Federal Court  Cour fédérale

Date: 20140806

Docket: T-1643-11

Citation: 2014 FC 776

Ottawa, Ontario, August 6, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SYNCRUDE CANADA LTD

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

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I. Introduction

[1] Federal regulations require diesel fuel produced in Canada to contain at least 2% renewable fuel. Syncrude Canada Ltd. [Syncrude] produces diesel fuel at its oil sands operations in Alberta which it uses there in its vehicles and equipment. Syncrude challenges the validity and applicability to it of the 2% renewable fuel requirement.

II. Factual Background

[2] The relevant statutory provisions are reproduced in Annex A.

[3] Subsection 139(1) of the *Canadian Environmental Protection Act, 1999,* SC 1999 c 33 [CEPA] provides that "[n]o person shall produce, import or sell a fuel that does not meet the prescribed requirements." Subsection 272(1) of CEPA makes it an offence to contravene subsection 139(1). If prosecuted by way of indictment, Syncrude would be liable to a fine for a first offence of not less than $500,000 and not more than $6,000,000, and on a second or subsequent offence, to a fine of not less than $1,000,000 and not more than $12,000,000: CEPA subsection 272(3).

[4] Subsection 140(1) of CEPA provides that the Governor in Council, on the recommendation of the Minister, may make regulations "for the purposes of section 139." In 2010, the Governor in Council promulgated the *Renewable Fuels Regulations,* SOR/2010-189 [RFR]. Subsection 5(2) of the RFR requires that diesel fuel produced, imported or sold in Canada must contain renewal fuel of at least 2% by volume. That requirement came into effect on July 1, 2011. That renewable fuel requirement may be met by blending diesel with biodiesel,

a fuel made from biological waste matter, such as cooking oil, or from feed stocks such as canola, soy or other crops. The requirement may also be met by purchasing compliance units from those who have more than 2% renewable fuel in their diesel fuel. Syncrude has been meeting this 2% requirement by purchasing compliance units.

[5] Syncrude produces synthetic crude oil and other substances by mining and processing oil sands within the Athabasca oil sands region in Alberta. This involves the excavation of oil sands from open pit mines, the extraction of bitumen from the oil sand, the conversion of bitumen to crude oil components, the upgrading and sweetening of the produced oil streams, the combining of the oil streams into synthetic crude oil, and the rehabilitation and reclamation of the mine and operations areas that have been completed.

[6] Syncrude uses a fleet of custom equipment to perform its extraction operations. To power this equipment, it purchases diesel fuel but also produces much of its own diesel fuel on site. The fuel it produces on site is used only by Syncrude and only in the Province of Alberta. In 2010, Syncrude's operations consumed more than 361 million litres of diesel fuel, of which more than 204 million litres were produced from its own operations.

[7] After the promulgation of the RFR but prior to subsection 5(2) coming into effect, Syncrude on April 26, 2011, filed a notice of objection to the proposed regulation and requested that a board of review be established "to inquire into the nature and extent of the danger posed by the substance in respect of which the … regulation … is proposed."

[8] The Minister responded on August 18, 2011, denying Syncrude's request to convene a board of review, stating:

> Your comments were considered in the preparation of the final *Regulations Amending the Renewable Fuels Regulations*. Responses to the comments received were included in the Regulatory Impact Analysis Statement submitted with the final Regulations, which were published in the *Canada Gazette* on July 20 [2011].

[9] Syncrude challenges the constitutional validity and statutory validity or *vires* of subsection 5(2) of the RFR. It also submits that it was denied procedural fairness by the Minister in making the decision to not convene a board of review, and further says that the Minister's decision in this regard is unreasonable.

III. Issues

[10] In addition to the question of the applicable standard of review, the following are the issues to be addressed:

1. Does Parliament have constitutional authority to apply the biodiesel blending requirement prescribed by subsection 5(2) of the RFR to Syncrude's diesel fuel?
2. Is the RFR *ultra vires* the regulation-making authority of the Governor in Council under section 140 of CEPA?
3. Was there a denial of procedural fairness by the Minister in making the decision not to convene a board of review due to a failure to provide reasons and a failure to consult with Syncrude?
4. Did the Minister err in interpreting the words "danger" and "substance" in section 333 of CEPA?

5. Was the Minister's decision unreasonable on the merits?

IV. Analysis

A. *Constitutionality of the RFR vis-à-vis Syncrude*

[11] Questions going to constitutional authority and the division of powers between a province and the federal government are determined on the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9, para 58.

[12] The Minister correctly notes in his Memorandum that "Syncrude only challenges the constitutionality of subsection 5(2) of the RFR, and only as it relates to its operations." The Minister submits that "subsection 5(2) is in pith and substance a legitimate use of the federal criminal law power to suppress the evil of air pollution by mandating a 2% renewable fuel content in diesel fuel produced." Syncrude submits that the dominant purpose and effect of subsection 5(2) of the RFR is to regulate non-renewable resources and promote the economic benefits of protecting the environment, "more precisely, its dominant purpose and dominant effect is to create a demand for biofuels in the Canadian market place" and any prohibition of harm that flows from the subsection is merely ancillary.

[13] For the reasons that follow, I find that the RFR are *intra vires* the federal government as a valid exercise of Parliament's criminal law power.

[14] The Supreme Court of Canada in *Québec (Procureur Général) v Canada Procureur (Procureur Général)*, 2010 SCC 61, [2010] 3 SCR 457 [*Re: Assisted Human Reproduction*]

provides the framework for determining division of powers questions such as that raised here. The Chief Justice at para 16 observes that when, as here, the challenge is only to one or more of the provisions of the legislation, and not its entirety, a court might begin by examining the challenged provisions because if they do not intrude into the other's jurisdiction, there is no need to make any further inquiry. She went on to observe, however, that in order to make sense of the challenged provisions, it may be necessary to examine the entire scheme of the legislation for the "impugned provisions must be considered in their proper context."

[15] Subsection 5(2) of the RFR, read alone and without reference to its enabling statute, is a prohibition on the production, importation, or sale of diesel fuel that contains less than 2% renewable fuel, and thus one could suggest, as Syncrude does, that it deals with local works and undertakings, property and civil rights, matters of a merely local or private nature, or the development of non-renewable natural resources – matters that fall within provincial, rather than federal jurisdiction. However, as the Supreme Court has cautioned, one must go further and ask what the purpose and effect of that provision is and how it fits into the regulatory scheme. As the Chief Justice stated in *Ward v Canada (Attorney General)*, 2002 SCC 17, [2002] 1 SCR 569 [*Ward*] at para 19: "The question is not whether the Regulations prohibit the sale so much as why it is prohibited." Answering that question requires that the subsection be viewed in its proper context which in this case requires that one examine not only the RFR but also CEPA. The Court must examine the legislative scheme as a whole and determine whether it is a valid exercise of federal jurisdiction. Then the Court must examine whether the specific subsection complained of is also valid.

[16] The validity assessment is undertaken in two steps. First, the dominant matter – the pith and substance – of the legislation must be determined. Once that has been done, one must determine whether it falls under one of the heads of power of the federal government or the provinces. The pith and substance of legislation is determined by examining the purpose and the effect of the legislation. As the Chief Justice noted at para 22 of *Re: Assisted Human Reproduction* referencing an article by D.W. Mundell: "One must ask, '[w]hat in fact does the law do and why?'"

(1) The Dominant Matter – Pith and Substance

(a) *The Purpose of the RFR*

[17] The RFR is subordinate legislation and as such it is relevant to consider the stated purpose of its enabling legislation, CEPA. While not determinative of the pith and substance of the RFR, it provides informative background and context. The following excerpts from the preamble to CEPA are instructive and identify that CEPA is designed, in part, to address environmental degradation, protect the environment and human health, and place the cost and responsibility of pollution on the polluter. It sets out that in developing laws to achieve these goals, a variety of interests will be considered contemporaneously, including environmental, health, social, economic, and technical issues:

> Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation
>
> …
>
> Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and

> aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;
>
> …
>
> Whereas the Government of Canada recognizes the integral role of science, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process.
>
> …
>
> Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle.
>
> [emphasis added]

[18] Also informative is the preamble to the RFR which focuses on the reduction of air pollution:

> Whereas the Governor in Council is of the opinion that the proposed Regulations could make a significant contribution to the prevention of, or reduction in, air pollution resulting from, directly or indirectly, the presence of renewable fuel in gasoline, diesel fuel or heating distillate oil;
> …

[19] The Supreme Court has unequivocally held that the Regulatory Impact Analysis Statement [RIAS] accompanying regulations can also be considered by courts in determining the purpose of the regulations and their intended application: *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26, [2005] 1 SCR 533, at para 157.

[20] The various RIASs that were published relating to the RFR indicate that Greenhouse Gas [GHG] emissions were the primary concern of the Minister when proposing the RFR.

[21] In 2005, six GHGs were added to Schedule 1 of CEPA which lists toxic substances. The RIAS accompanying the 2005 amendments to Schedule 1 published in the *Canada Gazette Part II*, Vol 139, No 24, explained at p 2627 that they were added to the toxic substances list because they "have significant global warming potentials (GWPs), are long-lived and therefore of global concern… [and] have the potential to contribute substantially to climate change." Additionally, it noted at p 2634 that there has been a substantial rise in the concentrations of GHGs "as a result of human activities, predominantly 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."

[22] A notice of intent to develop the RFR was introduced in 2006 in the *Canada Gazette Part I*, Vol 140, No 52. The notice stated:

> 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.

[23] Under the heading "Rationale for Action" the notice focused first on the reduction of GHG emissions:

> Use of renewable fuels can significantly reduce emissions of greenhouse gases. This environmental benefit is projected to

> increase as next-generation feedstocks and technologies come online.
>
> Achieving a renewable volume equal to 5% of Canada's transportation fuel pool would result in an additional 1.9 billion litres of renewable fuels per year, over and above the effects of provincial regulations already in place. This represents incremental lifecycle GHG emission reductions of 2.7 million tones per year (the equivalent of almost 675,000 vehicles).

[24] The notice set out additional rationale for the proposed regulations, including benefits to the economy and to Canadian farmers:

> Early entry into the renewable fuels market and the wider bio-economy may bring short- and long-term benefits to the Canadian economy, as well as allowing farmers to find new markets, offset financial losses, and diversify income sources.
>
> The emerging global bioeconomy is an opportunity to diversify farm incomes by creating market opportunities for Canadian farmers as both developed and developing countries move away from dependence on traditional petroleum based fossil fuels in favour of more sustainable options. The economic potential of the bioeconomy is significant; by 2050, the global market for renewable fuels and bio-energy alone is expected to grow from $5 billion to well over $150 billion per year.

