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Prime Minister Trudeau You've Got the Power (the Criminal Law Power): *Syncrude Canada Ltd v Canada* and Greenhouse Gas Regulation

By: Sharon Mascher

Case Commented On: *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 (CanLII)

On May 30th Justice Rennie delivered the Federal Court of Appeal's unanimous judgment in *Syncrude Canada Ltd v Canada (Attorney General)*. At issue in this case was the validity of s 5(2) of the federal *Renewable Fuels Regulations*, SOR/2010-189 (RFRs) which requires that all diesel fuel produced, imported, or sold in Canada contains at least 2% renewable fuel. While the FCA held that the RFRs are valid, from a climate change perspective this conclusion is not the reason this decision is important. As my colleague Nigel Bankes has noted here, the RFRs represent only "a tiny, tiny step" towards reducing Canada's greenhouse gas (GHG) emissions. Rather, coming as it does on the heels of Canada signing the Paris Agreement and in the midst of talks aimed at developing a pan-Canadian climate change framework, the *Syncrude* decision is important because the FCA confirms that the federal government can use the criminal law power to regulate GHG emissions. More specifically, given that the RFRs at issue in this case create a flexible scheme that allows for the buying and selling of compliance units to achieve the 2% renewable fuel requirement, the *Syncrude* decision endorses the use of the criminal law power to support market-based emissions trading schemes or other pricing mechanisms. In short, provided federal regulations are directed at the purpose of reducing GHG emissions, this FCA decision tells the federal government that it has the constitutional power to take action on climate change.

Background to the Case

Since 2005, six of the most significant GHGs – including carbon dioxide – have been listed as toxic substances in Schedule I of the *Canadian Environmental Protection Act* 1999, SC 1999, c 33 (CEPA). For the purposes of CEPA, a substance is toxic if it has (or may have) an immediate or long-term harmful effect on the environment or its biological diversity or constitutes (or may constitute) a danger in Canada to human life or health (s 64). Section 139 of CEPA prohibits the production, importation and sale in Canada of fuel that does not meet prescribed standards. To carry out this provision, the Governor in Council has the authority to make regulations prescribing the properties and characteristics of fuel provided 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, directly or indirectly, the combustion of fuel (s 140). It is pursuant to this provision that the RFRs were promulgated.

Section 5(2) of the RFRs requires all diesel fuel produced, imported or sold in Canada to contain at least 2% renewable fuel. To achieve this renewable fuel requirement, every litre of renewable fuel mixed into other fuel – including mixing that occurs outside Canada before the fuel is imported – creates one compliance unit (ss 13(2)). Each compliance unit, therefore, represents one litre of renewable fuel in the total Canadian fuel supply. To meet the 2% renewable fuel

requirement, regulated entities are required to expend two compliance units for every 100 litres of fuel they produce, import or sell. Regulated entities can do this by mixing fuel themselves to create compliance units or by purchasing compliance units from others (RFRs, s 20(1). As Justice Rennie notes (at para 79), the RFRs are "agnostic" as to where or how the 2% renewable fuel requirement is met, as long as it is met. Failure to comply with the RFRs is an offence under the CEPA with penalties payable on conviction (CEPA s 272(1)).

As Syncrude Canada Ltd. produces diesel fuel to operate vehicles and equipment at its Alberta oil sands operations, it is captured by the RFRs. Syncrude commenced an application in the Federal Court challenging the validity of the RFRs on constitutional and administrative grounds. The Federal Court dismissed its application (see *Syncrude Canada Ltd. v Canada (Attorney General)*, 2014 FC 776 (CanLII) and ABlawg posts on the administrative and constitutional law issues at play here, here, and here). Syncrude appealed.

The Criminal Law Power and the Constitutional Validity of the RFRs

In the FCA, Syncrude argued that s 5(2) of the RFRs did not have a valid criminal law purpose because it was not aimed at the reduction of air pollution. Rather, in Syncrude's submission, the RFRs are in fact an economic measure aimed at the creation of a local market (a matter within s 92(13) of the *Constitution Act, 1867*) or directed to non-renewable natural resources (a matter of provincial legislative competence under s 92A of the *Constitution Act, 1867*). Syncrude's argument is predicated on the assertion that the renewable fuel requirement that s 5(2) establishes is ineffective (at para 40). Given the direction this analysis provides to understanding the scope of the criminal law power in the context of GHG regulation going forward, it is relevant to consider Justice Rennie's reasoning in some detail.

