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Federal Court to Syncrude: Climate Change is a Real, Measured Evil, Whose Harm has been Well Documented

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Case commented on: *Syncrude Canada Ltd. v Attorney General of Canada*, 2014 FC 776

"The fall term in the 1997-1998 academic year," wrote Professor David Beatty, "was a constitutional law teacher's dream." Professor Beatty was referring to the release of two Supreme Court of Canada decisions that touched some of the "most politically charged issues" of the day and which "together raised almost every important issue in constitutional law" (one of which was *R v. Hydro Quebec*, [1997] 3 SCR 213, 1997 CanLII 318 (SCC), central to the *Syncrude* decision being commented on here; see David Beatty, "Canadian Constitutional Law in a Nutshell" (1998) 36(3) Alta L Rev 605). As it turns out, the summer of 2014 has shaped up to be an environmental law teacher's dream. In May, the Federal Court released its decision in *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 463 (CanLII), a decision that I have suggested represents a major development in Canadian environmental assessment law. Then in August, the Federal Court handed down its judgment in *Syncrude*, which my colleague Professor Nigel Bankes has observed is the "first case in which a party has challenged the constitutional validity of any federal greenhouse gas regulations." This post focuses on that very issue; Professor Shaun Fluker has also written a post on the decision, focusing on the administrative law issues.

The Constitutional Question

Subsection 5(2) of the *Renewable Fuel Regulations*, SOR/2010/189 (RFR), being regulations made pursuant to subsection 140(1) of the *Canadian Environmental Protection Act, 1999*, SC 1999 c 33 (*CEPA*), requires that diesel fuel produced, imported or sold in Canada must contain renewable fuel of at least 2% by volume. Compliance can be achieved by either blending diesel with biodiesel, which is made from either biological waste matter or feed stocks, or by purchasing compliance units from those who have more than 2% renewable fuel in their diesel fuel.

Canada argued 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" (at para 12). For its part, Syncrude argued that the provision's "dominant purpose and effect…is to regulate non-renewable resources and promote the economic benefits of protecting the environment," and in particular "to create a demand for biofuels in the Canadian market place," such that any prohibition of harm is merely ancillary (*ibid*).

Justice Zinn first set out the applicable framework as recently set out in *Québec (Procureur Général) v Canada Procureur (Procureur Général)*, 2010 SCC 61 (CanLII) [*Re: Assisted Human Reproduction*]. The first step is to determine the dominant matter – the pith and substance – of the impugned provisions, a contextual analysis that requires asking "[w]hat in fact does the law do and why?" (at para 16, citing

para 22 of *Re: Assisted Human Reproduction*). The second step is to determine which of the heads of power such matter falls under.

Justice Zinn then began by considering the purpose of the RFR and, because it is subordinate legislation, the *CEPA* as well. Referring to the preamble of both, Justice Zinn observed that *CEPA* is designed "to address environmental degradation, protect the environment and human health, and place the cost and responsibility of pollution on the polluter", while the RFR were considered by the Governor in Council (GiC) as contributing to "the prevention of, or reduction in, air pollution…" (at para 17). Following the teaching in *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 (CanLII), Justice Zinn also considered the various Regulatory Impact Analysis Statements (RIAS) related to the RFR, which in his view confirmed that the driving concern was the reduction of greenhouse gas (GHG) emissions (at para 21). Readers interested in the history and evolution of the federal government's position on climate change should check out paragraphs 22 – 28 of the judgment. Justice Zinn himself summarized those documents as follows:

> [30] …The RIAS for both the RFR and its amendment…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.

While Justice Zinn recognized that the RFR were "also intended to increase the demand for renewable fuels and develop new market opportunities" (at para 31), it was equally clear that these economic effects were part of a larger strategy, the purpose of which was to reduce GHG emissions: "Creating a demand for renewable fuels was…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" (at para 35).

Consequently, Justice Zinn had no difficulty concluding that "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" (at para 39). Turning to the regulations' effect, the bulk of this part of the decision was aimed at rejecting Syncrude's efforts to have the Court assess the efficacy of the RFR. However, Justice Zinn was also of the view that even if this was part of the test, 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'" (at para 45; see also para 49).

Having determined that the pith and substance of the RFR is the reduction of GHG emissions and potentially other emissions (at para 54), Justice Zinn turned to classification. The federal criminal law power requires that there be (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose (*Reference re Firearms Act (Can)*, 2000 SCC 31 (CanLII)). There was apparently no dispute with respect to the first two criteria; the issue was whether the RFR were enacted with a valid criminal law purpose (at paras 58, 59).

The Minister relied on *R. v. Hydro Quebec*, the landmark but also controversial Supreme Court ruling that grounded *CEPA*'s toxic substances regime in the criminal law power. In that case, both the majority and minority agreed that Parliament's use of the criminal law power was not limited to protecting public health; "the protection of the environment is itself a legitimate basis for criminal legislation" (*Hydro Quebec*, at para 43). Where the parties disagreed, and where the majority ultimately prevailed, was whether the impugned regime was more regulatory than prohibitory in nature. Writing for the majority, Justice La Forest held that environmental issues did not always lend themselves to blunt prohibitions but

that this should not preclude Parliament from relying on the criminal law power, especially where the alternative is the seemingly more drastic reliance (from a federalism perspective) on its residual power to pass laws for peace, order and good government (POGG).

Applying this reasoning to the RFR, Justice Zinn acknowledged that they appeared "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 [*sic*] 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" (at para 67).

Where the decision gets really interesting, in my view, is around paragraph 78. Here, and in contrast to the public messaging from industry and industry groups such as the Canadian Association of Petroleum Producers (i.e. that they support action on climate change), Syncrude argued that "the production and consumption of petroleum fuels is not dangerous and does not pose a risk to human health or safety," and that "there is no evil to be suppressed." To this, Justice Zinn responded that "[t]he 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" (at para 83).

Discussion

Several years ago at the annual "CBA-DoJ Day" in Ottawa (an event organized by the National Energy, Environment and Resources Law section of the Canadian Bar Association), someone asked counsel from Environment Canada if they thought that the toxic substances provisions of *CEPA* – the provisions upheld under the criminal law power in *R. v. Hydro Quebec* – would pass muster if they were to be challenged now, in light especially of the fact that there are now thousands of regulated substances under that scheme. If I recall correctly, the response was positive if somewhat tepid. Justice Zinn's decision would seem to be put any doubt to rest, while at the same time swinging the criminal law door open for all manner of schemes to control GHG emissions, including cap and trade. And while it is pretty clear that this door is not one that the current federal government will be walking through, a future government just might.