[25] The proposal recognized that the provinces were also regulating renewable fuel content and providing tax incentives to promote renewable fuels production and use. However, it was stated that federal regulation was also desirable to "address inconsistencies created by a patchwork of provincial fuel requirements" which could "create barriers to interprovincial trade, e.g. by favouring the use of biofuels produced within a certain province."

[26] In April 2010, a draft of the RFR was published in Part I of the *Canada Gazette*. The public was given an opportunity to file comments or notices of objection. The RFR was published in the *Canada Gazette Part II*, Vol 144, No 18 in September 2010.

[27] The RIAS accompanying the RFR [September 2010 RIAS] explicitly states that the issue being addressed is the emission of GHGs:

> Greenhouse gasses (GHGs) are primary contributors to climate change. The most significant sources of GHG emissions are anthropogenic, mostly as a result of combustion of fossil fuels. The emissions of GHGs have been increasing significantly since the industrial revolution and this trend is likely to continue if no action is taken. … The Government of Canada is committed to reducing Canada's total GHG emissions by 17% from 2005 levels by 2020.
>
> Existing Government of Canada initiatives on renewable fuels have had limited success in achieving significant reductions in GHG emissions. In view of the environmental concerns related to climate change, additional actions are required to further reduce these emissions.
>
> …
>
> The objective of the Regulations is to reduce GHG emissions by mandating an average 5% renewable fuel content based on gasoline volume, thereby contributing towards the protection of Canadians and the environment from the impacts of climate change. … The Regulations fulfill the commitments under the Renewable Fuels Strategy of reducing GHG emissions from liquid petroleum fuels and create a demand for renewable fuels in Canada…
>
> …
>
> The Regulations will promote an integrated and nationally consistent approach, and make a significant contribution to reduction in air pollution from GHGs to protect the health and environment of Canadians.

[28] Substantially similar explanations were provided in the RIAS accompanying the 2011 amendments to the RFR which set July 1, 2011, as the date on which the 2% biodiesel requirement in subsection 5(2) of the RFR would come into force: *Canada Gazette Part I*, Vol 145, No 9.

[29] As earlier noted, the purpose of CEPA is to promote environmental quality, address threats of environmental damage, to achieve the highest level of environmental quality for all Canadians, and ultimately contribute to sustainable development.

[30] The RFR is consistent with all of those aims. The RIAS for both the RFR and its amendment which set the date subsection 5(2) became effective make clear that GHG emissions pose a significant, enduring effect on the environment, have high global warming potentials, and can directly affect the health of Canadians. The RIASs also explain that renewable fuels have been shown to make a significant contribution to lowering GHG emissions on a life-cycle basis. While the provinces currently have regulations imposing renewable fuels requirements, Parliament was of the view that federal regulation could contribute above and beyond the provincial contributions and would fill gaps and address inconsistencies in provincial legislation.

[31] Undoubtedly, the RFR was also intended to increase the demand for renewable fuels and develop new market opportunities for agricultural producers and rural communities – the RIAS explicitly states that this is part of the plan. However, the RIAS also makes clear that these economic effects are part of a four-pronged Renewable Fuels Strategy, one purpose of which is to reduce GHG emissions: *Canada Gazette Part II*, Vol 144, No 18 at pp 1684-1685. These

same goals were set out in Questions & Answers – Renewable Fuels Regulations, which was prepared to explain the RFR.

[32] Canadian jurisprudence has held that the economy and the environment are not mutually exclusive – they are intimately connected. The Supreme Court of Canada in *Friends of Oldman River Society v Canada (Ministry of Transport)*, [1992] 1 SCR 3 at para 93 stated: "The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several heads of power assigned to the respective levels of government." The Court went on at para 96 to say that "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." This is consistent with the expression in the preamble of CEPA which states that "environmental or health risks and social, economic and technical matters are to be considered."

[33] Syncrude points to significant expenditures by the federal government to promote the renewable fuels industry as evidence that the dominant purpose of the RFR was to create a market for renewable fuels. Among other expenditures, the Government of Canada contributed $200 million over four years for capital expenditures on construction or expansion of renewable fuel production facilities, $1.5 billion over nine years to support renewable fuels production in Canada, $500 million over eight years to produce next-generation renewable fuels, and $10 million over two years for scientific research and analysis.

[34] In my view, Syncrude takes a myopic view of the role of the RFR in ultimately reducing GHG emissions. Part of the long-term strategy was to create a demand for renewable fuels that would drive development of next generation technologies. Parliament expected that these next generation technologies would contribute to greater reductions of GHG emissions in the long term. However, it had to create the "conditions necessary to drive these next-generation technologies to market." These conditions include establishing a demand for renewable fuels to "give industry the certainty needed in order to secure investments and a supply of renewable fuels for the Canadian market:" Questions & Answers – Renewable Fuels Regulations.

[35] Creating a demand for renewable fuels was therefore a necessary part of the overall strategy to reduce GHG emissions, but it was not the dominant purpose. The reason the government wanted to create a demand for the fuels was to make a greater contribution to the long term lowering of GHG emissions.

[36] As the Minister of the Environment stated in an interview on May 23, 2006, "what we're looking for is, number one, that the technology that we're looking to invest in provide the maximum opportunity for emissions reductions" [emphasis added]. In the same interview, when asked whether there would be "a net benefit to the environment," the Minister went on to say: "Yes. And that's why we brought these three components together. We can't do this framework without the three components of energy, environment, and agriculture" [emphasis added].

[37] The underlying reason for contributing to infrastructure costs, production of renewable fuels, and investment in next generation technologies was to "generate greater environmental

benefits in terms of GHG emission reductions:" *Canada Gazette Part I*, Vol 145, No 9 at p 699. Creating economic and agricultural opportunities were necessary components of achieving these goals.

[38] Syncrude recognizes at para 76 of its Amended Memorandum of Fact and Law that part of the objective of the RFR was to encourage next-generation renewable fuels production and create capital incentives to provide opportunities to farmers in the biofuels sector. It observes that these and other incentives collectively create a demand for biofuels. What Syncrude overlooks is that the market demand for renewable fuels and advanced renewable fuels technologies has to be created to achieve the overall goal of greater GHG emissions reduction.

[39] In my view, for the reasons stated above, the dominant purpose of the RFR was to make a significant contribution to the reduction of air pollution, in the form of reducing GHG emissions.

(b) *The Effect of the RFR*

[40] The second step of the pith and substance analysis is to examine the effect of the law on those who are subject to it. The Court may consider both its legal effect and its practical effect: *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at para 54.

[41] Syncrude submits that, at best, the effect of the law from an environmental perspective was unknown at the time the RFR was introduced. There was conflicting evidence regarding the actual quantity of GHG emissions reductions that renewable fuels generated in comparison to

traditional fuels. Syncrude submits that there was some evidence available that suggested that the creation and use of renewable fuels actually generated increased emissions compared to traditional fuels.

[42] The Minister submits that the pith and substance analysis is not concerned with the efficacy of the law or whether it actually achieves its goals – this is a concern properly directed to and considered by Parliament.

[43] I agree with the Minister that it is not for this court to assess the efficacy of the law in achieving its stated purpose, as has been stated by the Supreme Court in *Ward* at para 18:

> The pith and substance analysis is not technical or formalistic. It is essentially a matter of interpretation. The court looks at the words used in the impugned legislation as well as the background and circumstances surrounding its enactment. In conducting this analysis, the court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals [references omitted and emphasis added].

[44] Syncrude's effort to present evidence that undermines the conclusions as to the actual savings to GHG emissions by the introduction of renewable fuels is in vain: the efficacy of the law or whether it achieves the legislature's goals is an irrelevant consideration. As the Supreme Court of Canada stated in *Reference re Firearms Act (Can)*, [2000] 1 SCR 783 [*Firearms Reference*], at para 18 "efficaciousness is not relevant to the court's division of powers analysis."

[45] Even if the Court were to consider the efficacy of the law, Syncrude has failed to present convincing evidence to show that the blending of renewable fuels would not "make a significant contribution to the prevention of, or reduction in, air pollution" as required by section 140 of

CEPA. Syncrude did not lead any expert evidence to support its position that the data undermines the conclusion that there would be a significant contribution to the reduction of air pollution.

[46] Syncrude points to evidence that the environmental impact of land use changes would outweigh the benefits of renewable fuels. In certain countries, in order to allow for the production of the feedstocks used to produce renewable fuels, there needs to be some change in land use. There was some evidence to suggest that land use changes may blunt some of the upside to renewable fuels, that the environmental impacts from land use changes might actually outweigh the benefits of renewable fuels production, and that agricultural land should not be converted to land used for biofuels crops. However, this evidence does not apply to Canada because no land use changes need occur here. The February 26, 2011 RIAS made clear that the RFR "are not expected to result in changes in land use:" Canada *Gazette Part I*, Vol 145, No 9 at p 719. Moreover, the evidence relied on by Syncrude was in the context of the European Union where they had higher targets of 10% renewable fuel content compared to the Canadian targets of 2% for biodiesel and 5% for gasoline.

[47] Syncrude's submission also ignores the evidence that exists to support the conclusion that incorporating renewable fuels would reduce both GHG emissions on a life-cycle basis and certain other emissions including acetaldehyde (in the case of biodiesel), Volatile Organic Compounds [VOCs], and fine particle pollutants [$PM_{2.5}$]. This evidence was referred to in the RIAS accompanying the RFR. The reduction of GHGs is only one part of the overall goal to reduce "air pollution."

[48] Additionally, and consistent with the preamble of CEPA, the RFR admits that Parliament did not necessarily have a full comprehension of the GHG emissions of various types of renewable fuels, but acknowledged a willingness to adjust the requirements as that evidence became available: *Canada Gazette Part II*, Vol 144, No 18 at p 1725. There is nothing unconstitutional about Parliament taking steps to address the threat of GHGs in the way it thought best, based on the evidence available to it at the time. The scientific method is based on the assumption that what is known today may not necessarily be what is known tomorrow. CEPA recognizes this, particularly in the environmental context. But, as the preamble to CEPA states, Parliament must act to address environmental threats on the best evidence available at the time, and not await scientific certainty. There is nothing preventing Parliament from adjusting or repealing the RFR if conclusive evidence is presented that renewable fuels do not reduce GHG emissions, but that is a decision for Parliament, not for the courts.

