September 12, 2014

Syncrude v Canada: Where is the gatekeeper when you need one?

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

This post continues on from the introductory comment posted by Nigel Bankes on September 11, 2014 (here) concerning this case, and discusses the administrative law aspects in Justice Zinn's decision. Briefly put, Syncrude challenges the validity of the *Renewable Fuels Regulations*, SOR/2010-109 enacted pursuant to section 140 of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*]. Section 139 of *CEPA* together with the *Renewable Fuels Regulations* require diesel fuel produced, imported or sold in Canada to contain renewable fuel of at least 2% by volume. Syncrude produces diesel fuel, and is thus subject to this requirement unless it can successfully argue the *Renewable Fuels Regulations* are *ultra vires* the authority of the Governor in Council or that there is some other legal defect in how the rules have been administered against it. My comment focuses on two points in the decision, namely: (1) are the *Renewable Fuels Regulations* unlawful because they do not conform to the regulation making powers of the Governor in Council set out in section 140 of *CEPA?*; and (2) did the Minister err in law by failing to afford Syncrude procedural fairness in administering the regulations?

I would say the resolution of these points by Zinn J. represents a fairly straightforward application of settled law, and I can accordingly describe the essence of the reasoning in short order. The law on the first issue was recently summarized by the Supreme Court of Canada in *Katz Group Canada v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24-28. An issue over the *vires* of a regulation involves the following considerations: (1) is the impugned regulation consistent with the objective of its parent statute – in order to demonstrate invalidity a person must establish that the regulation is not consistent with such objective or that it addresses a matter which is not set out in the regulation-making provision of the parent statute; (2) there is a presumption of validity such that the onus or burden is on the challenger to demonstrate that the regulation is *ultra vires* – so where possible a regulation will be read in a 'broad and purposive' manner to be consistent with its parent statute; (3) the inquiry into the *vires* of a regulation does not involve assessing the policy merits of the regulation, nor does the reviewing court assess whether the regulation will successfully meet its objective. There is also, of course, always the prospect that a regulation is unlawful because it has been enacted for an improper purpose that amounts to an abuse of discretion.

After citing the *Katz* decision, Justice Zinn considers various arguments put forward by Syncrude to support its position that the *Renewable Fuels Regulations* are invalid because they fail to conform with *CEPA*. Zinn J. rejects all of these arguments, and I will comment on these in turn.

Syncrude argues the Governor in Council erred by failing to form the opinion that the *Renewable Fuels Regulations* could make a significant contribution to the prevention of, or reduction in, air pollution before enacting the regulations – an opinion which section 140(2) of *CEPA* requires it to form. Here Justice Zinn references the preamble to the regulations, which states such an opinion was formed and he applies the presumption of validity noted above to assert that the validity – or in my words the *bona fides* – of this opinion as set out in the regulations is not open to question in this case without tangible evidence from Syncrude that such opinion was not actually formed (at paras 114 - 118).

Syncrude argues a Cabinet Directive on strategic environmental assessments concerning policy proposals imposes a mandatory obligation on a Minister to perform such an assessment before enacting the *Renewable Fuels Regulations.* This argument required Syncrude to establish that the Cabinet Directive is law rather than policy, which it fails to do (at paras 119-123). Justice Zinn is rather short on reasoning here, and perhaps little was made of this in argument. However, the distinction between legislative instruments which are binding and policy instruments which are not binding is a complex area, and resolving these questions is typically more involved than what is set out in this case. A good summary of the applicable law on this point can be found in John Mark Keyes, *Executive Legislation*, 2d ed (Lexis Nexis, 2010) at 19 - 63.

Syncrude argues the *Renewable Fuels Regulations* do not accord with the purpose and objective of *CEPA* because they do not protect the 'environment' as defined in *CEPA* to mean air, land and water. In this regard, Syncrude emphasizes the conjunctive aspect of this definition and asserts that the record did not include material to demonstrate the regulation was intended to protect land and, moreover, that the renewable fuel requirement would actually result in negative impacts to these components. Again citing the *Katz* decision, Justice Zinn rules that a *vires* inquiry cannot go into the merits of the policy underlying the regulation save for those egregious cases where abuse of discretion is evident. And moreover, he lists several reasons for rejecting the conjunctive interpretation of 'environment' offered by Syncrude (at paras 124 - 137).

The second issue concerns whether the Minister failed to afford Syncrude procedural fairness in rejecting Syncrude's request for a review of the *Renewable Fuels Regulations* before they were enacted. Syncrude argues that before rejecting such request, the Minister was required to consult with Syncrude on the issue and also that the Minister provide Syncrude with reasons for its decision not to initiate the review. This argument by Syncrude is based on the Minister's power under sections 332 and 333 of *CEPA* to establish a board of review – on the request of a person who objects to a proposed regulation – to inquire into the nature and extent of the danger posed by the substance in respect of which the regulation is proposed. The legal question here is whether the Minister owed Syncrude a duty of procedural fairness under the common law, since the statute is silent on these questions of consultation and reasons.

Justice Zinn has little trouble ruling the Minister has no such duty of procedural fairness towards Syncrude or any other person for that matter in deciding whether or not to establish a board of review (at paras 144 - 161). The law on this point is well settled: The common law duty of procedural fairness does not apply to decisions of a legislative or general nature. Syncrude

argues the decision is specific and directed at it, however Zinn J. points to the wording in *CEPA* that any such review would address general matters pertaining to the substance in question under the regulation rather than the specific circumstances of a person objecting to the regulation.

I will end this comment by returning to the title – where is the gatekeeper when you need one? The constitutional law aspects of this decision aside, which I have not considered here, it seems to me there was little prospect of success on these administrative law arguments by Syncrude. One can't help but read this judgment and contrast it with the many leave to appeal decisions of the Alberta courts on applications involving Alberta's energy regulatory boards, which seem to hold the applicants to an unbearably high burden of showing not just the prospect of success but more than a reasonable probability of success in their arguments, before even getting the chance to argue their case on the merits!