the government knew that there would be no reduction in GHG emissions over the life cycle of a renewable fuel. This evidence is based on changes in land use patterns, whereby the conversion of agricultural lands from pasture or lower value crops to the production of bio or renewable fuels generate net increases in GHGs. Syncrude also points to US studies indicating increases in death rates from respiratory issues, and to the government's own evidence that "ethanol use may result in increased emissions of volatile organic compounds": see reference to Notice of Intent, paragraph 10 above.

[55] Suffice to say, the Governor in Council considered this issue and concluded otherwise. The 2011 RIAS; *Canada Gazette, Part II*, Vol. 145, No. 15, (July 20, 2011), specifically considered the adverse effects of the renewable fuel requirement on air pollution and on human health. It observed that except for a minor increase in Nitrogen Oxide (NOx) all other toxic emissions decreased (RIAS pp. 1462-1465). The RFRs were expected to directly result in an incremental reduction of GHG emissions by 1 megaton per year: RIAS p. 1436.

[56] The 2005, 2010 and 2011 RIAS describe a considered body of scientific research in support of the relationship between the RFR requirement and the reduction of GHGs. They also indicate that the renewable fuels requirement would reduce GHGs, as well as other emissions such as acetaldehyde, volatile organic compounds and fine particle pollution, all defined pollutants. The September 1, 2010 RIAS noted that the RFRs "are not expected to result in land use changes": p. 1709. The evidence relied on by Syncrude originated in European Union countries with higher renewable fuel targets and different land use patterns. Syncrude led no evidence of its own to support its argument that the RFRs would increase GHGs when applied to its own operations or to Canada as a whole.

[57] Syncrude selectively highlights certain passages from the 2008 report commissioned by Natural Resources. A complete reading of the report makes it clear that while some renewable fuels have greater upstream emissions than fossil fuels, other renewable fuels result in significant GHG emission reductions. Moreover, the government's Strategic Environmental Assessment indicates that the government was cognizant of the fact that "next generation" renewable fuels were under development and would lead to greater long-term reduction in GHGs.

[58] The legal and practical effect of legislation is relevant for the purpose of determining the pith and substance of the law: *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at para. 23, [2000] 1 S.C.R. 494 [*Global Securities Corp.*]. However, it is well established doctrine that "the wisdom or efficacy of the statute" is not relevant to determining its pith and substance: *R v. Morgentaler* [1993] 3 S.C.R 463 at 487-488, 107 D.L.R. (4th) 537, citing P. W. Hogg, *Constitutional Law of Canada*, vol. 1, 3d ed. (Toronto: Carswell, 1992, loose-leaf) at 15-15, and more recently, in *Ward*, at para. 18.

[59] Syncrude contends that the evidence (which, as noted, is not compelling) that the RFRs would not in fact reduce GHG emissions is relevant to the characterization of the dominant purpose because it addresses *the legal and practical* effect of the provision. It contends that the evidence that the RFRs will not be effective in reducing GHGs is not addressed to the question of whether the provision is *in fact* efficacious. It concedes, correctly, that whether the measure is worthwhile or useful is not germane to the characterization exercise.

[60] This distinction simply seeks to circumvent the proposition, consistent since *Global Securities Corp.* at paragraph 22, and more recently iterated in *Ward* at paragraph 26, that the effectiveness of the legislation is irrelevant for the purposes of characterization. There is no doubt as to what the regulations seek to achieve, how they operate, and their practical effect. The argument that there may be a better, more efficacious way to reduce GHGs does not alter the conclusion. As noted in *Ward*, at paragraph 26 "the purpose of legislation cannot be challenged by proposing an alternative, allegedly better, method for achieving that purpose." Syncrude's

argument that, because the RFRs are ineffective, an assertion which fails on the evidence, the dominant purpose must have been to establish a local market, fails.

F. ***The regulation is not an economic measure***

[61] As noted, Syncrude contends that the dominant purpose of the RFRs was to create a market in renewable fuels. The RIAS reveals careful consideration of the refining industry, transportation to the consumer, and the effect of subsection 5(2) on agriculture. There is also evidence that the creation of long-term demand for renewable fuels was an integral part of the strategy to reduce GHGs.