[49] Syncrude further argued that because the RFR did not actually produce the alleged intended effect of reducing GHG emissions, the dominant purpose must have been to create a demand for renewable fuels and benefit farmers. However, Syncrude has not demonstrated that the introduction of renewable fuels has not led to reduced GHG emissions. Therefore, this submission must also fail.

[50] Finally, Syncrude says that there is evidence that it would achieve significant GHG emissions reductions if the RFR did not apply to it because it produces and uses all of its own diesel on site thereby saving on the GHG emissions resulting from transporting fuel. Apart from the fact that Syncrude provided no evidence to the Minister before the RFR was promulgated

that there would be an increase in GHG emissions if the RFR applied to Syncrude, this is simply an attempt to re-brand the efficacy argument. The Supreme Court of Canada in *Ward* stated at para 26 that "the purpose of legislation cannot be challenged by proposing an alternate, allegedly better, method for achieving that purpose."

[51] At its most basic level, the argument is that since the RFR applied to Syncrude would not achieve its stated purpose, the RFR is unconstitutional. Again, the Court is not the arbiter of whether or not the means Parliament has chosen are effective or adequate. An analysis of the legal and practical effects of the law is relevant only for the purpose of determining the pith and substance of the law. As the Supreme Court of Canada stated in *Global Securities Corp v British Columbia (Securities Commission)*, [2000] 1 SCR 494 at para 23, "the effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance." Although Syncrude can request an exemption from the application of the RFR, failure by the Minister to provide such exemption does not render the RFR unconstitutional.

[52] However, even if the RFR as applied to Syncrude would increase Syncrude's GHG emissions, this is not evidence that the RFR overall would not decrease GHG emissions. Syncrude led evidence that, together with Suncor, their combined production accounted for 12% of western Canada's distillate production and that the amount used on-site accounted for only 3% of western Canada's distillate production. Even accepting Syncrude's arguments at face-value, it is a stretch to infer that the RFR will not achieve a reduction in GHG emissions even with Syncrude's alleged increased emissions.

[53] For these reasons, I find that the effect of the RFR is to reduce GHG emissions by requiring renewable fuels to be blended with traditional fuels.

(c) *Conclusion on Pith and Substance*

[54] The pith and substance of the RFR and of subsection 5(2) is the reduction of GHG emissions, and potentially other emissions. The dominant purpose is to reduce GHG emissions; the benefits to the economy and the renewable fuels industry are a necessary, but secondary component of the plan to achieve reduced GHG emissions, and an intermediary step to introducing next generation technologies that will provide even greater GHG reductions. The effect of the RFR is to reduce GHG emissions on a life-cycle basis both in the short term and the long term by incorporating renewable fuels.

(2) Categorizing the Law: Heads of Power Analysis

[55] Having determined the pith and substance of the law, the second stage requires the Court to identify which heads of power are engaged by the law: *Re: Assisted Human Reproduction* at para 19.

(a) *Criminal Law Power*

[56] The Minister argues that the RFR and its subsection 5(2) fall under the federal criminal law power under subsection 91(27) of the *Constitution Act, 1867* [*Constitution*].

[57] Syncrude challenges the validity of enacting the RFR under the criminal law power, stating that the pith and substance of the RFR is directed at regulating "non-renewable resources

(petroleum fuels)" and promoting "the benefits of protecting the environment by creating a demand for biodiesel in the Canadian marketplace." This analysis arguably engages the provincial heads of power for: (1) local works and undertakings; (2) property and civil rights; and (3) matters of a merely local or private nature under subsections 92 (10), (13) and (16) of the *Constitution* respectively. It also engages the development of non-renewable natural resources under paragraph 92A(1)(b).

[58] When the Federal head of power in issue is Parliament's criminal law power under subsection 91(27) of the *Constitution*, para 27 of the *Firearms Reference* teaches that the matter is a valid exercise of the criminal law power if there is: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose.

[59] There is no dispute between the parties that the first two criteria are met. The determinative issue is whether the RFR was enacted with a valid criminal law purpose.

[60] In order to have a valid criminal law purpose, the law must address a public concern relating to peace, order, security, morality, health, or some similar purpose: *Re: Assisted Human Reproduction* para 43. It must suppress an evil or safeguard a threatened interest such as public peace, order, security, health, or morality, stopping short of pure economic regulation: *Reference re: Dairy Industry Act (Canada), s 5(a)*, [1949] SCR 1.

[61] Relying on *Canada (Procureure générale) v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro*] and *Re: Assisted Human Reproduction*, the Minister submits that the RFR addresses a valid

criminal law purpose because it aims to suppress GHG emissions that cause harm to the environment "since unblended diesel fuel releases more GHGs on a life cycle basis than that with renewable fuel content."

[62] Prohibitions directed at protecting the public from environmental hazards have been considered valid criminal law purposes in the past, see for example *Hydro*, where a unanimous Supreme Court of Canada (although split in its decision on other issues), agreed at para 123 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."

[63] In *Hydro*, the Supreme Court made clear at para 43 that:

> 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 [emphasis added].

[64] At issue in *Hydro* were provisions of the *Environmental Protection Act*, RSC 1985, c 16 (4th Supp), regarding the designation and regulation of toxic substances, as well as a provision that permitted the Minister to issue an interim order directing that a substance be temporarily placed on the toxic substances list and regulating that substance, where the Minister is of the opinion that immediate action is required.

[65] The dissent agreed that protection of the environment was a legitimate public purpose, but found that the impugned provisions were more of an attempt to regulate environmental pollution than to prohibit or proscribe it. In particular, the dissent found that the prohibitions were ancillary to the regulatory scheme and not the other way around. It further concluded that the impugned provisions were not focused on specifically prohibiting toxic substances, but rather, regulating and controlling the manner in which they are allowed to interact with the environment. Finally, it noted the seemingly unlimited breadth of the impugned provisions owing to the broad definition of "toxic substance" and "substance" in the Act.

[66] The majority held that "environmental protection legislation should not be approached with the same rigour as statutes dealing with less complex issues in applying the doctrine of vagueness developed under s. 7 of the Charter" in relation to criminal law cases, and that "the effect of requiring greater precision would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution." It agreed with the dissent that in certain cases, sweeping prohibitions "could be so broad or all-encompassing as to be found to be, in pith and substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment," but ultimately determined that the provisions demarcated a restricted number of substances. The use of these substances in a manner contrary to the regulations was ultimately prohibited, and this was a specific targeting of substances without resort to unnecessarily broad prohibitions.

[67] On its face, the RFR appears to be more regulatory in nature than prohibitory. However, like the majority in *Hydro*, I am of the view that this particular evil – GHG emissions by

combustion of fossil fuels – is not well addressed by specific prohibitions. For example, much of society runs on fossil fuels and Parliament should not be expected to prohibit the use of fossil fuels entirely in order to meet progressive goals of GHG emission reduction.

[68] Nor should Parliament be expected to adopt more specific prohibitions against the components of diesel or gasoline; for example, it would be prohibitively costly to determine which hydrocarbons (out of the many constituents of diesel and gasoline fuels) specifically contribute to GHG emissions. It would be even more costly for industry to comply with such specific prohibitions, and for the Minister to monitor such a scheme of prohibitions.

[69] The same can be said of the components of the renewable fuels. This was specifically noted in Questions & Answers – Renewable Fuels Regulations, released in September 2010 which states:

> [Question] The regulations do not include requirements that renewable fuels used have lower greenhouse gas emissions than conventional fuels. Why not?
>
> [Answer] The impact of a renewable fuel on emissions of greenhouse gases vary depending on the feedstock used to produce the fuel, what processes are used to produce the fuel, and where it is produced in relation to where it is used. There is considerable controversy as to methodologies for estimating lifecycle emissions of various renewable fuels. The Government has decided that for the present the regulations will not have any such explicit requirements; however, in the future, when there is more information available, such requirements may be introduced into the regulations.

[70] Additionally, the majority in *Hydro* at para 150 accepted that regulations "providing for or imposing requirements respecting the quantity or concentration of a substance listed in

Schedule I that may be released into the environment either alone or in combination with others from any source" were valid [emphasis added]. In this case, the RFR is structured in the same way – it imposes requirements respecting the concentration of renewable fuels in fossil fuel mixtures and in this way, controls the "manner and conditions of release" of GHG emissions (on a life cycle basis) that would otherwise result from the use of fossil fuels with no renewable content.

[71] I observe that the structure of the RFR is different in that it does not explicitly reduce the concentration of fossil fuels in a fuel mixture – it does so only by mandating the addition of an alternative fuel source, thereby implicitly reducing the concentration of the target fuel source. In my view, this is an insignificant difference because the ultimate effect is the same – fossil fuel use will be reduced by the proportion of renewable fuels introduced. Put another way, the RFR prohibits the use of 100% crude diesel/gasoline for the supplier's average total distillate pool for each period.

[72] The fact that companies would be permitted to use 100% crude diesel/gasoline in the winter months and make up for it by using larger renewable fuel content in the summer months, or by purchasing compliance units, does not detract from the prohibition. Compliance units are only created by someone over-mixing renewable fuels, thereby compensating for another user's emissions and the net effect is therefore the same.

[73] Additionally, the concerns of the minority in *Hydro* do not apply here. First, the prohibitions are not ancillary to the regulatory scheme. Part 7 of CEPA is concerned with

controlling pollution and managing waste. Within Part 7, Division 4 is specifically directed towards pollution and waste created by fuels. Gasoline and diesel – the precursors to GHG emissions – are being regulated by prohibiting uses in manners contrary to the regulations, much like the regulation of toxic substances in *Hydro*.

[74] Syncrude does not argue that the definition of "air pollution" in section 140(2) of *CEPA* is overbroad. In any event, section 140 is sufficiently precise and not overbroad given that the "air pollution" in issue must result directly or indirectly from "the fuel or any of its components" or "the fuel's effect on the operation, performance, or introduction of combustion or other engine technology or emission control equipment." This is even more specific than the definition of "substance" and "toxic substance" at issue in *Hydro*, which the majority found to be sufficiently precise. Accordingly, regulations made under section 140 would not have unlimited breadth.

