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The Federal Renewable Fuels Regulations Survive an Aggressive and Comprehensive Challenge from Syncrude

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Case commented on: [Syncrude Canada Ltd. v Attorney General of Canada](#), 2014 FC 776

In the dog days of summer (August 6, 2014) Justice Russel Zinn of the Federal Court of Canada handed down his judgement in a case in which Syncrude sought to challenge the validity of the federal *Renewable Fuels Regulations*, [SOR/2010/189](#) (RFR) on both constitutional and administrative law grounds. The judgment seems to have passed almost without comment in the media. The RFR require that diesel fuel produced, imported or sold in Canada must contain renewable fuel of at least 2% by volume. This requirement can be met by blending diesel with biodiesel (although this can be challenging at cold temperatures). Failure to comply with the RFR is an offence although a regulated entity can achieve compliance by purchasing compliance units from other regulated entities who have exceeded their own compliance targets. See the judgement at para 4.

It is a pity that the decision did not attract greater media attention because the case is politically important and also legally significant on a number of fronts. For example, this is the first case in which a party has challenged the constitutional validity of any federal greenhouse gas regulations. The decision gives strong support to the federal government's reliance on the criminal law power to legislate in this area. The case also offers useful guidance at the administrative law level as to the preconditions that the Governor in Council must meet before making regulations under the *Canadian Environmental Protection Act, 1999*, [SC 1999, c.33](#). The decision confirms that the courts will not interfere with the manner in which the executive goes about meeting its policy objectives even if the efficacy of the measure (either absolutely or comparatively) may be open to question. And there are other interesting tidbits in the case as well. For example, there is a useful discussion of the Cabinet Directive on Strategic Environmental Assessments and on the distinction between a Cabinet Directive and a regulation made by Order in Council. We hope to post individual comments on some of the specific legal issues over the coming week(s).

Finally, it is interesting to consider the greenhouse gas politics of this decision. This set of federal regulations represents a tiny, tiny step towards meeting Canada's post-Kyoto diluted Copenhagen challenge of minus 17% of 2005 emission levels by 2020. I am sure that compliance with the regulations will increase operating costs but I am equally sure that this increase is

nothing more than a drop in the bucket for Syncrude. This litigation therefore suggests that at least the sector of big oil represented by the Syncrude interests will fight federal greenhouse gas regulations in all of its forms and that it will fight them hard. There was no stone left unturned in this litigation. Counsel for Syncrude pursued every possible avenue no matter how small the chance of success or creative the argument. Big carbon may be just like big tobacco in protecting its turf – one of several similarities that my colleagues Martin Olszynski and Sharon Mascher hope to explore more fully in a forthcoming research project.

Big carbon might want to think more carefully about the politics of this. So who stands behind Syncrude? [Who should the press be asking questions of?](#) Answer: (37%) Canadian Oil Sands Partnership, (9%) SINOPEC, (25%) Imperial Oil Resources, (5%) Mocal Energy, (5%) Murphy Oil Company, (7%) Nexen Oil Sands Partnership, (12%) Suncor Energy Ventures Partnership. Perhaps Imperial Oil would be a good place to start given their important global carbon position.

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