[62] It must be recalled that it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power. Syncrude concedes that GHGs are air pollution within the definition of CEPA. Nevertheless, Syncrude urges that subsection 5(2) is *ultra vires* because the government foresaw and hoped for the development of a market whereby more renewable fuels would be available for consumption, replacing the consumption of fossil fuels which produce the GHGs. It also contends that the RFRs do not in fact, achieve the goal of reducing air pollution, indeed, it says that the renewable fuel requirement would lead to a net increase in GHGs, arising from the GHG emissions associated with the planting, harvesting, transportation and refining of bio-fuel crops.

[63] The Attorney General does not contest that Canada foresaw that the RFRs would have favourable economic consequences and that there would be market responses in agriculture to

the increased demand for renewable fuel. The impact on various sectors of agriculture was negligible: *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), pp. 1708-1710). The overall cost of the RFRs would be borne by consumers, at an estimated cost of 1¢ per litre, and would be lost in day to day fluctuation of fuel prices: pp. 1746-1717. These effects were considered to be minimal.

[64] However, these consequential effects cannot be considered in isolation. The reason the government hoped for the development of a renewable fuels market in Canada was because the availability of renewable fuels would lead to a long-term reduction of GHGs. The judge concluded that "these economic effects are part of a four-pronged Renewable Fuels Strategy" (emphasis in original).

[65] Insofar as the effect on agriculture was concerned, the Minister of the Environment noted that the reason why the government hoped for the emergence of a renewable fuels market was "to provide the maximum opportunity for emissions reductions." When asked whether the RFRs would cause a net benefit for the environment, the Minister replied: "Yes. And that is why we brought these three components together. We can't do this framework without the three components of energy, environment and agriculture."

[66] The environment and economy are intimately connected. Indeed, it is practically impossible to disassociate the two. This point was well-made in *Friends of Oldman River Society v Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 where the Court said "it defies reason to assert that Parliament is constitutionally barred from weighing the broad

environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature."

[67] The existence of the economic incentives and government investments, while relevant to the characterization exercise, do not detract from the dominant purpose of what the RFRs do and why they do it. The inquiry does not end with proof of an incentive or market subsidy. Consistent with *Ward*, one must inquire as to the purpose and effect. For example, regulations under the *Firearms Act*, S.C. 1995, c. 39 could call for new, enhanced locking mechanisms. The fact that capital investments are made to assist the lock industry to transition to the new requirements would not detract from the dominate purpose being addressed to "peace, order, security, morality, health or some other purpose" (*AHR* at para. 43). Here, the RIAS (*Canada Gazette, Part I*, Vol. 145, No. 15, (July 20, 2011), p. 699) states the purpose of collateral investments in infrastructure costs related to the production of renewable fuels was "to generate greater environmental benefits in terms of GHG emission reductions."

[68] The evidence demonstrates that part of the objective of the RFRs was to encourage next-generation renewable fuels production and to create opportunities for farmers in renewable fuels. However, the evidence also demonstrates that a market demand and a market supply for renewable fuels and advanced renewable fuels technologies had to be created to achieve the overall goal of greater GHG emissions reduction.

[69] The criminal law power is not negated simply because Parliament hoped that the underlying sanction would encourage the consumption of renewable fuel and spur a demand for

fuels that did not produce GHGs. All criminal law seeks to deter or modify behaviour, and it remains a valid use of the power if Parliament foresees behavioural responses, either in persons or in the economy.

[70] To close on this point, the consequential shifts in agriculture and the market for fuel arising from the renewable fuel requirement is not inconsistent with the dominant purpose of subsection 5(2) being the reduction of GHGs, with their uncontroverted costs to the health of the human and natural environment; rather, it reinforces the dominant purpose.

G. *The absence of an absolute prohibition*

[71] Syncrude also argues that the RFRs cannot be a valid exercise of the criminal law power given certain exemptions in the RFR regime, and that in imposing a 2% renewable fuel requirement, they do not ban outright the presence of GHGs in fuel.

[72] I note at the outset that this appears to be, in essence, an allegation that the "prohibition" requirement for a valid exercise of the criminal law power is unmet, not the "criminal law purpose" requirement. This gives me pause because, before the Federal Court, Syncrude conceded the presence of a prohibition. This is of no consequence, however, as constitutionality, as a matter of law, cannot be conceded. In any event, the judge found that the absence of a total prohibition on the use of non-renewable fuels (and the absence of a total prohibition on a given supplier using more than 98% non-renewable fuels at a given time) did not preclude subsection 5(2) from being a valid exercise of Parliament's criminal law power.