[75] Finally, if Syncrude's argument stands, then it applies to the whole of Division 4 which seeks to regulate fuels generally. However, Syncrude does not challenge even subsection 5(2) of the RFR, nor the RFR as a whole, let alone the entirety of Division 4 of CEPA. In fact, it actually concedes that other prohibitions enacted under ss. 139 and 140 of CEPA (for example, the *Sulphur in Diesel Fuel Regulations*, SOR/2002-254, which limits the concentrations of sulphur in diesel fuel) are valid exercises of the discretion granted under those provisions. In my view, there is nothing to distinguish a prohibition of sulphur concentration from the imposition of a certain level of renewable fuel content. Both seek to prevent the emission of toxic substances (sulphur dioxide and GHG emissions) or air pollution. As noted previously, I am not

convinced that a direct prohibition and an indirect prohibition are sufficiently different to warrant different treatment.

[76] Questions & Answers – Renewable Fuels Regulations, released in September 2010 also addresses the difference between the RFR and the *Sulphur Regulations*:

> [Question] Why are the limits on an average basis rather than per-litre limits like under the Sulphur in Diesel Fuel Regulations?
>
> [Answer] The Renewable Fuels Regulations are concerned with reducing greenhouse gases, a global national issue. It is the overall quantity of petroleum fuels displaced by renewable fuels that provides the greenhouse gas benefit ….

[77] To summarize, protection of the environment is itself a valid criminal law purpose, and in this case, there are sufficiently precise prohibitions and penalties. That it is the overall quantity of crude fuels displaced that provides the greenhouse gas benefit does not render the RFR an invalid use of the criminal law power.

[78] As an aside, Syncrude argues that subsection 5(2) of the RFR does not raise a reasoned apprehension of harm in this case. Syncrude submits that the production and consumption of petroleum fuels is not dangerous and does not pose a risk to human health or safety. Syncrude concedes that regulating substances such as PCBs and sulphur which are dangerous and pose a risk to human health, are valid exercises of the criminal law power.

[79] In Syncrude's view, there is no evil to be suppressed, but even if there were, subsection 5(2) of the RFR does nothing to prohibit the emission of harmful substances in the environment. If this were a valid exercise of the criminal law power, Syncrude submits that it would give

"limitless definition" to criminal law that the dissent of the Supreme Court of Canada cautioned against in *Re: Assisted Human Reproduction* at paras 239-240.

[80] First, "reasonable apprehension of harm" is a concept originating in criminal laws enacted under the purpose of protecting public health. As the case law demonstrates, protection of the environment is its own valid criminal law objective, and therefore, the RFR do not need to be justified under the same constraints or concepts from the public health purpose.

[81] Second, I disagree with Syncrude that subsection 5(2) would unbind the limits of the criminal law power. As stated above, subsection 5(2) accords with the form of a valid exercise of the criminal law power, despite the fact that it comes in the form of a mandatory inclusion of a substance rather than a prohibition of another substance.

[82] Third, the dissent's comments in *Re: Assisted Human Reproduction* are of no assistance because those comments were directed towards the assessment of morality instead of health. The dissent cautioned that in a multicultural society, differing attitudes ought to be considered when addressing "moral problems."

[83] Fourth, even being mindful of the dissent's concerns, there is a real evil and a reasonable apprehension of harm in this case. The evil of global climate change and the apprehension of harm resulting from the enabling of climate change through the combustion of fossil fuels has been widely discussed and debated by leaders on the international stage. Contrary to Syncrude's submission, this is a real, measured evil, and the harm has been well documented.

[84] Further, the Supreme Court's guidance at paras 55-56 of *Re: Assisted Human Reproduction* is instructive. There is no constitutional threshold level of harm that constrains Parliament's ability to target conduct causing these evils, provided that Parliament can establish a reasonable apprehension of harm. More importantly, Parliament is entitled to target conduct that elevates the risk of harm to individuals, even if it does not always crystallize in injury.

[85] For these reasons, I find that the dominant purpose and effect of subsection 5(2) of the RFR is to make a significant contribution to the reduction of air pollution, in the form of reducing GHG emissions. Parliament chose to do so by using its criminal law power. Protection of the environment is itself a valid criminal purpose, and the impugned provision creates a valid prohibition backed by a penalty, although the prohibition does not take the form of a direct, targeted, restrictive prohibition.

(b) *Conclusion on Constitutionality*

[86] Therefore, I find that the RFR is *intra vires* the federal government and is constitutionally valid.

(c) *Ancillary Powers Doctrine*

[87] Having found that the RFR is constitutional under Parliament's criminal law power, it is unnecessary to consider the ancillary powers doctrine which occupied a significant portion of Syncrude's submissions. However, had I found that subsection 5(2) of the RFR was not itself a valid exercise of Parliament's criminal law power, I would have found it to have been saved by the ancillary powers doctrine.

[88] The ancillary powers doctrine permits administrative or regulatory provisions to be upheld despite the fact that they may, in pith and substance, fall outside of the jurisdiction of the enacting government. Such provisions may be upheld if they are connected to a valid legislative scheme and further the legislative purpose: *Re: Assisted Human Reproduction* at para 126.

[89] In assessing validity of provisions, the court must determine whether the provision is rationally and functionally connected to the scheme. The provision should functionally complement the other provisions of the scheme and fill gaps in the scheme that might otherwise lead to inconsistency, uncertainty, or ineffectiveness, and it need not be shown that the scheme would necessarily fail without the ancillary provisions: *Re: Assisted Human Reproduction* at para 138.

[90] Paras 129-130 of *Re: Assisted Human Reproduction* set out three factors that typically ought to be considered when conducting an analysis under the ancillary powers doctrine, although this is not an exhaustive list:

1. Scope of the heads of power in play and whether they are broad or narrow;
2. Nature of the impugned provision; and
3. History of legislating on the matter in question.

The more an ancillary provision intrudes on the competency of the other government, the higher the threshold for upholding it on the basis of the ancillary powers doctrine.

Heads of Power

[91] Broad heads of power lend themselves to more overlap: where the legislation is enacted under a broad head of power, the intrusion will be less serious. Where the head of power being intruded upon is broad, the intrusion will be less serious.

[92] In this case, the federal head of power is the criminal law power and it is broad. The provincial heads of power suggested by Syncrude are (1) local works and undertakings; (2) property and civil rights; (3) matters of a merely local or private nature and (4) the development of non-renewable natural resources. The first three heads of provincial power are broad, but the fourth is relatively narrow. However, I am not persuaded that the provision intrudes on the development of non-renewable natural resources; rather, it deals with their use. Therefore, the intrusion is "less serious" when considering all factors.

Nature of the Provision

[93] In this case, subsection 5(2) of the RFR is meant to create a minimum standard across all provinces with respect to the use of biodiesel. The RIAS published with the proposed and final regulations acknowledge that the provinces have already legislated to some extent, and that one of the goals of the RFR is to create consistency and fill gaps in the patchwork of provincial legislation. In this case, Syncrude notes that under Alberta's *Oil Sands Conservation Act*, RSA 2000, c O-7 and *Renewable Fuels Standard Regulation*, Alta Reg 29/2010, it would be excluded from the usual requirement for renewable fuels that apply to fuel producers, importers, and sellers.

[94] Although the overall intention is to complement and supplement provincial legislation, Syncrude's example shows that the subsection 5(2) will override and intrude on some aspects of provincial regulation in this area, and this suggests that it is a more serious intrusion.

History of Legislating

[95] Parliament has a history of legislating with respect to protecting the environment. In *Re: Assisted Human Reproduction*, the majority noted that Parliament had a history of legislating with respect to morality, health, and security and invoking its criminal law power to uphold regulatory schemes and provided the examples of the *Firearms Reference* and *Hydro*. In the majority's view, these historical comparisons suggested that the ancillary provisions only constituted a minor intrusion on provincial powers.

[96] In this case, Parliament has a history of legislating to protect the environment and using the criminal law power to do so. However, with respect to the use of renewable fuels, the provinces have also legislated on the issue. In my view, this factor is therefore neutral.

[97] Overall, I conclude that had it been found that the RFR was *ultra vires* the federal government, the intrusion of the ancillary provisions into provincial powers would not be serious enough to warrant striking it down. The regulations are enacted under broad heads of power and only intrude on other broad heads of power. While they override some aspects of provincial legislation, in most respects, they seek to complement it. Finally, Parliament has a history of legislating to protect the environment and although the provinces have some history of

legislating on the issue of renewable fuels, in my view, this is insufficient to demonstrate that the intrusion into provincial powers is serious.

B. *Statutory Validity of Subsection 5(2) of the RFR*

[98] Syncrude submits that the RFR are *ultra vires* or invalid because they result from an invalid exercise of the regulation-making authority of the Governor in Council in CEPA.

[99] The RFR were promulgated pursuant to subsection 140(1) of CEPA and the parties appear to agree that the regulations were made in respect of one or more of the following paragraphs of that subsection:

> (*a*) the concentrations or quantities of an element, component or additive in a fuel;
>
> (*b*) the physical or chemical properties of a fuel;
>
> (*c*) the characteristics of a fuel, based on a formula related to the fuel's properties or conditions of use;
>
> (*c.1*) the blending of fuels;
>
> (*d*) the transfer and handling of a fuel.

[100] Subsection 140(2) of the RFR provides a condition precedent to the making of any regulation respecting the matters that are set out in paragraphs 140(1)(a) to (d):

> (2) The Governor in Council may make a regulation under any of paragraphs (1)(a) to (d) if the Governor in Council is of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from
>
> (a) directly or indirectly, the fuel or any of its components; or

> (b) the fuel's effect on the operation, performance or introduction of combustion or other engine technology or emission control equipment.
>
> [emphasis added]

[101] Syncrude attacks the legislative validity of the RFR on three bases. It submits that:

1. The Governor in Council failed to form the opinion required by subsection 140(2) of CEPA, a condition precedent to the promulgation of the RFR. Moreover, it submits that contrary to the "intent" under section 333 of CEPA, the Minister failed to assess the environmental impacts of the RFR by convening a board of review prior to making his recommendation to the Governor in Council;
2. The Minister failed to conduct a Strategic Environmental Assessment [SEA] of the RFR before they were made into law, as required by the *Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* [*Cabinet Directive*]; and
3. The RFR is inconsistent with the object of CEPA to protect the environment.

[102] For the reasons that follow, I am not persuaded that any of these objections are founded, and I find that the RFR is legislatively valid.

(1) Was the Condition Precedent in Subsection 140(2) Observed?

[103] Where a condition precedent in the statute is not followed, the regulations are *ultra vires*: *Katz Group Canada Inc v Ontario (Health and Long-Term Care*, 2013 SCC 64, [2013] 3 SCR 810 [*Katz*] at paras 24 and 27.

[104] The standard of review of the validity or *vires* of regulations on administrative law grounds is correctness: *Mercier* at paras 78-79.

[105] Syncrude argues that CEPA sets out a condition precedent to the enactment of regulations. The Governor in Council must form the opinion that the RFR could make a significant contribution to "the prevention of, or reduction in, air pollution" before it can make a regulation.

[106] Syncrude says that the Minister only considered a "preliminary scan" completed in 2006, which focuses on GHG reductions. It submits that the Minister should have had a complete assessment of non-GHG air pollutant emissions created by the 5% renewable fuel requirement, as they are harmful to human health and no studies have been conducted. Among other items, it points out that the Minister was aware that in September 2010 the United States Environmental Protection Agency estimated that the use of biofuels would cause 245 premature deaths in the United States because of the adverse impact on air quality. Syncrude suggests that the Minister's disinterest in considering other impacts of renewable fuels is demonstrated by the failure to convene a board of review, which could have assessed the overall impact of the RFR on air pollutants, and determined the environmental impact on land and water.

[107] In short, Syncrude argues that because the Minister failed to consider non-GHG pollutants and ignored evidence that the RFR could not make a significant contribution to the prevention of, or reduction in, air pollution, the Governor in Council could not form the required opinion under section 140 of CEPA, and the regulations are *ultra vires*.

[108] The Minister agrees that the opinion of the Governor in Council is a condition precedent to it making valid regulations under the CEPA. It argues that the establishment of a board of review is not a condition precedent to the creation of regulations and is otherwise irrelevant to the issue raised. The Minister submits that the Governor in Council met the condition precedent and it is not the role of the Court to second guess it. Rather, it is submitted that the court must simply confirm that the required opinion was formed: *Mercier v Canada*, 2010 FCA 167, 2010 Carswell Nat 1960 [*Mercier*] at para 80; leave to appeal refused 417 NR 390 (SCC).

[109] I agree with the Minister that the failure to establish a board of review under subsection 333(1) if CEPA is not a condition precedent to valid regulation-making. Moreover, it is entirely irrelevant, in my view, to the issue being addressed.

[110] Paragraph 333(1)(a) provides, in relevant part, as follows: "Where a person files a notice of objection … in respect of a decision or a proposed order, regulation or instrument made by the Governor in Council … the Minister or the Ministers may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the decision is made or the order, regulation or instrument is proposed" [emphasis added].

[111] Syncrude submits that notwithstanding the use of the discretionary word "may" in paragraph 333(1)(a), the establishment of the board of review is mandatory and that was the intent of Parliament. I disagree. Syncrude's view is simply not supported by the express language Parliament chose to use in section 333.

[112] Section 333 has six subsections, each dealing with the establishment of a board of review in certain express circumstances, as follows:

> (1) Where a person files a notice of objection under subsection 77(8) or 332(2) in respect of
>
> > (*a*) a decision or a proposed order, regulation or instrument made by the Governor in Council, or
> >
> > (*b*) a decision or a proposed order or instrument made by either or both Ministers … ,
>
> (2) Where a person files a notice of objection under subsection 9(3) or 10(5) in respect of an agreement or a term or condition of the agreement …,
>
> (3) Where a person or government files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under section 167 or 177 within the time specified in that subsection …,
>
> (4) Where a person files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under Part 9 or section 118 within the time specified in that subsection …,
>
> (5) Where a person files with the Minister a notice of objection under section 134 within the time specified in that section …,
>
> (6) Where a person files with the Minister a notice of objection under section 78 in respect of the failure to make a determination about whether a substance is toxic or capable of becoming toxic.

[113] In each of the circumstances described in subsections 1, 2 and 5, the circumstance is followed by the phrase "the Minister may establish a board of review; however, in each of the circumstances described in subsections 3, 4, and 6, the circumstance is followed by the phrase 'the Minister shall establish a board of review'" [emphasis added]. It is beyond doubt that Parliament intended to differentiate the circumstances where the Minister is required to establish a board of review and those where he has a discretion to establish a board of review. The

circumstances relevant to the facts here did not mandate the Minister to establish a board of review.

[114] The only condition precedent to the RFR is that found in subsection 140(2) of CEPA, namely that the "Governor in Council is of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution."

[115] The preamble to the RFR, as published in the *Canada Gazette, Part II* on August 23, 2010, reflects that the Governor in Council had formed the requisite opinion. It reads as follows:

> Whereas the Governor in Council is of the opinion that the proposed Regulations could make a significant contribution to the prevention of, or reduction in, air pollution resulting from, directly or indirectly, the presence of renewable fuel in gasoline, diesel fuel or heating distillate oil.

[116] Syncrude's submission is that "[n]othing in the voluminous record on this Application shows the basis for any conclusion that the Regulations result in a significant reduction in air pollution when all air contaminants (not only GHGs) are accounted for" [emphasis in the original]. Syncrude takes the position that the Governor in Council could not have formed the required opinion because there was insufficient evidence available to support such an opinion. In short, it is asking the court to second guess the opinion of the Governor in Council.

[117] The Court must presume that the RFR was validly enacted and the burden of proving otherwise rests on Syncrude: *Katz* at paras 25 and 26. There is no evidence that the Governor in Council did not in fact form the opinion stated by it. In reality, what Syncrude challenges is not the making of the opinion but its validity. However, as the Minister submits, "this court is not to

inquire into the validity of the Governor in Council's opinion that the RFR could result in a reduction of air pollution, whether the Governor in Council formed its opinion on accurate or misleading information, or whether its opinion is right or wrong." See *Thorne's Hardware Ltd v Canada*, [1983] 1 SCR 106, para 13; *Canada (Attorney General) v Hallet & Carey Ltd*, [1952] AC 427 (PC), para 12; *Reference re Regulations in Relation to Chemicals*, [1943] SCR 1, para 22; *Teal Cedar Products (1977) Ltd v Canada*, [1989] 2 FC 158, [*Teal*] para 16, leave to appeal refused 100 NR 320 (SCC); and *Canadian Council for Refugee v Canada*, 2008 FCA 229, para 78-80, leave to appeal refused (2009) 395 NR 387 (note).

[118] Syncrude has offered no evidence that the opinion required was not made and, as the Federal Court of Appeal stated in *Teal*, "If the Governor in Council deemed the Order in Council necessary … it matters not that this opinion be right or wrong." That is a full answer to Syncrude's submission that the condition precedent was not fulfilled.

(2) Was a Strategic Environmental Assessment Required?

[119] Syncrude submits the *Cabinet Directive* imposes a mandatory obligation on a Minister to ensure that a SEA is performed on regulations before implementing any proposal that may result in important environmental effects, either positive, or negative. It is argued that the *Cabinet Directive* is a statutory condition precedent that was not followed, and thus, the regulations are invalid.

[120] Syncrude argues that the *Cabinet Directive* is a "regulation" made by or under the authority of the Governor in Council; that the *Cabinet Directive* required a SEA; that the *Cabinet*

Directive was part of the regulation making process under CEPA, and is a condition precedent arising from the statute.

[121] This submission hinges on section 2(1)(b) of the *Interpretation Act*, RSC 1985, c I-21, which reads:

> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (a) in the execution of a power conferred by or under the authority of an Act, or
>
> (b) by or under the authority of the Governor in Council…

[122] First, this *Cabinet Directive* is an administrative policy of general application, passed under the authority of Cabinet, not the Governor in Council, as is required by the *Interpretation Act*. Justice Scarth dealt with a cabinet directive, passed by the provincial Cabinet, in the case of *Independent Contractors and Business Association of British Columbia v British Columbia* (1995), 6 BCLR (3d) 177, [1995] BCJ No 777 at para 14. To paraphrase Justice Scarth's analysis into the Federal sphere, a cabinet directive does not purport to have been enacted in execution of a power conferred under an Act, nor is it suggested that it was made by or under the authority of the Governor in Council, or that any Order-in-Council was approved by the Governor General, acting on the advice of the Cabinet. This *Cabinet Directive* is merely a policy issued by Cabinet, and does not fall under the definition of "regulation" under section 1 of the *Interpretation Act*.

[123] In any event, it is evident from the record that whether "required" or not, an SEA was made and was submitted to Cabinet. The SEA is attached to an affidavit filed by Leif Stephanson and is entitled: *The impact of a federal renewable fuels regulation on air pollution*. Accordingly, even if the SEA were a condition precedent, it was met.

(3) Is the RFR Inconsistent with the Object of CEPA?

[124] Syncrude submits that the RFR does not accord with the purposes and objects of CEPA, as the RFR does not protect the "environment" as defined in subsection 3(1) of CEPA. The relevant portions of subsection 3(1) read:

> "environment" means the components of the Earth and includes
>
> (a) air, land and water;
> (b) all layers of the atmosphere;
> (c) all organic and inorganic matter and living organisms; and
> (d) the interacting natural systems that include components referred to in paragraphs (a) to (c).

[125] Syncrude focuses on the phrase "air, land and water" and argues that regulations under CEPA are required to protect the whole environment—not just the air, but also land and water, due to the above wording. It says that the Governor in Council failed to consider any effects of the RFR on land and water, and as such, the regulations are *ultra vires*.

[126] A challenge to the *vires* of a regulation requires that it be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate: *Katz* at para 24. Because of the presumption of validity of regulations, the burden is on Syncrude to demonstrate the regulations are invalid. As previously stated, the Court does not inquire into the policy merits to determine whether a regulation is "necessary, wise or effective in practice."

[127] The Supreme Court of Canada elaborated in *Katz*, at para 28:

> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; *Keyes*, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health*, (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as ultra vires on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111) [emphasis added].

[128] Syncrude has cited extensively from the record, to attempt to show that land use was not properly considered, that there will be no net reduction in GHG emissions, or that there will be an increase in air pollution, which will result in negative impacts to the land and water, relative to the air. Though its submissions were thorough, I am not persuaded that it has met the burden of showing the RFR and the biofuel requirement is irrelevant, extraneous, or completely unrelated to the statutory purpose of CEPA. That is a very high burden.