Characterization of Section 5(2)

After affirming the methodological approach adopted by the Federal Court in its constitutional analysis, Justice Rennie turns to the two step division of powers analysis: characterization of the law; and classification of the essential character by reference to the relevant heads of power (at para 38, citing *Reference re Firearms Act (Can)* 2000 SCC 31 (CanLII) at para 15).

The characterization analysis is informed by both the law's purpose and its effect. Given that Syncrude's argument is founded on the assertion that the renewable fuel requirement is ineffective, Justice Rennie highlights the language of the Supreme Court in the *Firearms Reference*. Responding in that case to the AG of Alberta's argument that the law at issue would not actually achieve its purpose, the Court stated that within the constitutional sphere it is for Parliament to "judge whether the measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of power analysis … [r]ather the inquiry is directed to how the law sets out to achieve its intended purposes in order to better understand its 'total meaning' " (*Firearms Reference* at para 18).

Analyzing the purpose and effect of s 5(2) of the RFRs, Justice Rennie concludes that it is directed to maintaining the health and safety of Canadians, as well as the natural environment upon which life depends (at para 41). Within the statutory scheme established by the CEPA, the 2% renewable fuel requirement is directed at the reduction of toxic substances in the atmosphere (at para 41). By displacing the combustion of fossil fuels, s 5(2) reduces the amount of GHG-related air pollution that would otherwise enter the atmosphere. Taken together, the purpose and effect of s 5(2) is "unambiguous on the face of the legislative and regulatory scheme in which it

is situated. It is directed to the protection of the health of Canadians and the protection of the natural environment." (at para 42) Justice Rennie notes that "[r]esort to the relevant Regulatory Impact Analysis Statement (RIAS) confirms this position" (at para 43).

Valid Criminal Law Purpose

The valid exercise of the criminal law power requires (1) a prohibition, (2) backed by a penalty, (3) for a valid criminal purpose (at para 47, citing *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 (CanLII)). There is no question that the RFRs contain a prohibition backed by a penalty. At issue here is whether these regulations have a criminal law purpose. The Supreme Court has confirmed that a law aimed at supressing or reducing an "evil" (*Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1) or addressing a public concern relating to peace, order, security, morality, health or some similar purpose has a criminal law purpose, although it "must stop short of pure economic regulation" (at para 48). Following the Supreme Court in *R v Hydro-Quebec*, [1997] 3 SCR 213, Justice Rennie easily concludes that "[p]rotection of the environment is, unequivocally, a legitimate use of the criminal law power." (at para 49) Further, "it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power." (at para 62) This conclusion, however, does not end the matter for Syncrude, whose "principal argument" it will be recalled is that the RFRs are ineffective in achieving their purpose.

(In)Effectiveness of the RFRs

Syncrude conceded that questions of whether the RFRs are worthwhile or useful are not germane to the characterization analysis. However, Syncrude sought to use evidence it argued supported the conclusion that the RFRs would not in fact reduce GHG emissions to characterize the dominant purpose of the legislation. The evidence as to the practical effects of the RFRs, it argued, "overwhelmingly contradict the suggestion that the dominant purpose of the RFRs is to reduce GHG emissions." (at para 52) However, Justice Rennie was unmoved by Syncrude's argument on either an evidentiary or legal basis. He was satisfied that the Governor in Council had considered the issue and that the RIAS had considered a body of scientific research to support the relationship between the renewable fuel requirement and the reduction of GHGs. The evidence offered by Syncrude that the RFRs would not in fact reduce GHG emissions was "not compelling" (at para 59). From a legal perspective, Justice Rennie was also not willing to entertain the argument that because the RFRs were ineffective their dominant purpose must have been to establish local markets. This argument, he reasoned, sought to circumvent the proposition as stated in *Ward*, that "the purpose of legislation cannot be challenged by proposing an alternative, allegedly better, method for achieving that purpose (at para 60).