[73] A prohibition need not be total, and it can admit exceptions: *Firearms Reference* at para. 39 and *RJR-MacDonald Inc. v. Canada (Attorney General,)* [1995] 3 S.C.R. 199 at paras. 52-57, 127 D.L.R. (4th) 1 [*RJR-MacDonald*]. Indeed, environmental regulations often set limits, or concentrations of listed substances; so too do regulations of the food industry. Recall that in *Hydro- Québec* the majority observed, at paragraph 150, that regulations imposing requirements prescribing *the manner and condition of release or the source of release* of substances listed in Schedule 1 to CEPA into the environment were a valid use of the criminal law power. Recall as well that paragraph 140(1)(a) of CEPA authorizes regulations respecting "the concentration or quantities of an element, component or additive in fuel."

[74] Syncrude points to the fact that the regulation is, in some circumstances, suspended during the winter due to technical challenges in blending traditional and renewable fuels. There are two answers to this, one legal, the other pragmatic. It may be that a criminal law requires exceptions in circumstances where a total prohibition would either be unjust or contrary to other interests which Parliament is charged with safeguarding. Many uncontroversial exercises of the criminal law establish a regime whereby, if certain measures or steps are taken otherwise-prohibited conduct becomes permissible. The *Food and Drugs Act*, R.S.C. 1985, c. F-27, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and *Firearms Act*, along with many others and their attendant regulations, require licenses in order to possess particular substances or items. Indeed, other regulations made pursuant to CEPA, such as the *Gasoline Regulations*, SOR/90-247, sections 4 and 6, prescribe a maximum amount of a harmful substance that is allowed in fuel without prohibiting that substance completely.

[75] There is no constitutional threshold of harm that must be surpassed before the criminal law power is met, provided there is a reasonable apprehension of harm. Syncrude has no answer to the question of whether the RFRs become constitutional at a 10%, 25%, 50% or 100% renewable fuel requirement. There is no magic number. As the Supreme Court observed in *AHR* at paragraphs 55 to 56, "there is no constitutional threshold of harm."

[76] Turning to the pragmatic answer; if the winter exemption is engaged, the RFRs require a greater than 2% utilization during the summer months. The regulatory obligation is met by purchasing compliance units from another user. On a national basis, the net effect is the same.

[77] To conclude, Syncrude's argument that the regulation is invalid because it is not a blanket prohibition has no doctrinal support. Further, Syncrude concedes that other regulations, such as those limiting concentration of lead and sulphur in fuel are valid: *Sulphur in Diesel Fuel Regulations*, SOR/2002-254. Nothing distinguishes the prohibition of a certain amount of sulphur or lead in fuel from a positive requirement of a certain amount of renewable fuel in fuels. Both seek to prevent the emission of toxic substances, whether sulphur dioxide or GHGs, and both are addressed to the reduction of air pollution.

H. ***Intrusion into provincial jurisdiction over non-renewable natural resources***

[78] The answer to Syncrude's argument that the RFRs intrude into provincial competence over non-renewable resources lies in the structure and operation of the RFRs themselves.

[79] The regulatory obligation is met either by meeting the 2% requirement, or by purchasing compliance units from another producer or user who has exceeded their own obligation. Shortfalls arising from the difficulties of blending renewable fuels with fossil fuels in the winter months can be compensated for by excess utilization of renewable fuel in the summer. The RFRs are, in this sense, agnostic as to who is required to meet the target, and importantly, agnostic as to how they do it, whether by blending fuels or purchasing compliance units. The overall effect is the same on a yearly, Canada-wide, basis – 2% less fossil fuel is consumed.

[80] It must also be remembered that subsection 5(2) applies to Syncrude as a consumer of diesel fuel in its operations, not its production of synthetic crude oil. Syncrude meets the requirements of the RFRs by purchasing compliance units from another producer. The RFRs do nothing to affect the rate or timing of resource extraction, which Syncrude describes as its core business. Simply put, Syncrude stands no different than any other consumer of diesel fuel in Canada, whether a trucking company, a municipal transit authority or a contractor with a diesel fuel requirement. The RFRs are laws of general application, and not directed to the management of natural resources.