[129] The Minister observed that Syncrude's position, if accepted, would require the Court to find all regulations under CEPA *ultra vires* unless they protect all the components of the "environment" as defined in subsection 3(1) of CEPA, despite being split into parts and divisions that deal with specific components of the environment.

[130] The Minister submitted that CEPA does not support such an interpretation. In oral argument, Syncrude disagreed, and stated that its position was that certain regulations may be neutral to some aspects of the environment, and have a positive effect on others, which would be acceptable. Its position is that CEPA regulations cannot harm the environment.

[131] While I am hesitant to say that CEPA regulations can improve some aspect of the environment at the expense of other aspects, I agree with the Minister that the structure of CEPA does not support an interpretation that all factors of the environment must be considered for every regulation passed under CEPA.

[132] First, although it has chosen to focus on part (a) of the definition of "environment", its argument is that all aspects of the environment must be considered at all times for all regulations made under CEPA. This would include (b), (c), and (d) which read:

> (b) all layers of the atmosphere;
>
> (c) all organic and inorganic matter and living organisms; and
>
> (d) the interacting natural systems that include components referred to in paragraphs (a) to (c).

[133] It would be prohibitively costly if not nearly impossible to consider the effect of a regulation on all of the above factors for each and every regulation made under CEPA. In my view, such a burden on the Minister would frustrate rather than further CEPA's objectives.

[134] Second, the organization of CEPA into specific parts and divisions does not support Syncrude's position. Part 7 for example deals with "controlling pollution and managing wastes"

and Division 4 relates specifically to "fuels." Within Part 7, Division 2 relates to "protection of marine environment from land-based sources of pollution", Division 3 relates to "disposal at sea", Division 5, "vehicle, engine and equipment emissions", Division 6, "international air pollution", and Division 7, "international water pollution." The regulation making powers are split into specific compartments in order to restrict the factors that must be considered or taken into account in making regulations for any specific purpose.

[135] Third, the title of Part 7 itself undermines Syncrude's interpretation that no regulation can permit harm to be done to any aspect of the environment. "Controlling pollution and managing wastes" implies that some level of pollution and waste is inevitable and that the goal is to reduce pollution and waste as much as possible rather than eliminate it. This necessarily entails permitting some harm to some aspect of the environment.

[136] Finally, reading the RIASs, it is clear that some impacts on land and water were considered. For example, studies were conducted on the impact of a spill or leak to soil, the impact on water quality in the agricultural sector, and the use of fertilizer. Further, the Governor in Council believed the threat of climate change applied to and affected all three areas of "environment" – air, land and water. The December 2006 RIAS makes clear that "Use of renewable fuels can offer significant environmental benefits, including reduced [GHG] emissions, less impact to fragile ecosystems in the event of a spill because of their biodegradability..." The consideration of the impact of the RFR on ecosystems necessarily entails considering all aspects of the environment for those ecoystems.

[137] To find the RFR *ultra vires* CEPA, would require a finding that they are extraneous to the overall purpose of CEPA, and the burden of so doing rests with Syncrude. I am satisfied that the regulations are within the overall purpose of the statute, and Syncrude has thus failed to meet its burden. The RFR were therefore not *ultra vires* the regulation making authority of the Governor in Council.

C. *Was there a denial of procedural fairness?*

[138] Syncrude alleges that upon receiving its notice of objection and its request to establish a board of review, the Minister owed Syncrude a duty of procedural fairness. It argues that the Minister's decision was of an administrative nature and "affects the rights, privileges or interests of an individual." It therefore attracts a duty of fairness: *Cardinal v Kent Institution*, [1985] 2 SCR 643, [1985] SCJ No 78 [*Cardinal*] at para 14. Syncrude submits that the Minister was procedurally unfair by failing to provide reasons for his decision to not convene a board of review, and by failing to consult with Syncrude.

[139] The Minister's principal submission is that the discretion to convene a board of review is a decision within the legislative process and that there is no duty of procedural fairness when the decision being reviewed is of a legislative nature. In the alternative, it is submitted that there was no breach of procedural fairness because reasons for the decision were provided both in a letter to Syncrude and in the RIAS. Since reasons were provided, even if they are inadequate, that is not a stand-alone reason for quashing a decision as unreasonable.

(1) Syncrude's Notice of Objection Not Filed in Time

[140] Although not raised by the Minister nor relied upon by him, and although not the basis upon which the Court rejects Syncrude's application, the Court observes that Syncrude's notice of objection was not timely.

[141] The RFR was first proposed in the *Canada Gazette Part I* on December 30, 2006. The Minister then published a draft version of the RFR in the *Canada Gazette Part I* on April 10, 2010, and members of the public were given an opportunity to file comments and notices of objection requesting a board of review at that time. The RFR were subsequently published in the *Canada Gazette Part II* on September 1, 2010, including subsection 5(2) which mandated the 2% average renewable fuel requirement in diesel fuel. However, no date was set for the coming-into-force of subsection 5(2) of the RFR. That date was set by *Regulations Amending the Renewable Fuels Regulations* set out in the *Canada Gazette Part I* on February 26, 2011. Syncrude filed its notice of objection on April 26, 2011.

[142] Syncrude should have filed its notice of objection within 60 days following April 10, 2010, the date on which the Minister published the draft RFR and invited the public to file comments and notices of objection. In 2010, 114 persons filed notices of objection and requested a board of review be convened. Syncrude did not.

[143] Syncrude's objection was only filed in respect of the amendment to the RFR which sets the date on which subsection 5(2) is to come into force. The amendment does not change the substance of subsection 5(2). Syncrude raises no objection about the date on which it is to come

into force, but rather objects to the substance of subsection 5(2). In contrast to the comments and notices of objection received in 2010, Environment Canada received 39 letters of comment in response to the 2011 amendment. Syncrude's letter was the only one that requested a board of review be convened. In my view, this further supports that Syncrude simply missed its opportunity to object in a timely manner.

(2) No Duty of Fairness is Owed Within the Legislative Process

[144] Even if Syncrude had filed a timely notice of objection, I am of the view that the Minister did not owe it a duty of fairness with respect to the decision as to whether or not he would convene a board of review because there is a general rule that typical procedural duties and protections do not apply in the legislative context.

[145] In *Canadian Assn of Regulated Importers v Canada (Attorney General)*, [1994] 2 FC 247, [1994] FCJ No 1 at paras 18-21 [*Canadian Assn*], the Federal Court of Appeal reviewed Supreme Court jurisprudence and concluded that "generally, the rules of natural justice are not applicable to legislative or policy decisions." In particular, it highlighted comments from *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602, at page 628 where Dickson J. stated: "A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision."

[146] In *Wells v Newfoundland*, [1999] 3 SCR 199 at para 59, the Supreme Court held that "legislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit." More recently, the Supreme Court stated in *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40, at para 41 [*Authorson*] that "due process protections cannot interfere with the right of the legislative branch to determine its own procedure" and further, that: "Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable."

[147] Parliament can however, impose mandatory procedures for itself to follow in the legislative process. In fact, the Court of Appeal in *Canadian Assn* stated that:

> In essence, what the respondents are seeking here is to impose a public consultation process on the Minister when no such thing has been contemplated by the legislation. There are statutes in which regulations or policies cannot be promulgated without notifying and consulting the public… No such legislative provision appears in the *Export and Import Permits Act*, something that Parliament could have inserted if it wanted notice to be given and consultation with the public to be held. [emphasis added]

[148] Parliament can set boundaries on the legislative process, particularly in the case of regulations. However, within those boundaries, it is free to dictate its own process. In this case, subsection 332(1) of CEPA imposes requirements that the Minister must comply with prior to enacting a regulation:

> The Minister shall publish in the *Canada Gazette* a copy of every order or regulation proposed to be made by the Minister or the

> Governor in Council under this Act, except a list, or an amendment to a list, referred to in section 66, 87, 105 or 112 or an interim order made under section 94, 163, 173, 183 or 200.1. [emphasis added]

[149] Further, subsection 332(2) permits any person to file "comments with respect to the order, regulation or instrument or a notice of objection requesting that a board of review be established under section 333 and stating the reasons for the objection" within 60 days after the publication of a proposed order or regulation in the *Canada Gazette* in accordance with subsection 332(1).

[150] Where a notice of objection has been filed, subsection 333(1) stipulates that "the Minister or the Ministers may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the decision is made or the order, regulation or instrument is proposed" [emphasis added].

[151] By contrast, as noted earlier, subsections 333(3), (4), and (6) mandate the Minister to establish a board of review when a notice of objection is filed with respect to regulations proposed under sections 118 (release of nutrients into waters), 167 (controlling substances released into the air that create air pollution) or 177 (controlling substances released into the water that create water pollution), or under Part 9 of CEPA, or where the Minister fails to determine whether a substance is toxic. Unlike these circumstances, there is no similar provision mandating a board of review for regulations made under section 139. The decision to convene a board of review is a discretionary one.

[152] That discretionary decision occurs within the context of the legislative process. Filing comments or a notice of objection is a formal way for the public to participate in that process and communicate with the legislature. However, within that context, the case law is clear that "legislative decision making is not subject to any known duty of fairness:" *Authorson* at para 39.

[153] Further, Syncrude and other affected parties were accorded other procedural protections including the publication of the RIAS. As noted by Van Harten, Heckman, and Mullan in *Administrative Law: Cases, Text, and Materials*, 6th Ed, (Toronto: Emond Montgomery Publications Limited, 2010) at p 653, the RIAS is "designed to identify the purpose of the proposed regulation, provide an analysis of its costs and benefits, and explain why a regulatory proposal is considered necessary … describe the regulation and its anticipated impact, alternatives considered, compliance with international obligations, and the extent of consultation that took place in the design of the regulation."

[154] The RIASs in this case reveal that the RFR was proposed in 2006. There was an invitation to file comments and notices of objection in April 2010. The Minister offered to, and did consult with provinces, territories, stakeholders, and industry representatives in May 2010.

[155] Parts of the RFR were redrafted in accordance with the feedback the Minister received, and it was published in September 2010. The performance of the RFR was to be reported and evaluated through the publication of annual reports on the regulations, the annual report for CEPA, Environment Canada's Report on Plans and Priorities, through Departmental

Performance Reports, and through Canada's reporting obligations under the *Kyoto Protocol Implementation Act*: *Canada Gazette Part II,* Vol 144, No 18 at p 1738.

[156] These are the due process equivalents of the legislative process, in the regulation making context. While CEPA provides an additional avenue for due process and democratic participation by permitting the filing of notices of objection and comments, receiving these filings is the extent of the Minister's obligation to any individual citizen, unless they fall under subsection 333(3), (4), or (6).