Regulation as an Economic Measure

Syncrude's argument that the dominant purpose of s 5(2) was to create a market in renewable fuels and was therefore *ultra vires* similarly failed. While it was not contested that an increased demand for renewable fuel would have favourable economic consequences and market responses in agriculture, Justice Rennie held that these consequential effects should not be considered in isolation. The reason the government hoped to develop a Canadian renewable fuels market was to support the long-term reduction of GHGs. Recognizing that it is at times practically impossible to disassociate the environment and economy (citing *Friends of the Oldman River Society v Canada (Ministry of Transport)*, [1991] 1 SCR 3), Justice Rennie concluded that "[t]he existence of the economic incentives and government investments, while relevant to the

characterization exercise, do not detract from the dominant purpose of what the RFRs do and why they do it." (at para 67) So, while part of the objective of the RFRs was indeed to encourage next-generation renewable fuel production and to create opportunities for farmers in renewable fuels, it was sufficient that the evidence also demonstrated that this market demand and supply was being created "to achieve the overall goal of greater GHG emission reductions." (at para 68) All criminal laws seek to deter and modify behaviour. It follows therefore that simply because Parliament "foresees behavioural responses either in persons or in the economy" does not mean that the regulation is an economic measure and does not invalidate the exercise of the criminal law power (at para 69).

Absence of an Absolute Prohibition

Syncrude's argument that the RFRs cannot be a valid exercise of the criminal law power because they contain exemptions and do not ban outright the presence of GHGs in fuel was also unsuccessful. Affirming the findings of the Federal Court and guided by the Supreme Court's direction in both the *Firearms Reference* and *RJR-MacDonald Inc. v Canada (Attorney General)* [1995] 3 SCR 199 (CanLII), Justice Rennie states that "[a] prohibition need not be total, and it can admit exceptions." (at para 73). He goes on to state "there is no constitutional threshold of harm that must be surpassed before the criminal power is met, provided there is a reasonable apprehension of harm" (at para 75). Noting that Syncrude had no answer to the question of when the RFRs become constitutional – at 10%, 25%, 50% or 100% renewable fuel requirement – Justice Rennie confirms "[t]here is no magic number." (at para 75) This conclusion is consistent with Syncrude's concession that other regulations limiting the concentrations of lead and sulphur in fuel are valid (*Sulphur in Diesel Fuel Regulations*, SOR/2202-254). Nothing distinguishes these prohibitions from that found in the RFRs and all are valid.

Intrusion Into Provincial Jurisdiction Over Natural Resources

Justice Rennie answers the question of whether the RFRs intrude into provincial jurisdiction over natural resources by examining the structure and operation of the RFRs themselves. In so doing, Justice Rennie concludes that the regulations are "agnostic as to who is required to meet the target, and importantly, agnostic as to how they do it, whether by blending fuels or purchasing compliance units" (at para 79). What matters is that the target of consuming 2% less fossil fuels – which is the same on a yearly, Canada wide basis – is met. Also important to Justice Rennie is that s 5(2) applies to Syncrude "as a consumer of diesel in its operations, not its production of synthetic crude oil" (at para 80). He goes on to note that the "RFRs do nothing to affect the rate or timing of resource extraction…" (at para 80) – Syncrude stands in no different position than any other consumer of diesel fuel in Canada. The RFRs are, therefore, laws of general application and not directed at the management of natural resources.

Indirect Means Argument

Syncrude also argued that the criminal law power does not support the use of indirect economic effects to achieve the dominant purpose of protecting the environment. The RFRs, it argued, indirectly address the emission of GHGs by creating a demand for renewable fuels in order to displace fossil fuels and thereby reduce GHG emissions. The finding that creating demand for renewable fuels is not the dominant purpose of the RFRs provides Justice Rennie with a short answer to this argument. However, in the alternative Justice Rennie finds that Syncrude's argument "that Parliament cannot use the criminal law power to indirectly reduce an evil has no support in the jurisprudence." (at para 83) In the *Firearms Reference* the Supreme Court

confirmed that "indirect means" may be used to achieve Parliament's ends. (at para 84, citing *Firearms Reference* at paras 39-40) Similarly, in *RJR-MacDonald* the Court affirmed that when considering whether a valid criminal law purpose exists, the court's emphasis must not be on Parliament's method of achieving that otherwise valid purpose, no matter how "circuitous" the path taken to achieve Parliament's goal. (at para 85, citing *RJR-MacDonald* at paras 50-51)

The Colourability Argument

Building on its assertion that the RFRs are ineffective in combating climate change, Syncrude also argued that they must therefore, by logical inference, "…be a colourable attempt to create a market for renewable fuels or to regulate provincially controlled natural resources" (at para 87). Syncrude constructed this argument as follows: the evidence suggests that the government knew that the use of renewable fuels do not in fact have a lower GHG emissions over their life cycle; the government understood that the RFRs would spur collateral economic incentives to agriculture and industry associated with planting and refining biofuels; and, therefore the primary purpose of the RFRs must have been to intrude into provincial responsibilities to create a market for Canadian renewable fuels. (at para 89)

Justice Rennie held, however, that the evidence supports the opposite conclusion. (at para 90) When considered in context, the references in the evidence associated with the creation of a domestic market for renewable fuels were directed at preventing or reducing air pollution through the reduction of GHGs. Justice Rennie also recognizes that in using the criminal law power to protect the environment, and in this case reduce GHG emissions, Parliament must necessarily navigate the economic consequences associated with doing so. While sometimes "crafting the regime so as to mitigate the economic side effects may be the majority of the work" and "managing economic effects plays a role, even a large role" this does not mean that the law is a colourable attempt to pursue an unconstitutional objective." (at para 91). This is so even if capital incentives and subsidies exist – provided the clear objective of these economic measures is to meet the ultimate purpose of reducing air pollution by reducing GHG emissions. And this is precisely what the Federal Court of Appeal finds that the RFRs are designed to do.

Ancillary Powers

In light of the preceding reasons, the FCA concludes that s 5(2) of the RFRs is a valid exercise of the criminal law power and is *intra vires* the *Constitution Act 1867*. Without examining the issue in any detail, Justice Rennie also concludes that had the law been *ultra vires*, it would have been saved by the ancillary powers doctrine for substantially the same reasons as those of the Federal Court.

Commentary

So what does the decision mean for Canada going forward?

Absent an appeal to the Supreme Court of Canada, this FCA decision removes the lingering question as to whether the federal government can rely on the criminal law power to regulate GHG emissions, an evil that justifies the exercise of the criminal law power. This is so even if the legislation or regulation creates favourable economic and market responses in other sectors or supports the use of indirect economic effects to achieve its dominant purpose. It is not

necessary that the legislation or regulation contain an absolute ban on GHG emissions – the prohibition need not be total or, as exemplified by the RFRs, even substantial, and exemptions are tolerated. And any such legislation or regulations will not be open to challenge on the basis that it is ineffective at achieving its purpose or on the basis that it intrudes into provincial jurisdiction over natural resources, provided that it is a law of general application.

In Canada's National Statement at COP21, Prime Minister Justin Trudeau promised that "Canada can and will do more to address the global challenge of climate change." At present, "[i]n the spirit of cooperation and collaboration" the federal and provincial governments are in the midst of a sixth month process to devise a pan-Canadian framework to address climate change. The first of these meetings held in Vancouver in March 2016 culminated in the Vancouver Declaration on Clean Growth and Climate Change. The Vancouver Declaration reflects, for the first time, a political consensus that Canada must live up to its international climate obligations. Specifically, Prime Minister Trudeau and the premiers committed to "[i]mplement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target…" and to "[i]ncrease the level of ambition of environmental policies over time... consistent with the Paris Agreement." However, also reflected in the Declaration is the federal government's commitment to giving provinces and territories the flexibility to design their own policies to meet emission reduction targets. This is in keeping with the province led, bottom-up approach to GHG regulation that has developed in Canada. So even as discussions on a pan-Canadian framework move forward, proactive provinces continue to set provincial targets, announce climate change plans and pass related legislation (see for example, Alberta's new *Climate Leadership Implementation Act* here). For its part, the federal government has largely seemed content to assume the role of cheerleader while continuing to insist that at the end of this six month process there will be a "package of measures" that will include a price on carbon (see here). What that package will look like remains to be seen, but following the *Syncrude* decision the FCA has made it clear that if necessary the federal government has the power – the criminal law power – to put in place regulations directed at reducing Canada's GHG emissions in order to meet the commitments the Trudeau government has made under the Paris Agreement.