I. *The indirect means argument*

[81] Syncrude argues that the use of the RFRs to create a demand for renewable fuels which would in turn reduce GHG emissions is an indirect, and not direct, means of addressing GHGs. It says that the jurisprudence does not support the use of the criminal law power to trigger indirect economic effects to achieve the dominant purpose of protecting the environment. I have already

found above that such creation of demand for renewables was not the dominant purpose of the RFRs. This suffices to dispose of this argument.

[82] In the alternative, however, I find that it would be a valid exercise of the criminal law power to use a prohibition to mandate a renewable component in fuel in order to indirectly achieve the consequential reduction of toxic GHGs in the atmosphere. This is precisely what section 139 authorizes. I stress that this point is not necessary to reach the conclusion that the RFRs are *intra vires* Parliament's authority; the reasons I have given above for this conclusion are independently sufficient.

[83] Syncrude is right to cite the *Margarine Reference*, as it does establish a relevant limit on Parliament's criminal law power. Specifically, Parliament cannot use the criminal law (in that case, prohibitions on the import, production, and sale of margarine) simply to create economic effects which it considers desirable. In that case, the economic effect – the protection of the dairy industry – was the end goal. However, Syncrude's argument that Parliament cannot use the criminal law power to indirectly reduce an evil has no support in the jurisprudence.

[84] The *Firearms Reference* establishes that a law need not have a direct prohibition of the evil in question. In the *Firearms Reference*, the Supreme Court confirmed, at paragraphs 39 and 40, that in exercising the criminal law power "Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required." In *RJR-MacDonald*, the impugned provision prohibited tobacco advertising and promotion in order to reduce tobacco consumption and in turn reduce the negative health effects of tobacco consumption. The Court found that it was

permissible for Parliament to prohibit the activity that indirectly causes the evil rather than the activity that directly causes the evil.

[85] If a law provides for a prohibition backed by a penalty, with the ultimate effect that an evil is reduced, that suffices to place the law within Parliament's constitutional *vires*. The court should be neutral as to the causal mechanism by which that evil is reduced. *AHR* directs that the exercise of the criminal law power is valid if the three parts of the test are met; it does not direct the court to find an exercise of the criminal law power to be valid if the three parts of the test are met unless the way in which that evil is reduced is of a prescribed type. There is no jurisprudential basis for adjoining this additional element to that test. Indeed, *RJR-MacDonald* expressly affirms that the emphasis must not be on Parliament's method of achieving an otherwise-valid criminal law purpose, no matter how "circuitous" a path Parliament takes to reach its goal.

[86] I am reassured in this conclusion by the fact that other exercises of the criminal law power involve a prohibition that changes economic conditions so as to reduce an evil. Consider for instance, section 355.2 of the *Criminal Code*, R.S.C. 1985, c C-46, which prohibits trafficking in property that was obtained via crime. The evil at which section 355.2 is aimed is the commission of the underlying crime, and the mechanism by which it reduces that evil is economic. In prohibiting the downstream trade in property and profit obtained via crime, it creates economic conditions that are less conducive to committing the underlying criminal conduct.

J. *The colourability argument*

[87] Syncrude suggests that the RFRs are ineffective at combating climate change and must, by logical inference, be a colourable attempt to create a market for renewable fuels or to regulate provincially controlled natural resources.

[88] Colourability is not lightly inferred, nor is it a backdoor to a reconsideration of the wisdom or efficacy of the law. In *Quebec v. Canada* at paragraph 31, the Court affirmed that colourability "simply means that 'form is not controlling in the determination of essential character'."

[89] The Supreme Court of Canada in *Hydro-Québec* made it clear that colourability requires Parliament's declared valid purpose to be a mere pretence for incursion into provincial jurisdiction. This is a high standard. Again, as in the case of characterization of the dominant purpose, Syncrude points to the evidence which it submits demonstrates that the government knew that renewable fuels do not in fact have lower life cycle GHG emissions. Syncrude also submits that the government understood that the RFRs would spur the development of a domestic market for renewable fuels, create collateral economic incentives to agriculture and industry to assist in the transition to planting and refining of biofuels, and have other positive effects on some sectors of agriculture. This, Syncrude submits, establishes that the primary purpose must have been to intrude into provincial responsibilities to create a market for Canadian renewable fuels.