(3) The Decision to Convene a Board is Not Administrative in Nature

[157] I do not accept that upon receiving Syncrude's notices of objection, the Minister had to make a decision of an administrative nature that affected the "rights, privileges or interests of an individual." The task of the board of review is not to adjudicate or decide on the rights, privileges or interests of any individual member of the public, but to investigate the comments or objections raised as they relate to the broader application of the proposed regulations.

[158] Section 333 of CEPA outlines the mandate of a board of review should one be convened. It is to inquire into the "nature and extent of the danger posed by the substance in respect of which the decision is made or the order, regulation or instrument is proposed." There is nothing about the mandate of the board of review that is individual in nature. It is even more tenuous to suggest that the Minister's discretionary decision to convene such a board, which itself does not adjudicate on the individual rights, interests, or privileges of anyone, is administrative in nature.

[159] Furthermore, Syncrude's notice of objection was primarily directed towards requesting a specific exemption from the application of the RFR to its operations. The requested board of review was an alternative to the exemption request. In fact, its submissions go into detail about its own operations, technical concerns such as cold weather operability that had already been raised by other stakeholders and were clearly considered by the Minister, logistical concerns specific to Syncrude, predictions as to the actual effect on Syncrude's GHG emissions if the RFR applied to it, as well as the fact that GHG emissions in Alberta were already being provincially regulated.

[160] As is discussed below in relation to the reasonableness of the decision on the merits, all of the issues raised by Syncrude that relate to the application of the RFR broadly were already known to the Minister. The issues specific to Syncrude's operations spoke to its primary request for an exemption from the RFR, rather than advancing a basis as to why a board of review should be convened.

(4) Conclusion on Procedural Fairness

[161] For the reasons set out above, I find that the Minister did not owe a duty of procedural fairness to Syncrude. Section 332 in CEPA which allows persons to file notices of objection following the publishing of regulations in the *Canada Gazette*, is part of the legislative process for which there are no procedural fairness obligations. The filing of a notice of objection did not initiate an administrative decision making process into the rights, interests, or privileges of Syncrude. The mandate of a board of review is to inquire into the nature and extent of the dangers posed by the substances that are the subject of the regulation in issue; that is to say, it is

to examine the impact of application of the regulations broadly. It is not tasked with adjudicating the merits of the application of the regulations to specific persons.

D. *Minister's Interpretation of "danger" and "substance"*

[162] Syncrude further submits that the Minister must have taken too narrow an approach to the term "danger" and must not have considered the concerns raised by Syncrude to be "dangers." Syncrude submits that the substance at issue was not GHG emissions, but biodiesel.

[163] I reject Syncrude's arguments. First, Syncrude presupposes that the Minister must convene a board of review to investigate the nature and extent of the danger of substances in relation to regulations promulgated under section 139 of CEPA. As found previously, the decision to convene a board of review in this context is discretionary. Therefore, the Minister did not have to form any opinion as to the scope of the term "danger." That was the role of a board of review, if one were convened as was done by the board of review convened to consider the dangers of Decamethylcyclopentasiloxane [Siloxane D5]. In conducting its review, the board considered the scope of the word danger in section 333 of CEPA. It is the role of the board to determine the scope of the "danger" that it is to review. The Minister's role is simply to determine whether a board of review ought to be convened.

[164] Even if it were the Minister's responsibility to determine the extent of the danger to be reviewed by the board of review, Syncrude offers no evidence, but only speculation, that the Minister interpreted that term too narrowly in this case.

[165] While I agree with Syncrude that the "substance" in issue that a board of review would have to investigate is biodiesel and not GHG emissions, again, there is simply no evidence that the Minister considered the substance in issue to be GHGs rather than biodiesel. Syncrude simply asserts that this is what happened.

E. *Reasonableness of the Decision on the Merits*

[166] Lastly, Syncrude challenges the reasonableness of the Minister's decision to not convene a board of review. Syncrude advances six primary arguments: (1) that nothing in the Certified Tribunal Record [CTR] indicates that the Minister gave any consideration to Syncrude's objections; (2) that the testing done by National Resources Canada [NR Can] cannot be applied to oil sands mining operations equipment because of the specialized nature of that equipment; (3) that the Minister did not consider the environmental impact of Syncrude having to truck biodiesel to its operations; (4) that the GHGenius model for the effect of the biodiesel requirement on GHG emissions is inaccurate; (5) that the Canadian average of GHG emissions does not apply to Syncrude, whose operations only incrementally contribute to GHG emissions; and (6) that handwritten notes by the Minister's staff indicate that it had a good case either to convene a board of review or to be granted an exemption.

[167] I find that the Minister's decision not to convene a board of review was reasonable for the following reasons.

[168] Although the Minister's response to Syncrude was brief, that does not mean that he failed to consider its objections. There is evidence in the record that shows that the issues raised by

Syncrude had already been considered at earlier stages in the regulation making process. The onus was on Syncrude to raise new issues that had never before been considered. The Minister has no obligation to reconsider issues that have already been addressed.

[169] The record shows that the Minister was aware of all of Syncrude's concerns that had general applicability (that is to say, those that were not specific to only Syncrude). For example, the Affidavit of Neeta Adams shows that Syncrude's concerns over the GHGenius model were already on the Minister's radar following the consultations with industry representatives in March 2007. It also makes it clear that the Minister was also made aware of the need to carefully consider the oil sands mining context by Suncor, another mining company with operations in Alberta, which engaged with the Minister during the consultation process.

[170] It is shown from the affidavit of Leif Stephanson, a professional engineer employed as Chief, Fuels Section with the Oil, Gas and Alternative Energy Division of the Energy and Transportation Directorate with Environment Canada, that winter performance issues were raised by Imperial Oil and Shell in June 2010. Shell even indicated that 95% of the Canadian diesel market is situated in what Europe would classify as "extreme arctic zones" where no blending with biodiesel would take place in the winter months due to the higher cloud points. Syncrude is correct that the NR Can report only tested biodiesel at temperatures down to -37°C; however, given that even the evidence that the best biodiesel feedstocks will cloud at temperatures below -10°C, the fact that the NR Can report did not test temperatures to -44°C is of questionable relevance. In any event, it is clear that Shell's comments indicated to the Minister that a

significant portion of Canada would not be able to blend in the winter, regardless of whether the coldest temperature was -37°C or -44°C.

[171] The record also reveals that Suncor had also informed the Minister that it was not feasible to blend biodiesel at temperatures between -43°C and -34°C, in its notice of objection and accompanying presentation.

[172] Syncrude's strategy for compliance, like Shell, Suncor, and Imperial Oil's would therefore be to blend biodiesel in the summer months in sufficient quantities to allow them to not have to blend in the winter months. There is nothing unique about Syncrude's circumstances that would warrant an inquiry by a board of review.

[173] As for the uniqueness of oil sands mining equipment, I note that the record shows that Shell is also a "major player in the oil sands sector, with its own process to manufacture bitumen and non-conventional crudes." Additionally, Suncor requested an exemption for self-use or self-produced fuel that, similar to Syncrude, it produced onsite at its oil sands operations. It is not credible for Syncrude to say that its own mining equipment is so unique that the Minister ought to have considered the application of the RFR to Syncrude's machinery specifically. Even if Syncrude's mining equipment is unique, it has not shown that a board of review, which considers the application of the RFR generally, ought to be convened to look into the nature and extent of the danger of biodiesel. It is not clear that the uniqueness of any equipment that uses the biodiesel would ever be a factor in a board of review's inquiry into the nature and extent of the danger of the substance.

[174] In terms of the use of the GHGenius model for measuring the expected GHG reduction from the implementation of the RFR, it is clear that there is dispute over the methodology for such modeling: the Ministry conceded as much in the Question and Answer document. However, the Ministry has consistently taken the position that it is the best model available. Recognizing the complexity of environmental science and modeling, the government is entitled to some deference as to the model upon which it has chosen to base its decisions.

[175] Finally, with respect to the issues raised by Syncrude that are specific to the application of the RFR to it, the Minister cannot be expected to convene a board of review to confirm Syncrude's own predictions as to the deleterious effect on GHG emissions that the RFR might cause as a result of its specific application to Syncrude. As has already been observed, that is not the mandate of the board of review, and in my view, these objections are irrelevant to considering the reasonableness of the Minister's decision as to whether or not a board of review should be convened. This also disposes of Syncrude's argument relating to the hand written notes of some of the members of the department.

[176] At the hearing, in relation to its constitutional argument, Syncrude submitted that the Minister had not adequately considered the cost of the RFR as a means for reducing GHG emissions. It is not for the reviewing court to assess the effectiveness of the measures ultimately chosen by Parliament to achieve its goals. For the purpose of the reasonableness analysis, it is enough that there is evidence in the record that the concerns raised by Syncrude had already been raised by others and been considered. In this regard, Imperial Oil's notice of objection also identified that the RFR was a relatively expensive initiative for the reduction of GHGs, and

further implored the Minister to consider the added cost of land use changes. Therefore, even the economic issues raised late by Syncrude were already known to the Minister.

[177] All of the above shows that there is no evidence in the record that the Minister failed to consider the issues raised by Syncrude in its notice of objection, and there is evidence that all of the issues raised that were relevant to the decision as to whether or not a board of review should be convened, were already squarely before the Minister.

[178] The Minister's decision not to convene a board of review was highly discretionary and is deserving of significant deference. In my view, it was reasonable to conclude that Syncrude had not raised any new issues that would warrant investigation by a board of review as other parties had already raised the same issues, or the concerns raised were unique to Syncrude and therefore not relevant to a board of review analysis.

V. Conclusion

[179] In summary, I find that the RFR are constitutionally valid and were properly made within the scope of CEPA. If procedural fairness was required, the Minister's decision not to establish a board of review was made in a procedurally fair manner. Finally, the Minister's decision was reasonable. Accordingly, the Court dismisses Syncrude's application for judicial review.

[180] The Minister is entitled to his costs. If the parties are unable to agree on an amount, the Minister may have his costs assessed at the middle of Column IV.

[181] The Court thanks all counsel for their thorough and most helpful written and oral submissions on a complex subject.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed with costs.

"Russel W. Zinn"

Judge

ANNEX A

Canadian Environmental Protection Act, 1999 (S.C. 1999, c. 33)	***Loi canadienne sur la protection de l'environnement (1999) (L.C. 1999, ch. 33)***
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
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;
(c) the characteristics of a fuel, based on a formula related to the fuel's properties or conditions of use;	c) les caractéristiques du combustible établies conformément à une formule liée à ses propriétés ou à ses conditions d'utilisation;
(c.1) the blending of fuels;	c.1) le mélange de combustibles;
(d) the transfer and handling of a fuel;	d) les méthodes de transfert et de manutention du combustible;
(e) the keeping of books and records by persons who produce, sell or import fuel or blend fuels;	e) la tenue des livres et registres par les producteurs, importateurs, vendeurs ou mélangeurs de combustible;
(f) the auditing of the books and records and the submission of audit reports and copies of the books and records;	f) la vérification des livres et registres et la remise de rapports de vérification et de copies des livres et registres;
(g) the submission by persons	g) la transmission par les

who produce, sell or import fuel or blend fuels of information regarding

producteurs, importateurs, vendeurs ou mélangeurs de combustible de renseignements concernant :

(i) the fuel and any element, component or additive contained in the fuel,

(i) le combustible et tout élément, composant ou additif présent dans le combustible,

(ii) any physical or chemical property of the fuel or any substance intended for use as an additive to the fuel,

(ii) les propriétés physiques et chimiques du combustible ou de toute autre substance devant y servir d'additif,

(iii) the adverse effects from the use of the fuel, or any additive contained in the fuel, on the environment, on human life or health, on combustion technology and on emission control equipment, and

(iii) les effets nocifs de l'utilisation du combustible, ou de tout additif présent dans celui ci, sur l'environnement ou sur la vie ou la santé humaines, ainsi que sur les technologies de combustion ou les dispositifs de contrôle des émissions,

(iv) the techniques that may be used to detect and measure elements, components, additives and physical and chemical properties;

(iv) les techniques de détection et de mesure des éléments, composants et additifs et des propriétés physiques et chimiques;

(h) the conduct of sampling, analyses, tests, measurements or monitoring of fuels and additives and the submission of the results;

h) l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance du combustible et d'additifs et la transmission des résultats;

(i) the submission of samples of fuels and additives;

i) la transmission des échantillons;

(j) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring; and

j) les conditions, procédures d'essai et pratiques de laboratoire auxquelles il faut se conformer pour l'échantillonnage, l'analyse, l'essai, la mesure ou la surveillance;

(k) the submission of reports on the quantity of fuel produced, imported or sold for export.

k) la présentation de rapports concernant la quantité de combustible produit, importé ou vendu pour exportation.

(2) The Governor in Council may make a regulation under any of paragraphs (1)(a) to (d) if the Governor in Council is of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from

(2) Le gouverneur en conseil peut prendre un règlement au titre des alinéas (1)a) à d) s'il estime qu'il pourrait contribuer sensiblement à prévenir ou à réduire la pollution atmosphérique résultant :

(a) directly or indirectly, the fuel or any of its components; or

a) directement ou indirectement, du combustible ou d'un de ses composants;

(b) the fuel's effect on the operation, performance or introduction of combustion or other engine technology or emission control equipment.

b) des effets du combustible sur le fonctionnement, la performance ou l'implantation de technologies de combustion ou d'autres types de moteur ou de dispositifs de contrôle des émissions.

(3) The Governor in Council may, on the recommendation of the Minister, make regulations exempting from the application of subsection 139(1) any producer or importer in respect of any fuel that they produce or import in quantities of less than 400 m3 per year.

(3) Sur recommandation du ministre, le gouverneur en conseil peut, par règlement, soustraire à l'application du paragraphe 139(1) un producteur ou un importateur en ce qui concerne tout combustible qu'il produit ou importe, selon le cas, dans une quantité inférieure à 400 mètres cubes par an.

(4) Before recommending a regulation to the Governor in Council under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the

(4) Avant de recommander la prise de tout règlement visé au paragraphe (1), le ministre propose de consulter les gouvernements provinciaux ainsi que les membres du comité qui sont des représentants de gouvernements autochtones; il peut aussi consulter tout ministère, organisme public ou peuple autochtone, tout représentant de l'industrie, des travailleurs et des municipalités ou toute

environment.

personne concernée par la qualité de l'environnement.

(5) At any time after the 60th day following the day on which the Minister offers to consult in accordance with subsection (4), the Minister may recommend a regulation to the Governor in Council under subsection (1) if the offer to consult is not accepted by the government of a province or members of the Committee who are representatives of aboriginal governments.

(5) Après les soixante jours suivant la date de la proposition de consultation faite en application du paragraphe (4), le ministre peut recommander au gouverneur en conseil la prise d'un règlement conformément au paragraphe (1) si le gouvernement d'une province ou les membres du comité qui sont des représentants de gouvernements autochtones n'acceptent pas l'offre.

(6) Within one year after this subsection comes into force and every two years thereafter, a comprehensive review of the environmental and economic aspects of biofuel production in Canada should be undertaken by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

(6) Il y aurait lieu, dans l'année suivant l'entrée en vigueur du présent paragraphe et par la suite tous les deux ans, que le comité soit du Sénat, soit de la Chambre des communes, soit mixte, que le Parlement ou la chambre en question, selon le cas, désigne ou constitue à cette fin, procède à un examen approfondi des aspects environnementaux et économiques de la production de biocombustibles au Canada.

(7) The committee referred to in subsection (6) should, within one year after a review is undertaken pursuant to that subsection, submit a report on the review to Parliament, including a statement of any recommendations that the committee makes in respect of biofuel production in Canada.

(7) Il y aurait lieu, dans l'année suivant le début de son examen, que le comité visé au paragraphe (6) présente au Parlement un rapport où sont consignées ses conclusions ainsi que ses recommandations quant à la production de biocombustibles au Canada.

…

…

332. (1) The Minister shall

332. (1) Le ministre fait

publish in the Canada Gazette a copy of every order or regulation proposed to be made by the Minister or the Governor in Council under this Act, except a list, or an amendment to a list, referred to in section 66, 87, 105 or 112 or an interim order made under section 94, 163, 173, 183 or 200.1.

publier dans la Gazette du Canada les projets de décret, d'arrêté ou de règlement prévus par la présente loi; le présent paragraphe ne s'applique pas aux listes visées aux articles 66, 87, 105 ou 112 ou aux arrêtés d'urgence pris en application des articles 94, 163, 173, 183 ou 200.1.

(2) Within 60 days after the publication of a proposed order or regulation in the Canada Gazette under subsection (1) or a proposed instrument respecting preventive or control actions in relation to a substance that is required by section 91 to be published in the Canada Gazette, any person may file with the Minister comments with respect to the order, regulation or instrument or a notice of objection requesting that a board of review be established under section 333 and stating the reasons for the objection.

(2) Quiconque peut, dans les soixante jours suivant la publication dans la Gazette du Canada des projets de décret, d'arrêté, de règlement ou de texte — autre qu'un règlement — à publier en application du paragraphe 91(1), présenter au ministre des observations ou un avis d'opposition motivé demandant la constitution de la commission de révision prévue à l'article 333.

(a) a decision or a proposed order

(b) a decision or a proposed order or instrument made by either or both Ministers

the Minister or the Ministers may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the decision is made or the order

(2) Where a person files a notice of objection under subsection 9(3) or 10(5) in

(2) En cas de dépôt de l'avis d'opposition mentionné aux paragraphes 9(3) ou 10(5), le

respect of an agreement or a term or condition of the agreement, the Minister may establish a board of review to inquire into the matter.

ministre peut constituer une commission de révision chargée d'enquêter sur l'accord en cause et les conditions de celui ci.

(3) Where a person or government files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under section 167 or 177 within the time specified in that subsection, the Minister shall establish a board of review to inquire into the nature and extent of the danger posed by the release into the air or water of the substance in respect of which the regulations are proposed.

(3) En cas de dépôt, dans le délai précisé, de l'avis d'opposition mentionné au paragraphe 332(2), le ministre constitue une commission de révision chargée d'enquêter sur la nature et l'importance du danger que représente le rejet dans l'atmosphère ou dans l'eau de la substance visée par un projet de règlement d'application des articles 167 ou 177.

(4) Where a person files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under Part 9 or section 118 within the time specified in that subsection, the Minister shall establish a board of review to inquire into the matter raised by the notice.

(4) En cas de dépôt, dans le délai précisé, de l'avis d'opposition mentionné au paragraphe 332(2) à l'égard d'un projet de règlement d'application de la partie 9 ou de l'article 118, le ministre constitue une commission de révision chargée d'enquêter sur la question soulevée par l'avis.

(5) Where a person files with the Minister a notice of objection under section 134 within the time specified in that section, the Minister may establish a board of review to inquire into the matter raised by the notice.

(5) En cas de dépôt, dans le délai précisé, de l'avis d'opposition mentionné à l'article 134, le ministre peut constituer une commission de révision chargée d'enquêter sur la question soulevée par l'avis.

(6) Where a person files with the Minister a notice of objection under section 78 in respect of the failure to make a determination about whether a substance is toxic, the Minister

(6) Lorsqu'une personne dépose un avis d'opposition auprès du ministre en vertu de l'article 78 pour défaut de décision sur la toxicité d'une substance, le ministre constitue

shall establish a board of review to inquire into whether the substance is toxic or capable of becoming toxic.

une commission de révision chargée de déterminer si cette substance est effectivement ou potentiellement toxique.

Renewable Fuels Regulations (SOR/2010-189)

Requirements Pertaining to Gasoline, Diesel Fuel and Heating Distillate Oil -

5. (1) 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(1), must be at least 5% of the volume, expressed in litres, of a primary supplier's gasoline pool for each gasoline compliance period.

5. (1) 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(1), ne peut être inférieure à 5 % du volume, exprimé en litres, des stocks d'essence du fournisseur principal au cours de chaque période de conformité visant l'essence.

(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.

(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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1643-11
STYLE OF CAUSE:	SYNCRUDE CANADA LTD v THE ATTORNEY GENERAL OF CANADA
PLACES OF HEARING:	VANCOUVER, BRITISH COLUMBIA and OTTAWA, ONTARIO
DATES OF HEARING:	VANCOUVER, BC - NOVEMBER 25, 2013 OTTAWA, ON - FEBRUARY 24, 25, 26, 27,2014
JUDGMENT AND REASONS:	ZINN J.
DATED:	AUGUST 6, 2014

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