[90] Here, however, the evidence supports the opposite conclusion. When the references in the evidence to the creation of a domestic market for renewable fuels is considered in its context, including the evidence that the purpose of subsection 5(2) in particular, was to make a significant contribution to the prevention and reduction in air pollution through a reduction of GHGs as well as the evidence that anticipated the market related consequences and goals were part of the strategy to reduce GHG emissions of fossil fuels, the colourability argument fails.

[91] Indeed, this observation highlights the degree to which the valid use of the criminal law power to protect the environment may have consequential economic effects. It would be extremely easy for Parliament to use the criminal law to protect the environment if Parliament had no concern for the economy; it could simply ban the consumption of fossil fuels. The challenge lies in protecting the environment while avoiding or compensating for negative economic side effects. In some cases, crafting the regime so as to mitigate the economic side effects may be the majority of the work. The fact that managing economic effects plays a role, even a large role, in a given law does not mean that the law is a colourable attempt to pursue an unconstitutional objective.

[92] Syncrude points to the concomitant capital incentives and subsidies to agriculture and industry to promote the renewable fuels industry as evidence that the RFRs were a colourable attempt to intrude into areas of provincial legislative competence. However, the analysis must go further, and inquiry must be made as to the reason and purpose which underlies these measures. When this is done, it is clear that their objective was to facilitate access to renewable fuels and spur the development of new technologies which would "generate greater environmental benefits

in terms of GHG emissions reduction": *Canada Gazette*, Part I, Vol. 145, No. 15, (July 20, 2011), p. 699. As the judge observed, the creation of a demand for renewable fuels was a necessary part of the overall strategy to reduce GHG emissions, but it was not the dominant purpose.

[93] These consequential market responses do not detract from the dominant purpose. The RFRs were designed to combat the deleterious effect of GHGs on the atmosphere by mandating that a type of fuel that was foreseeably less GHG-emitting be used in at least 2% of the fuel supply. The evidence points overwhelmingly to the fact that the RFRs were in pith and substance directed to the reduction of air pollution by reducing GHG emissions from the use of fossil fuels.

K. ***Ancillary powers***

[94] In light of these reasons, and the determination that subsection 5(2) of the RFRs is within federal legislative competence, it is not necessary to consider whether the ancillary powers doctrine would save the impugned provision. However, even if the law were *ultra vires*, I conclude that it would be saved by the ancillary powers doctrine, substantially for the reasons given by the judge at paragraphs 87 to 97 of the Reasons.

L. ***Statutory validity***

[95] As noted, Syncrude contends that the Governor in Council failed to form the opinion in subsection 140(2) that the regulation "could make a significant contribution to the prevention of,

or reduction in, air pollution," which is a condition precedent to the promulgation of valid regulations.

[96] Substantively, the burden rests with Syncrude to show that the RFRs are inconsistent with the enabling statute. In this regard, the court does not inquire into the policy merits of the RFRs, or whether a regulation is "necessary, wise or effective in practice": *Katz* at para. 28.

[97] Syncrude's administrative law argument amounts to the following: CEPA subsection 140(2) requires the Governor in Council to be of the opinion that a regulation will reduce air pollution before making that regulation under subsection 140(1). The RFRs do not in fact reduce air pollution. Therefore, the Governor in Council could not have been of the opinion that they do, because that opinion would have been incorrect, capricious, or otherwise made for improper or extraneous objectives beyond those of the statute.

[98] The error inherent in this chain of reasoning is obvious. Subsection 140(2) does not require absolute scientific certainty, if such a state exists. What is required is an opinion, which may not be shared by all, that the regulation could reduce air pollution. There was ample evidence before the Governor in Council, set forth in the RIAS, supporting that opinion.

[99] In support of its argument, Syncrude points to evidence in the record to the effect that because of changes in land use patterns, there will be no net reduction in GHG emissions, and that there will be an increase in air pollution which will result in deleterious impacts on the

environment. However, it is clear from the evidence that the Governor in Council considered this issue, noting that in Canada there would be no change in land use patterns. The 2010 RIAS specifically addresses Syncrude's point, noting that the RFRs "are not expected to result in any changes in land use": *Canada Gazette, Part II*, Vol. 144, No. 18, (September 1, 2010), p. 1709. The evidence falls short of establishing that the biofuel requirement is irrelevant, extraneous, or completely unrelated to the statutory purpose of section 140 and the CEPA.

[100] In essence, Syncrude invites the Court to second guess the Governor in Council's opinion, an invitation that this Court should decline. Even if there was a solid evidentiary foundation establishing a different scientific opinion on the net contribution of the RFRs to the reduction of GHGs, it would not detract from the Governor in Council forming a different opinion on admittedly different evidence.

VII. Conclusion

[101] I find that subsection 5(2) of the RFRs is *intra vires* both the *Constitution Act 1867* and CEPA and I would dismiss the appeal with costs.

"Donald J. Rennie"

J.A.

"I agree
C. Michael Ryer J.A."

"I agree
Richard Boivin J.A."

ANNEX A

***Canadian Environmental Protection Act*, 1999, SC 1999, c33**	***Loi canadienne sur la protection de l'environnement* (1999) (L.C. 1999, ch. 33)**
General Requirements for Fuels	**Réglementation des combustibles**
Prohibition	**Interdiction**
139 (1) No person shall produce, import or sell a fuel that does not meet the prescribed requirements.	139 (1) Il est interdit de produire, d'importer ou de vendre un combustible non conforme aux normes réglementaires.
Regulations	**Règlements**
140 (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139 and may make regulations respecting	140 (1) Sur recommandation du ministre, le gouverneur en conseil peut prendre tout règlement d'application de l'article 139 et, par règlement, régir:
(a) the concentrations or quantities of an element, component or additive in a fuel;	a) la quantité ou la concentration de tout élément, composant ou additif dans un combustible;
(b) the physical or chemical properties of a fuel;	b) les propriétés physiques ou chimiques du combustible;

ANNEX B

Renewable Fuels Regulations (SOR/2010-189)	*Règlement sur les carburants renouvelables* (DORS/2010-189)
Distillate pool	**Stocks de distillat**
5 (2) For the purpose of section 139 of the Act, the quantity of renewable fuel, expressed as a volume in litres, calculated in accordance with subsection 8(2), must be at least 2% of the volume, expressed in litres, of a primary supplier's distillate pool for each distillate compliance period.	5 (2) Pour l'application de l'article 139 de la Loi, la quantité de carburant renouvelable, correspondant à un volume exprimé en litres et calculée conformément au paragraphe 8(2), ne peut être inférieure à 2 % du volume, exprimé en litres, des stocks de distillat du fournisseur principal au cours de chaque période de conformité visant le distillat.
Representing renewable fuel	**Correspondance — carburant renouvelable**
7 (1) Compliance units, which represent litres of renewable fuel, created under Part 2 are used to establish compliance with section 5.	7 (1) Les unités de conformité créées au titre de la partie 2 correspondent à des litres de carburant renouvelable et servent à établir la conformité avec l'article 5.
Blending in Canada — distillate compliance units	**Mélange au Canada — unité visant le distillat**
13 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel on its blending in Canada with a batch of diesel fuel or heating distillate oil.	13 (2) Sous réserve du paragraphe (3), une unité de conformité visant le distillat est créée pour chaque litre de carburant renouvelable au moment où il est mélangé, au Canada, à un lot de carburant diesel ou de mazout de chauffage.
Importation — distillate compliance units	**Importation — unité visant le distillat**
14 (2) Subject to subsection (3), a single distillate compliance unit is created for each litre of renewable fuel that is contained in a batch of diesel fuel, or heating distillate oil, on its importation into Canada.	14 (2) Sous réserve du paragraphe (3), une unité de conformité visant le distillat est créée pour chaque litre de carburant renouvelable que contient un lot de carburant diesel ou de mazout de chauffage au moment de son importation au Canada.

To primary suppliers

20 (1) A compliance unit may only be transferred in trade to a primary supplier.

À un fournisseur principal

20 (1) Un échange ne peut être conclu que si le destinataire de l'unité de conformité est un fournisseur principal.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED AUGUST 6, 2014, NO. T-1643-13 (2014 FC 776)

DOCKET:	A-383-14
STYLE OF CAUSE:	SYNCRUDE CANADA LTD. v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 3, 2015
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	RYER J.A. BOIVIN J.A.
DATED:	MAY 30, 2016

APPEARANCES:

Bernard J. Roth Joshua A. Jantzi	FOR THE APPELLANT
Christine Ashcroft Darcie Charlton Maia McEachern	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dentons Canada LLP Calgary, Alberta	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT